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A Fine Romance: The Indulgent Relationship between Federal Courts and Federal Agencies and the Broken NEPA Decision-Making Process. *Prairie Band Pottawatomie Nation v. Fed. Highway Admin.*

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A Fine Romance: The Indulgent Relationship Between Federal Courts and Federal Agencies and the Broken NEPA Decision-Making Process

Prairie Band Pottawatomie Nation v. Fed. Highway Admin.¹

I. INTRODUCTION

Federal law, namely, the National Environmental Protection Act (“NEPA”) was implemented to integrate environmental and public concerns into the decision-making processes of federal agencies.² NEPA requires federal agencies to consider both the positive and negative impacts of proposed federal projects and actions as well as potential alternatives to proposed actions.³ By statute, NEPA requires that federal agencies prepare a statement analyzing potential impacts to the human environment prior to the commencement of any qualifying federal action.⁴ Agencies must prepare a statement analyzing how the action will affect the quality of the human environment.⁵

The public is encouraged to engage in the decision-making process by making timely and useful comments in regards to the environmental impact statement (“EIS”) submitted by a federal agency.⁶ Useful public comments highlight inadequacies in the EIS statement; raise objections to the interpretation of environmental impacts; and identify new impacts, mitigation measures or alternatives.⁷ However, even when useful public comments are submitted to federal agencies, the agencies have final say in selecting an alternative and in deciding which mitigation measures will be incorporated in the final EIS.⁸

When a non-governmental organization or concerned citizens feel that their comment or alternative have been unfairly cast aside, or that the

¹ 684 F.3d 1002 (10th Cir. 2012).

² 7 C.F.R. § 1b.2 (a)-(b) (2013); *See also* Sierra Club v. Hodel, 848 F.2d 1068, 1088 (10th Cir.1988).

³ 23 C.F.R. § 771.105 (a)-(b) (2013).

⁴ 23 C.F.R. § 771.123(a).

⁵ *Id.*

⁶ 23 C.F.R. § 771.123(g)(1)-(3).

⁷ *Id.*

⁸ 23 C.F.R. § 771.125(a)(1).

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federal agency has not complied with federal regulations, their recourse is to commence litigation against the federal agency.⁹ However, these plaintiffs will find that, for the underdog, administrative jurisprudence is pitted with potholes.¹⁰ Plaintiffs are at a disadvantage because: (1) federal courts defer to federal agencies on factual findings; (2) federal agencies both create and interpret federal regulations; and (3) courts will only overturn the decision of an agency if it is arbitrary, unreasonable or capricious—a very high standard.¹¹ Therefore, federal courts rarely overturn the decisions of federal agencies despite public disdain for agency action.

Thus, the expected occurred in a historical farming area of Lawrence, Kansas when the Tenth Circuit Court of Appeals bowed to the expertise and analysis of the Federal Highway Administration and sanctioned the building of a South Lawrence roadway despite electrified public objections.¹²

II. FACTS AND HOLDING

The South Lawrence Trafficway (“SLT”), a roadway proposition that would link state highway K-10 and Interstate 70, has been a hotly debated highway project in Lawrence, Kansas for over twenty years.¹³ A western segment of the SLT has been completed, but the remaining portion has not been built because of objections from Prairie Band

⁹ James Christman, David S. Harlow & Craig Harrison., *Courts Should Not Defer to Agencies’ Interpretations of Their Own Rules*, 15 LEGAL BACKGROUNDER 29, 1 (2000), available at <http://www.hunton.com/files/Publication/4e498b6e-69c5-4dff-bd6d-cbb1d9b0fe44/Presentation/PublicationAttachment/80e98178-d09c-48ab-9a75-ee045dab0303/wlf.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Prairie Band Pottawatomie Nation v. Fed. Highway Admin.*, 684 F.3d 1002, 1006 (10th Cir. 2012).

