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Fourth Circuit Looks at NEPA Cost Benefit Analysis
Lieutenant Colonel David Howlett

In a recent decision, *Hughes River Watershed Conservancy v. Johnson*, the Fourth Circuit Court of Appeals looked at the adequacy of a cost and benefit analysis in an environmental impact statement (EIS). The case provides guidance on the level of detail required for economic benefit information in an environmental analysis prepared under National Environmental Policy Act of 1969 (NEPA).

In this case, federal agencies prepared an EIS for construction of a dam in West Virginia. That EIS came under scrutiny in a 1996 decision, *Hughes River Watershed Conservancy v. Glickman*, where it was asserted that the agencies had not provided fair consideration of the project's adverse environmental effects because they had overestimated the economic benefits to be gained from the dam's recreational use. The court of appeals disagreed and determined that the agencies had not violated NEPA. The court remanded this case for the agencies to reevaluate their estimates of recreational benefits. Subsequent EIS analysis was to be based upon net benefits, rather than gross benefits.

The federal agencies obtained a new economic study of the project. This study evaluated all additional recreational benefits provided by the proposed dam, changes in activity mix and considered non-use values. The study showed an overall positive benefit-cost ratio for the dam, which supported the project's economic feasibility. The agencies incorporated the study's conclusions into a supplemental EIS, which was again challenged.

In *Hughes River Watershed Conservancy v. Johnson*, the court reviewed Supreme Court cases that addressed NEPA analyses of economic issues. It concluded that an agency is first vested with discretion to determine that certain values -- such as recreation --

outweigh environmental costs. The court also determined that NEPA requires agencies to balance a project's economic benefits against its environmental effects. Although an agency could choose to go forward with a project that does not make economic sense, it must nevertheless take a "hard look" at the issue.

Looking at the supplemental EIS, the court found that the federal agencies, "in making their economic recreational benefits determinations, considered the total number of visitors to the Project, the number of visitors who would be diverted to the Project from existing facilities, the consumer surplus figure, and non-use values." Such a non-use value would include the value that a person places on knowing the river exists in its free-flowing state and knowing the river will be protected for future generations. The agencies' weighing of these factors led the court to determine that the agencies' decision to implement the project was not arbitrary or capricious.

This case demonstrates that economic benefit information in a NEPA document must be thorough and even-handed. The fact that certain factors are imprecise or unquantifiable will not render the result inadequate. (LTC Howlett/LIT)

Environmental Guidance for Overseas Facilities Formally Staffed MAJ Mike Egan

The Deputy Under Secretary of Defense (Environmental Security) has released for coordination a final draft copy of the Overseas Environmental Baseline Guidance Document (OEBGD). The product of over 18 months of work, the OEBGD lays out implementation guidance, procedures, and criteria for environmental compliance. The OEBGD's compliance requirements will apply to overseas facilities, such as DoD installations outside the United States, its territories and possessions.

In particular, the OEBGD is to be used by authorized DoD Environmental Executive Agents who will work with representatives of the host nations where our significant DoD

installations are located. These Environmental Executive Agents are responsible for developing final governing standards for all DoD installations in the host nations concerned. In carrying out this task, they will look to the OEGBD's specific DoD environmental criteria. This OEGBD baseline guidance will apply to DoD installation activities unless it is inconsistent with: (1) the law of an applicable host nation; (2) base rights and/or Status of Forces Agreements; (3) other international agreements or (4) practices established pursuant to such agreements. In addition, the guidance will regulate DoD component operations in foreign countries that lack their own environmental standards. Likewise, the new requirements will also apply if existing national standards provide less protection for human health and the environment than would be granted in the OEGBD's baseline guidance.

After formal coordination, the approval and distribution of the OEGBD guidance is anticipated by the third quarter of fiscal year 1999. (MAJ Egan/CPL)

EPA Proposes New Rules for Lead-based Paint Debris MAJ Mike Egan

EPA has proposed a new rule on lead-based paint (LBP) demolition debris. Under the latest proposal, LBP demolition debris that fails the Toxicity Characteristic Leaching Procedure (TCLP) would no longer be subject to regulation under RCRA. The trade-off, however, is that all LBP demolition debris, regardless of hazard, would be subject to regulation under TSCA.

