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ENVIRONMENTAL LAW: INJUNCTIONS AGAINST PRIVATE DEVELOPERS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

Silva v. Romney, 473 F.2d 287 (1st Cir. 1973)

Petitioners brought suit in United States District Court to enjoin the Department of Housing and Urban Development (HUD) from giving assistance to a proposed low income housing project in their neighborhood prior to preparation of an environmental impact statement.[1] The injunction was granted by the district court.[2] While HUD was preparing the required statement, the private developers began cutting trees on the project site.[3] Petitioners then filed a "Motion for Relief Preserving Status Quo" and a "Motion for Temporary Restraining Order" seeking to enjoin further clearing prior to completion of the impact study. The district court denied both motions. On appeal, the United States Court of Appeals for the First Circuit remanded and HELD, that the private developers could be enjoined from further action prior to completion of the HUD study.[4]

Essentially an agency regulating act,[5] the National Environmental Policy Act (NEPA) is designed to insure that federal officials consider environmental consequences *before* a significant federal project is launched and while it is still a *proposed* action,[6] that alternatives are seriously considered, and that any irreversible commitments involved are identified.[7] The majority of decisions interpreting NEPA to date indicate that it imposes an affirmative burden on government agencies only, not on private parties.[8] Two decisions specifically refused to enjoin state action pending compliance by sponsoring federal agencies with the mandates of NEPA,[9] and a third has refused to apply NEPA requirements to a purely state project.[10] A significant number of federal highway cases, however, have resulted in injunctions for non-compliance with

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1. The National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-47 (1970), requires that every proposal involving "major Federal actions significantly affecting the quality of the human environment," include a detailed statement concerning the environmental impact of the proposed action. *Id.* §4332(2)(c).

2. Silva v. Romney, 342 F. Supp. 783 (D. Mass. 1972).

3. When petitioners learned of this activity, 3 of the 11.38 acres involved had already been cleared. 473 F.2d at 288.

4. *Id.* The court also urged the adoption of suitable status quo regulations by HUD. *Id.*

5. Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 22 HASTINGS L.J. 805, 808 (1971).

6. Boston v. Volpe, 464 F.2d 254, 257 (1st Cir. 1972).

7. 42 U.S.C. §4332(2)(c)(iii), (iv) (1970).

8. *E.g.*, Atlanta Gas Light Co. v. Southern Natural Gas Co., 330 F. Supp. 1039, 1050 (N.D. Ga. 1972).

9. Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

10. Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537 (7th Cir. 1972).

NEPA. In several of these cases state action has also been expressly[11] or impliedly[12] enjoined, either due to the relationship between the state and federal action,[13] or to the likelihood that further state proceedings would seriously impair the soundness of any alternatives considered in the required environmental impact study.[14]

Prior to the instant case, no court had enjoined a purely private party from continuing work on privately owned property pending compliance by a federal agency with NEPA requirements. The only previous case in which a private company had been enjoined, *West Virginia Highlands Conservancy v. Island Creek Coal Co.*,[15] involved federal lands. The court there enjoined the parties because the requisite federal permission was granted without NEPA compliance.[16]

Relying on *Island Creek* and three additional cases involving injunctions against state actions,[17] the instant court concluded it had the power to enjoin further action by the private developer pending compliance by HUD with NEPA,[18] since the developer had entered into a contract with HUD[19] and thereby reached "the point at which the federal government becomes a partner with"[20] the potential grantee. It therefore declared that one acting in such partnership with the federal government is subject to an injunction prohibiting specific action.[21]

Not wishing to base the obligations of federal and non-federal parties on any one interim step in the development of the partnership,[22] however, the instant court strongly suggested that HUD and other federal agencies promulgate regulations to govern the pre-commitment stage of activities in federal projects involving non-federal parties.[23] The court recognized that unconsidered environmental action during this stage was as dangerous as action

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11. *E.g.*, Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972).

12. *E.g.*, Committee To Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972).

13. *E.g.*, Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972).

14. *E.g.*, Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972).

15. 441 F.2d 232 (4th Cir. 1971).

16. *Id.* at 236.

17. Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971) (Clark, J., dissenting) (believed court did not have power to enjoin state department where it declared it would complete project with or without federal funds); Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972); Gibson v. Ruckelshaus, 3 E.R.C. 1028 (E.D. Tex. 1971), *rev'd sub nom.* City of Lufkin v. Gibson, 447 F.2d 492 (5th Cir. 1971) (reversal was based on noncooperation of plaintiffs).

18. 473 F.2d at 290.

19. *Id.* at 289.