¹³ *Id.*

Pottawatomie Nation, the Sierra Club, the Wetlands Preservation Organization and other ecological organizations.¹⁴ These ecological organizations, Plaintiff-Appellants in the following legal actions, are opposed to the construction because of the project's potential harm to historical, environmental, and cultural elements in the area.¹⁵

The proponents of the project, Defendant-Appellees in the following lawsuits, consisted of the Federal Highway Administration ("FHWA") and the Kansas Department of Transportation ("KDOT").¹⁶ During litigation, the Defendants supported the highway project because the completion of the SLT would result in improved motorist safety and relieve traffic congestion on surface streets in South Lawrence.¹⁷ The most direct proposed route of the SLT runs by the northern edge of Wakarusa River floodplain and through the historical Haskell Agricultural Farm Property.¹⁸ This route contains cultural landmarks in the north and an environmentally sensitive area in the south called the Baker Wetlands.¹⁹

A less direct and more expensive route for the SLT would avoid the Haskell Farm and run along the southern side of the Wakarusa floodplain, but this route would require a winding roadway and a bridge over the floodplain.²⁰ In choosing a route for the SLT, government organizations narrowed down a large list of options and conducted an evaluation of the twelve most viable options for several factors, including: the plans' imposition on the wetlands, cost, relief of traffic congestion, increased noise pollution, and motorist safety.²¹ Proponents of the SLT

¹⁴ *Id.* Other organizations include: the Jawhawk Audubon Society, Save the Wetlands, Inc., the Kansas University Environs, and the Ecojustice. *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1007.

¹⁸ *Id.* The Haskell Farm was used by the Haskell Indian Nations University for agricultural education. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

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completion selected two final routes, the 32nd Street Alignment B Alternative (“32B”) that took a direct route through the Haskell Farm and the 42nd Street Alignment A Alternative (“42A”), which took a longer southern route by floodplain avoiding Haskell Farm.²² The FHWA and KDOT chose route 32B in a draft of an environmental impact statement (“EIS”) then opened a notice and comment period in which public input was allowed regarding the selected route.²³

After the comment period closed, the governmental highway organizations issued a final EIS in which the organizations formally chose Alternative 32B.²⁴ Following the final decision, opponents of the route proposed a third alternative called “42C,” which ran along 42nd street, but a route similar to this was eliminated early on in the evaluation process due to the roadway’s sharp curves and large price tag.²⁵ After revisiting the plan at the request of the ecological organizations opposing Alternative 32B, the FHWA and KDOT rejected 42C based on safety concerns for motorists and cost.²⁶

Ecological groups challenged FHWA and KDOT’s decision in the United States District Court for the District of Kansas. The ecological organizations, Plaintiffs, brought claims under the Administrative Procedure Act (“APA”), the National Environmental Policy Act (“NEPA”), and §4(f) of the Department of Transportation Act.²⁷

Plaintiffs argued that the FHWA and KDOT’s adoption of the EIS was arbitrary and capricious because it did not comply with NEPA and APA based on four flaws identified in the EIS, including that the noise

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1007-08.

analysis failed to adhere to the United States Department of Transportation regulations and that the FHWA and KDOT should not have rejected Alternative 42C.²⁸

The EIS included results regarding the analysis of the potential noise impact of the government's selected plan, Alternative 32B.²⁹ NEPA requires that the FHWA determine whether a proposed project will result in noise levels in excess of federally regulated limits or if a proposed project will result in a large overall noise increase.³⁰

In compliance with NEPA, the FHWA hired a government contractor who measured existing noise levels at various points on Haskell Farms.³¹ Following this initial analysis, the contractor then used computer modeling to predict what noise levels would be on Haskell Farms in 2025 under both Alternative 32B and 42A.³² The contractor measured the impact of noise on both routes with and without sound boundaries.³³ Results from this study showed that 32B had a very high impact on noise levels on Haskell Farm without sound barriers, but when sound barriers were introduced, 32B had less noise impact than the 42A Alternative with no sound mitigating measures.³⁴

The Plaintiffs disputed the adequacy of the EIS noise analysis by arguing the government contractor did not fully compare future noise levels to existing noise levels.³⁵ The Plaintiffs' claim was based on a sentence in the FHWA noise summary, which suggests that the

²⁸ *Id.* at 1008. The last two arguments raised by the Plaintiffs regarding Defendants' cost analysis and safety criteria were rejected by the District Court after only a brief discussion and will not be discussed in this note. *Id.*

²⁹ *Id.* at 1009.

³⁰ *Id.* at 1008-09; *see also* 23 C.F.R. § 772.11 (2013).

³¹ *Prairie Band*, 684 F.3d at 1009.

