

NATIONAL LAKESHORE NEIGHBORS RESIST TREE REMOVAL

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Communities and residents adjacent to park resources tend to be very protective of what they consider “their park,” including the flora and fauna contained therein. Most people generally like and want to preserve the status quo of park resources near their neighborhoods. Accordingly, park neighbors may not only question, but strenuously oppose park resource decisions which involve the perceived wanton destruction of existing flora and fauna. Citizen opposition may be so strong as to prompt a costly and time consuming lawsuit in federal or state court.

See: NEPA Challenge to Park Sharpshooters for Deer Control”
<http://cehdclass.gmu.edu/jkozlows/lawarts/10OCT11.pdf>

As illustrated by the case described herein, the legal basis in many of these federal lawsuits for challenging agency decisions in managing park resources is typically the procedural requirements of the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA). Assuming the agency has followed prescribed procedures under NEPA and the APA, federal courts will generally defer and not “second guess” agency expertise and discretion in making resource management decisions for a particular park site. In so doing, however, the federal court will also consider whether challenged resource management decisions were consistent with the expressed language of the enabling legislation which originally created a particular park resource.

In state courts, state administrative and environmental statutes analogous to the federal APA and NEPA may provide a legal basis and similar judicial review process for challenging agency actions involving state or local park projects.

3,400 TREES

In the case study described herein, *Coalition to Protect Cowles Bog Area v. Salazar*, 2013 U.S. Dist. LEXIS 92658 (7/2/2013), plaintiffs, a group of neighbors from a neighborhood adjacent to the Indiana Dunes National Lakeshore, challenged a project by the National Park Service (“NPS” or “Park Service”) “to restore a portion of Cowles Bog back to a wetland by cutting down approximately 3,400 trees.” Plaintiffs objected to the destruction of the trees. After a lengthy approval process, the project began at the end of 2012.
(SEE: <http://www.nps.gov/indu/naturescience/great-marsh-restoration.htm>)

The Indiana Dunes National Lakeshore is described as a patchwork of land stretching along the southern edge of Lake Michigan for approximately 25 miles. At about the midway point of this expanse is Cowles Bog, a wetland area that today has significant tree growth.

Plaintiffs filed suit in federal district court, alleging the project violated the National Environmental Policy Act (“NEPA”) and the Administrative Procedure Act (“APA”) when the

NPS "reached its decision to cut down 3,400 trees in order to restore Cowles Bog to a wet-mesic prairie."

FACTS OF THE CASE

The Indiana Dunes National Lakeshore was established in 1966 when Congress passed the "Lakeshore Act." *See* 16 U.S.C. §§ 460u, *et seq.* (i.e., Title 16 of the United States Code beginning at section 430u) NPS had conducted investigations into the Cowles Bog Wetland Complex to establish what it would have looked like in the absence of human interference (settlers came to the area early in the 19th Century). The Park Service has established a policy that aims to restore park resources in this way. *See* Management Policies § 4.1, found at <http://www.nps.gov/policy/MP2006.pdf>.

The area is now heavily wooded (thus the 3,400 trees at issue), but the soil samples "documented an unusual micro-topographical complex of nine soil types that developed under conditions of wetmesic prairie with a few scattered trees." Moreover, "presettlement records" from an 1830 survey showed that the area under consideration for restoration had been a marsh. The Park Service thus concluded, based on the extensive samples, the 1830 land survey, and a comparison of aerial photography from the 1930s onward, that the area had originally been a wetland with minimal tree cover.

With this information in hand, the Park Service decided to undertake the process of restoring the area to a wet-mesic prairie. On July 20, 2011, the Park Service convened an "Agency Coordination Meeting" with various state and federal agencies regarding the preparation of an environmental assessment (EA). Later that evening, the Park Service also held a "Public Input Meeting." Presentations were again made about the history of the area and also about the various plans under consideration, and attendees then asked numerous questions about the project.

Some nine months later, on March 9, 2012, the Park Service issued the EA for comment. The EA plainly stated that "[t]he purpose of the proposed action is to restore approximately 25 acres of [the Cowles Bog Wetland Complex] to its former lake plain wet-mesic prairie conditions and provide waterfowl habitat in an adjacent open water body."

After describing the history of the area, the EA goes on to consider a "range of alternatives to provide a lake plain wet-mesic prairie [that] were developed and evaluated throughout the development of [the] environment assessment." The EA analyzed three proposals to achieve this goal: (1) the no-action alternative (which is required by the regulations governing NEPA), (2) the preferred alternative, which retained selected trees, and (3) an alternative that would have retained trees only near a historic home site in the project area.

Each of these alternatives were analyzed for their impact on various topics like geology and soils, vegetation, wildlife, threatened and endangered species, water quality, and wetlands. The EA also analyzed the cumulative impacts of the preferred alternative and the no-action alternative with other past, present, and reasonably foreseeable future actions. The EA concluded that for each of the impact topics, the preferred alternative would not have a significant impact on the human environment, i.e. Finding of No Significant Impact (FONSI).

