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Consideration of Cumulative Impacts and a Properly Tiered EA & EIS: A Guarantee for Eighth Circuit Deference to Agency Decision-Making. Arkansas Wildlife Federation v. United States Army Corps of Engineers

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CONSIDERATION OF CUMULATIVE IMPACTS AND A PROPERLY TIERED EA & EIS: A GUARANTEE FOR EIGHTH CIRCUIT DEFERENCE TO AGENCY DECISION-MAKING

Arkansas Wildlife Federation v. United States Army Corps of Engineers[1]

I. INTRODUCTION

The NEPA process requires an agency to make continuous decisions and judgment calls regarding preparation of Environmental Assessments and Environmental Impact Statements from the development stage of project planning up to the completion of the project. In *Arkansas Wildlife Federation v. United States Army Corps of Engineers*, the Arkansas Wildlife Federation ("AWF") challenged the U.S. Army Corps of Engineers ("Corps") Final Environmental Assessment ("EA") cumulative impact analysis and tiering of the Final Assessment on the prior Final Environmental Impact Statement ("EIS").

The gravamen of AWF's claim was that the Corps failed to accurately assess the cumulative impact of the proposed project on the White River Basin and neglected to fully consider substantial changes and new information related to the project. By affirming the district court's decision in favor of the Corps, the Eighth Circuit made a clear statement, reinforcing the discretion assigned to the Corps. In cases where an agency has considered the reasonably foreseeable cumulative impacts of a project and has properly tiered informational documents upon one other, including the consideration of new, significant information, the Eighth Circuit will shelve its judgment, deferring to the judgment of the agency.

II. FACTS AND HOLDING

The Grand Prairie Region is 500,000 acres located between Mississippi and Arkansas and serves as a major agricultural area important in rice production.[2] The Corps designed the Grand Prairie Project to continue providing a means of irrigation while conserving the two main

[1] 431 F.3d 1096 (8th Cir. 2005).
[2] *Id.* at 1098.

aquifers that supply the area.[3] Early in 1998, the Corps published for public comment a draft EIS for the Grand Prairie Project.[4] In response to public comments, the Corps then issued a draft General Reevaluation Report ("GRR").[5] The Final Environmental Impact Statement ("FEIS")[6] was issued by the Corps in 1999, and the Record of Decision ("ROD") was signed in 2000.[7]

The FEIS and Record of Decision selected "Alternative 7B" as the plan to be implemented.[8] The Project identified as Alternative 7B is comprised of five parts: (1) "conservation of water by increasing agricultural efficiency of water usage," (2) "reduction of water withdrawals from the Alluvial Aquifer so that there is no net loss of water and an end to drawing on the Sparta Aquifer for irrigation," (3) "additional on farm reservoirs," (4) "construction of a system that would pump excess water from the White River into the Grand Prairie region," and (5) "various environmental improvement features."[9] Subsequent to signing the ROD in 2000, twenty-four percent of the cost of the Grand Prairie Project had been invested.[10]

In February 2004, a group of plaintiffs including the Arkansas Wildlife Federation ("AWF"),[11] brought a lawsuit against the Corps

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[3] *Id.* at 1098-99. The Alluvial Aquifer and Sparta Aquifer provide the majority of groundwater to the Grand Prairie Region. *Id.* at 1099. Ninety percent of the agricultural water used in the region is provided by the Alluvial Aquifer. *Id.* at 1098. Due to the demands placed on the Alluvial Aquifer, the current rate of consumption will result in its depletion by the year 2015 unless conservation efforts are employed. *Id.* If the Alluvial Aquifer is depleted serious economic consequences are inevitable: "seventy seven percent of the irrigated crop would be lost" and "rice production would decline by twenty-three percent." *Id.* at 1098-99. Similarly, the Sparta Aquifer supplies the area with water for drinking purposes and industrial use. *Id.* at 1099. Unfortunately, the use of water from the Sparta Aquifer for drinking water will cease to be possible if it has to be diverted for other uses as the Alluvial Aquifer is depleted. *Id.*

[4] *Id.*

[5] *Id.*

[6] The Eighth Circuit erroneously identified the FEIS as the "Final Environmental Impact Assessment" while providing the correct abbreviation for the document, "FEIS."