³² *Id.* Vehicle traffic predictions in 2025 were provided by KDOT to the government contractor. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

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government contractor only made a partial comparison.³⁶ Plaintiffs argued the partial noise analysis comparison was a material procedural error that unfairly prejudiced the Plaintiffs under the APA because the analysis played a role in selecting Alternative 32B over the other routes considered.³⁷

Plaintiffs also argued that the Defendants' noise analysis should have considered a larger geographic area.³⁸ Because the noise analysis was deficient in its geographical scope, Plaintiffs contended the analysis violated the APA because it was arbitrary and capricious.³⁹

The district court affirmed the Defendants' noise analysis procedures because the government contractor complied with NEPA in analyzing potential noise impacts on Haskell Farm and testing feasible and reasonable abatement measures.⁴⁰ The court found that the noise analysis was conducted correctly and any errors made during the noise analysis were harmless.⁴¹ The Tenth Circuit Court of Appeals affirmed the district court's ruling that the Defendants' partial noise analysis did not unfairly prejudice the Plaintiffs and the limited geographical scope of the noise analysis was neither capricious nor arbitrary.⁴²

Next, Plaintiffs claimed the FHWA and KDOT erred in rejecting their proposed route "Alternative 42C."⁴³ NEPA requires that the FHWA enter in an "early and open" scoping process in which the agency engages in a reasonable and good faith selection of alternatives to the FHWA's

³⁶ *Id.*

³⁷ *Id.* at 1010.

³⁸ *Id.*

³⁹ *Id.* at 1010-11.

⁴⁰ *Id.* at 1009-10.

⁴¹ *Id.* at 1010.

⁴² *Id.* at 1010-11.

⁴³ *Id.* at 1011.

proposed route.⁴⁴ The FHWA and KDOT explored similar routes to Alternative 42C, which also ran along 42nd street and passed west of the S-curves on the street.⁴⁵ The 42C proposal offered by ecological organizations was similar to proposals rejected by the FHWA and KDOT early in the scoping process due to the danger to motorists and the high cost of the longer route.⁴⁶

Specifically, the Defendants found the 42C proposal infringed on Lawrence Park and public school properties, failed to provide a safe transition to bridges, and did not properly join with the proposed K-10 interchange.⁴⁷ Despite these problems, the FHWA and KDOT created a modified version of 42C that corrected these issues, but the agencies were still forced to reject the route because, even with modifications, 42C would still increase traffic accidents.⁴⁸

The district court found that the Defendants' decision was not arbitrary or capricious and that the FHWA and KDOT went above and beyond what was required by revising Alternative 42C and undergoing an additional analysis. Further, the court stressed that if the Plaintiffs desired a more thorough review of alternative 42C, Plaintiffs should have proposed the route prior to the final draft of the Defendants' EIS.⁴⁹ In the instant case, the appellate court affirmed the district court's ruling that Defendants did not act in an arbitrary or capricious manner in failing to consider Alternative 42C.⁵⁰ The appellate court confirmed that Defendants acted reasonably and in good faith in regard to their selection of alternative routes.⁵¹

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1012.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1012-13.

⁵⁰ *Id.* at 1012.

⁵¹ *Id.*

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III. LEGAL BACKGROUND

On January 1, 1970, NEPA was signed into law by President Nixon, making it the primary national charter dedicated to protecting the environment.⁵² NEPA was enacted as a legislative and executive response to growing concerns about human actions and their environmental impacts.⁵³ The book, *Silent Spring*, authored by Rachel Carson, was also an impetus for the development of NEPA because the book critiqued the environmental effects of thoughtless action by federal agencies.⁵⁴ NEPA is often called the “Magna Carta of environmental policy[,]” and as such, the law requires federal agencies to make an assessment of the potential environmental effects of an agency’s proposed action.⁵⁵

NEPA contains the governing guidelines for federal agencies for virtually any activity undertaken, funded, or permitted that affects the environment.⁵⁶ Under NEPA, federal agencies must consider environmental impacts not only on natural resources, but also on social, cultural and economic resources.⁵⁷

Procedures under NEPA are particularly well suited for citizen interaction.⁵⁸ Citizens in areas to be impacted are encouraged to share information and propose alternative actions to agencies.⁵⁹ In fact, the

⁵² COUNCIL ON ENVTL. QUALITY, A CITIZENS GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD 2 (2007), *available at* http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CitizensGuide.pdf [hereinafter CEQ].