The TSCA regime would require the following: (1) LBP debris would be stored for up to 180 days in an inaccessible container (or 72 hours if it is accessible) and; (2) that the LBP debris be disposed in construction/demolition waste landfills (not municipal landfills) or hazardous waste disposal facilities, and; (3) that disposal facilities be notified that the waste contains LBP demolition debris with information on the date the debris was generated. The generator and the landfill would have to keep records for 3 years.

The proposed rule includes a household waste exemption. So, wastes from a resident's home renovations would not be included in the rule's purview. Army, as Executive Agent, is currently coordinating comments from all of the services for a single DoD submittal. (MAJ Egan/CPL)

AEC Complete OB/OD Facility Guide
MAJ Mike Egan

Pursuant to the new DoD Open Burn/Open Detonation (OB/OD) Optimization Program, the Army and DoD have been actively attempting to reduce the number of sites that require a RCRA permit for OB/OD activities. Open burning and open detonation are the most commonly used methods for disposing of conventional weapons that cannot be recycled or resold. Open burning is the combustion of explosive material and propellants, while open detonation involves a controlled process of exploding munitions. OB/OD operations are regulated as hazardous waste treatment units in accordance with RCRA, and so are often subject to RCRA permits. RCRA B permits are required for facilities -- including federal facilities -- that treat, store and dispose of hazardous waste. The RCRA Subpart X regulations cover miscellaneous units, among which are the OB/OD units that deal with propellants, explosives, pyrotechnics and thermal treatment.

To assist the individual installation in determining the value of maintaining its RCRA Subpart X permit, the Army Environmental Center will be issuing an OB/OD facility guide. This guide provides an evaluation package to assist an installation Commander in any future decisions on maintaining a permit. Expected distribution date for this guide is March 99. (MAJ Egan/CPL)

Contraste

Las torres se derrumban y no se vuelven a alzar.
El humilde hormiguero siempre regresa.

Contrast

Castle towers tumble and will never rise again.
The humble anthill always returns.

Jose Emilio Pacheco (translated by LTC Howlett, LIT)

Hughes River Watershed Conservancy v. Johnson, No. 98-2134, 1999 U.S. App. Lexis 397 (4th Cir. Jan. 13, 1999).

42 U.S.C. 4321 et seq.

Id. at 447.

Hughes River Watershed Conservancy v. Johnson, 1999 U.S. App. Lexis 397 at *7.

Id. at *11, citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989).

Hughes River Watershed Conservancy v. Johnson, 1999 U.S. App. Lexis 397 at *15; citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989).

Hughes River Watershed Conservancy v. Johnson, 1999 U.S. App. Lexis 397 at *17.

Id. at *17-18.

Id. at *16-17, quoting *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974).

The OEBCG was prepared by an interservice committee, comprised of representatives of the Military Departments, the Chairman of the Joint Chiefs of Staff and the Defense Logistics Agency, pursuant to DODI 4715.5, Management of Environmental Compliance at Overseas Installations, April 22, 1996.

Environmental Executive Agents are appointed by the Office of the Secretary of Defense.

See, DoDI 4715.5, Management of Environmental Compliance at Overseas Installations, April 22, 1996, Para. 3.c. (1).

Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris, Part II, 63 FR 70233 (Dec. 18, 1998).

42 U.S.C. § 6900 et seq.

15 U.S.C. § 2601 et seq.

Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris, Part II, 63 FR 70233; 70235 (Dec. 18, 1998).

Id. at 70241.

Id. at 70241-2.

15 U.S.C. § 2601 et seq.

To fall under RCRA, the munitions in question must be clearly slated for disposal and fall under RCRA specifications for hazardous waste found in 40 C.F.R. Part 261.

For a general overview of RCRA B permit requirements for treatment, storage and disposal operations, see, 40 C.F.R. § 270.10 - § 270.29.

See, 40 C.F.R. § 264.600, Subpart X, "Miscellaneous Units." Permit requirements for OB/OD units are found at 40 C.F.R. § 270.23.