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* The twenty-four percent constituted $71 billion of the total estimated cost of $319 billion of the Grand Prairie Project. *Id.*

[11] In addition to the Arkansas Wildlife Federation the list of plaintiffs included the National Wildlife Federation, Arkansas Nature Alliance, the Hampton Landing Property Owners' Association, the White River Conservancy, the Augusta Improvement Club, Kenneth L. Rose,

claiming that the Corps had failed to comply with NEPA in assessing the merits of the EIS associated with the Grand Prairie Project.[12] The plaintiffs sought preliminary and permanent injunctions to prevent the construction of the water import aspect of the Project.[13] AWF claimed that the Corps failed to consider the range of "reasonable feasible alternatives" before selecting Alternative 7B.[14] AWF also alleged that the FEIS and ROD failed to adequately consider the collective effect that the proposed project would have on the environment including the "direct and indirect impacts of the Project on the White River basin."[15] Finally, AWF claimed that the Corps "tiered" the minimum flow requirements of the Arkansas State Water Plan to the FEIS improperly.[16]

A Draft Environmental Assessment ("DEA") that included a number of proposed changes to the original plan and a Finding of No Significant Impact ("FONSI") was published for public comment in March 2004.[17] In July, a Final Environmental Assessment ("FEA") was issued by the Corps, approving the proposed changes in the DEA.[18] The changes were determined by the Corps to be minor, causing "no significant unmitigated environmental impacts not already considered," and therefore a Supplemental Environmental Impact Statement ("SEIS") was not required.[19] AWF responded by amending its pleadings in order to

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E.W. Ray, Charles Bowerman, Tommy M. Castleberry, Sr., Greg Rawn, Oliver M. Eichelmann, Everett G. Oates, and David Carruth. *Id.* at 1099 n.2. The plaintiffs are collectively referred to as AWF.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* "Tiering" refers to the coverage of general matters in broader environmental impact statements with subsequent narrower statements or environmental analyses incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. 40 C.F.R. § 1508.28 (2005).

[17] *Ark. Wildlife Fed'n v. U.S. Corps of Eng'rs*, 431 F.3d at 1099 ("AWF"). The DEA suggested converting twenty-nine miles of canals into pipelines, providing water delivery by pipeline instead of existing streams, use of 113 acres of borrow pits to store materials for constructing levees instead of hauling materials from a farther distance, construction of a separate building to house the control system, widening of a canal, alignment changes to canals and pipelines, replacement of canal 3200 with multiple small pipelines, and rehabilitation of existing reservoirs. *Id.*

[18] *Id.* at 1100.

[19] *Id.*

challenge the Corps finding, arguing that an SEIS was required.[20]

AWF and the Corps moved for summary judgment, and the district court determined that the four-year delay by AWF "in challenging the FEIS, GRR, and ROD was unreasonable" and was thus barred by laches.[21] The court held that the Corps satisfied the requirements under NEPA with regard to the FEIS, GRR, and ROD.[22] The Corps sufficiently considered the "cumulative impacts" as well as the direct and indirect effects of the Grand Prairie Region Project and a SEIS was not required subsequent to the adopted changes contained in the FEA.[23]

AWF then appealed the grant of summary judgment to the Eighth Circuit Court of Appeals. AWF claimed the lower court wrongly decided that a SEIS was not required since "the cumulative impact analysis of the Corps had been inadequate; second, substantial changes in the Project had been made; and third, significant new information had been discovered."[24]

The Eighth Circuit affirmed the district court's grant of summary judgment in favor of the Corps.[25] The court reasoned that since the Corp considered the cumulative impact of projects in the Grand Prairie Region including some that were not reasonably foreseeable, the cumulative impact analysis in the FEIS and FEA conformed to the requirements under NEPA.[26] Similarly, the projects discussed briefly in the FEA were thoroughly discussed in the FEIS, thus the Corps properly tiered the FEA.[27] Finally, the court held that although the Corps did not prepare a new SEIS based on new information, the Corps did not act arbitrary or capricious since the projects covered were at the earliest stages of planning.[28]

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 1098.
[26] *Id.* at 1102.
[27] *Id.*
[28] *Id.* at 1104.

