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Clarifying the Scope of NEPA Review and the Small Handles Problem

INTRODUCTION

In *White Tanks Concerned Citizens, Inc. v. Strock*, the Ninth Circuit addressed the scope of federal environmental analysis required for wetland fill permits issued in connection with larger, otherwise non-federal development projects.[1] Often called the "small handles" problem,[2] courts have struggled with the extent to which an environmental analysis under the National Environmental Policy Act (NEPA) must consider the entirety of a private development or just those components subject to direct federal jurisdiction.[3] In *White Tanks*, the Ninth Circuit clarified its previous holdings and articulated a test that considers the relationship between the federal action and the project as a whole. Specifically, the court emphasized both the logistical relationship—whether the federal permit was necessary for the entire project to go forward—and the locational relationship—whether the waters that required a federal permit under the Clean Water Act (CWA) were sufficiently interspersed in the larger project such that they could not be considered independently.[4] Ultimately, the *White Tanks* court reversed the decision of the lower court and held that, because the jurisdictional waters at issue were dispersed in such a way that development could not proceed without a federal permit, the Army

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1. White Tanks Concerned Citizens, Inc. v. Strock, 563 F.3d 1033 (9th Cir. 2009).

2. *See* HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 261 n.2 (5th ed. 2002). The federal "small handles" problem arises where an action is partly, but not entirely, federal. The central question is to what extent does the "federal handle" component subject the state and local components, or project as a whole, to federal NEPA review. *See id.*

3. *See, e.g.*, Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177 (4th Cir. 2009) (holding that the Corps did not act arbitrarily or capriciously in limiting the scope of its NEPA analysis to the impact of the mining operation on jurisdictional waters as opposed to examining the broader impact of the entire valley fill project).

4. *See* Scott Birkey & R. Clark Morrison, Client Alert: Ninth Circuit Provides Guidance on Triggers for Environmental Impact Statements (Apr. 30, 2009), http://www.coxcastle.com/publications/publication.cfm?id=403.

Corps of Engineers (the Corps) erred in not considering the broader impacts of the proposed project when granting the permit.

I. OVERVIEW

The environmental dispute in *White Tanks* concerned the construction of Festival Ranch, a master-planned community that would house an estimated 60,000 people in an undeveloped desert area.[5] Located near the White Tank Mountains and the Hassayampa River floodplain in Maricopa County, Arizona, the site occupied 10,105 acres, including 787 acres of washes.[6] The proposed development would fill 26.8 acres of these washes and disturb a total of 144 acres of washes that traversed the development site.[7]

Under the CWA, all discharges of dredge or fill material into jurisdictional waters require a section 404 permit, issued by the Corps.[8] The developers of Festival Ranch applied for a section 404 dredge and fill permit so that they could fill in 26.8 acres of washes and develop the site.[9]

When deciding whether to grant section 404 permits, NEPA guidelines require that the Corps investigate whether the proposed project would "significantly affect[] the quality of the human environment."[10] In the case of the Festival Ranch permit, the Corps restricted the scope of its environmental analysis to the 787 acres of washes and 83.6 acres of upland areas directly affected by the dredge and fill activity.[11] The Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS), and plaintiff-appellant White Tanks Concerned

5. *White Tanks*, 563 F.3d at 1036.

6. *Id.* It is unclear whether desert washes—dry streambeds that flow only after significant rainfall—fall within the scope of the Corps' jurisdiction under the CWA. *See* Rapanos v. United States, 547 U.S. 715 (2006) (holding, in a 4-4-1 decision, that the CWA governs relatively permanent standing or continuously flowing bodies of water such as streams, oceans, rivers, and lakes). *But cf.* 33 C.F.R. § 328.3(a)(3) (2010) (defining "waters of the United States" to include "all other waters such as . . . streams (including intermittent streams), mudflats, sandflats, [and] wetlands"). In *White Tanks*, the existence of the Corps' jurisdiction was not disputed. *White Tanks*, 563 F.3d at 1035.

