Group Denied Standing to Challenge Forest Service Activities

The federal district court for Western Michigan has held that an environmental group did not have standing to challenge the U.S. Forest Service's decision not to prepare an environmental assessment of the agency's planned wildlife habitat improvement projects in a national forest because the group did not demonstrate that its members used the specific forest lands or observed the wildlife that would be affected by the planned projects.

Heartwood, Inc. (Heartwood) sued the U.S. Forest Service (Forest Service) and the district manager for the Huron-Manistee National Forest (Forest) (collectively, Defendants), alleging that the Forest Service had failed to comply with the federal National Environmental Policy Act (NEPA) by failing to prepare a publicly available environmental assessment before deciding to perform various wildlife habitat improvement projects.

In December 1999, the Forest Service issued a "scoping letter" describing proposed wildlife habitat improvement projects for the Service for the next fiscal year. The Forest Service received four responses to the scoping letter from the public, including one from Heartwood.

In March 2000, the Forest Service prepared a "biological assessment" pursuant to the Endangered Species Act (ESA) to assess the potential effects of the proposed projects on federally listed or proposed endangered species with the potential to be found in or near the project areas. The biological assessment concluded that the projects would have no effect on any such species. The Forest Service also performed a "biological evaluation" to evaluate the potential effects of the projects on sensitive species other than those listed or proposed to be listed as endangered under the ESA. The biological evaluation concluded that the projects could have potential impacts on three such species.

In April 2000, the Forest Service issued a Notice of Decision and Decision Memo regarding the work. The Decision Memo described the details of the projects as well as the results of the biological assessment and biological evaluation. The Decision Memo addressed whether an additional "environmental assessment" of the projects' environmental impact pursuant to NEPA was required.

To understand the issues raised by these facts, a short review of NEPA is necessary. NEPA was intended to ensure that decisions regarding "major federal action" would take into account all relevant information relating to the impacts of the action on humans and the environment. NEPA requires federal agencies to prepare an "environmental impact statement" (EIS) for major federal actions that significantly affect the quality of the human environment. In addition, regulations promulgated by the Council on Environmental Quality (CEQ) provide that, even if a federal action is one which does not categorically require an EIS, the agency in question must prepare an "environmental assessment" (EA) to help it consider whether the action will, in fact, significantly affect the environment. If so, the agency must prepare an EIS.

The CEQ regulations also direct federal agencies to identify "categorical exclusions" to NEPA requirements, defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by" the federal agency. If a proposed action falls within a categorical exclusion, the agency need not prepare and EIS or and EA. The regulations also require an agency to establish exceptions to the categorical exclusions for "extraordinary circumstances in which a normally excluded action may have a significant environmental effect."

Under these regulations, the Forest Service adopted procedures implementing NEPA's requirements, including a list of categorical exclusions and extraordinary circumstances for determining when an EIS or EA would be required. Those procedures had been published and made available for public comment in 1991 and 1992.

In the case at hand, the Forest Service's Decision Memo concluded that an EA was not required under NEPA because the project fell within the Forest Service's categorical exclusion for "wildlife habitat improvement activities which do not include the use of herbicides or do not require more than one mile of low standard road construction" and there were no "extraordinary circumstances."

The decision was considered final and not subject to appeal. Nonetheless, Heartwood attempted to appeal and comment on the Decision Memo, claiming that an "extraordinary circumstance" was present. The Forest Service denied the appeal, and Heartwood appealed to the court. Both parties moved for judgment before trial.

The Defendants argued that they were entitled to judgment before trial because Heartwood lacked "standing" to bring its claim.

The doctrine of standing is based on Article III of the U.S. Constitution, which limits the jurisdiction of the federal courts to "cases" and "controversies." U.S. Supreme Court decisions have long held that standing is an essential part of the Constitution's case-or-controversy requirement. Over the years, the courts have developed a three-part standing test. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not just hypothetical. Second, the challenged action of the defendant must have caused the injury. Third, it must be likely that the injury will be redressed by the requested relief.

Further, the courts have held that a party cannot simply rely on injury to the environment; rather, the party must show that he has or will suffer some individualized, concrete harm as a result of an alleged violation of a law by the defendant. The party must "somehow differentiate himself from the mass of people who may find the conduct of which he complains to be objectionable only in an abstract sense."