III. LEGAL BACKGROUND

NEPA was enacted for the purpose of restoring and maintaining environmental quality.[29] A recommendation or report on a proposal requires an EA, a document that briefly examines the possible environmental impacts of the proposed action.[30] An EA is ordered to determine whether an EIS is necessary.[31] In situations where legislation or other major federal action has the potential of significantly affecting the environment, an EIS must be completed by the responsible official.[32] The EIS is required to include "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," "alternatives to the proposed action," including "no action" alternatives, other reasonable courses of action, mitigation measures not included in the proposed action, "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[33] Direct, indirect, and cumulative impacts must all be considered in an EIS.[34] Cumulative impacts are "the impacts on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such action."[35]

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[29] 42 U.S.C. § 4331 (2000). The purpose of NEPA is:

> "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."

Id.

[30] 42 U.S.C. § 4332 (2000).

[31] *Id.*; 40 C.F.R. § 1508.9 (2005); *see, e.g.*, Catron County Bd. Of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996).

[32] 40 C.F.R. § 1502.3 (2005).

[33] *Id.*

[34] 40 C.F.R. § 1508.25(c) (2005).

[35] 40 C.F.R. § 1508.7 (2005). An impact is reasonably foreseeable if it "is sufficiently likely to occur that a person of ordinary prudence would take it into account." United States v. Dubois, 102 F.3d 1273, 1287 (1st Cir. 2002).

NEPA does not require the responsible agency to wait for other agencies to complete their studies[36] or to accept the advice or suggestions of other agencies.[37] Therefore, it is up to the discretion of the responsible agency to assess the value of comments from other agencies and parties as they relate to the project in question.[38]

NEPA is a procedural statute. Thus, when a government agency is contemplating legislation or a major Federal action, an EA is generally required while an EIS may also be required.[39] An EA is required for all proposed actions for which the environmental impact is uncertain, thereby providing a method of evaluating whether a significant effect will result from the proposed action.[40] Completing an EA serves to determine the necessity of preparing an EIS in the case of likely significant environmental effects.[41] An EA requires the responsible agency to either make a finding of no significant impact ("FONSI")" or prepare an EIS if a significant environmental impact will result from the proposed action.[42]

In general, a FEA is considered deficient only if it does not include a cumulative impact analysis or is not tiered to an EIS that contains such an analysis.[43] Tiering an EA on a proper EIS will not always eliminate deficiencies in the cumulative impact analysis of the EA;[44] however, an FEA cannot be both concise and brief and provide detailed answers for each and every question.[45] When a proposed action is likely to have a significant environmental impact, NEPA policy requires the responsible agency to err in favor of the preparation of an EIS.[46] Thus, an EIS serves two purposes: assurance that environmental considerations will be taken

[36] Envtl. Def. Fund, Inc. v. Hoffman, 566 F.2d 1060, 1068 (8th Cir. 1977).
[37] Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1038 (10th Cir. 2001).
[38] *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201 (D.C. Cir. 1991).
[39] *See* 40 C.F.R. §§ 1502.3, 1508.9 (2005)
[40] 42 U.S.C. §4332(2)(E) (2000); 40 C.F.R. § 1508.9 (2005); and *see, e.g.*, Or. Natural Res. Council v. Lyng, 882 F.2d 1417 (9th Cir. 1989), *opinion amended on denial of reh'g*, 899 F.2d 1565 (9th Cir. 1990).
[41] *See, e.g.*, Fund for Animals, Inc. v. Ric 85 F.3d 535 (11th Cir. 1996).
[42] *See, e.g.*, Comm. to Preserve Boomer Lake Park v. Dep't of Transp., 4 F.3d 1543 (10th Cir. 1993).
[43] *See* Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895-96 (9th Cir. 2000).
[44] *See* Klamath-Siskiyou Wildlands Center v. Bureau of Land, 387 F.3d 989, 997-98 (9th Cir. 2004).
[45] Sierra Club v. U.S. Forest Serv., 46 F.3d 835, 840 (8th Cir. 1995).
[46] *See, e.g.*, Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997).

