

Dubois v. Dept of Agriculture (Loon Lake EIS case study)

Roland C. DUBOIS and Restore: The North Woods, Plaintiffs, Appellants,  
v.  
UNITED STATES DEPARTMENT OF AGRICULTURE, et al., and Loon Mountain  
Recreation Corporation, Defendants, Appellees.

Nos. 96-1015, 96-1068.

United States Court of Appeals,  
First Circuit.

Dec. 19, 1996.

102 F.3d 1273, 43 ERC 1824, 27 Env'tl. L. Rep. 20,622

Loon Mountain Recreation Corporation ("Loon Corp.") operates a ski resort in the White Mountain National Forest in Lincoln, New Hampshire. In order to expand its skiing facilities,

Corp. sought and received a permit to do so from the United States Forest Service

Dubois sued the Forest Service alleging violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq., the Clean Water Act ("CWA"), 33 U.S.C. § 1251, et seq., the Administrative Procedure Act, 5 U.S.C. § 501, et seq. ("APA"),

White Mountain National Forest ("WMNF") is a public resource managed by the United States Forest Service for a wide range of competing public uses and purposes,

including "outdoor recreation, range, timber, watershed, ... wildlife and fish purposes," 16 U.S.C. § 528 (1994), and skiing, 16 U.S.C. § 497(b) (1994)

National Forest Management Act of 1976, the Forest Service makes long-term plans to coordinate these competing uses, 16 U.S.C. § 1604(e)(1) (1994),

issues "special use" permits authorizing private recreational services on national forest land, 36 C.F.R. §§ 251.50-.65 (1995).

Loon Pond is located in the WMNF at an elevation of 2,400 feet. unusual for its relatively pristine nature.

New Hampshire Department of Environmental Services ("NHDES") regulations classify Loon Pond as a Class A waterbody,

protected by demanding water quality standards under a variety of criteria, see N.H.Code Admin. R. Env-Ws 432.03,

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Outstanding Resource Water ("ORW"), protected against any measurable long-term degradation by the State's anti-degradation rules, see id. 437.06; 40 C.F.R. § 131.12(a)(3) (1995).

Loon Mountain Ski Area, which has operated since the 1960s not far from Loon Pond.

Prior to the permit revision that gave rise to this litigation, Loon Corp. held a special use permit to operate on 785 acres of WMNF land.

permit allowed Loon Corp. to draw water ("drawdown") for snowmaking from Loon Pond, as well as from the East Branch of the Pemigewasset River ("East Branch") and from nearby Boyle Brook.

Loon Corp. was authorized to pump snowmaking water from Loon Pond down to 18 inches below full level.

In addition to being used as a source of water for snowmaking, Loon Pond has been the repository for disposal of water after it is pumped through the snowmaking system.

includes water that originally came from Loon Pond, as well as water that originated in the East Branch or in Boyle Brook

250,000 gallons of East Branch water have been transferred into Loon Pond each year in this manner.

water discharged into Loon Pond contains at least the same pollutants that were present in the intake water.

Evidence in the record indicates that intake water taken from the East Branch contains bacteria, other aquatic organisms such as Giardia lamblia, phosphorus, turbidity and heat.

1986, Loon Corp. applied to the Forest Service for an amendment to its special use permit to allow expansion of its facilities within the WMNF.

NEPA, 42 U.S.C. § 4332, the Service developed a draft EIS, and a supplement to the draft.

criticism of the adequacy of those documents, the Forest Service issued a revised draft EIS ("RDEIS"), which was published for public comment.

RDEIS set forth five alternatives to meet the perceived demand for additional alpine skiing. All five were located at the Loon Mountain site.

Many individuals and groups, including both plaintiffs, filed comments pointing out various environmental problems with each alternative that involved expanding the ski area.

lengthy comment from the U.S. Environmental Protection Agency ("EPA") expressed its concern that the use of Loon Pond for snowmaking purposes would "use Loon Pond like a cistern"

instead of treating it "with care" because it is "acknowledged to be one of the rare high altitude ponds of its size in the White Mountains."

Other commenters suggested that Loon Corp. be required to build artificial water storage ponds, in order to eliminate the problem of depleting Loon Pond when withdrawing water for snowmaking

as well as the problem of adding pollutants to Loon Pond when discharging water into the Pond after use.

During the EIS process, Ron Buso, a hydrologist for the WMNF, expressed concern to another Forest Service hydrologist that the proposed drawdown of Loon Pond by twenty feet was likely to have a severe impact on the Pond.

explained that natural snowmelt in New Hampshire is extremely acidic and that, as a result of the planned drawdown, a substantial amount of acidic snowmelt would remain in Loon Pond,

number of scientists whose affidavits were submitted to the district court, the increase in the Pond's acidity due to the planned drawdown would change the chemistry of the Pond, cause toxic metals to be released from the sediment, and kill naturally occurring organisms.

Without addressing the issues raised in the Buso memorandum or in the comments suggesting artificial storage ponds, the Forest Service prepared a Final EIS ("FEIS").

