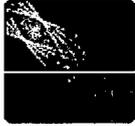


Superfund Records Center

SITE: New Bedford

BREAK: 9.1

OTHER: 518404



Fw: Revised document

Carl Dierker to: Dave_S_Rothstein

09/13/2010 11:02 AM

Cc: Ann Williams, Joanna Jerison, Cynthia Catri

Dave -- Attached is an unsolicited legal analysis that we received from Mass EEA on the New Bedford South Terminal project and the ESA consultation process. It would be great if you could give it a quick look so we could have a telephone conversation about the correctness of their conclusions with some combination of Ann, Joanna, Cindy and me tomorrow (Tuesday afternoon). If you let me know a convenient time for you, I'll rearrange my schedule to accommodate yours.

Thanks,
Carl

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----- Forwarded by Carl Dierker/R1/USEPA/US on 09/13/2010 10:55 AM -----

From: "Kimmell, Ken (EEA)" <Ken.Kimmell@state.ma.us>
To: Carl Dierker/R1/USEPA/US@EPA
Date: 09/10/2010 05:29 PM
Subject: FW: Revised document

Carl, I took the liberty of asking my staff to look into the question of whether the EPA can lawfully issue a draft approval, contingent upon concluding the section 106 and ESA consult processes prior to a final approval. Here is the result of our research; I hope this is useful to you.

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New Bedford NHPA and ESA compliance.docx



SDMS DocID

518404

MEMORANDUM

To: Carl Dierker

Date: September 7, 2010

Re: New Bedford Section 106 and Endangered Species Act compliance

Questions:

- 1) Can the Environmental Protection Agency (EPA) issue a draft approval document for the New Bedford project prior to the completion of the National Historic Preservation Act Section 106 process and the concurrence of the Massachusetts Historical Commission?
- 2) Can EPA issue a draft approval document for the New Bedford project prior to the completion of Endangered Species Act consultation?

Answers:

- 1) Yes. The regulations implementing Section 106 of the National Historic Preservation Act (Section 106) provide that a federal agency must complete the Section 106 process "prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license." As long as any action taken by EPA does not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties, EPA could issue a draft document.
- 2) Yes, EPA may issue a draft document prior to completion of the consultation process required by Section 7 of the Endangered Species Act (ESA) as long as it does not have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid the destruction or adverse modification of critical habitat.

1) National Historic Preservation Act Section 106

As long as any action taken by EPA does not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties, EPA could issue a draft document.

a) Timing

There is nothing in the implementing regulations for Section 106 (30 C.F.R. Part 800) that would place all agency action on hold during the consultation process. 36 C.F.R. §800.1 provides that the agency official must complete the section 106 process "prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license." This "does not prohibit agency officials from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." 36 C.F.R. §800.1(c). As long as any action taken by EPA can be categorized as "nondestructive project planning" and does not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties, EPA could issue a draft decision, especially if it is for the purpose of obtaining stakeholder input.

In addition, EPA's approach in this case appears to be unique and does not seem to be tied to clear statutory processes and mandates that would proscribe a specific procedural path to

complete the Section 106 process. A degree of discretion is appropriate and allowable under these regulations as long as a broad range of alternatives is considered prior to the issuance of an approval. The nature of the draft decision appears to be the key; it would need to be very clear that the document would not be foreclosing the necessary analysis and consultation process under Section 106.

b) Discretion

While Section 106 contemplates a robust consultation process, the regulations provide the agency a degree of discretion in fulfilling its obligations. 36 C.F.R. §800.2(a)(4) provides that the agency official shall involve the consulting parties (including the State Historic Preservation Officer) in findings and determinations made during the section 106 process. There are specific steps in this consultation process that cannot be short-circuited. However, the agency official is also directed to plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes. Because this project arises in the context of a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanup there is an argument that EPA should be able to structure the consultation process in a manner that is appropriate to the scale of the undertaking and the scope of its involvement. Because this project appears to be unusual, the interplay between the consultation process and requirements of other statutes could be structured differently to best effectuate the purposes of CERCLA.

In addition, there appears to be a degree of discretion with respect to structuring public involvement: "the precise method of meeting these standards is left up to the agency official and may be guided by other applicable agency public involvement procedures. The agency can adjust the level and method based on the circumstances of the undertaking, as provided for in 800.2(d) and 800.6(a)(4)." (Section 106 Guidance, page 8). Perhaps initial public outreach could be included in any draft document issued by EPA.

2) Endangered Species Act

EPA may issue a draft document prior to completion of the consultation process required by Section 7 of the Endangered Species Act as long as it does not have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid the destruction or adverse modification of critical habitat.

a) Timing

Similar to the structure of the NHPA, the ESA creates a broad mandate for federal agencies to aid in the conservation of listed species; Section 7(a)(2) requires an agency to insure, in consultation with the Secretary of Interior or Commerce, that any action it authorizes, funds or carries out is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitats. There is nothing in the regulations that would place all agency action on hold during the process of conferring with the U.S. Fish and Wildlife Service. In terms of timing, the regulations state that a biological assessment must be completed before any contract for construction is entered into and before major construction activities are begun (50 C.F.R. §402.12). It is not clear that this section will apply in this case.

