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Highway J Citizens Group v. Mineta, 349 F.3d 938 (7th Cir. 2003)

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service and it held a legal right to do so. In this case, Le-Ax proved the physical ability to provide water because the eight-inch water main adjacent to the property could supply ample water with minimal additional work. Further, Le-Ax proved the legal right to provide water services to University Estates by pointing to Ohio law which gives water districts the right to supply water inside and outside of the district's geographic boundaries.

Even though the Fifth Circuit held Le-Ax met the usual requirements to file a claim under section 1926(b), the court refused to allow Le-Ax to use the statute in this case. Le-Ax claimed it could use the statute to recruit new customers outside of its geographical boundaries. However, the court determined such a broad interpretation would create a monopoly not intended by Congress. The court turned to the legislative history to determine that rural water districts could only use the statute as a defensive measure to prevent local governments from taking the water district's current customers or customers within the geographic boundaries of the water district. The court held water districts cannot use the statute as an offensive tool to force new clients to use the water district's services. Since University Estates was located outside of Le-Ax's geographic boundaries, the court found Le-Ax could not use the statute to force University Estates to contract only with Le-Ax for water services. Therefore, the court reversed the district court's ruling and remanded the case with instructions to enter judgment in favor of Athens.

One member of the court disagreed with the majority by finding the statute does not limit a water district's protected area to politically defined boundaries. Instead, the dissenting judge felt the statute should protect a water district's service boundary from invasion by competing service providers.

David B. Oakley

SEVENTH CIRCUIT

Highway J Citizens Group v. Mineta, 349 F.3d 938 (7th Cir. 2003) (holding an agency implementing a major federal project must adequately take a hard look at any potential environmental impacts pursuant to the National Environmental Policy Act; an agency must sufficiently consider several reasonable alternatives to the extent necessary to make a fully informed decision; and an agency may not segment two projects for the sole purpose of avoiding an Environmental Impact Statement).

The Highway J Citizens Group ("Highway J") filed an action in the United States District Court for the Eastern District of Wisconsin against Norman Mineta, in his official capacity as Secretary of the United States Department of Transportation ("U.S. DOT"), Frederick

Wright, in his official capacity as Executive Director of the Federal Highway Administration (“FHWA”), and Thomas Carlsen, in his official capacity as Acting Secretary of the Wisconsin Department of Transportation (“WDOT”) (collectively “Agencies”). Highway J opposed the Ackerville Bridge/Lovers Lane Project and the County J/Highway 164 Project. Highway J alleged a contamination plume filled with arsenic and trichloroethylene migrated toward the Ackerville Bridge because of the Ackerville Bridge Project. Highway J asked the district court to enjoin the Agencies from proceeding with the Ackerville Bridge Project until determination of the extent of the contamination plume; to instruct the Agencies to pump grout around the pilings already driven in the ground to support the Ackerville Bridge; and to require the Agencies to complete an Environmental Impact Statement (“EIS”) for the Ackerville Bridge Project.

The district court denied Highway J’s request for a preliminary injunction and ruled against Citizens on the merits of their complaint. On the merits, the district court found the Agencies took the requisite hard look at environmental consequences of the Ackerville Bridge Project; considered sufficiently reasonable alternatives and made a fully informed decision to proceed; and reasonably decided to segment the Ackerville Bridge Project and the County J/Highway 164 Project. Highway J appealed the ruling to the United States Court of Appeals for the Seventh Circuit. On appeal, Highway J requested a permanent injunction closing the Ackerville Bridge until the Agencies pumped grout around the pilings; an EIS of the Ackerville Bridge Project; a revised EIS of the County J/Highway 164 Project to include the Ackerville Bridge area; and a permanent injunction stopping the County J/Highway 164 Project from continuing pending the revised EIS. The court denied all of Highway J’s requests and affirmed the district court’s judgment.