into account in agency decision-making and ensuring public awareness regarding agency decision-making, including the consideration of environmental effects of the proposed action.[47]

When an agency performs an EIS, "tiering" is encouraged in order to eliminate repetitive discussion of the same issues and ensure that the pertinent issues are the focus at each level of environmental review.[48] Thus, general matters covered by a broader EIS are incorporated by reference in subsequent, supplemental EISs where the topic is more narrow in scope and suitable for decision while excluding those issues not yet fully developed or previously decided upon.[49]

Once a draft EIS ("DEIS") has been prepared, but before the preparation of a final EIS ("FEIS"), the responsible agency must obtain comments from federal agencies that have jurisdiction by law or expertise, state and local agencies, as well as the public at large.[50] In situations where an agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or when "there are significant new circumstances or information relevant to environmental concerns," a supplemental EIS ("SEIS") is required.[51] A change is considered substantial if it presents a "seriously different picture of the environmental impact."[52] Once the comment period has ended, the responsible agency must prepare an EIS by assessing and considering the comments individually and collectively and then respond to those comments in the FEIS.[53] A FEIS complies with the NEPA requirements as long as the

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[47] *See, e.g.*, Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972).
[48] 40 C.F.R. § 1502.20 (2005).
[49] 40 C.F.R. § 1508.28 (2005).
[50] 40 C.F.R. § 1503.1 (2005).
[51] 40 C.F.R. § 1502.9(c) (2005). This section has been interpreted to require a SEIS "if the changed plans or circumstances will affect the quality of the human environment in a significant manner . . . not already considered by the federal agency." Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 204 (1st Cir. 1999); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989).
[52] South Trenton Residents Against 29 v. Fed. Highway Admin., 176 F.3d 658, 663 (3rd Cir. 1999); *see also* Hickory Neighborhood Def. League v. Skinner, 893 F.2d 58, 63 (4th Cir. 1990); Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987). To determine whether a change is substantial or not requires taking account of the possible environmental consequences not previously considered. *Marsh*, 490 U.S. at 374. "A reduction in the environmental impact is less likely to be considered a substantial change relevant to environmental concerns than would be an increase in the environmental impact." Friends of the Bow v. Thompson, 124 F.3d 1210, 1218-19 (10th Cir. 1997).
[53] 40 C.F.R. § 1503.1, 1503.4 (2005).

responsible agency takes a "hard look" at the environmental impacts of the proposed action.[54] For an EIS to be found sufficient, courts require the agency to include a "full disclosure" of the proposal's environmental impact, a "good-faith effort" to consider environmental values, and compliance with NEPA requirements.[55]

At the time of decision, the responsible agency must prepare a Record of Decision ("ROD") that will state the decision, identify all alternatives considered, discuss all factors considered by the agency while making the decision, and state whether all practicable means to avoid or minimize environmental harm from the action have been adopted.[56]

Federal courts hold original jurisdiction over NEPA claims as well as agency decisions not to prepare an EIS.[57] Agency decisions are reviewed under the "arbitrary and capricious" standard.[58] While challenges to agency action are reviewed under the "arbitrary and capricious" standard,[59] the reviewing court is not free to substitute its own judgment for the agencies', rather the court's function is to ensure that adequate consideration of all relevant environmental impact has occurred.[60] The strength of NEPA is contained in its authority to require the responsible agency to complete supplemental EISs in order to consider all relevant environmental impacts.

