

Federal Court Rules U.S. Foreign Policy Considerations Outweigh Procedural Violations of NEPA

A federal judge in Kalamazoo, Michigan has ruled that the United States Department of Energy (DOE) will be allowed to ship a small amount of plutonium to Canada through Michigan, despite an otherwise meritorious request by environmentalists for an injunction to block the shipment. The judge rendered his decision even though the environmentalists' claims were valid, finding that issues of the power of the Executive office in carrying out United States foreign policy and facilitating nuclear non-proliferation outweighed a procedural violation of the National Environmental Policy Act (NEPA).

Background

As part of a strategy to reduce stockpiles and dispose of surplus weapons-grade plutonium, the United States and Russia committed to programs to make peaceful use of portions of the stockpiles. In one pilot project, the two countries each agreed to convert approximately four ounces of the material into fuel rods and then ship them to an experimental nuclear reactor in Canada.

In early 1999, in conformance with NEPA, the U.S. Department of Energy ("DOE") conducted an environmental assessment ("EA") considering the environmental impact of fabricating the fuel rods and transporting them from Los Alamos, NM to Canada by way of Michigan. In September of 1999, the DOE published a Finding of No Significant Environmental Impact in the Federal Register. In December of 1999, environmentalists sued DOE in federal court seeking a temporary restraining order and preliminary injunction to stop DOE from making the shipment. The environmentalists contended that DOE violated NEPA by improperly assessing the potential environmental impact of the project, and as a consequence, failing to prepare a comprehensive Environmental Impact Statement ("EIS").

Court's Decision

In rendering the court's decision, Judge Richard Enslen weighed the competing considerations of strict procedural compliance with NEPA, which ensures that the environmental consequences of major governmental actions are carefully considered before such actions are taken, against the power of the President of the United States to carry out foreign policy. Judge Enslen analyzed whether to exercise his discretionary authority to grant a preliminary injunction by considering four factors:

- (1) whether the movant has a "strong" likelihood of success on the merits;
- (2) whether the movant would otherwise suffer irreparable injury;
- (3) whether issuance of a preliminary injunction would cause substantial harm to others; and
- (4) whether the public interest would be served by issuance of a preliminary injunction.

Likelihood of Success on the Merits

In determining whether the environmentalists were likely to succeed in showing that DOE violated NEPA, the court examined how carefully DOE reviewed the potential environmental repercussions of the DOE project, called the "Parallex Project." The plaintiffs alleged that DOE did not carefully review the potential for "Human Initiated Events" such as sabotage and terrorism. In addition, the environmentalists alleged that DOE had not fully examined project alternatives. In light of NEPA's requirement that DOE evaluate alternatives to the project, the plaintiffs argued that DOE should have evaluated a "no action" alternative. Finally, the plaintiffs alleged that DOE had made its decision to proceed with the pilot project before completing its EA, thus acting in bad faith. The plaintiffs cited as an example of DOE's bad faith the fact that DOE had prepared the fuel rods before completing the EA.

The environmentalists presented expert testimony critical of DOE for failing to fully consider issues of terrorism. DOE countered that, given the tiny amount of nuclear material involved in the project, the consequences of any terrorist act would be minimal. The court found that, although it was not completely satisfied with DOE's assessment of the risk of terrorism, the government's analysis was "not so unreasonable as to render it arbitrary and capricious."

DOE also argued that it need not consider a "no action" alternative because of the foreign policy purpose of the project. The important political objective of encouraging Russia's continuing pursuit of peaceful uses of its weapons-grade plutonium stockpile would be achieved by proceeding with the pilot project, according to DOE. Therefore, DOE argued, the "no action" alternative was not applicable. The court was concerned, however, that the rules promulgated under NEPA do not allow government agencies to commit resources to a project before making a final decision. The court concluded, because DOE had produced fuel rods in advance of the EA, it appeared that DOE had committed to proceeding with the Parallex Project long before the EA was completed. Therefore, the court considered the environmentalists likely to succeed in their claim that DOE's action was "arbitrary and capricious" and, therefore, illegal.

The environmentalists also contended that DOE improperly "segmented" the project to avoid evaluating the environmental impact of a planned larger project. The plaintiffs complained that DOE should have considered the impact of all future shipments to Canada over the life of the larger project and not just the experimental pilot project. Also, the environmentalists complained that DOE ignored the environmental impact of the shipment by Russia of Russian fuel rods to Canada. Thus, the plaintiffs argued that DOE minimized the potential environmental risks by intentionally narrowing the scope of the EA.