⁵³ *What is NEPA?*, NAT’L. PRES. INST. (2012), *available at* <http://www.npi.org/NEPA/what-is>.

⁵⁴ *Id.*

⁵⁵ CEQ, *supra* note 50, at 2.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 1.

main purposes of NEPA's environmental review process are to aid agencies in making more informed decisions and to encourage citizen involvement in the decision-making process.

Appellate courts are required to review compliance to NEPA regulations in order to determine whether defendants neglected to consider an important aspect of the problem, made a decision contrary to the evidence, failed to consider relevant factors, or made an error of judgment.⁶⁰ The court scrutinizes NEPA claims under the APA *de novo*, without regard for the lower court's review of an agency's action.⁶¹ Agency decisions will only be reversed if the EIS is fraught with deficiencies that undermine NEPA's goal of including an informed public in the decision-making process.⁶² Additionally, a violation of the APA does not warrant reversal unless a plaintiff can establish that the agency's error has resulted in undue prejudice.⁶³

A. *Noise Analysis*

Federal regulations establish a standard for highway noise levels and, to that end, the government has devised a three-step noise analysis procedure that must be followed when the FHWA begins a new highway project.⁶⁴

⁶⁰ *Prairie Band Pottawatomie Nation v. Fed. Highway Admin.*, 684 F.3d 1002, 1008 (10th Cir. 2012) (citing *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 710–11 (10th Cir.2010)); 5 U.S.C. § 706(2)(A)-(E) (2011).

⁶¹ *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 710–11 (10th Cir.2010).

⁶² *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1098 (10th Cir. 2007) (citing *Utahns for Better Transp. v. U.S. DOT*, 305 F.3d 1152, 1163 (10th Cir. 2002)).

⁶³ *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009); 5 U.S.C. § 706 (2011).

⁶⁴ 23 C.F.R. § 772.11 (2013).

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First, the FHWA must assess if the new construction will result in an increased traffic noise level.⁶⁵ A “traffic noise impact” is qualified as any noise level that exceeds the noise level defined by federal regulations or construction that results in an increase of noise over existing noise levels.⁶⁶ Defined noise levels vary in relation to land use, with residential areas having the lowest noise level limits and commercial areas having higher noise limits.⁶⁷ Federal regulations require that the FHWA compare predicted noise levels to current noise levels to determine whether a noise impact will occur.⁶⁸

Second, the FHWA must consider noise abatement measures if the FHWA determines that a construction project will create a noise impact.⁶⁹ A noise impact occurs when existing noise levels are extremely high or predicted future noise levels will result in a substantial increase.⁷⁰ A “substantial increase” is defined by the Department of Transportation in which the federal action is occurring.⁷¹ In addition, the FHWA must evaluate any reasonable and feasible noise abatement measures that are likely to be integrated in the construction of the project.⁷² Feasibility is determined by a “combination of acoustical and engineering factors considered in the evaluation of a noise abatement measure.”⁷³ Third, federal law proscribes the FHWA from approving projects and plans which will result in noise impacts, but do not incorporate feasible noise abatement measures.⁷⁴

⁶⁵ 23 C.F.R. § 772.11(a).

⁶⁶ 23 C.F.R. § 772.5.

⁶⁷ *See id.*

⁶⁸ 23 C.F.R. § 772.11(a), (d).

⁶⁹ 23 C.F.R. § 772.13(a).

⁷⁰ 23 C.F.R. § 772.5.

⁷¹ *Id.*

⁷² 23 C.F.R. § 772.13(g).

⁷³ 23 C.F.R. § 772.5.

⁷⁴ 23 C.F.R. § 772.13(h).

