

Outside Counsel

Expert Analysis

‘BHUSD v. FTA’: How the Court Departed From NEPA’s Presumptive Remedy

BY JENNIFER S. RECINE,
LAUREN TABAKSBLAT
AND TIFFANY L. HO

The National Environmental Policy Act (NEPA) mandates that an agency reviewing an infrastructure project take a “hard look” at the project’s environmental consequences *before* the agency decides to proceed. Because the timing of environmental analysis is critical for it to serve its intended purpose under environmental law, when a court finds that an agency has violated NEPA by overlooking or omitting an important impact from its review and remands the decision to the agency for further study, the court almost always vacates the record of decision (ROD) associated with the project, stopping the project until the remand analysis is completed.

In two recent decisions, however, courts departed from this presumptive remedy, permitting two of the biggest infrastructure projects in the United



In two recent decisions, courts departed from this presumptive remedy, permitting two of the biggest infrastructure projects in the United States to proceed, notwithstanding findings that further environmental analysis was required as to each project.

States—the Dakota Access Pipeline and the Westside Purple Line Subway Extension in Los Angeles—to proceed, notwithstanding findings that further environmental analysis was required as to each project. In both instances, the

courts relied on the limited exception to the presumptive remedy articulated in *Allied-Signal v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1996). In *Allied-Signal*, the court determined that remand without vacating the ROD is appropriate where there is a serious possibility that an agency will be able to substantiate its decision on remand and stopping the project will lead to impermissibly disruptive consequences in the interim.

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, – F. Supp. 3d –, 2017 WL 4564714 (Oct. 11, 2017), concerning the Dakota Access Pipeline project,

JENNIFER S. RECINE is a litigation partner and member of the management committee, LAUREN TABAKSBLAT is a litigation partner, and TIFFANY L. HO is a litigation associate at Kasowitz Benson Torres in New York.

illustrates a proper application of *Allied-Signal*. There the U.S. District Court for the District of Columbia permitted the completed pipeline to operate pending a remand analysis because the U.S. Army Corps of Engineers (USACE) had substantially complied with NEPA. By contrast, in *Beverly Hills Unified School District v. Federal Transit Administration*, 2016 WL 4445770 (C.D. Cal. Aug. 12, 2016), a district court in the Central District of California made no such finding. But it nevertheless applied the holding in *Allied-Signal*, permitting the Federal Transit Administration (FTA) and the Los Angeles County Metropolitan Transportation Authority (Metro) to enter into billions of dollars of contracts locking the alignment the agencies were ordered to reconsider on remand into place and undermining the purpose of NEPA.

The 'Standing Rock' Decision

In *Standing Rock*, the court found that the environmental assessment for the Dakota Access Pipeline—a 1,172 mile underground oil pipeline—“substantially complied” with NEPA and upheld the majority of determinations by the USACE, including the agency’s central conclusion that the risk of an oil spill was sufficiently low that an environmental impact statement did not need to be prepared. Beyond this core holding that the environmental analysis was sound in principle, the court found three discrete deficiencies in the agency’s analysis.

In determining the appropriate remedy for the identified errors, the court reiterated the longstanding rule that “vacating a rule or action promulgated in violation of NEPA is the standard remedy.” The

District Court then analyzed whether the factual circumstances in *Standing Rock* “merit[] departure from the presumptive remedy of vacatur.” Addressing the *Allied Signal* factors, the court concluded that the agency’s three errors did not present “fundamental flaws in [the agency’s] reasoning” and the record demonstrated a “significant likelihood” that USACE would substantiate its deci-

Departing from the presumptive remedy of vacatur under these circumstances undermines NEPA’s purpose.

sion on remand. The court reached this conclusion because USACE had “already gathered” and analyzed relevant data or information, and needed to “simply connect the dots,” “better articulat[e] their reasoning,” or explain “already-conducted” analysis to substantiate its prior conclusions.

While the court acknowledged that stopping operation of the pipeline pending the remand analysis would have “some disruptive effect,” the court cautioned against placing too much emphasis on disruption in reaching its conclusion because such emphasis might incentivize agencies and third parties to devote as many resources to a project “as early as possible ... and then claim disruption in light of such investments,” promoting an “act first and ask later” attitude which is directly contrary to NEPA’s purpose. Thus, the court held that effect of disruption was “only barely relevant” and remanded without vacatur based on its findings that the agency’s “errors are likely to be cured.”

