

9-1-2006

Nw. Evtl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125 (9th Cir. 2006)

Tim Cronin

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Tim Cronin, Court Report, Nw. Evtl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125 (9th Cir. 2006), 10 U. Denv. Water L. Rev. 173 (2006).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

UNITED STATES CIRCUIT COURTS**NINTH CIRCUIT**

Nw. Env'tl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125 (9th Cir. 2006) (holding the Army Corps of Engineers satisfied the National Environmental Policy Act's "hard look" requirement through extensive examination of the cumulative, direct, and economic impacts of the proposed channel deepening project).

In 1989, seeking to facilitate the navigational needs of larger vessels, Congress directed the Army Corps of Engineers ("Corps") to assess the feasibility of a plan to deepen the Columbia River's navigation channel by three feet.

In August 1999, the Corps responded to Congress' directive by releasing a Final Integrated Feasibility Report and Environmental Impact Statement. The report contained analyses of possible environmental and economic impacts of the proposed project and its alternatives; devised a plan to dispose of dredged material from the project; and outlined implementation of the project. Following the release of the report, a number of key supporters to the plan, including the NOAA fisheries ("NOAA") and the states of Oregon and Washington, withdrew their support, citing new information that cast doubts upon the report's findings. In response, the Corps undertook additional studies, this time employing independent agencies to corroborate their conclusions. In January 2003, the Corps issued its Final Supplemental Integrated Feasibility Report and Environmental Impact Statement which incorporated the 1999 report with revised and expanded analyses. Following the release of the revised report, both Oregon and Washington certified the project, and in January 2004 the Corps issued its Record of Decision approving the channel deepening project.

In response to ongoing and proposed dredging activities in the Columbia River which threatened to exacerbate coastal erosion, the Northwest Environmental Advocates ("NWEA") filed suit in United States District Court for the Western District of Washington, claiming in an amended complaint that the Corps violated the National Environmental Policy Act ("NEPA") by failing to take a "hard look" at the channel deepening project's various environmental and economic impacts. Following the trial court's ruling that the Corps took the required hard look, the NWEA contended in its appeal to the Court of Appeals for the Ninth Circuit that the Corps' analyses failed to properly evaluate the cumulative impact on coastal erosion, the cumulative impact of the channel deepening project in light of past and future actions, the direct impact on river toxicity and salinity, and the projected economic impacts of the proposed project.

Under NEPA, federal actions which significantly affect the quality of the human environment require an agency to prepare an environmental impact statement which catalogues the proposed project's cumulative impact. The cumulative impact analysis must satisfy a hard look requirement and provide a useful analysis of the cumulative impact of past, present, and future projects.

Addressing NWEA's assertion that the Corps failed to take a hard look at the cumulative impact on coastal erosion, the court noted the Corps' thorough analysis of the potential for sediment loss resulting from unfettered deep water disposal of dredged materials. The analysis included a worst-case scenario impact statement and included a plan to structure disposal in such a way as to minimize disposal at that site. Furthermore, the Corps studied the potential impact of reducing the availability of sediment within the river and changes in river hydraulics resulting from channel deepening, concluding the impact to be marginal at most. By acknowledging the potential for coastal erosion from excessive deep water disposal and conclusively analyzing the potential for sediment loss and then conscientiously structuring a plan to minimize any identifiable loss, the court found the Corps satisfied the hard look requirement.

In dismissing NWEA's contention that the Corps failed to evaluate the cumulative impact of the channel deepening project in light of past, present, and future actions, the court underscored the detailed record of historical salinity levels provided by the Corps. Additionally, the court noted, the Corps provided the results of extensive testing on current levels and submitted a third party opinion on the projected future effects of dredging in the Columbia River. Based on the records submitted, the court found the Corps' analysis to satisfactorily comply with the NEPA requirements for a cumulative impact analysis.

Next, NWEA claimed the Corps failed to take a hard look at the direct impacts of channel deepening by neglecting to test toxicity levels outside of the navigation channel and by using antiquated methods to test estuary salinity. On both claims the court rejected NWEA's arguments, adopting instead the belief that the toxicity tests were unnecessary and the salinity test was still an effective test.

Finally, NWEA challenged the Corps' economic analysis on the grounds that it failed to adequately consider all of the costs associated with the channel deepening project. Again, the court rejected NWEA's reasoning, finding an analysis which includes a thorough accounting of costs and benefits corroborated by third party data satisfies the NEPA requirements.

Responding to the majority's decision, the dissent argued that the Corps failed to satisfy the NEPA requirements. In its reasoning, it found the Final Supplemental Integrated Feasibility Report and Environmental Impact Statement devoid of an adequate study of past, present, or future impacts of dredging in the Columbia River. It further

found Corps' methodology for measuring economic impact deeply flawed and prejudicial. Because of these deficiencies, the dissent urged for reversal of the judgment.

Despite the dissent's arguments, the majority agreed with the trial court that the Corps took the required hard look and affirmed the judgment of the trial court.

Tim Cronin

TENTH CIRCUIT

United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006) (holding that the United States Army Corps of Engineers regulated tributaries to navigable waters under a permissible interpretation of the Clean Water Act because there was a sufficient nexus where pollution discharged in tributaries had a potential to move downstream and pollute navigable waters).

The Tenth Circuit Court of Appeals reviewed a ruling by the United States District Court for the District of Wyoming which found Edward Hubenka ("Hubenka") guilty of three counts of discharging pollutants into the Wind River in violation of the Clean Water Act ("Act"), 33 U.S.C §§ 1311(a) and 1319(c)(2)(A). Hubenka sought to divert the flow of the Wind River, which was a braided stream, to prevent the erosion of its banks from threatening an irrigation channel supplying his nearby property. The Wind River, after joining the Little Wind River and the Popo Agie River, eventually becomes the Big Horn River which joins the Yellowstone River in Montana and ultimately flows into the Missouri River.

On appeal, Hubenka alleged that the Army Corps of Engineers ("Corps") unconstitutionally interpreted the Act to apply to a non-navigable tributary. Further, Hubenka alleged that he did not violate the Act by discharging pollutants because he did not add materials from outside the river's banks. The court reviewed the construction and the applicability of the Clean Water Act *de novo*.

The court first considered the constitutionality of the Corps' interpretation of the Clean Water Act. Under the Act, the Corps has the authority to regulate dredge and fill activities on "navigable waters." The statute defines "navigable waters" broadly as "waters of the United States." The issue in the case was whether the Corps, which originally applied the statute only to navigable-in-fact waters, could revise its regulations to include tributaries of navigable waters under the broad language of the statute.

In answering this question, the court utilized the two-step approach prescribed in *Chevron v. Natural Resources Defense Council, Inc.* for reviewing an agency's interpretation of the statute it administers. Under this test, the court must first determine whether Congress specifically ad-