In addition, the EA also addressed two alternatives that "were considered and dismissed because they did not meet the project's purpose." The two alternatives that were considered but dismissed would have retained trees over either 40 cm in diameter at breast height or 70 cm at breast height. The EA concluded that neither of these options would "reduce the tree canopy enough to support desired species and would not provide a buffer to Mineral Springs Road. Therefore, neither of these options would meet the project's Purpose and Need."

The public comment period on the draft EA closed on April 9, 2012. The Park Service received 74 written comments, of which 35 supported the project and 39 expressed concern about it. The Park Service provided detailed and lengthy responses in writing to each of the 39 comments that expressed concern. On November 5, 2012, the Superintendent of the Lakeshore signed a recommendation of a FONSI for submission to the Regional Director for approval. The Midwest Regional Director of the Park Service approved both the response to the comments that were received and the FONSI, and signed the FONSI as approved. Shortly thereafter, the project began. Plaintiffs subsequently filed suit in federal court in an attempt to stop the project.

NEPA

As described by the federal district court, "[w]hen a federal agency elects to pursue any major action that might significantly affect the environment — like, say, cutting down 3,400 trees — it must comply with NEPA," including preparation of an Environmental Assessment ("EA"). Further, the court noted that an EA is a "concise public document that briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a) (i.e., Title 40 of the Code of Federal Regulations at section 1508) According to the court, "[t]he purpose of an EA is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement [EIS]." Further, the court noted that "[t]he EA thus ultimately results in one of two findings:

- 1) a finding that an EIS is required, in which case additional time and expense will be incurred, or 2) a finding of no significant impact, which is commonly referred to as a 'FONSI'."

If the agency issues a FONSI, as noted by the court, the project may then "proceed as planned without performing the more comprehensive EIS and without further inquiry." *See* 40 C.F.R. § 1501.4(e).

NPS AUTHORITY

In this particular instance, plaintiffs claimed NPS "never had the authority to undertake the restoration in the first place based on the relevant statutory authority."

As cited by the federal district court, the "Administration" subsections in the Lakeshore Act were significant in "evaluating the extent of the Park Service's authority to restore Cowles Bog." In particular, the court noted subsection 6(a) regarding the "Utilization of authorities for

conservation and management of natural resources” conferred broad authority and discretion on the Secretary of the Interior, working through NPS, to manage and conserve natural resources consistent with the purposes of the Lakeshore Act.

Moreover, as described by the court, the legislative intent of the Lakeshore Act is “to preserve for the educational, inspirational, and recreational use of the public certain portions of the Indiana dunes and other areas of scenic, scientific, and historic interest and recreational value in the State of Indiana.” 16 U.S.C. § 460u. To do so, Administration subsection 6(b) provides, in pertinent part, that “preservation of the lakeshore” restrict “developments for public uses” and “visitor conveniences” in providing for “public enjoyment and understanding”:

In order that the lakeshore shall be permanently preserved in its present state, no development or plan for the convenience of visitors shall be undertaken therein which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing or with the preservation of such historic sites and structures as the Secretary may designate.

Further, as cited by the federal district court, “the only subsection of the Lakeshore Act that specifically addresses Cowles Bog was passed in 1976 as part of an amendment to the Act” which provided, in relevant part, as follows:

By July 1, 1977, the Secretary shall prepare and transmit to the Committees on Interior and Insular Affairs of the United States Congress a study of [designated] areas... and report concerning the following objectives: (a) preservation of the remaining dunes, wetlands, native vegetation, and animal life within the area; (b) preservation and restoration of the watersheds of Cowles Bog and its associated wetlands. 16 U.S.C. § 460u-18(a).

As a result, under Section 6(a), under this “hugely expansive grant of authority,” the Secretary of Interior could determine that “the restoration of Cowles Bog to be an appropriate way to manage the natural resources of the Indiana Dunes.” In so doing, however, the court acknowledged that “subsection 6(b) constrains the Secretary's authority” because “Congress was explicit” that “the lakeshore shall be permanently preserved in its present state.” 16 U.S.C. § 460u-6(b).

PRESERVED IN PRESENT STATE

As characterized by the plaintiffs, subsection 6(b) provided “clear, plain, mandatory language” that Congress had “plainly decreed” that “the Lakeshore was to continue without fundamental change or destruction in its existing condition.” Accordingly, plaintiffs contended NPS lacked the authority for the restoration of Cowles Bog because the planned removal of trees violated “Congress's mandate to permanently preserve the property in its present state.” The federal district court rejected this argument.

