

NEPA CHALLENGE TO PARK SHARPSHOOTERS FOR DEER CONTROL

James C. Kozlowski, J.D., Ph.D.

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In pertinent part, the National Environmental Policy Act (NEPA), 42 USC § 4332, mandates that all federal agencies “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.”

In so doing, NEPA requires federal agencies to include in every recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment, a detailed statement, i.e., an environmental impact statement (EIS) by the responsible official to include the following:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The National Environmental Policy Act of 1969 (NEPA) also established the Council on Environmental Quality (CEQ). In addition, the Environmental Quality Improvement Act of 1970 provided CEQ with rulemaking authority to issue regulations which establish procedures and provide direction to federal agencies to implement NEPA and ensure “environmental information is available to public officials and citizens before decisions are made and before actions are taken.”

In pertinent part, the stated policy of the CEQ regulations (40 CFR § 1500.2) requires federal agencies, to the fullest extent possible, implement the following policy and procedures:

Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

In so doing, since it is limited to major federal actions significantly affecting the human environment, a costly and time consuming EIS should be the exception rather than the rule. CEQ regulations also allow federal agencies to use “categorical exclusions” (CE) to “define categories of actions which do not individually or cumulatively have a significant effect on the

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human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§1508.4).” In addition, following an environmental review and issuing an assessment (EA), the CEQ regulations also authorize federal agencies to issue a “finding of no significant impact” (FONSI) “when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§1508.13).” Accordingly, NEPA compliance for the vast majority of proposed federal actions is based on a CE or EA/FONSI, rather than an EIS.

After preparing a draft environmental impact statement and before preparing a final environmental impact statement, CEQ regulations (40 CFR § 1503.1) require federal agencies to invite “comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.” Further, CEQ regulations (40 CFR § 1502.19) circulate the entire draft and final environmental impact statements to the following:

- (a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.
- (b) The applicant, if any.
- (c) Any person, organization, or agency requesting the entire environmental impact statement.
- (d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

In so doing, NEPA and implementing CEQ regulations ensure that interested parties and the general public is provided with adequate notice and an opportunity to be heard prior to the implementation of any major federal action “significantly affecting the quality of the human environment.”

### ALTERNATIVES “HEART” OF EIS

As described in the CEQ regulations (40 CFR § 1502.14), the inclusion of alternatives of the proposed action is the “heart of the environmental impact statement.” Further, comparing reasonable alternatives to the proposed action pursuant to the CEQ regulations achieves NEPA’s policy objectives by “sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” In comparing reasonable alternatives to the proposed action, federal agencies are required to include the following in an EIS:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless

another law prohibits the expression of such a preference.

In the case of *Friends of Animals v. United States National Parks*, No. 10-2329, 2011 U.S. App. LEXIS 13094 (3<sup>rd</sup> Cir. 6/27/2011), several nonprofit animal rights organizations, including named plaintiff Friends of Animals (hereinafter plaintiffs referred to collectively as “FOA”) challenged “the procedures used by the National Park Service (NPS) to conclude that a massive deer cull involving sharpshooters was the best option for preserving vegetation in Valley Forge National Historical Park (Valley Forge Park).” In particular, pursuant to the NEPA CEQ regulations cited above, FOA alleged NPS had failed to properly and fully consider a reasonable “predator” alternative to this proposed federal action.

## FACTS OF THE CASE

Valley Forge Park is located in rapidly growing suburbs eighteen miles northwest of center city Philadelphia. The park is overrun with white-tailed deer. Between 1983 and 2009, the deer density in the park increased from 31 to 35 deer per square mile to 241 deer per square mile. The deer voraciously eat vegetation within the park, and estimates of the appropriate deer density for maintaining natural forest regeneration range from 10 to 40 deer per square mile.

Following a three-year study and the proper publishing of notices, distribution of a draft environmental impact statement (EIS), and public meetings and public comment periods on the issue, the NPS published a final EIS on August 28, 2009, as required by NEPA, 42 U.S.C. § 4321 *et seq.*

The EIS identified as its objectives, in pertinent part, the protection and restoration of native plant communities and the cultural landscape through the reduction of deer browsing, and the maintenance of the white-tailed deer population within the park in a manner that allowed for restoration of native plants. The NPS focused on four alternatives for accomplishing these goals.

Alternative A was dubbed "No-action," and called for a continuance of the then-in-place deer management and monitoring efforts.

Alternative B, "Combined Nonlethal Actions," included a proposal for rotational fencing of selected forested areas, in conjunction with the introduction of a chemical reproductive control agent, when an effective chemical agent became available on the market.

Alternative C, "Combined Lethal Actions," included direct reduction of the deer population through the use of sharpshooters.

Alternative D, "Combined Lethal and Nonlethal Actions," involved the use of sharpshooters to immediately reduce the deer population, plus the use of chemical reproductive controls to maintain the population size once an acceptable agent became available.