FEIS added a sixth alternative, also on the Loon Mountain site.

new alternative provided for expansion of Loon Corp.'s permit area by 581 acres and for the construction of one new lift and approximately 70 acres of new ski trails, changes designed to accommodate 3,200 additional skiers per day (from the current 5,800 per day).

Forest Service deemed Alternative 6 as the preferred alternative.

Loon Corp. would more than double the amount of water used for snowmaking, from 67 million gallons per year to 138 million gallons.

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Loon Corp. was authorized to draw the Pond down for snowmaking by fifteen feet, compared to the current eighteen inches

March 1993, the Forest Service published a Record of Decision (ROD) adopting Alternative 6.

mitigation measure to blunt the adverse environmental impact on Loon Pond, the Forest Service required Loon Corp. to pump water from the East Branch to Loon Pond in December and May of each year if the Pond was not otherwise full at those times.

FEIS, the Forest Service recognized that the East Branch is a relatively unprotected Class B waterway under New Hampshire law, and that transfer of East Branch water to Loon Pond, a protected Class A waterbody and Outstanding Resource Water under state and federal law, would introduce pollutants into the Pond.

FEIS nor the ROD set any limits, however, on the level of non-bacterial organisms such as *Giardia lamblia* or on pollutants such as phosphorus that may be present in the transferred water.

Dubois and RESTORE appealed the ROD to the Regional Forester and, thereafter, to the Chief of the Forest Service.

appeals were denied

March 16, 1994, the Forest Service issued a special use permit to Loon Corp., implementing the decision described in the ROD.

challenging the Forest Service's approval of the Loon Mountain expansion project.

Forest Service actions violated the CWA because they would lead to violations of state water quality standards

Forest Service violated both NEPA by failing to consider alternatives to the use of Loon Pond and failing to develop adequate mitigation measures.

Forest Service violated the CWA, 33 U.S.C. § 1311, by failing to obtain a National Pollutant Discharge Elimination System ("NPDES") permit before approving Loon Corp.'s expansion plans,

which entailed removing water from the East Branch, using it to pressurize and prevent freezing in its snowmaking equipment, and then discharging the used water into Loon Pond.

Dubois, an NPDES permit was required in order for Loon Corp. to discharge pollutants into Loon Pond, including the discharge from Loon Corp.'s snowmaking equipment.

RESTORE claimed that the Forest Service violated NEPA by failing to prepare a Supplemental EIS after it developed Alternative 6 as the preferred alternative.

RESTORE, this new alternative, not specifically mentioned in the previously published draft EIS or RDEIS,

contained substantial changes to the proposed action that are relevant to environmental concerns, which required a supplemental EIS under NEPA and relevant implementing regulations

RESTORE claimed that a supplemental EIS was required because the Forest Service's Final EIS failed to "rigorously explore and objectively evaluate all reasonable alternatives" that are capable of meeting the stated goals of the project, as required by 40 C.F.R. § 1502.14 (1995).

RESTORE, the asserted goal of meeting skier demand could have been met by expanding ski areas other than Loon, in particular, ski areas located outside the White Mountain National Forest.

#### THE NEPA/EIS ISSUE

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., declares a broad national commitment to protecting and promoting environmental quality. Robertson, 490 U.S. at 348; 42 U.S.C. § 4331 (1994).

primary mechanism for implementing NEPA is the Environmental Impact Statement (EIS). 42 U.S.C. § 4332 (1994).

EIS is an "action-forcing" procedure, designed "[t]o ensure that this commitment is infused into the ongoing programs and actions of the Federal Government."

NEPA requires that an agency considering any action that would have a significant impact on the environment prepare an EIS.

EIS must contain a "detailed statement" including, inter alia, the environmental impacts of the proposed project, and all reasonable alternatives to the project. 42 U.S.C. § 4332(C)

EIS helps satisfy NEPA's "twin aims": to ensure that the agency takes a "hard look" at the environmental consequences of its proposed action,

and to make information on the environmental consequences available to the public, which may then offer its insight to assist the agency's decision-making through the comment process.

EIS thus "helps insure the integrity of the process of decision," providing a basis for comparing the environmental problems raised by the proposed project with the difficulties involved in the alternatives.

EIS, the agency must "consider every significant aspect of the environmental impact of a proposed action," and "evaluate different courses of action,"

EIS's discussion of environmental impacts "forms the scientific and analytic basis for the comparisons" of alternatives, 40 C.F.R. § 1502.16 (1995), which are "the heart" of the EIS,

discussion of impacts must include both "direct and indirect effects (secondary impacts) of a proposed project."

agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

In this context, reasonable foreseeability means that "the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."

environmental effect would be considered "too speculative" for inclusion in the EIS if it cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker.

Nevertheless, "[r]easonable forecasting . . . is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'"

"[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences" of a proposed action.

As one aspect of evaluating a proposed course of action under NEPA, the agency has a duty "to study all alternatives that appear reasonable and appropriate for study . . . ,

as well as significant alternatives suggested by other agencies or the public during the comment period."

As stated in the Council on Environmental Quality ("CEQ") regulations implementing NEPA, the consideration of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14.

These implementing regulations are entitled to substantial deference.

regulations require that the EIS "[r]igorously 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." 40 C.F.R. § 1502.14(a).

"absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement.'"

'existence of a viable but unexamined alternative renders an environmental impact statement inadequate.'"

Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot "bring into compliance with NEPA an EIS that by itself is inadequate.

Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned.

#### Requisite Level of Detail

EIS requirement is to "provide decisionmakers with sufficiently detailed information to aid in determining whether to proceed with the action in light of its environmental consequences."

What level of detail is sufficient depends on the nature and scope of the proposed action.

The discussion of environmental effects of alternatives need not be exhaustive.

"[W]hat is required is information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned,"

information sufficient for the agency to "[r]igorously explore and objectively evaluate" all reasonable alternatives. 40 C.F.R. § 1502.14(a);

The courts have applied "a rule of reason in determining whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."

One aspect of this determination is whether the agency has gone "beyond mere assertions and indicate[d] its basis for them."

The agency "must 'explicate fully its course of inquiry, its analysis and its reasoning.'"

court must determine whether, in the context of the record, the agency's decision -- and the analysis on which it is based -- is too unreasonable for the law to permit it to stand.

We apply a rule of reason because courts should not "fly speck" an EIS and hold it insufficient based on inconsequential or technical deficiencies.

implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to the fullest extent possible."

The agency must "squarely turn[]" all "procedural corners" in its EIS.

Applying these standards to the instant case, we conclude

Forest Service has not rigorously explored all reasonable alternatives,

alternative that Loon Corp. be required to build artificial water storage ponds, instead of withdrawing water for snowmaking from, and discharging water into, an "outstanding resource water" like Loon Pond.

adverse environmental impacts of using Loon Pond were before the agency, and more than one commenter proposed building artificial water storage ponds,

Instead of "rigorously explor[ing]" the alternative of using artificial water storage units instead of Loon Pond, the Forest Service's Final EIS did not respond to these comments at all.

agency did not in any way explain its reasoning or provide a factual basis for its refusal to consider, in general, the possibility of alternatives to using Loon Pond for snowmaking

failure violated the Forest Service's EIS obligation under NEPA. See 40 C.F.R. § 1502.9(b) (1995); 42 U.S.C. § 4332(C)(iii) (1994).

use of artificial storage ponds is not so facially implausible that it can be dismissed out of hand.

Forest Service, on another occasion, required the Sugarbush Ski Area in Vermont to construct, for its snowmaking operations, three artificial water storage ponds

Our conclusion is buttressed by NEPA's requirement that an agency consider and an EIS discuss "steps that can be taken to mitigate the adverse environmental consequences" of a proposed project.

Even though there is no requirement that the agency reach a particular substantive result, such as actually formulating and adopting a complete mitigation plan,

the agency must discuss "the extent to which adverse effects can be avoided," i.e., by mitigation measures, "in sufficient detail to ensure that environmental consequences have been fairly evaluated."

duty -- coupled with the comments alerting the agency to the environmental consequences of using Loon Pond for snowmaking and suggesting the containment pond solution –

required the Forest Service to seriously consider this alternative and to explain its reasoning if it rejected the proposal.

Nor can the Forest Service claim that its failure to consider an alternative to using Loon Pond for snowmaking was a de minimis or "fly speck" issue

record indicates serious adverse consequences to Loon Pond if it is used "as a cistern," to use EPA's words,

at least a reasonable probability that the use of artificial storage ponds could avoid those consequences.

existence of this non-de minimis viable but unexamined alternative renders [the Loon EIS] inadequate.

counsel for the Forest Service argued that constructing artificial storage ponds large enough to serve as an alternative to using Loon Pond would not be a viable alternative for reasons that were conclusorily stated

"post hoc rationalization of counsel" cannot overcome the agency's failure to consider and address in its FEIS the alternative proposed by commenters.

Such post hoc rationalizations are inherently suspect, and in any event are no substitute for the agency's following statutorily mandated procedures.

even if the agency's actual decision was a reasoned one, the EIS is insufficient if it does not properly discuss the required issues.

how probing" an investigation NEPA requires of alternatives depends on the circumstances, including the nature of the action at issue.

reviewing court must be flexible in evaluating the depth of analysis to require in an EIS, because, while NEPA "does not mandate particular results,"

it does require that the agency have adequately identified and evaluated a project's environmental consequences.

final EIS contains no "description" or "discussion" whatsoever as to why an alternative source of water such as an artificially created storage pond would be impractical.

agency has discretion to balance competing concerns and to choose among alternatives, but it must legitimately assess the relative merits of reasonable alternatives before making its decision.

After a searching and careful review of the record in the instant case, we are not convinced that the Forest Service's decision was founded on a reasoned evaluation of the relevant factors,

, or that it articulated a rational connection between the facts found and the choice made,

Hence, it acted arbitrarily and capriciously in granting Loon Corp.'s special use permit for the expanded ski resort.

Moreover, because the Forest Service did not satisfy the requirement that it "rigorously explore and objectively evaluate" all reasonable alternatives,[18] 40 C.F.R. § 1502.14(a), its decision was not in accordance with law.[19] See 5 U.S.C. § 706(2)(A).