Highway J contested the Ackerville Bridge Project. Primarily, the Ackerville Bridge Project addressed safety concerns that arose from the road layout in close proximity to railroads. The Ackerville Bridge Project also brought the existing bridge into compliance with requirements necessary for the road to support truck traffic. Secondly, the Ackerville Bridge Project provided for future expansion of the roadways. The Ackerville Bridge Project entailed two overpass structures and a road connection. A former waste disposal facility (“landfill”) located about 2000 feet northwest of the bridge leaked landfill leachate. The landfill leachate contaminated underlying groundwater flowing from the landfill (“contamination plume”). Jeffrey Gonyo, a Highway J member, informed the Agencies of the contamination plume in February 2000. Initially, the Agencies concluded the contamination plume raised no significant concerns. Further, the Agencies found the Ackerville Bridge Project required limited excavation, thereby limiting contact with groundwater.

At a public hearing on March 23, 2000, Mr. Gonyo testified regarding Highway J’s opposition to the Ackerville Bridge Project. Specifically, Mr. Gonyo stated the Ackerville Bridge Project’s purposes

could be accomplished by simpler, less costly means, the Agencies improperly segmented the County J/Highway 164 Project, and the landfill contamination posed great risks to private wells and drinking water. On April 25, 2000, the Agencies finalized the Finding of No Significant Impact ("FONSI") and the Environmental Assessment ("EA") reports. The FONSI and EA considered whether the landfill significantly impacted the Ackerville Bridge Project and triggered a requisite Environmental Impact Statement ("EIS"). Both reports concluded the landfill did not affect the Ackerville Bridge Project and an EIS was unnecessary. Additionally, the FONSI and EA addressed joining the Ackerville Bridge Project and the County J/Highway 164 Project as one EIS. The FONSI and EA determined the Ackerville Bridge best effectuated all of the Project's goals and stood on its own merit.

Mr. Gonyo sent a letter to the FWHA on July 7, 2000, which requested reconsideration of the FONSI and EA and the completion of an EIS before construction began. Mr. Gonyo expressed concern that the pilings driven into and below the groundwater table spread contamination. Both WDOT and the FWHA responded to Mr. Gonyo's concerns through a memorandum that concluded the Ackerville Bridge Project did not impact groundwater flow and no private wells in the region demonstrated landfill leachate contamination. Based on the findings enumerated in the memorandum, the Agencies re-affirmed the FONSI's and EA's validity.

Highway J then contacted the United States Environmental Protection Agency ("EPA") with their concerns. Highway J requested an investigation of the landfill. The EPA responded by preparing a Sampling and Analysis Plan for the Old Town Dump site, located south of the landfill and a potential source of leachate contamination. John E. Thresher, Highway J's groundwater expert, issued a report that named the landfill as the sole source of contamination. The report also stated arsenic near the landfill had migrated toward Ackerville. Mr. Gonyo and Mr. Thresher publicly expressed their concerns during a hearing on July 10, 2001. Mr. Thresher particularly stressed the potential contamination of private wells and drinking water caused by driving pilings into the ground. Although the Agencies admitted the pilings extended below the groundwater level, they still asserted the concrete-filled pilings insignificantly affected the groundwater flow.

On November 16, 2001, Mr. Gonyo sent a letter to WDOT that discussed a Town of Polk resolution opposing the Ackerville Bridge Project and requested its immediate termination. WDOT responded through a letter and stated safety was the primary goal of the Ackerville Bridge Project. The EPA sent a letter to Mr. Gonyo on December 13, 2001, explaining that it believed the EA for the Ackerville Bridge Project and the EIS for the County J/Highway 164 Project adequately addressed and resolved any potential contamination issues. Additionally, the letter stated an EPA investigation revealed no release of contaminated groundwater. At a public hearing on January 30, 2002, State Representatives and Senators requested monitoring wells

in Ackerville. The Agencies granted the request and installed monitoring wells to determine the potential impacts of groundwater contamination on areas surrounding the bridge pilings. WDOT stated the Ackerville Bridge Project posed an insignificant risk to groundwater and the monitoring wells would not delay or change the existing Project in any way. A monitoring well report discovered no significant impact on groundwater flow in the area. Construction on the bridge began in May 2002 and by July 3, 2002, when Highway J filed this lawsuit, the Agencies had already driven eighty-four percent of the pilings into the ground.