In addition, Section 7(d) of the Act prohibits federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of

foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. (16 U.S.C. Section 1536(d); 50 C.F.R. §402.09). This section applies only when consultation has been initiated. *Pacific Rivers Council v. Thomas*, 936 F. Supp. 738 (1996). In this instance, assuming consultation has been initiated, a draft document released for public comment would not constitute an irreversible or irretrievable commitment of resources having the effect of formulating and implementing reasonable and prudent alternatives because EPA will have the opportunity to change project components prior to final approval. While it is not clear what the nature of the document will be, it can be made very clear that EPA is in no way prejudging the outcome of the ESA consultation process.

b) Caselaw

Section 7(d) was enacted mainly to prevent incidents such as the more than \$50 million loss at Tellico Dam as a result of *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279 (1978). *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384 (1987). Courts have allowed a range of activities to proceed with a finding that they do not constitute irreversible or irretrievable commitment of resources.

In *Bays' Legal Fund v. Browner*, 828 F.Supp. 102 the court found that "the statute does not prohibit each and every permanent commitment of resources, only those which have "the effect of foreclosing" the formulation of alternatives. See 16 U.S.C. § 1536(d). In *Bays' Legal Fund* the court found that the plaintiffs had not met their burden of showing that the EPA's and the ACOE's decision to allow construction on the MWRA's outfall tunnel was arbitrary or capricious given the remaining discharge alternatives and the fact that construction would not preclude the development of reasonable and prudent alternatives.

In *Conservation Law Foundation of New England, Inc. v. Andrus*, 623 F.2d 712 (1979) the court upheld sales of leases of tracts for oil and gas exploration on Georges Bank. The court found that the ESA by its terms applies to all action by the Secretary and that "any contract which he enters into (e. g., a lease) which requires a future action on his part (e.g., approval of plans) will contain as an implied term a condition that the Secretary will behave lawfully (e. g., not violate the ESA)." *Conservation Law Foundation of New England, Inc. v. Andrus* at 715.

Other activities that courts have found to be acceptable under this Section include:

- 1) preliminary activities permitted by lease sale of federal properties with oil and gas potential off north coast of Alaska in the Beaufort Sea with respect to impact on the Bowhead whale. *North Slope Borough v. Andrus*, C.A.D.C.1980, 642 F.2d 589, 206 U.S.App.D.C. 184;
- 2) plans to pave a forest development road running along the south fork of the Salmon River; none of the work would have precluded the Forest Service from pursuing other alternatives had NMFS determined in its biological opinion that the project would jeopardize the continued existence of salmon. *Forest Conservation Council v. Espy*, D.Idaho 1993, 835 F.Supp. 1202, affirmed 42 F.3d 1399;
- 3) a National Park Service interim management plan, permitting continuing operation of a campground at a national park pending the results of an

environmental impact statement concerning effect on grizzly bears. The plan was subject to termination, modification or permanency depending on the findings of environmental impact statement when such became available. *National Wildlife Federation v. National Park Service*, D.Wyo.1987, 669 F.Supp. 384.

- 4) the offering for competitive bidding of certain oil and gas leases on tracts located in the Santa Maria Basin. *Brown v. Watt*, C.D.Cal.1981, 520 F.Supp. 1359, affirmed in part, vacated in part and reversed in part on other grounds 683 F.2d 1253, certiorari granted 103 S.Ct. 2083, 461 U.S. 925, 77 L.Ed.2d 295, reversed 104 S.Ct. 656, 464 U.S. 312, 78 L.Ed.2d 496, on remand 729 F.2d 614.

Activities that courts have been found to trip the "irreversible or irretrievable commitments of resources" language include:

- 1) ongoing timber, range, and road projects in two forests under land resource management plans (LRMP) that might affect threatened species of chinook salmon. *Pacific Rivers Council v. Thomas*, C.A.9 (Or.) 1994, 30 F.3d 1050, on remand 1994 WL 908600, certiorari denied 115 S.Ct. 1793, 514 U.S. 1082, 131 L.Ed.2d 721;
- 2) timber harvesting and other ground-disturbing actions in national forests that had previously been approved by Forest Service and Bureau of Indian Affairs, and that could affect threatened species of Mexican spotted owl, despite any prior site-specific consultations on existing management plans. *Silver v. Babbitt*, D.Ariz.1995, 924 F.Supp. 976.
- 3) sale of oil and gas leases in the Beaufort Sea since once a lease has been granted, revocation is unlikely. *North Slope Borough v. Andrus*, D.C.D.C.1979, 486 F.Supp. 326.

3) Conclusion

Both the NHPA and the ESA and the corresponding sets of regulations provide for some degree of discretion in fulfilling the agency's mandate. There is nothing in either construct that prohibits a draft approval or work being done generally during the consultation process, especially if that work is fulfilling a stakeholder involvement function. EPA should be able to issue a draft approval document as long as it is structured carefully to allow subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties and to allow the formulation or implementation of reasonable and prudent alternatives which would avoid the destruction or adverse modification of critical habitat.