The NPS chose Alternative D. The agency estimated that it would take four years to achieve its

deer density goal.

The EIS also briefly summarized other options that the NPS had considered and rejected. Specifically, under the heading "Reintroduction of Predators," the EIS first discussed the unsuitability of introducing wolves or cougars. Specifically, the EIS noted that "the park is surrounded by developed areas and the proximity to humans is not appropriate for the reintroduction of large predators."

Coyotes (*Canis latrans*) are present in the park and bobcats (*Lynx rufus*) potentially could be supported by habitats within the park. However, these predators have been shown not to exert effective control on white-tailed deer populations.

Based on these reasons, the reintroduction of predators was dismissed as a management option.

After NPS announced its plan to commence the deer hunt in the winter 2010, FOA requested the federal district court to issue a preliminary injunction halting the planned agency action pending a full trial. The federal district court rejected FOA's request and granted NPS's motion for summary judgment, effectively dismissing FOA's claims. FOA appealed.

#### APA REVIEW

On appeal, FOA claimed the planned agency action to be undertaken by NPS violated the procedural requirements of the National Environmental Policy Act ("NEPA") and the Administrative Procedures Act ("APA").

After a federal agency has prepared and considered an Environmental Impact Statement and has decided to go forward with a major federal action under NEPA, the federal appeals court noted that it would apply the APA standard of judicial review for challenges to agency actions. Specifically, the APA requires the federal court to "determine whether all necessary procedures were followed" and consider "all relevant questions of law, and to examine the facts to determine whether the decision was arbitrary, capricious, and an abuse of discretion."

Further, federal appeals court noted that NEPA is more procedural than substantive with the following "specialized standard of review for arbitrariness" under the APA:

In deciding whether the agency acted arbitrarily, we will not substitute our own judgment for that of the agency, but we will insist that the agency has, in fact, adequately studied the issue and taken a hard look at the environmental consequences of its decision. We presume that the agency action is valid, and the burden of proof rests with the appellants who challenge such action.

Moreover, the appeals court acknowledged that NEPA is an environmental policy act, not necessarily an environmental protection act. Accordingly, NEPA does not require a federal agency to maximize or even achieve environmentally beneficial outcomes in a proposed project. On the contrary, NEPA simply requires the agency to take the necessary "hard look" at the

environmental consequences of a proposed project.

NEPA serves procedural rather than substantive goals. It does not require agencies to achieve particular substantive environmental results, but requires them to collect and disseminate information about the environmental consequences of proposed actions.

Further, the appeals court noted that NEPA requires the agency to consider only "reasonable" alternatives in the EIS which would achieve the agency goals of a proposed project, as opposed to environmental goals like those espoused by groups like FOA.

Where the agency has examined a breadth of alternatives but has excluded from consideration alternatives that would not meet the goals of the project, the agency has satisfied NEPA.

In addition, pursuant to the APA, the federal appeals court acknowledged that the proper role of the federal courts is to "review an agency's reasonableness determination with considerable deference to the agency's expertise and policy-making role."

#### REASONABLE ALTERNATIVES

On appeal FOA had argued that "NPS failed to adequately consider the reasonable alternative of increasing the local coyote population and "the EIS contained false alternatives that presented the NPS with only one viable option." In other words, according to FOA, the use of sharpshooters to control the deer population was effectively a foregone conclusion by NPS from the very outset. As a result, FOA contended "the NPS did not follow NEPA requirements when it failed to consider increasing the coyote population as a reasonable alternative."

As characterized by the federal appeals court, FOA's argument required more detailed explanation of "how an agency determines when an option is reasonable" pursuant to NEPA and APA review. In so doing, the court would "evaluate the NPS's choice of alternatives in light of the stated objectives of the action." According to the court, "an alternative is properly excluded from consideration in an environmental impact statement only if it would be reasonable for the agency to conclude that the alternative does not bring about the ends of the federal action."

In this particular instance, the federal appeals court noted "NPS's primary objective was to protect the native plants and landscape of Valley Forge Park." Further, the court found NPS had "determined that a deer density of 241 deer per square mile had "direct and indirect negative impacts on plant and animal communities." Accordingly, the court concluded NPS could require "any reasonable alternative would have to result in the reduction of the deer population or in the prevention of such a high density of deer from accessing the vegetation and landscape."

Moreover, the court found that "the reintroduction of predators was dismissed as a management option" because "coyotes could not consistently control white-tailed deer populations." Specifically, the court noted the "1997 Coffey and Johnston study cited by the NPS in the EIS [which had] found that coyotes could not even 'consistently control' a white-tailed deer

population, not to mention succeed in reducing the deer population to target levels.” As a result, the federal appeals court found the NPS could properly reject “the option of coyote predation” offered by FOA as an alternative to the proposed deer hunt because it would not achieve the stated goal of the proposed federal action.

