

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

first time on appeal. The court then upheld the district court's use of the *de novo* standard for the section 9 claim, finding that the government itself had requested the *de novo* standard at trial and could not thereafter appeal the ruling. Furthermore, the court found that USFS had failed to implement its own wildlife management provisions with respect to timber harvesting in East Texas, and that such conduct constituted a taking of an endangered species within the meaning of 16 U.S.C. § 1532(19) and violated ESA section 9. The Fifth Circuit affirmed the district court's holding that USFS's harvesting practices jeopardized the existence of the woodpecker and destroyed and adversely modified its habitat in violation of ESA section 7. The court determined that the district court had acted within its statutory authority in granting an injunction and ordering an appropriate timber management plan. However, the court ruled that the district court effectively dictated the principal features of the plan, and had thereby left little room for the congressionally mandated consultation process promulgated under 16 U.S.C. § 1539(a)(1). Accordingly, the court affirmed the district court's findings, upheld the injunction, vacated the specific features of the plan and remanded the case to the district court to review USFS's current timber management plan for compliance with the ESA.

KAREN HARTMAN

G. Clean Air Act

Natural Resources Defense Council v. United States EPA, 937 F.2d 641 (D.C. Cir. 1991)

Petitioners sought judicial review of an Environmental Protection Agency (EPA) decision not to consider fugitive dust from surface coal mining operations when identifying major emitters of air pollution. Such an identification triggers application of the Clean Air Act's (CAA) "Prevention of Significant Deterioration" (PSD) provisions, which in turn impose strict permit requirements for "new" major emitting facilities in areas already complying with ambient air quality standards. 42 U.S.C. § 7475 (1988). The petitioners argued that (1) EPA improperly used a cost-benefit analysis when omitting surface coal mines from its list of pollution sources for which fugitive dust will be considered in identifying major sources of air pollu-