In the opinion of the court, the broad legislative authority under subsection (a) to manage the Lakeshore as the Secretary “deems appropriate” was only restricted to a “development or plan”

involving “the convenience of visitors.” For such plans and developments, the court found must be “compatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing” such that the Lakeshore will be “permanently preserved in its present state.”

According to the court, plaintiffs’ characterization of the phrase “permanently preserved in its present state” ignored the limitation on projects “for the convenience of visitors.” More importantly, the court found plaintiffs’ “interpretation of the statute means that the Secretary would have to manage those resources in a very specific way — to preserve the entire Lakeshore in its 1966 condition as if it were permanently frozen in time.” In the opinion of the court, “Plaintiffs’ reading of the statute would lead to absurd outcomes” because this “interpretation would make it impossible for Park Service to manage the Lakeshore” as Congress intended.

It cannot be that Congress intended the language “permanently preserved in its present state” to mean that the park had to be maintained in something like a hermetically sealed geodome from 1966 on. If that were the case, wouldn't the Secretary have to make individualized decisions as to every flower, shrub, tree, etc. to ensure that the Lakeshore looks exactly as it did in 1966? That is an absurdity, of course.

Moreover, the court acknowledged that “a cardinal principle of statutory construction” requires courts to give statutes “a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.” Further, in this particular instance, the court noted that it was “also clear that Congress has considered the restoration of Cowles Bog as at least potentially within the authority of the Secretary.” Specifically, as noted above, Congress had directed “the Secretary of the Interior to study various objectives (including the potential restoration of Cowles Bog) and then report back to Congress about the results of those studies.”

As a result, the federal district court held the Lakeshore Act granted “the Secretary wide discretion to manage the Lakeshore as he deems appropriate, and the decision of the Park Service to undertake a restoration of Cowles Bog was not in excess of its statutory authority.”

NEPA COMPLIANCE

Having found that NPS had the authority to undertake a restoration of Cowles Bog, the federal district court then considered whether NPS had complied with the procedural requirements of the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA).

As described by the federal district court, the appropriate judicial standard of review for plaintiffs’ NEPA claim would be the Administrative Procedures Act (“APA”). 5 U.S.C. § 706. Pursuant to the APA, the federal district court noted the following judicial standard of review would apply:

The APA instructs courts to set aside agency action only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5

U.S.C. § 706(2)(A). The inquiry under this standard must be searching and careful, but "the ultimate standard of review is a narrow one."

This narrow review means asking two questions: "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." If the agency considered "the proper factors" and made "a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference."

While federal agencies are afforded judicial deference under the APA, in contrast, the court noted that NEPA imposed the following requirements on agency actions:

NEPA does not itself mandate particular results, but only imposes procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.

What this all means is that NEPA merely prohibits uninformed — rather than unwise — agency action. If an agency's decision is based on the appropriate information and considerations, it must be upheld even if it is not a decision that a judge would have made in the first instance as the decision-maker for the federal agency.

Applying these principles to the facts of this case, the federal district court acknowledged that "reasonable people might think that cutting down 3,400 trees to establish a wet-mesic prairie doesn't sound like a terrific idea." However, within the context of the NEPA, the federal district court recognized that it was "prohibited from substituting its judgment for that of the agency as to the environmental consequences of its actions." Instead, the role of the court was limited to "applying the arbitrary and capricious standard in the NEPA context is to insure that the agency has taken a 'hard look' at environmental consequences."

In so doing, the federal district court found plaintiffs had to overcome a "difficult burden" in proving that NPS violated NEPA. Specifically, plaintiffs had to prove that NPS's "EA and FONSI were either prepared so heedlessly as to constitute an uninformed decision or prepared as facades to paper-over what was an already predetermined outcome." In contrast, NPS simply had to "go through the necessary process proscribed by the statute — properly prepare the EA and the FONSI — such that their ultimate decision to restore Cowles Bog amounted to a truly informed decision (*i.e.*, a hard look)."

In the opinion of the federal district court, plaintiffs had "failed to meet their hefty burden" to establish NPS had violated NEPA. On the contrary, the court found "the Secretary sufficiently complied with NEPA in this case."

REASONABLE ALTERNATIVES

Plaintiffs had argued that “the Secretary never properly considered a range of reasonable alternatives in the EA” as required by NEPA. As cited by the federal district court, in “preparing an EA, NEPA requires agencies to consider reasonable, feasible alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii) In this particular instance, the court noted that it was “important to keep in mind that the goal of the project is to establish a lake plain wet-mesic prairie.”

According to the court, in addressing the “reasonable alternatives requirement under NEPA, agencies are “not required to consider alternatives that would not serve the reasonable project purpose.” On the contrary, the court noted that an EA or EIS need only “consider in detail alternatives that would address both of the Project's stated purposes and needs.”

