

ship" between the state and federal government existed. Therefore, the court denied the injunction.

MORGAN HOGERTY

*Tongass Conservation Society v. Cheney*, 924 F.2d 1137 (D.C. Cir. 1991)

Plaintiff-appellant, Tongass Conservation Society, sought injunctive relief under the National Environmental Policy Act (NEPA), contesting the adequacy of the United States Navy's Environmental Impact Statement (EIS) for a planned testing facility.

For their new Trident nuclear submarines, the United States Navy requires testing grounds which must be free from both natural and human noise. In 1979, the increasing noise at the Navy's existing West Coast testing facilities prevented the accurate and complete testing of the new Trident submarines, causing the Navy to begin a search for new testing facilities based on the area's quietness, size, water depth, weather conditions, remoteness from waterway traffic, and proximity to home ports. Twelve of these sites were eliminated by the Navy as being unsuitable and one was eliminated on the basis of the potentially increasing ambient noise. The remaining site, the western arm of the Behm Canal, located near Ketchikan, Alaska, is a relatively pristine fjord that extends sixty miles from north to south and three miles from east to west. This area was deemed to be the only site which would provide the necessary testing conditions.

NEPA provides that the EIS must address all "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). The court found that the Navy satisfied NEPA through the preparation of an EIS and an Addendum to the EIS. The criteria for the screening of potential sites by the Navy and the characteristics of each site were stated in the EIS. The EIS Addendum described the field studies that eliminated alternative sites, evaluated the suitability of the Behm Canal, and reviewed the process for the selection of the testing site within the Behm Canal. The Navy made reasonable efforts to acquire information concerning socio-economic impacts and took steps to mitigate the potential damage to the socio-economic environment of the area, which is marketed as a wilderness. In sum, the court concluded that the

Addendum to the EIS adequately justified the Navy's position that there was no reasonable alternative to the Behm Canal site and that the Addendum to the EIS adequately addressed the socio-economic impact of the testing facility.

JESSICA K. HEW

*F. The Endangered Species Act*

*Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991)

The Sierra Club, the Wilderness Society, and the Texas Committee on National Resources (Sierra Club) brought an action against the United States Forestry Service (USFS), challenging USFS's "even-aged" timber harvesting policies in East Texas national forests. Sierra Club alleged that even-aged timber harvesting destroys the natural habitat of an endangered species, the red-cockaded woodpecker, in violation of the Endangered Species Act of 1973 (ESA). 16 U.S.C. §§ 1531-1543 (1988).

The district court determined that existing timber management practices "harmed" the behavioral, nesting, breeding and foraging patterns of the woodpecker within the meaning of the ESA, and held that USFS was in violation of ESA section 7, (prohibiting federal agency actions which jeopardize or threaten the existence of an endangered species or destroy or adversely modify its habitat) and ESA section 9 (making it unlawful for any person to take any endangered species within the United States). The court enjoined further even-aged lumbering within 1,200 meters of active woodpecker colonies and ordered USFS to promulgate a comprehensive plan to maximize survival of the woodpecker in Texas national forests in accordance with specific court-imposed restrictions.

On appeal, the government claimed that the district court decision should be reversed on the grounds that first, the court lacked jurisdiction because Sierra Club had not complied with the "notice and delay" requirement of the ESA, and second, the district court had improperly used the *de novo* standard of review for the ESA section 9 claim and third, the district court had improperly found a violation of ESA section 7.

The Fifth Circuit dismissed the government's jurisdictional claim, finding that the "notice and delay" requirement was not jurisdictional in nature and could not thereby be raised for the