20. Boston v. Volpe, 464 F.2d 254, 256 n.2 (1st Cir. 1972). In *Boston v. Volpe* the court concluded the state and federal authorities had not reached such a partnership and therefore refused to enjoin further state action pending compliance with NEPA. *Id.* at 259.

21. 473 F.2d at 290, relying on Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958). In so doing the instant court expressly refused to follow a contrary holding by the Fourth Circuit in Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

22. 473 F.2d at 290.

23. *Id.* at 291.

during any later stage and could possibly destroy the utility of an agency's impact statement.[24]

In suggesting status quo regulations, the court further noted such regulations would be advantageous to both the federal and non-federal parties involved.[25] The federal agency would benefit, since the time and effort required to prepare an impact statement would not be wasted, and the private developer would be encouraged to prepare his own preliminary environmental study. If the non-federal party undertook this study he could then conceivably expect a faster agency decision, and he would bear much less risk that the agency's preliminary approval would be withdrawn later due to an unfavorable impact study.[26] The latter result, entirely possible under present HUD procedures, could frustrate HUD's performance of its dual responsibility of providing low income housing without damaging the environment, since if HUD withdrew its support for environmental considerations the private developer might be unable to obtain private financing.[27]

In deciding that HUD had the power to formulate status quo regulations,[28] the instant court looked to the wording of NEPA: "The Congress authorizes and directs that to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]."[29] The Act continues with a stronger and more specific mandate not mentioned by the court to declare that all agencies shall develop procedures to insure that environmental values be considered in decisionmaking.[30]

Coupling this congressional mandate with the President's requirement that all agencies correct any deficiencies in their present policies and procedures that prohibit full compliance with the intent and purpose of NEPA[31] and considering HUD's own authority to make "rules and regulations . . . necessary to carry out [the Secretary's] functions, powers and duties,"[32] the principal court

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24. *Id.* This has also been a concern of previous courts. *See, e.g.,* Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972). Some courts have even stated guidelines for agencies to consider in determining whether to suspend construction of a project while they comply with NEPA. *See* Coalition for Safe Nuclear Power v. AEC, 463 F.2d 954, 956 (D.C. Cir. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1128 (D.C. Cir. 1971). In *Calvert Cliffs'* at 1128, the court, suggesting that the AEC consider halting construction of a nuclear power plant stated: "It is far more consistent with the purposes of the Act [NEPA] to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible."

25. 473 F.2d at 291.

26. *Id.*

27. *Id.*

28. *Id.*

29. 42 U.S.C. §4332(1) (Supp. 1973).

30. *Id.* §4332(2)(B). The Act declares that all agencies of the federal government shall "identify and develop *methods* and *procedures* . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking." (Emphasis added.)

31. Executive Order No. 11,514, 3 C.F.R. 104 (1970).

32. 12 U.S.C. §1701(c)(a) (1970).

concluded that not only did HUD have the authority to formulate status quo regulations but that such regulations may be required.[33]

Based on the above Presidential and congressional directives, a court might well be justified in requiring HUD to formulate appropriate procedures to preserve the status quo.[34] This type of action would not be unprecedented,[35] having been employed under NEPA to require the Atomic Energy Commission to revise its rules and procedures to bring them within the intent and purpose of the Act.[36] Applying judicial restraint, the instant court concluded it need not take this step at present.[37]

The principal decision represents a major step forward in the protection of our environment, not only in restraining a private party in partnership with the federal government from effecting the "emasculation of a remedy clearly available against the federal respondents,"[38] but also in dealing with the environmental void created by present agency policies. Hopefully, HUD and others will follow the court's suggestion; if not, it appears that at least one court is aware that requiring such rules as are needed to enforce the purpose and intent of NEPA is within its discretion.[39]

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33. 473 F.2d at 292.

34. *Id.*

35. Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966).

36. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1129 (D.C. Cir. 1971). In *Calvert Cliffs'* the court concluded that the AEC's procedures for implementing NEPA, including an interpretation that the impact statement was *accompanying* the project through the agency's review process when physically passed along but never discussed unless specifically raised by a party to the proceedings, made a "mockery of the Act" and ordered the AEC to revise its procedures to conform to the purpose of NEPA. *Id.*

37. 473 F.2d at 292. The court did not consider whether the President, the Congress, or the courts have the constitutional power to prevent a private party from making certain uses of his property solely because he has applied for federal aid. Nevertheless, it is beyond challenge that the federal government has the power to "impose reasonable conditions on the use of federal funds, federal property, and federal privileges." Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958). For additional support see Berman v. Parker, 348 U.S. 26 (1954); FPC v. Idaho Power Co., 344 U.S. 17 (1952).

38. Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1329 (4th Cir. 1972).

39. 473 F.2d at 292.