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Interior Department Not Obligated to Update NEPA Analysis for Coal Leasing Program

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On June 19, 2018, the U.S. Circuit Court of Appeals for the District of Columbia rejected a challenge by environmental groups and held that the U.S. Department of the Interior (DOI) has no legal obligation to update its National Environmental Policy Act (NEPA) analysis for the federal coal management program to consider the climate change impacts of leasing federal coal. *Western Org. of Resource Councils (WORC) v. Zinke*, No. 15-5294 (D.C. Cir. 2018). While this decision does not change DOI's obligation to prepare NEPA analyses for site-specific decisions—including decisions by the Bureau of Land Management to lease individual coal tracts—it soundly rejects efforts to force DOI to prepare a new overarching environmental analysis for the agency's national coal leasing program.

Background

The Western Organization of Resource Councils and Friends of the Earth sued DOI in 2014 claiming that the agency had violated NEPA and the Administrative Procedure Act (APA) by failing to update the federal coal management program's 1979 Programmatic Environmental Impact Statement (PEIS). The plaintiffs argued that the DOI was required to supplement its NEPA analysis to consider the climate impacts of federal coal leasing throughout the country and take account of more recent studies that analyze greenhouse gas emissions from coal combustion, including the impacts of those combustion emissions on global warming.

In August 2015, the U.S. District Court for the District of Columbia dismissed the plaintiffs' case. The District Court held that because the coal management program was established in 1979, and DOI had not proposed to take any *new action* with respect to the overall coal program, the agency had no mandatory duty to supplement its 1979 environmental analysis under section 706(1) of the APA, which states that "a reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

In January of 2016, while the plaintiffs' appeal to the D.C. Circuit was pending, then-Secretary of the Interior Sally Jewell issued an order committing the DOI to prepare an updated PEIS and imposing a national moratorium on federal coal leasing during the agency's environmental review. Following this order, plaintiff's appeal was stayed. However, in March 2017, current Secretary Ryan Zinke lifted the coal leasing moratorium and halted preparation of a new PEIS. The stay was then lifted and the appeal was placed back on the court's active docket.

The Decision

The D.C. Circuit's decision affirmed the District Court's dismissal of the

plaintiffs' NEPA and APA claims, finding that neither NEPA nor the DOI's statements create a legal duty for DOI to update the federal coal management program's PEIS. The court relied on the U.S. Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), which held that the only action a court may compel an agency to take under APA section 706(1) is "discrete action that the agency has a duty to perform." The court rejected plaintiffs' arguments that NEPA regulations and agency statements in the 1979 PEIS created a mandatory duty for the Secretary to update the PEIS.

Rather, the court held that the "action" proposed by the PEIS was the 1979 approval of DOI's regulations implementing the coal program. Because the DOI is not proposing to take any new action in reliance on the 1979 PEIS, the agency was not required to prepare a supplemental environmental analysis under either 706(1) of the APA or the NEPA regulation at 40 C.F.R. § 1502.9(c)(1)(ii).

Implications of the *WORC v. Zinke* Decision

As an initial matter, the D.C. Circuit's *WORC v. Zinke* decision makes clear that the DOI does not have a duty to prepare a new environmental analysis under NEPA to support its national coal leasing program. Unless and until the DOI decides to revise that program, the agency may continue its current practice of analyzing the environmental impacts of federal coal leasing in the context of individual environmental analyses for specific leasing decisions.

However, the court suggested two alternative paths for plaintiffs or other groups to raise claims regarding climate change impacts of coal leasing:

> First, these groups may file a petition with the DOI asking the agency to revise its coal leasing regulations. If the DOI rejects such a petition, the organizations may seek judicial review of the agency's decision.
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> Second, the court noted that organizations may bring site-specific challenges to individual leasing decisions on the ground that "the [environmental impact statement] prepared in support of any such decision fails to satisfy NEPA's mandate to consider the cumulative environmental impacts of coal leasing." As expected, the court offered no guidance on the appropriate scope of the DOI's cumulative impacts analysis for individual leasing decisions.

It is worth noting that the portion of the court's decision setting forth "alternative avenues" for legal challenges against federal coal leasing decisions was explicitly rejected by one member of the three-judge panel (Judge Henderson) as she believed it was "neither necessary nor appropriate to advise parties on potential avenues of relief not before [the court]."