

*Chevron, U.S.A., Inc. v. Yost*, 919 F.2d 27 (5th Cir. 1990)

Appellant, Chevron, sought judicial review of the United States Coast Guard's decision to impose civil penalties under the Clean Water Act (CWA), 33 U.S.C. §§ 1301-1362 (1988). On twelve separate occasions, Chevron accidentally discharged small quantities of oil into an open body of water. These spills were large enough, however, to cause an iridescent sheen. Accordingly, Chevron, in compliance with the CWA, reported each of the discharges to the United States Coast Guard, the enforcing agency.

At administrative hearings, Chevron asserted that despite any visible sheen, the impact on the ecosystem was de minimis. Nevertheless, the Coast Guard hearing officer assessed civil penalties for each of the twelve violations. On appeal to the Commandant of the Coast Guard, the penalties were upheld. Chevron then challenged the Commandant's decision in federal district court. The district court entered a summary judgment in favor of Chevron finding that, when spills did not cause actual injury to the environment, penalties were inappropriate. The court explained that it was bound by an earlier decision holding that, when applying the pre-1978 version of the CWA, the Environmental Protection Agency's (EPA) sheen test was a rebuttable presumption of harm to the environment. The Coast Guard appealed.

The Fifth Circuit held that civil penalties could be imposed under the amended version of the CWA for accidental discharges of small quantities of oil which violated EPA regulations, even if the spills did not cause actual injury to the environment. The 1978 amendments to the CWA gave EPA broader authority to extend its reach beyond actual injury to impose fines for discharges of oil in quantities large enough to create a sheen on the water that "may be harmful" to public health or welfare.

ALICIA M. MARTONE

*E. The National Environmental Policy Act*

*Coker v. Skidmore*, 941 F.2d 1306 (5th Cir. 1991)

Appellants and the United States Army Corps of Engineers (the Corps) appealed an order enjoining the construction of a levee on the Yazoo River and the condemnation of associated

lands until such time as the Corps prepared a supplemental Environmental Impact Statement (EIS) covering the levee construction. The district court found that the Corps' decision to file a Finding of No Significant Impact (FONSI) pursuant to their final Environmental Analysis (EA), instead of filing a supplemental EIS in place of the original EIS, was arbitrary and capricious under the appropriate rules governing the agency. This decision was based on the fact that the defendants had admitted that substantial portions of the original EIS, issued in 1975 for the entire Yazoo River Project, were outdated.

The primary issue before the appellate court was whether the district court erred in holding that the Corps was required to prepare a supplemental EIS, in place of the original EIS, for construction of the levee under the National Environmental Policy Act of 1969 (NEPA). NEPA requires federal agencies proposing major federal acts significantly affecting the quality of the human environment to prepare an EIS; a detailed statement by the responsible official concerning the environmental impact of the proposed action. In response to this requirement, the Corps in 1975 prepared an original EIS for the construction of the Yazoo River Basin Flood Control Project in northwest Mississippi. Appellees sued for an injunction fifteen years later when the Corps prepared to build a levee in connection with the project which would have affected their property. Appellees charged that the Corps could no longer rely on the original EIS which had been intended to cover the entire project because it had become outdated. Appellees insisted that for this reason, the Corps had to file a supplemental EIS for construction of the levee. The Corps declared that their issuance of a FONSI pursuant to their issuance of the project's final EA was sufficient under NEPA, and that they could rely on the original EIS for the construction of the levee. Appellants reasoned that because some projects are too large to complete at one time and must be divided into parts, an agency may rely upon tiering, pursuant to the regulations of the Council on Environmental Quality (CEQ). More specifically, the agency may tier the new project via a FONSI to the original EIS pursuant to the final EA, instead of issuing a supplemental EIS for the new project.

The court of appeals held that the issue before it was not whether an EIS could become so outdated that it could no longer provide the foundation upon which a subpart, such as a levee, could be tiered, but whether the 1975 EIS in the instant

case was now insufficient so as to require the preparation of a supplemental EIS as a prerequisite of constructing of the levee. CEQ, which sets forth the agency's body of rules, states that the Corps must supplement an original EIS if:

- I) The agency makes substantial changes in the proposed action that are relevant to environmental concerns, or
- II) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Applying *de novo* review, the Fifth Circuit held that the district court did not make a finding of significant new circumstances relevant to environmental concerns and bearing on the proposed action or its impacts. Therefore, the court of appeals found that the district court erred in finding that the Corps' decision not to supplement the EIS before commencing construction of the levee was arbitrary and capricious and the court's issuance of the injunction was improper. The court of appeals then vacated the district court's order and dissolved the injunction.

STEVE BRONSON

*Lockhart v. Kenops*, 927 F.2d 1028 (8th Cir. 1991)

Appellant, a local land owner, appealed the district court's grant of summary judgment to the United States Forest Service. The lower court held that the Agency's decision not to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), was not arbitrary and capricious. Appellant brought an action seeking declaratory and injunctive relief to prevent the Forest Service from proceeding with the exchange of a parcel of federal land until it had complied with the requirements of NEPA.

The court first discussed the scope of NEPA, which requires an EIS to be made for all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(3). Generally, the government's determination as to the need for for an EIS hinges on whether the proposed action will "significantly" affect the environment. This determination requires consideration of a list of factors found in 40 C.F.R. § 1508.27. The court clarified this procedure, stating that NEPA mandates federal agencies to consider not only the