To determine whether an agency has met NEPA's procedural requirements, a reviewing court takes a "hard look" at whether the agency took a "hard look" at the environmental consequences of the proposed action and exhibited reasoned decision-making.[61] In 1989, the U.S. Supreme Court held that NEPA provides no substantive mandates for overturning agency decisions, finding that NEPA does not require particular results but "simply prescribes the necessary process."[62]

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[54] City of Richfield, Minn. v. F.A.A., 152 F.3d 905, 906 (8th Cir. 1998).
[55] *See* Silva v. Lyan, 482 F.2d 1282 (1st Cir. 1973); *see* Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, 684 F.2d 1041 (1st Cir. 1982); *see* 42 U.S.C. § 4332 (2000).
[56] 40 C.F.R. § 1505.2 (2005).
[57] 5 U.S.C. § 706(2)(A) (2000).
[58] Marsh v. Or. Natural Res. Def. Council, 490 U.S. 360, 374 (1989).
[59] 5 U.S.C. § 706(2)(A) (2000); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989).
[60] Mid States Coalition for Progress v. Surface Trans. Bd., 345 F.3d 520 (8th Cir. 2004) (quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87 (1983).
[61] Greater Boston Television Corp v. FCC, 444 F.2d 841 (D.C. Cir. 1970).
[62] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

IV. INSTANT DECISION

On appeal to the Eighth Circuit, AWF argued that the FEIS and the FEA failed to properly evaluate the cumulative impact of various actions on the Grand Prairie Project.[63] In addition, AWF contends that the Corps should have prepared a SEIS on the basis that the proposed changes were substantial and relevant to environmental concerns or that significant new circumstances or information relevant to the Grand Prairie Project had arisen since the original EIS had been published.[64] The Eighth Circuit rejected each of the claims made by AWF's on appeal and affirmed the district court's decision.[65]

A. Adequacy of Consideration of Cumulative Impact of Past, Present and Future Actions

AWF contended that the Corps failed to consider the cumulative effects of past, present, and future action on the Grand Prairie Project.[66] AWF claimed that the FEA may be properly evaluated only after a thorough review of the FEIS.[67] In *Newton County Wildlife Association v. Rogers*[68] and *Sierra Club v. U.S. Forest Service*,[69] the Eighth Circuit suggested that prior environmental impact statements should be reviewed in order to determine the sufficiency of an FEA.[70] However, the Eighth Circuit did not address the issue of whether laches barred the consideration of the FEIS as it related to the FEA because of the court's

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[63] *AWF*, 431 F.3d at 1100.
[64] *Id.* at 1102. *See* 40 C.F.R. § 1502.9(c) (2005).
[65] *AWF*, 431 F.3d at 1098.
[66] *Id.* at 1100.
[67] *Id.* The Corps responded by pointing out that AWF had failed to appeal the district court ruling with regard to laches thereby preventing a challenge to the adequacy of the cumulative impact analysis in the FEIS. *Id.* However, AWF claimed that the FEIS was not "sufficiently comprehensive" in order to allow the cumulative impact analysis contained therein to serve as the impact analysis in the FEA. *Id.* AWF suggested that it was improper to rely upon the cumulative impact analysis contained in the FEIS for purposes of evaluation in the FEA. *Id.*
[68] 141 F.3d 803, 809 (8th Cir. 1998).
[69] 46 F.3d 835, 840 (8th Cir. 1995).
[70] *AWF*, 431 F.3d at 1100. However, there are no existing cases signifying that such a rule should apply to an FEIS in cases where review is barred by laches. *Id.*

subsequent conclusion that the cumulative impact analysis for the FEIS and FEA was adequate.[71]

NEPA requires the Corps to consider the environmental impact of any action that might significantly affect the environment including "unavoidable adverse" environmental impacts, and "the relationship between local short term uses of the environment and long-term productivity."[72] As a result, direct, indirect, and cumulative impacts must be taken into consideration.[73]

In criticizing the Corps for listing additional projects in the FEIS rather than analyzing the cumulative environmental impacts, AWF relied heavily upon a number of governmental and private organizations.[74] AWF claimed that the Corps should have delayed the Project in order to evaluate the merits of these entities' environmental findings.[75] However, the court found that NEPA only requires the Corps to consider and respond to the comments of other agencies, but it does not require the Corps to stay its progress in anticipation of the completion of other groups' studies.[76] In addition, NEPA does not require the Corps to accept the input or suggestions of other agencies.[77] In the end it is the Corps choice in deciding which opinions to value and take into consideration as they apply to a project and the agency's decision of those to reject.[78] Due to the deference given to an agency's discretion, the court expressed its hesitancy to "second guess" the Corps' judgment.[79]

The court found that the Corps took a "hard look" at the environmental impact of the project in conjunction with four existing projects, two pending projects, three unauthorized and unfunded projects, and five other actions affecting the White River as well as the cumulative

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[71] *Id.*

[72] *See* 42 U.S.C. § 4332(C) (2000).