B. *Alternative 42C*

In order to identify potential issues with a proposed action, agencies must conduct an “early and open” scoping process.⁷⁵ “Scoping” is the time period in which agencies determine the scope of issues to be addressed and identify any major issues related to a proposed action.⁷⁶ The scoping process occurs prior to an agency conducting in-depth analyses of EIS alternatives.⁷⁷ An agency is only required to analyze the environmental impact of practical alternatives likely to be effective.⁷⁸ An agency is not required to analyze alternatives that it has rejected in good faith.⁷⁹ The agency is simply required to use the “rule of reason” in the scoping stage when deciding which alternatives to exclude from the EIS analysis.⁸⁰ Additionally, an agency is not required to evaluate an alternative unless it is substantially distinct from the alternatives already proposed.⁸¹

IV. INSTANT DECISION

In the instant case, the appellate court found that the Defendants’ failure to fully comply with the three step noise analysis procedure required by 23 C.F.R. § 722 did not unfairly prejudice the Plaintiffs.⁸² The court held that Defendants partially complied with step one of 23 C.F.R. § 772.11(a) when the Defendants determined that the highway project would result in noise impacts.⁸³ However, the court noted that in determining noise impact, the FHWA did not compare existing noise

⁷⁵ 40 C.F.R. § 1501.7 (2013).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992).

⁷⁹ *Id.*

⁸⁰ *Am. Rivers v. Fed. Energy Reg. Comm’n*, 201 F.3d 1186, 1200 (9th Cir. 2000).

⁸¹ *New Mexico ex rel. Richardson v. Bureau of Land Mgmt*, 565 F.3d 683, 705 (10th Cir. 2009).

⁸² *Prairie Band Pottawatomie Nation v. Fed. Highway Admin.*, 684 F.3d 1002, 1011 (10th Cir. 2012).

⁸³ *Id.* at 1009-10.

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levels with predicted noise levels as required by 23 C.F.R. § 772.11(d)(2).⁸⁴ Although the FHWA only partially complied with step one of 23 C.F.R. § 722, the court concluded that the Defendants' failure to compare the existing and predicted noise levels resulted in harmless error.⁸⁵ The court reasoned that this error was not prejudicial because, despite their oversight, the Defendants properly proceeded to step two and explored the feasibility of noise reduction measures as required by law.⁸⁶

The appellate court also rejected the Plaintiffs' argument that incomplete analysis under 23 C.F.R. § 722 was a material error because the noise analysis was used to select Alternative 32B over other routes.⁸⁷ The court noted that, while the Defendants' noise analysis did not compare predicted noise to existing noise levels, the analysis *did* compare the predicted noise level of each proposed alternative route against Alternative 32B, the selected route.⁸⁸ The court concluded that because the partial noise analysis did not affect the relative comparison of proposed alternatives it was a harmless error.⁸⁹

The appellate court concluded that the Plaintiffs failed to allege any legal authority or sufficient facts to prove that the noise analysis was deficient in geographical scope.⁹⁰ The court noted that 23 C.F.R. § 772.11 only requires highway agencies to consider areas of human use when conducting their noise analysis.⁹¹ Further, the majority stated that federal highway regulations exempt undeveloped land from the noise analysis requirement.⁹² In addition, the court indicated that the noise analysis was

⁸⁴ *Id.* at 1010.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1009-10.

⁸⁷ *Id.* at 1010.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1010-11.

⁹¹ *Id.* at 1010.

⁹² *Id.* (citing 23 C.F.R. § 772.11(c)(2)(vi)-(vii)).

primarily focused on Haskell Farm and found that the remaining land affected by construction was undeveloped.⁹³ The court also highlighted that legal precedent requires courts to defer to government agencies' expertise in determining the specific areas which require scientific or technical analysis based on federal regulations.⁹⁴ Therefore, the court concluded the Defendants' noise analysis was not arbitrary or capricious and did not violate the APA.⁹⁵

In the instant case, the court found that the Defendants acted in good faith when selecting alternatives for detailed consideration in selecting a route for the SLT.⁹⁶ The court stated that the Defendants' selection of alternative routes is scrutinized under a standard of "reasonableness" and absent a showing of bad faith, the Defendants' decisions must stand.⁹⁷ The court noted that the FHWA and KDOT complied with NEPA regulations by engaging in a good faith early and open scoping process and in considering Alternative 42C the government rejected the route in favor of 42A and 42B.⁹⁸ The court concluded that Alternative 42C did not differ greatly from 42A and 42B.⁹⁹ All three routes followed a southern route around the floodplain and avoiding Haskell Farm, required a longer more expensive route than 32B, and were equal in terms of their environmental impact on the land.¹⁰⁰ The court reasoned that FHWA and KDOT evaluated Alternative 42C thoroughly and found that 42C was slightly less expensive, but required a sharp S-curve which was unsafe.¹⁰¹ Furthermore, the court commented that Plaintiffs did not propose Alternative 42C until after the scoping process, yet the Defendants' still considered their proposal and engaged in a

⁹³ *Prairie Band*, 684 F.3d at 1010.