7. *White Tanks*, 563 F.3d at 1036.

8. 33 U.S.C. § 1311(a) (2006) (making discharge of pollutants unlawful); *id.* § 1344(a) (authorizing the Corps to issue dredge and fill permits). The CWA is a comprehensive statute, designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a).

9. *White Tanks*, 563 F.3d at 1037.

10. 42 U.S.C. § 4332(2)(C) (2006). Section 404 dredge and fill permits are federal actions under NEPA. *See* Friends of the Earth v. Hintz, 800 F.2d 822, 836 (9th Cir. 1986); *see also* 40 C.F.R. § 1508.18(b)(4) (2010) (defining federal action for the purpose of NEPA as including "actions approved by permit or other regulatory decision").

11. *White Tanks*, 563 F.3d at 1037.

Citizens, Inc.[12] expressed concern that this permit would have unacceptable environmental impacts that would exceed NEPA's "significance" threshold. They urged the Corps to conduct "a full-scale environmental analysis, including an Environmental Impact Statement ('EIS') addressing the large-scale direct, secondary, and cumulative impacts of the [Festival Ranch] project."[13] Despite negative comments, the Corps did not expand its analysis or complete an EIS.[14] Instead, the Corps issued a Finding of No Significant Impact (FONSI) and concluded that the issuance of the section 404 permit would not cause significant environmental impacts with respect to the limited areas it considered.[15]

At issue in *White Tanks* was the adequacy of the study that went into the Corps' decision to grant the section 404 permit and to thereby allow the dredge and fill of the ephemeral washes that ran through the Festival Ranch site.[16] In other words, when there is a federal hook (here, a section 404 permit) in an otherwise non-federal project (here, the private development of Festival Ranch), to what components does NEPA apply?

NEPA does not specify the scope of analysis that federal agencies must conduct in determining whether their actions, when combined with private actions, constitute a "significant Federal action."[17] Thus, each agency has promulgated its own NEPA regulations to address this question. Under the applicable regulations, the Corps jurisdiction for NEPA review extends to those portions of a project that are subject to Corps' "control and responsibility."[18] The determination of whether "sufficient control and responsibility" exists to turn a private action into a federal action hinges on the following factors:

(1) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project).

12. White Tanks Concerned Citizens, Inc. describes itself as an Arizona non-profit public interest corporation that has been involved in efforts to preserve the White Tank Mountains and surrounding areas since 2000. *Id.*

13. *Id.* Under NEPA, federal agencies may prepare an Environmental Assessment (EA) when the environmental effects of a proposed action are not readily discernible. 40 C.F.R. § 1501.4(b) (2010). An EA is followed by one of two conclusions. If the EA establishes that the agency's action may have a significant effect upon the environment, the agency must prepare an Environmental Impact Statement (EIS), which sets forth the unavoidable adverse environmental effects of the proposed action and alternatives to the proposed action. *Id.*; 42 U.S.C. § 4332(2)(C) (2006). If the EA reveals no significant environmental effect, the agency must issue a Finding of No Significant Impact (FONSI), accompanied by "a convincing statement of reasons to explain why a project's impacts are insignificant." Nat'l Park & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001).

14. *White Tanks*, 563 F.3d at 1037.

15. *Id.*

16. *Id.* at 1035.

17. *See* Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 398 (9th Cir. 1989).

18. 33 C.F.R. pt. 325 app. B § 7(b)(1) (2010).