[73] 40 C.F.R. § 1508.7 (2005).

[74] *Id.* at 1101. These agencies and organizations consisted of the Environmental Protection Agency and the Fish and Wildlife Service as well as other state and private organizations. *Id.* Many of the organizations had suggested that the Corps delay the Project until the comprehensive studies of the White River basin was completed by other entities. *Id.*

[75] *Id.*

[76] *Id.* (citing Envtl. Def. Fund, Inc. v. Hoffman, 566 F.2d 1060, 1068 (8th Cir. 1977)).

[77] *Id.* (citing Custer County Action Association v. Garvey, 256 F.3d 1024, 1038 (10th Cir. 2001), Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201 (D.C. Cir. 1991)).

[78] *Id.* (citing Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201 (D.C. Cir. 1991)).

[79] *Id.*

impact of potential irrigation projects not reasonably foreseeable under the terms of the statute.[80] Based on this finding, the court determined that the Corps had not abused its discretion in considering the environmental impact in the FEIS.[81]

AWF also claimed that the cumulative impact analysis in the FEA was inadequate.[82] AWF argued specifically that the past and present action sections of the FEA failed to consider the cumulative impact of the Project on the White River.[83] The court determined that AWF based this argument on the "incorrect assumption that the FEIS was inadequate."[84] The Eighth Circuit concluded that because the FEA was properly tiered upon the FEIS and the FEA provided a sufficiently thorough assessment of new environmental impacts, "the cumulative impacts of the Project were properly considered in compliance with the Act."[85]

The court focused on the importance "tiering" plays in the NEPA process.[86] While the court acknowledged that "tiering" an EA upon a previous EIS will not necessarily alleviate any deficiencies found in a cumulative impact analysis, it also pointed out the fact that the Corps' FEA could not be both concise and brief.[87] Since the Corps had properly tiered the FEA upon the prior FEIS and the FEA contained the relevant new information of new environmental impacts, the court found that the cumulative impacts were not deficient and were in compliance with NEPA.[88]

AWF also claimed the FEIS and FEA inappropriately postponed the study of the cumulative impacts of reasonably foreseeable action.[89] However, the court disagreed, pointing out that the FEIS and FEA both

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[80] *Id. See* 40 C.F.R. § 1508.7 (2005).
[81] *AWF*, 431 F.3d at 1101.
[82] *Id.* Based on AWF's claims, the Corps failed to include sufficient detailed information in the FEA as required by NEPA and the determinations made were conclusory. *Id.*
[83] *Id.*
[84] *Id.* A subsequent EA should be tiered to an EIS in order to save time and money from repetitious investigation. 40 C.F.R. § 1502.20 (2005). This plan allows the agency to "focus on issues which are ripe for decision and exclude from consideration issues already decided or not ripe." 40 C.F.R. § 1508.28 (2005).
[85] *Id.* at 1101-02.
[86] *Id.* at 1102.
[87] *Id.* at 1101-02.
[88] *Id.*
[89] *Id.* at 1102.

evaluated the "probable environmental consequences" of the proposed action and thus chose to defer judgment to the Corps.[90] AWF relied on *Mid States Coalition for Progress v. Surface Transportation Board*,[91] but the court distinguished that case from the case at hand since the "agency in Mid-States stated that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so."[92] The Corps did not completely ignore the cumulative impact of reasonably foreseeable outcomes, but took into consideration the collective influence of projects in the area, including a number that were not reasonably foreseeable.[93] These facts satisfied the court, resulting in a determination that the impact analysis in the FEIS and FEA met the requirements under NEPA.[94]