⁹⁴ *Id.* at 1011.

⁹⁵ *Id.* at 1010-11.

⁹⁶ *Id.* at 1012-13..

⁹⁷ *Id.* (citing *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001)).

⁹⁸ *Prairie Band*, 684 F.3d at 1012.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

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detailed analysis of the flaws contained in 42C.¹⁰² The appellate court reprimanded the Plaintiffs by stating that they should have submitted their proposal in a timely fashion if they desired a more complete analysis of Alternative 42C.¹⁰³ Therefore, the court concluded the district court did not err in finding that the Defendants' selection process was fair and reasonable especially when the court considers the untimeliness of proposal 42C.¹⁰⁴

V. COMMENT

A. *The Court Permits Differing Standards of Conduct for Agencies*

The appellate court reprimanded the Plaintiffs for the untimeliness of proposal 42C.¹⁰⁵ The court ruled that the reasoned explanation given by the FHWA of why Alternative 42C was inferior was more than sufficient.¹⁰⁶ This ruling is puzzling because the majority stated that although the analysis of alternative 42C by the FHWA was arguably inadequate.¹⁰⁷ However, because the submission for the Alternative was not timely, the FHWA and KDOT were excused from strictly adhering to the process as outlined by federal regulation, which requires federal agencies to analyze *timely* public comments and alternatives.¹⁰⁸

Conversely, the court neglected to admonish the FHWA for its failure to fully comply with the three-step noise analysis procedure as outlined by federal regulation.¹⁰⁹ Case law in the Tenth Circuit states that

¹⁰² *Id.*

¹⁰³ *Id.* at 1012-13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

noncompliance with NEPA is only excused when there is a statutory conflict with regulations governing an agency that renders compliance utterly impossible.¹¹⁰ In the instant case, the court states that the record is unclear as to whether noise comparison tables constitute a complete comparison of existing and predicted noise levels.¹¹¹ In fact, the court is unclear as to “whether the government actually validated predicted noise level through comparison between measured and predicted levels as required per § 772.11.”¹¹²

B. Environmental Ramifications were not Substantively Considered

The court sees no harm to the Plaintiffs despite the incomplete noise analysis because the FHWA correctly proceeded to step two of the analysis, which required the identification noise abatement measures.¹¹³ The court states that this oversight was therefore harmless despite the unclear comparison.¹¹⁴ In *Catron County Bd. Of Comm’rs*, the Tenth Circuit found that a “harmless error analysis” was not appropriate in all instances.¹¹⁵ A harmless error analysis by a reviewing court is inappropriate when an agency substantively fails to deliberate on action that can affect the quality of the human environment in accordance with NEPA.¹¹⁶ In this case, the court states “we will not uphold an agency’s decision on the grounds that it *might* have made the same decision even without the error; otherwise, NEPA would be a near toothless environmental safeguard.”¹¹⁷

¹¹⁰ See *Catron Cnty. Bd. of Comm’rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1435 (10th Cir.1996).

¹¹¹ *Prairie Band*, 684 F.3d at 1009.

¹¹² *Id.*

¹¹³ *Id.* at 1009-10.

¹¹⁴ *Id.* at 1010.

¹¹⁵ See *Catron Cnty. Bd. of Comm’rs*, 75 F.3d at 1433.

¹¹⁶ *Id.*

¹¹⁷ *Prairie Band*, 684 F.3d at 1010.

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However, the court fails to understand that the FHWA *might* not have made the same decision had the error compared existing noise levels not existed. The court stated that the selected Alternative, 32B, had less of a noise impact with mitigation measures than the FHWA taking no action and the 42A alternatives because the routes involved increased traffic on existing surface streets.¹¹⁸ The majority must then assume that the newly constructed SLT will not produce any additional noise in the future. Moreover, the incomplete noise analysis does not provide an answer to the potential increase of future noise once the SLT is completed.¹¹⁹

The FHWA believes that the new construction will decrease noise levels on Haskell farms with mitigation measures because it will lessen the traffic on surface streets.¹²⁰ However, the court and the FHWA fail to consider that traffic and noise impact could increase after the completion of Alternative 32B to a level much higher than the “no action” alternative. For this reason, a comparison of current and predicted noise as required by statute is imperative in this case. If the FHWA would have properly completed the noise analysis and the predicted noise level was much higher than the present noise level in the EIS, the FHWA *might* not have made the same decision. The court’s “harmless analysis” of the FHWA’s error was inappropriate because, in doing only a partial noise comparison, the agency failed to substantively consider the full environmental ramifications of their construction project.