The 'Beverly Hills' Decision

The dangers of emphasizing the disruptive consequences of vacatur the *Standing Rock* court warned about are illustrated in the *Beverly Hills* case. There, the court held that the FTA violated NEPA and §4(f) of the Department of Transportation Act when it failed to analyze environmental impacts of the Westside Purple Line Extension—a popular project in traffic-congested Los Angeles that will extend the city’s subway to a new western terminus located near the West Los Angeles Veteran Affairs Hospital. Among other deficiencies, the court found that the FTA violated §4(f) when it determined that tunneling underneath Beverly Hills High School—the only public high school in the city of Beverly Hills—was not a “use” of protected historic and recreational resources on the High School campus, and “consequently fail[ed] to undertake the follow-on §4(f) analysis” of feasible and prudent alternative alignments and all possible planning to minimize harm to those resources. (This article focuses on the court’s conclusion that the FTA failed to engage in the requisite §4(f) alternatives analysis. In addition to this error, the court identified three other principal violations of NEPA which it ordered the FTA to address in a supplemental analysis on remand.)

Notwithstanding the FTA’s conceded failure to conduct *any* alternatives analysis of feasible and prudent alternatives to the use of the High School’s historic and recreational resources, the court declined to vacate the record of decision for the project. Rather, rejecting the

longstanding principle that vacatur is the presumptive remedy for agency action that violates NEPA, the court held that an analysis of the *Allied Signal* factors dictate that remand, without vacatur, was the appropriate remedy.

In reaching this conclusion, the court gave short-shrift to consideration of the seriousness of the FTA's errors, holding—in a single conclusory paragraph—that “there is no indication that the FTA would be unable to offer better and/or more complete reasoning for its challenged decisions.” The court failed to identify any evidence in the record, such as “already conducted” analyses, that would allow the agency to substantiate or better articulate its reasoning. This is because the FTA's erroneous determination that there would be no “use” of the school campus resulted in the FTA never having conducted the requisite §4(f) analysis in the first instance.

While NEPA mandates that §4(f)'s feasible and prudent alternatives analysis be conducted *prior* to the point of commitment to a particular alignment, the court held that the claimed disruptive consequences of vacating the ROD weighed against stopping the project during remand. Those disruptive consequences included the delay in executing, the Full Funding Grant Agreement (FFGA), a binding commitment to award \$1.187 billion in federal funds. Without the FFGA, the project sponsor, Metro, would be unable to award binding contracts to design and build the subway alignment.

The determinative effect given to the FTA and Metro's claimed disrupt-

ive consequences of vacating the ROD in the *Beverly Hills* case resulted in the court granting the agencies license to execute binding contracts committing multi-billion dollars in resources to the alignment under consideration before the remand analysis was complete. In making the decision, the court acknowledged testimony from Metro's CEO that executing the FFGA would prejudice the evaluation of alignments on remand because any changes would jeopardize federal funding, but nevertheless found that a desire to avoid a delay in realizing the project's benefits justified applying the *Allied-Signal* exemption.

When Courts Should Depart From Presumptive Remedy

Applied properly, *Allied-Signal* permits agencies to avoid disrupting infrastructure projects in limited circumstances where an agency has substantially complied with NEPA and record evidence demonstrates a significant likelihood that on remand the agency will be able to substantiate its prior conclusion based on previously gathered and analyzed data.

But courts should be cautious not to expand the *Allied-Signal* exception to justify popular infrastructure projects where there is no evidence in the record that the agency previously conducted the required environmental review. Failing to vacate the record of decision in the absence of such evidence will enable an infrastructure project that has not been adequately analyzed to proceed, undermining NEPA's central purpose and result-

ing in environmental harm. As courts have repeatedly recognized, NEPA does not set out substantive environmental standards, but instead establishes “action-forcing” procedures to ensure that agencies meet their obligations. In this way, NEPA simply guarantees a particular procedure, rather than a substantive result. Consistent with its central purpose, NEPA requires that environmental analysis be completed *before* the agency commits to a project design, so that the analysis can serve practically in the decision-making process and will not be used to rationalize or justify decisions already made.

In declining to vacate, the *Beverly Hills* court permitted the FTA and Metro to execute multi-billion dollar contracts for the construction of the subway tunnels beneath the high school and spend hundreds of millions of dollars in federal funds on the alignment as designed *before* the agencies conducted any analysis of alternative alignments. Departing from the presumptive remedy of vacatur under these circumstances undermines NEPA's purpose. Numerous courts have recognized that such a commitment of resources will inevitably restrict the agency's options. Either the project planners will have to undergo a major expense in making alterations or the environmental harm will have to be tolerated. It is all too probable that the latter result will come to pass. *Lathan v. Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971).