B. Necessity of SEIS

AWF contended that a SEIS was required due to substantial changes in the proposed project that were relevant to environmental concerns or that there were significant new circumstances or information relevant to environmental concerns.[95] In situations where the plans or circumstances change to the degree of affecting the "quality of the human environment in a significant manner" that has yet to be considered by the agency, a SEIS is required.[96] The Corps responded by indicating that the assessment of the environmental impacts of the changes had previously been considered and "that the changes will not significantly alter the areas

[90] *Id.* AWF's argument relied upon *Mid States Coalition for Progress v. Surface Trans. Bd.*, 345 F.3d at 550. *Id.* The distinguishing fact between *Mid States Coalition* and the instant case is that the agency in Mid States identified a specific outcome that was reasonably foreseeable but then failed to actually consider its impact. *Id.*

[91] 345 F.3d 520 (8th Cir. 2003).

[92] *AWF*, 431 F.3d at 1102.

[93] *Id.*

[94] *Id.*

[95] *Id.* The list of changes contained in the FEA that AWF claims were not previously considered include: "an eighty two mile decrease in the miles of canals used," "one hundred thirteen mile increase in the miles of pipeline used," "reduction in the use of natural streams in favor of pipelines," "doubling the acres of permanent upland hardwood impacts," construction of borrow pits to store machinery, and widening Canal 1000 to create a one hundred acre reservoir." *Id.*

[96] *Id.*

served, the costs, the project purposes, or the White River basin."[97] The court found that based on the record, AWF overstated the cumulative impact of the changes on the environment.[98] In making that determination, the court considered the evaluation of non-functional canals in the area, the fact that pipelines are less damaging to the environment than canals, the positive benefits to the natural streams,[99] the effect on timber, the use of the borrow pits in reducing costs of the Project, as well as the impact of the creation of Canal 1000.[100]

The Eighth Circuit found that the Corps "adequately considered the environmental impact of the proposed changes and reasonably concluded that they were not significant" and that those effects suggested that the positive aspects of the Project outweighed the negative.[101] While the court pointed out that a reduction in environmental impact never triggers the requirement of a SEIS, a reduction in negative impact is less likely suggestive of a significant impact than an increase in environmental impact.[102]

In addition, the court rejected AWF's reliance on *DuBois v. United States Department of Agriculture*[103] because there the agency adopted an alternative that had never been considered.[104] Here, the Corps allowed for public comment and adjusted the design of the Project rather than adopting a completely new and yet unconsidered alternative.[105] The court also distinguished *DuBois* from the standpoint that that case related to the "selection of a completely new and unconsidered alternative" while the change contemplated here was merely one of design.[106]

The final claim by AWF was that estimates regarding water removal from the White River would be greater than estimated, thereby

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[97] *Id.*
[98] *Id.* at 1103.
[99] "While the reduction of natural stream use" would reduce some of the fishery benefits, it was viewed as being minor. *Id.* This outcome was balanced against the fact the adverse impacts related to riparian vegetation and zebra mussels introduction. *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] 102 F.3d 1273 (1st Cir. 1996).
[104] *AWF*, 431 F.3d at 1103.
[105] *Id.*
[106] *Id.*

requiring a SEIS.[107] Additionally, AWF contended that a number of projects identified in the FEA were not mentioned in the FEIS or that the cumulative impact of their environmental effect had not been sufficiently considered in the FEIS.[108] The Corps responded by suggesting that the determination of whether new information is significant enough to warrant a SEIS should be left to agency discretion.[109] The court agreed, identifying those projects in question as being too new and thus not significantly sufficient to justify a SEIS.[110]

The court identified its role as verifying the agency's consideration of relevant factors and ensuring that the Corps did not fail to utilize clear judgment.[111] It maintained that an agency is not required to provide a SEIS in the case of any new information, and in this case, the significant information relevant to the environmental impact had been taken into account in the detailed FEIS and in the subsequent, and properly tiered, FEA.[112] The Eighth Circuit concluded that the Corps did not act arbitrarily or capriciously in refusing to prepare a SEIS based on new information.[113]