(2) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
(3) The extent to which the entire project will be within Corps jurisdiction.
(4) The extent of cumulative Federal control and responsibility.[19]

II. *WHITE TANKS CONCERNED CITIZENS, INC. V. STROCK*: ANALYSIS

In determining the appropriate scope of NEPA analysis in *White Tanks*, the Ninth Circuit observed that its prior decisions in *Save Our Sonoran v. Flowers*[20] and *Wetlands Action Network v. U.S. Army Corps of Engineers*[21] represent two ends on a spectrum.[22] In *Wetlands*, the wetland portion of the development, which gave rise to federal jurisdiction, was concentrated in particular areas.[23] The *Wetlands* court held that because a major portion of the development project could proceed without a section 404 permit, the Corps could limit its analysis to the jurisdictional waters.[24] In *Save Our Sonoran*, on the other hand, the jurisdictional waters were dispersed throughout the development property "like capillaries through tissue."[25] The *Save Our Sonoran* court held that because no development could proceed without filling the waters, the NEPA analysis should have included the entire property.[26]

In *White Tanks*, the Ninth Circuit found that the Festival Ranch project most closely approximated the development with interspersed wetlands in *Save Our Sonoran*, and thus, the Corps had issued its FONSI based on too narrow a scope of analysis.[27] The *White Tanks* holding emphasized the relationship between the waters affected by the dredge and fill activity, which gave rise to the need for federal inquiry under the CWA and NEPA, and the project as a whole. The court examined two aspects of this relationship: the logistical feasibility of a "no-action alternative" and the locational relationship between the jurisdictional waters and the entirety of the project.

First, critical to the court's analysis was that, like in *Save Our Sonoran*, the Festival Ranch development provided for no feasible "no-

19. *Id.* § 7(b)(2).
20. Save Our Sonoran v. Flowers, 408 F.3d 1113 (9th Cir. 2005).
21. Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105 (9th Cir. 2000).
22. *White Tanks*, 563 F.3d at 1040.
23. *See Wetlands*, 222 F.3d at 1110.
24. *Id.* at 1118.
25. *Save Our Sonoran*, 408 F.3d at 1122.
26. *Id.*
27. *White Tanks*, 563 F.3d at 1036, 1042.

action alternative."[28] The court reasoned that, without a section 404 dredge and fill permit, the development would not be a cohesive master-planned community, but rather would be isolated clusters of housing with limited connectivity.[29] In other words, the large-scale development could not proceed without federal action (the issuance of the section 404 permit).[30]

Second, the court emphasized the interconnected relationship between jurisdictional waters and the Festival Ranch project for which the developers sought the dredge and fill permits: "It is not the quantity of the water that matters, but the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the project's goals."[31] The court concluded that, like in *Save Our Sonoran*, the waters in the Festival Ranch development were not concentrated in particular areas but instead dispersed throughout the property to such an extent that "the washes affect[ed] the entire property."[32] Most importantly, by emphasizing the relational component, the court deemphasized the quantity of land affected. The Festival Ranch developers planned to fill washes that constituted less than 0.3 percent of the acreage of the entire project, and yet the relationship of the small federal handle to the entirety of the project gave rise to a much broader NEPA review.[33]

As a final consideration, the court gave weight to the fact that the EPA and the FWS—"not the usual suspects in opposing the action of a federal agency"—disagreed with the Corps' limited assessment.[34]

Apart from clarifying precedent in the Ninth Circuit, the *White Tanks* opinion accords with the larger purpose of NEPA. The NEPA EIS requirement serves two purposes. First, the creation of an EIS ensures "that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."[35] One commentator observed, "The irony in the 'small handle' logic is that the larger a project gets the smaller the scope

28. *Id.* at 1041; *see Save Our Sonoran*, 408 F.3d at 1122.

29. *White Tanks*, 563 F.3d at 1041.

30. *Id.*

31. *Id.*

32. *Id.* (quoting *Save Our Sonoran*, 408 F.3d at 1118).

33. In *Save Our Sonoran*, the washes constituted approximately 31.3 acres, or about 5 percent of the site; the application sought a permit to fill 7.5 acres of those jurisdictional waters (only 1 percent of the site). *Save Our Sonoran*, 408 F.3d at 1118. In *Wetlands*, the applicant sought a permit to fill 16.1 acres of the wetlands, in a development covering 1,000 acres. *Wetlands*, 222 F.3d at 1109.