First, the court addressed the standard of appellate review. An appellate court may review an agency's action under the National Environmental Policy Act ("NEPA") pursuant to the Administrative Procedures Act. In reviewing such action, an appellate court may only set aside an agency's action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. In the NEPA context, an appellate court must determine if the agency took a hard look at environmental consequences.

Highway J claimed the Agencies failed to take a hard look at the Ackerville Bridge Project's environmental consequences and that NEPA regulations required an EIS for the Ackerville Bridge Project. The court held the analysis turned on the existence of a nexus between the Ackerville Bridge Project and the preexisting contamination in the general area. NEPA governs the Ackerville Bridge Project, but not any preexisting contamination. Highway J alleged the bridge pilings worsened the preexisting groundwater contamination situation, thus requiring the Agencies to complete an EIS. However, the court noted the Agencies had adequately explored potential contamination. The court further explained the Ackerville Bridge Project did not significantly impact contamination, thus NEPA did not apply. The Agencies do not need to remedy preexisting contamination under NEPA.

In addition, Highway J contended the bridge pilings created a zone of permeability that allowed contamination into private wells and drinking water. The Agencies asserted the pilings insignificantly affected the underlying groundwater. In resolving this issue, the court emphasized its role was not to decide which environmental expert was correct, but rather to determine if the agency took a hard look at the relevant information and potential consequences resulting in an informed judgment. After extensively reviewing the documentation provided by both parties, the court determined the Agencies adequately examined potential contamination in response to Mr. Gonyo and Highway J's repeated concerns. Accordingly, the Agencies were fully compliant with NEPA. Furthermore, the Agencies did not ignore Highway J's anxieties over the Ackerville Bridge Project. At all times, the three Agencies responded to concerns through their own studies and experts, and the Agencies agreed to install monitoring wells in order to calm Highway J's fears.

Highway J also argued the Agencies failed to consider the degree

to which the project affected public health and safety, the degree to which the effects on human environment were likely to be highly controversial, and the degree to which the possible effects on the human environment were highly uncertain or involved unique/unknown risks. The court pointed out that even though the experts disagreed about potential contamination, the Agencies did not necessarily fail to meet their requirements. Through their hard look at environmental consequences and conclusion of insignificant groundwater impact, the Agencies reasonably determined an EIS was not required.

Although Highway J urged the court to only look at the April 2000 FONSI and EA in the hard look analysis, the court held the Agencies reconsidered their formal position at the request of Mr. Gonyo. Even though the Agencies took a hard look at environmental impacts of the Ackerville Bridge Project after the initial FONSI and EA, the Agencies deemed both documents valid after the hard look analysis. Construction commenced more than a year after the Agencies engaged in a hard look regarding potential adverse environmental consequences. Since the Agencies deemed the FONSI and EA valid after an adequate hard look analysis, the Ackerville Bridge Project needed no further supplementation. Additionally, the Agencies already placed most of the disputed pilings in the ground, so requiring further supplementation at that point would have been futile.

Agencies must study, develop, and describe appropriate alternatives to major federal projects under NEPA. Given the safety purpose and future expansion purpose of the Ackerville Bridge Project, the court held the Agencies had considered an adequate number of reasonable alternatives and explored each alternative sufficiently.

Finally, Highway J claimed the three Agencies improperly segmented the Ackerville Bridge Project and County J/Highway 164 Project in order to avoid preparing an EIS for the Ackerville Bridge Project. According to the court, segmentation represents an agency's decision about one project's end and another project's beginning. Segmentation requires three criteria: connect logical termini and be of sufficient length to address environmental matters on a broad scope, have independent utility or independent significance, and not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. The court looked to see if the Agencies ignored or gave insufficient weight to factors described in the NEPA as an attempt to avoid NEPA requirements. Additionally, the court is not responsible for determining whether the Agencies chose the best alternative, only whether the Agencies made an informed and reasonable choice. The court held the Agencies expressly considered each segmentation criteria in the FONSI and EA and reasonably justified each factor.

Thus, the court affirmed the district court's judgment.

Susan Curtis