The court rejected the environmentalists' argument that DOE's "larger plans" should have been considered in the EA. Judge Enslin was not convinced that the U.S. had made any "larger plans." The court found that only the pilot project needed to be considered. In the absence of a concrete plan on the part of the U.S. or Russia for a larger project, a meaningful EA could not incorporate the larger project's risks.

The court was troubled, however, by the fact that after it left the United States, the Russian plutonium would be transported along the St. Lawrence Seaway, within one mile of the U.S. border, and that the U.S. exercises some control over the planned route through its agreements with Russia and Canada. The court observed that, even though the Russian plutonium would not be transported within the U.S., environmental releases could potentially impact U.S. border states. On this basis, the court concluded that DOE may have improperly segmented its environmental impact analysis by excluding consideration of possible impacts resulting from movement of the Plutonium within Canada, and, as a consequence, the environmentalists were likely to prevail on the merits of the case.

Irreparable Harm

The court then considered whether the plaintiffs would suffer an irreparable injury if the court did not stop the shipment of plutonium through Michigan. The court found that because NEPA is a procedural statute, the court had no mandate to issue an injunction unless the environmentalists could demonstrate tangible environmental injury. Judge Enslin noted that the environmentalists could not demonstrate any likelihood that a plutonium release would result from the project. However, the court concluded that, once a shipment of American fuel rods had been transported to the Canadian reactor, the plaintiffs would “forever lose the ability to formally comment on the safety and environmental concerns arising from the Russian shipment. Thus, the court concluded that the environmentalists would be irreparably harmed by the failure of the court to stop the U.S. shipment.

Harm to Others; Public Interest Concerns

In examining the public policy implications of the decision facing the court, Judge Enslin examined whether the public interest would be served by stopping the project. The court heard arguments from the environmentalists and DOE about why public policy should favor one view or another. The result was that, instead of presenting legal arguments invoking cases and statutes, the parties produced experts to testify about the merits of their espoused policies. This, the court noted, turned the proceedings into something akin to a legislative hearing.

The court heard arguments from the environmentalists that shipment of plutonium constituted nuclear proliferation and from DOE that such shipments supported efforts against proliferation. The environmentalists feared continuing shipments of plutonium in the future. DOE argued that stopping the project could lead to a decision by Russia to halt further cooperation in the Parralex Project and hinder efforts to help Russia find ways to dispose of its surplus plutonium. DOE argued further that an injunction would send the world community the wrong message, casting doubts as to the United States’ seriousness about its international commitments. The court observed that the Parralex Project was a direct result of negotiations between Presidents Bill Clinton and Boris Yeltsin, and that, according to DOE, American credibility would be harmed by a decision to halt the shipment.

The court highlighted its traditional deference to the executive branch of government in matters of foreign affairs, both as required by the Constitution and as a practical matter. The court acknowledged it did not have the necessary resources or expertise to resolve foreign policy

matters. By stopping the plutonium shipment, not only would the court be acting in an area generally left to the legislative and executive branches, but the court was mindful that it would be weighing society's interest in nuclear nonproliferation. The court concluded, "if ever there were an issue that demanded deference to the Executive, surely this is it." Although both sides had persuasive arguments, the court felt compelled to defer to the executive branch's expertise in determining the foreign policy impacts of a putting a stop to the project, and regarded foreign policy issue as a political question and not a legal question. Thus, the court accepted DOE's assessment that U.S. nonproliferation interests would be harmed by an injunction.

Finally, the court found that the arguments as to the merits of various policy options were best resolved by elected officials of the U.S. and Russian governments, and found attempts to influence foreign policy through the courts an inappropriate intrusion upon the powers of the other branches on government. The court felt ill-equipped to determine whether a future Canadian program using surplus Russian and American plutonium would be good policy for any of the three affected countries, and would not speculate as to whether a court injunction might affect the future of a large scale program.

The court concluded that, despite DOE's apparent violation of NEPA, it was constrained by broad foreign policy interests that might be sacrificed as a result of the court's interference with the shipment of plutonium fuel rods through Michigan. The court denied the environmentalists' motion for an injunction, reasoning that separation of powers concerns required the court to accord judicial deference to the executive branch in matters of foreign affairs.

Hirt v. Richardson, 1:99-CV-933 (W.D. Mich.) December 17, 1999.

This article was prepared by Stuart J. Weiss, an associate in our Environmental Department, and previously appeared in the February, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.