V. COMMENT

The Eighth Circuit's decision in *Arkansas Wildlife Federation v. U.S. Army Corp of Engineers* maintained the judicial rule of deference given to agency decision making. The court's holding was sound and reasonable as it pertained both to the adequacy of the Corp's cumulative impact analysis and the appropriateness of tiering the FEA to the FEIS. Since the court concluded that the cumulative impact analysis in the FEIS and FEA was adequate, review of prior EISs was barred by laches. Furthermore, the court determined that a SEIS was unnecessary because the FEA updated information contained in the FEIS and the FEA was properly tiered upon that document. The court's decision is consistent

[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1103-04.
[111] *Id.* at 1104 (citing Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989)).
[112] *Id.*
[113] *Id.*

with the position that "the NEPA process involves an almost endless series of judgment calls[,] ... the line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts."[114]

Since NEPA's authority rests on the ability to force the creation of a SEIS, it is tempting to argue that where questions of sufficiency arise, the court should err on the side of further study and investigation. However, a balance must be struck between full consideration of cumulative environmental impacts and the ability of the responsible agency to complete a project in a timely and efficient manner. In this case, the Corps' had completed a FEIS that addressed the cumulative impact of numerous other relevant actions, including a number that were not reasonably foreseeable. Subsequently, a FEA tiered on the FEIS supplemented the previously published information. While the FEA contained a number of changes compared to the information contained in the FEIS, none of those changes presented a "seriously different picture of the environmental impact."[115]

Through the proper use of tiering, agencies connect EISs to subsequent EAs to "focus on issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe."[116] Time and money are saved utilizing this procedure, and new information is presented at the relevant stage of the process. In considering proposed changes that will result in a positive environmental impact, the Eighth Circuit rightly deferred to the Corps in determining that a reduction in environmental impact was likely to have a non-substantial impact. As a matter of NEPA policy, such a decision is justified in light of the fact that the proposed change was a matter of design, rather than an entirely new alternative.

To impose the requirement of additional SEISs, despite consideration of the relevant environmental impacts in prior EISs, as well as the FEIS and the FEA, would ultimately force agencies into constant litigation over failure to wait for completion of additional studies and investigations. As a matter of policy, it should be left to the informed

[114] *Id.* (citing Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987)).
[115] *Id.* at 1102. *See* South Trenton Residents Against 29 v. Fed. Highway Admin., 173 F.3d 658, 663 (3rd Cir. 1999); *see also* Hickory Neighborhood Def. League v. Skinner, 893 F.2d 58, 63 (4th Cir. 1990); Sierra Club v. Froeklke, 816 F.2d 205, 210 (5th Cir. 1987).
[116] 40 C.F.R. § 1508.28 (2005).

discretion of the agency whether or not to supply a SEIS once the pertinent information has been evaluated. To require constant updates via SEISs would hinder the progress of projects and tie the hands of the responsible agency. When an agency has properly tiered EISs and EAs and has used a good faith "hard look" assessment of the value of studies and comments to determine the environmental impacts of a project, the congressional intent underlying NEPA and the fundamental public policy concerns of both are satisfied.

VI. CONCLUSION

The decision by the Eighth Circuit Court of Appeals in *Arkansas Wildlife Federation v. United States Army Corp of Engineers* provides a number of important insights into the NEPA process and guidance directed toward agency action. First, proper "tiering" of a subsequent Environmental Assessment to an Environmental Impact Statement will assist in providing the information necessary to substantiate an agency's cumulative impact analysis. The Eighth Circuit determined that the Corps' consideration of the cumulative impact of projects in the region, including some that were not reasonably foreseeable.

Additionally, in situations where changes in a project's plans would result in a reduction in the impact it would have and those changes are commented on and considered by the agency, the Eighth Circuit reserves judgment and discretion for the agency responsible for the project.

NEPA requires a responsible agency to make a continual series of judgment calls and decisions from development to completion of a project. In cases where the responsible agency has considered substantial changes and cumulative environmental impact and utilized the continuum of information created throughout relevant projects, the Eighth Circuit will almost unequivocally support the agency's decision making.

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