On appeal, FOA argued further that “the NPS never actually considered the option of *enhancing* the coyote population because the EIS subchapter discussing coyotes was titled ‘Reintroduction of Predators,’ and coyotes already existed in Valley Forge Park.” Assuming NPS had not considered enhancing the coyote population as an alternative, the court found nonetheless that FOA had failed to establish a violation of NEPA and the CEQ regulations because “the available evidence suggested that coyotes cannot reduce the deer population.”

The NPS clearly researched, and rejected, the idea of reducing the deer population through the use of predators. It may have relied on only one study. But with no evidence suggesting that an enhanced coyote population could reduce the white-tailed deer population in Valley Forge Park, and with evidence stating exactly the contrary, the NPS did not err in concluding that coyote predation was not a reasonable alternative and did not require further study.

In so doing, the federal appeals court recognized “there is necessarily a limit to the thoroughness with which an agency can analyze every option.” Moreover, in this particular instance, the appeals court found FOA had failed to offer “a specific, detailed counterproposal to the agency’s preferred option that had a chance of success” in achieving the stated goal of the proposed federal action.

FOA sought to add to the record certain studies relating to coyote predation and coyote-human interactions. The District Court did not consider them, but we have, and it is clear that two of the studies *support* the NPS’s conclusion that coyotes could not reduce the white-tailed deer population in Valley Forge Park.

Further, the appeals court noted the CEQ regulations “governing the NPS’s actions required the agency to rigorously explore all reasonable alternatives and only “briefly discuss the reasons for eliminating other options from detailed study.” In this particular instance, the court determined that NPS had “adequately considered and appropriately rejected the option of coyote predation because there was not a shred of evidence that such an option could achieve the NPS’s stated goals.” As a result, applying the deferential standard of judicial review of agency actions under the APA, the federal appeals court concluded “NPS’s determination on this issue was neither arbitrary nor capricious,” i.e. a failure to consider relevant factors and/or a clear error in judgment.

On appeal, FOA had also contended that “alternatives A and B were no more than ‘straw men,’ and that the NPS from the beginning preferred to “shoot the deer,” the options available in alternatives C and D.”

As cited by the federal appeals court, “NEPA requires federal agencies to study in detail all reasonable alternatives to actions significantly affecting the quality of the human environment.”

42 U.S.C. §§ 4332(2)(C)(iii), (E); 40 C.F.R. §§ 1502.1, 1502.14(a). Moreover, the court noted that other federal circuit courts of appeal "have interpreted this requirement to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow they can be accomplished by only one alternative." Reiterating the general principle that "NEPA does not mandate particular results," the federal appeals court, however, acknowledged that the goal of judicial review was simply "to ensure that the agency gathered information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned."

[Under the applicable deferential APA standard of judicial review for NEPA challenges to agency actions] courts only consider whether an agency's decisions regarding which alternatives to discuss and how extensively to discuss them were arbitrary, keeping in mind that such decisions are necessarily bound by a rule of reason and practicality.

In this particular instance, the court found the administrative record "indicated that the NPS engaged in a lengthy and reasoned review process before focusing on alternatives A, B, C, and D and ultimately choosing Alternative D."

#### "NO ACTION" ALTERNATIVE

On appeal, FOA had also contended that Alternative A, the "No-action" alternative was a "false alternative" because it "called for a continuance of the then-in-place deer management and monitoring efforts." The federal appeals court rejected this contention, noting CEQ regulations expressly required the NPS to include the Alternative A "No-action" alternative in the EIS. 40 C.F.R. § 1502.14(d). In so doing, this requirement forces federal agencies to consider the environmental consequences of effectively doing nothing and maintaining the status quo.

#### CONCLUSION

In the opinion of the court, "by the time the NPS prepared the final EIS, the record reflects that the NPS seriously considered options other than using sharpshooters to kill the deer." As a result, based on a review of the record, the federal appeals court held NPS had properly included and considered "a reasonable range of alternatives" in the EIS.

As to Alternative B, "Combined Nonlethal Actions," the NPS met internally to discuss management of the white-tailed deer population beginning in September 2006. The results of those meetings were discussed in a Final Internal Scoping Report, which shows that NPS considered the nonlethal options of chemical reproductive control, fencing of targeted areas or the entire park, the "hazing" or frightening of the deer, translocation, the use of chemical repellents, and supplemental feeding to reduce damage to the natural vegetation.

Having concluded that NPS "did not violate the requirements of NEPA," the federal appeals court, therefore, affirmed the judgment of the federal district court in favor of NPS.

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James C. Kozlowski, J.D., Ph.D. is an associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: [jkozlows@gmu.edu](mailto:jkozlows@gmu.edu)  
Webpage with link to Law Review archive: <http://mason.gmu.edu/~jkozlows>