In this case, Heartwood argued that it had standing because it presented evidence that "its members use the area of the Forest that will be affected by the projects and thus will suffer injury to their interest in aesthetic or recreational enjoyment of the affected area." Heartwood also claimed that its members had "suffered an informational injury as a result of the Forest Service's failure to prepare an EA." (Although the court's opinion does not describe what kind of organization Heartwood is, Heartwood's website states that it is "an association of groups, individuals, and businesses dedicated to the health and well being of the native forest of the Central Hardwood region, and its interdependent plant, animal, and human communities.") Therefore, Heartwood claimed, it had demonstrated that it, or its members, had suffered an injury-in-fact.

The court began its analysis by observing that the U.S. Supreme Court has held that, in the context of environmental laws such as NEPA, "plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Other courts, the court observed, "have reduced the injury in fact requirement under NEPA to a two-part test requiring a plaintiff to show: (1) that by failing to comply with NEPA the agency created or increased the risk of actual, threatened, or imminent or environmental harm; and (2) the failure to

comply has increased the risk of environmental harm to a concrete interest of the plaintiff as shown by either a 'geographical nexus to, or actual use of the site of the agency action.'"

In support of its claim to have standing, Heartwood offered affidavits from three of its members, all of whom alleged that they use the Forest, including the areas to be subject to the proposed projects, for various recreational purposes, and that the proposed projects would affect their use and enjoyment of the Forest.

The court held that these affidavits were insufficient to confer standing on Heartwood. Relying on the U.S. Supreme Court's 1990 decision in *Lujan v. National Wildlife Federation*, the court held that "the statements in the affidavits offered by Heartwood about use of 'the project area' or use of 'the area which is the subject of this lawsuit'" were too vague. The court noted that this case involved "small, discrete areas of a very large tract of land," and that "[t]he projects … will occur on 86 of the 531,000 acres of land" within the Forest, "representing only 0.02% of the total land space…. [W]hen faced with a motion for summary judgment on the issue of standing, a plaintiff must do more than assert generalized allegations in an affidavit which could *conceivably* demonstrate use of the affected land; rather, a plaintiff must set forth specific facts showing injury from use of the affected land." (Original emphasis.)

The affidavits offered by Heartwood, the court held, "do not meet this requirement," because they did not provide details showing past or future planned use of the specific project areas. Accordingly, the affidavits did "not suffice to establish actual injury" to the affiants "because [they] did not provide a factual basis to conclude that the affiant[s] will suffer an actual injury to [their] recreational or aesthetic values by, for example, viewing the effects of the action on the environment."

Heartwood placed great weight on the U.S. Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, (2000), in which the plaintiff group was found to have standing where, among other things, one of its members had canoed in a river approximately forty miles downstream of a source of pollution. The court, however, concluded that *Friends of the Earth* was distinguishable because the group's members in that case established that they used the polluted river, whereas Heartwood had failed to show that its members would use the land that would be affected by the Forest Service's projects. Further, Heartwood had failed to show that the projects' effects would "transcend the boundaries of the project area and impact the same watershed and the same wildlife used and observed by its members."

The court also rejected Heartwood's claim that it had standing because it had "suffered an informational injury as a consequence of the Forest Service's improper use of a categorical exclusion, i.e., it was denied information about the projects which should have been included in an EA." Essentially, Heartwood was alleging that the Forest Service's alleged violation of NEPA in failing to prepare an EA injured its ability to disseminate information that is essential to its activities.

The court stated that it had found no Supreme Court or Sixth Circuit precedent addressing whether "informational injury" may suffice to satisfy Article III's standing requirements in a NEPA case. Other courts, however, had found "that allowing informational injury to supply the basis for Article III standing in a NEPA case would be contrary to established Supreme Court precedent requiring more than a mere interest in an environmental problem to confer standing because any plaintiff, whether organization or individual, could meet the standing requirement by simply alleging a need for the information for environmental purposes."

Therefore, the court granted the Defendants' request for judgment before trial and dismissed the lawsuit on the basis that Heartwood lacked standing to pursue its claims in court.

Heartwood, Inc. v. United States Forest Service, 2001 W.L. 1699203 (W.D. Mich.) December 3, 2001

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