34. *White Tanks*, 563 F.3d at 1042.

35. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 768 (2004) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (internal quotation marks omitted)).

of the Corps' NEPA analysis becomes."[36] The *White Tanks* court addressed this concern by considering the relationship—rather than the mere percentage—of the affected land compared to the project as a whole. The *White Tanks* court reasoned that, while the ephemeral washes that give rise to the federal action may represent a very small number of acres in a very large development (here, 26.8 acres or 0.3 percent of the total project), the scope of environmental review under NEPA must be dictated by the environmental effects triggered by the filling of these washes.[37] To hold otherwise would be to permit NEPA review of a "hypothetical project" (just the federal handle) as opposed to the actual project that would be developed if the Corps granted the dredge and fill permit.[38] This reasoning best achieves the purpose of informing the agency of the significant environmental impacts associated with its decision.

Second, the EIS requirement "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision."[39] The holding in *White Tanks* achieves this "informing the public" purpose of NEPA. Publicly accessible information and public pressure could influence the Corps' decision to grant the section 404 permit, which, in turn, determines the viability of the project and the environmental impact on the "federal handle." This reasoning distinguishes the holding in *White Tanks* from *Public Citizen*[40] and *Aracoma Coal Co.*,[41] where public pressure would have little effect

36. Patrick A. Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development*, 20 ENVTL. L. 747, 756 (1990).

37. *White Tanks*, 563 F.3d at 1039–40. The NEPA implementing regulations explicitly require consideration of the impact of indirect effects of the proposed project, 40 C.F.R. § 1508.8 (2010), connected actions, *id.* § 1508.25(a)(1), cumulative actions, *id.* § 1508.25(a)(2), and cumulative impacts, *id.* § 1508.7, which result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. *See also* 33 C.F.R. pt. 325 app. B § 7(b) (2010) (explaining the Corps' scope of analysis "include[s] the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project").

38. Appellant's Opening Brief at 10, *White Tanks*, 563 F.3d 1033 (No. 07-15659).

39. *Public Citizen*, 541 U.S. at 768 (quoting *Robertson*, 490 U.S. at 349 (internal quotation marks omitted)).

40. In *Public Citizen*, the Supreme Court held that an agency did not have to take into account certain environmental effects in its EA because that agency had "no ability to countermand the President's lifting of the moratorium" on trucks from Mexico; therefore, it was not the agency's action that was the proximate cause of the negative environmental impacts. *Id.* at 752.

41. In *Aracoma Coal*, the Fourth Circuit upheld the Corps' decision to restrict its NEPA review to impacts from the fill of jurisdictional waters, rather than impacts from the entirety of the mining operations. Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177 (4th Cir. 2009). The court based its holding in part on its determination that the Corps lacked "sufficient

because the agency lacked "control and responsibility" and the power to act on the information contained in the EIS.

CONCLUSION

In *White Tanks*, the Ninth Circuit addressed to what extent federal authorization is required for one portion of a larger non-federal project. The problem in these cases, sometimes called the "small handles" problem, is whether federal responsibility, and therefore federal procedural requirements, should swallow the entire project. The *White Tanks* court struck an optimal balance between NEPA's goals of improving agency decision making and informing the public, on one hand, and the concerns of holdups and wasteful expenditures of public resources due to unwarranted review, on the other. The court looked at the distribution of lands that gave rise to NEPA jurisdiction, finding that where the "federal handle" was interspersed or scattered throughout the property, the Corps has broad permitting authority. Thus, it is not the size of the federal handle that matters; rather, courts will look to whether the federal component is dispersed in such a way that it is the but-for cause and proximate cause for the development of the larger project.

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control and responsibility" because a West Virginia state agency retained substantial regulatory control over all other aspects of those operations. *Id.* at 197.

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