C. A One-sided Decision Making Process

NEPA only requires that agencies examine in good faith, alternatives that appear to be practical and effective.¹²¹ An agency need not “analyze the environmental consequences of alternatives it has in good

¹¹⁸ *Id.* at 1009

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1011.

faith rejected as too remote, speculative, or... impractical or ineffective."¹²² The agency must use the rule of reason in determining which alternatives to consider during the scoping stage¹²³ and alternatives need not be considered if they are not significantly distinguishable from other alternatives the agency has already reviewed.¹²⁴

These legal standards allow agencies to exert almost total control of the scoping process. This procedure leaves little chance that even timely submitted alternatives proposed by ecological organizations will be seriously considered when proposed. It is presumably very easy for government agencies to classify an alternative as too remote or speculative without fully researching the alternative. Agencies are not required to conduct an in-depth analysis of the alternatives submitted until after the early and open scoping process and the EIS alternatives for review have been selected.¹²⁵ Therefore, under NEPA, agencies have the ability to eliminate alternatives without conducting or being required to conduct an in-depth analysis of the alternative. Essentially, agencies can eliminate alternatives at will and with little justification. This method of process of selection lends itself, at best, to uninformed decision-making and at worst, to bad faith decision-making. This occurs because there is little incentive for agencies to analyze alternatives when agencies can eliminate an alternative after doing little to no research and still be functioning within the confines of NEPA.

D. *NEPA becomes a Toothless Safeguard*

NEPA was created to impose procedural requirements on federal agency so that major federal action would not be undertaken without first

¹²² Colo. Env'tl. Coal. v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999) (quoting All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992)).

¹²³ Custer Cnty. Action Ass'n. v. Garvey, 256 F.3d 1024, 1040 (10th Cir. 2001).

¹²⁴ New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 708-09 (10th Cir. 2009).

¹²⁵ *Prairie Band*, 684 F.3d at 1011.

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considering the environmental impacts of that action.¹²⁶ When agencies do not follow the procedural requirements of NEPA, the public cannot be appropriately apprised of agency action or meaningfully participate in the decision-making process, as the Act requires.¹²⁷

Moreover, if a Plaintiff, like Prairie Brand, decides to pursue legal action against an agency, the court will only set aside an agency decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”¹²⁸ For many plaintiffs, this will be a hard standard to exceed because “a presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.”¹²⁹ The courts presume an expertise on the part of federal agencies that also must be rebutted by plaintiffs seeking to overturn agency action.¹³⁰ A court’s deference to a federal agency undermines our nation’s longstanding adversarial legal system. This dereference almost eliminates the possibility of a plaintiff’s lawsuit thwarting a federal action that could be detrimental to the environment.

VI. CONCLUSION

The instant case illuminates a system in which courts give deference to an agency’s finding of fact and interpretation of their own regulations. Additionally, the judiciary fails to reprimand an agency that does not follow the procedural process as outlined in NEPA. Lastly, this case demonstrates that even if an agency does not follow the procedural scheme, an agency’s actions will only be overturned due to extreme

¹²⁶ *New Mexico ex rel. Richardson*, 565 F.3d at 707-08.

¹²⁷ *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002).

¹²⁸ 5 U.S.C. § 706(2)(A) (2013).

¹²⁹ *Citizens’ Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008).

¹³⁰ *New Mexico ex rel. Richardson*, 565 F.3d at 704.

abuses of power. Together, these pieces of the system wholly defy the spirit of NEPA which was created to involve the public in decisions which will affect their environment. NEPA was designed to help federal agencies, nongovernmental organizations and concerned citizens protect the human environment. *Prairie Band* reduces the act's effect so that it favors federal agencies and marginalizes public comment and public participation.

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