To achieve this goal, the EA analyzed three proposals: (1) the preferred alternative, which retained selected trees, (2) an alternative that would have retained trees only near a historic home site in the project area, and (3) the no-action alternative which is required by 40 C.F.R. § 1502.14(d). In addition, the EA also noted two alternatives that “were considered and dismissed because they did not meet the project's purpose.”

Plaintiffs contended that this consideration of alternatives was inadequate. According to plaintiffs, the range of alternatives considered by NPS was effectively limited to two, i.e., cut 99% of the trees' or cut 97% of the trees. As a result, plaintiffs contended that not considered “a range of reasonable alternatives as required by NEPA.” The federal district court rejected this argument:

Here, the entire stated purpose of the project is to restore the area to a wet-mesic prairie, and because a significant tree canopy prevents such a restoration, all of the reasonable alternatives have to involve the cutting of the vast majority of trees.

Moreover, the court acknowledged that “a less extensive' search for alternatives is required” when “an agency makes an informed decision that the environmental impact will be small.” As a result, under APA review, the federal district court would “accord deference” in finding the scope of alternatives considered by NPS for the bog restoration project complied with NEPA.

EA DEFICIENCIES

Plaintiffs further argued that “the EA contained various inaccuracies, deficiencies, and misrepresentations” such that NPS’s “decision to restore Cowles Bog was not sufficiently informed to meet NEPA's standards.” Pursuant to NEPA, the federal district court acknowledged that “an agency decision must be based on sound science.”

NEPA requires that agencies shall insure the professional integrity including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24.3 The integrity of the EA would be undermined if it contains serious inaccuracies, deficiencies, or misrepresentations. It is also true, however, that scientific data requires a high level of technical expertise and,

as a result, courts must defer to the informed discretion of the responsible federal agencies.

Accordingly, in reviewing scientific judgments and technical analyses within the agency's expertise," the court acknowledged that judicial review "is generally at its most deferential." Moreover, in conducting a deferential judicial review, the federal district court was required to "take care to distinguish between claimed deficiencies that are merely flyspecks and those that are significant enough to defeat the goals of informed decisionmaking and informed public comment."

In this particular instance, the court characterized all of plaintiffs' perceived deficiencies as "little more than flyspecks," e.g. the bog was actually a swamp. Similarly, plaintiffs had claimed "a portion Cowles Bog was timbered in 1830." Accordingly, plaintiffs contended that "land with any trees cannot be wetland" and NPS was effectively "trying to restore this area to a different wetland type." As a result, plaintiffs claimed "the 'restoration' of the area to a wet-mesic prairie is not a 'restoration' at all." The federal district court rejected this argument:

The Park Service conducted soil samples that demonstrate that the project site developed under "conditions of wet-mesic prairie with a few scattered trees. Project site hydrology present prior to disturbances by humans would have supported saturated soils, mesic soils, and soils inundated by one to five inches of water.

Accordingly, in the opinion of the federal district court, NPS "had more than sufficient scientific evidence to rationally conclude that a restoration was appropriate." As a result, the court found the Secretary's decision was an "informed" one as required by NEPA.

Plaintiffs had also argued that "the Secretary failed to sufficiently engage the public in the decision making process." As noted by the court, "Federal regulations do not clearly define how public involvement requirements might apply where, as here, an agency prepares only an EA (and FONSI) rather than an EIS." As cited by the court, in the case of an EA, the agency is required to "involve environmental agencies, applicants, and the public" only "to the extent practicable." 40 C.F.R. § 1501.4(b). As a result, the court found "agencies have significant discretion in determining how they comply with NEPA's public participation regulations in preparing an EA." In the opinion of the court, these NEPA "requirements for public participation were easily met here."

The Park Service held a public scoping meeting at the beginning of the EA process and a special public presentation on the EA for the Town of Dune Acres. They led a site visit of the proposed project area for members of the public. They circulated the EA for public comment and prepared a document responding to all the comments received. They posted the EA, the response to comments, and the FONSI on Park Service's website. This was more than sufficient to meet NEPA's goals for informing the public about the project.

As a result, the federal district court held the NPS EA "adequately complied with NEPA's

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requirements and provided a sufficient rationale for the Park Service to undertake the Cowles Bog restoration.” The federal district court, therefore, granted summary judgment in favor of NPS effectively dismissing plaintiffs’ lawsuit.

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Virtual Visits to Cowles Bog at Indiana Dunes on YouTube:
<http://www.youtube.com/watch?v=Jhw9i4L3hjA>

Early Spring & Autumn in Cowles Bog
<http://www.youtube.com/watch?v=F3U17IAeY54>

Cowles Bog
<http://www.youtube.com/watch?v=T2V1NNQ9-Vs>

<http://www.youtube.com/watch?v=tD0sfBSqHIU>

Volunteer at Cowles Bog
http://www.youtube.com/results?search_query=Cowles+Bog&sm=12