National Environmental Policy Act Scope of Analysis in Corps Permitting Actions In the Ninth Circuit – A Legal Analysis

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Introduction to NEPA Scope of Analysis Determinations

Section 404 of the Clean Water Act (CWA) authorizes the Corps of Engineers (Corps) to issue permits for the "discharge of dredged or fill material" into waters of the United States. 33 U.S.C. §§ 1344, 1362. Section 10 of the Rivers and Harbors Appropriations Act of 1899 (R & H Act) authorizes the Corps to issue permits for the construction or modification of structures in navigable waters, or the accomplishment of any other work affecting the course, location, condition, or physical capacity of navigable waters. 33 U.S.C. § 403. Section 9 of the R & H Act authorizes the Corps to approve plans for dams or dikes that would span a navigable waterway. 33 U.S.C. § 401. Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amemded, authorizes the Corps to permit the ocean disposal of dredged material. 33 U.S.C. § 1413.

In evaluating permit applications under these regulatory authorities, the Corps must comply with the National Environmental Policy Act (NEPA). 42 U.S.C. § 4321 et seq. NEPA requires Federal agencies to analyze the environmental impacts of "Federal actions" and to prepare an Environmental Impact Statement (EIS) for any major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

The NEPA regulations promulgated by the President's Council on Environmental Quality (CEQ) explain that the term "'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 33 C.F.R. § 1508.18. The CEQ regulations define the term "Federal action" through illustration by identifying four categories of activity: adoption of official policy; adoption of formal plans; adoption of programs; and approval of specific projects. Id.

For purposes of the Corps regulatory program, the definition of the NEPA "Federal action" is relatively straightforward. The category pertaining to the approval of specific projects states: "Projects include actions approved by permit . . ." 40 CFR § 1508.18(b)(4).[1] Thus, for purposes of the Corps regulatory program, the NEPA "Federal action" is the action taken by the Corps in either issuing or denying the permit pursuant to one of the Corps regulatory authorities.

[1] The Corps Civil Works NEPA regulation confirms this fact, referring to ". . . the proposed Federal action (permit issuance)." See 33 C.F.R. Appendix B, Paragraph 9(b)(5)(a).

The CEQ regulations "encourage [agencies] to publish explanatory guidance for these regulations and their own procedures," 33 C.F.R. § 1507.3, and the Corps has done this in issuing 33 C.F.R. Part 325 implementing NEPA.

In the case of the Corps of Engineers' regulatory program, the specific activity requiring authorization by a Corps permit (for example, the discharge of dredged or fill material into a water of the United States, or the placement of a structure in a navigable water) may, at times, be merely one component of a larger project involving upland activities taking place beyond the limits of a particular jurisdictional water. In such circumstances, the question arises as to what "scope of analysis" the Corps will adopt to govern its NEPA review. This paper provides guidance on this issue in view of the Ninth Circuit's recent ruling in Save our Sonoran, Inc. v. Flowers, 408 F.3d 1113 (9th Cir. 2005) and other relevant case law within the Ninth Circuit.

The determination of what is the appropriate scope of analysis to govern the Corps' permit review and decision is guided by the Corps' NEPA regulations for the regulatory program. See 33 C.F.R. Part 325, Appendix B.[2] Appendix B directs agency personnel to include within the scope of analysis the "specific activity requiring a [Corps] permit and those portions of the entire project over which the Government has sufficient control and responsibility to warrant Federal review." 33 C.F.R., Part 325, Appendix B paragraph 7.b. (1). This requirement is discussed in Appendix B and is illustrated by several examples that recognize that in some circumstances the Corps' NEPA scope of analysis may be expanded beyond the limits of the Corps' regulatory jurisdiction (e.g., the "waters of the U.S.") to address upland portions of the larger project. As a general rule, the Corps extends its scope of analysis beyond the jurisdictional waters where the environmental consequences of a larger project may be considered the products of either the Corps permit action or the Corps permit action in conjunction with other Federal involvement.[3]

Upon occasion, parties have challenged the adequacy of the Corps' NEPA documentation underlying permit decisions, asserting that the scope of analysis undertaken by the Corps was impermissibly narrow. These challenges typically have contended that the Corps must expand its NEPA review to evaluate the effects of portions of the overall project that lie outside the particular waters that are subject to Corps' jurisdiction. Sometimes it is argued that the Corps NEPA analysis must address the effects of the entire upland activity, notwithstanding the fact that the Corps involvement in the entire project is limited to the approval by permit of some activity associated with the larger project occurring in jurisdictional waters. In such circumstances, the issue of what is the proper scope of analysis is crucial to the fulfillment of the agency's obligations under NEPA.

Before the Ninth Circuit Court of Appeals, these challenges seeking to expand the scope of analysis of the Corps' NEPA evaluation of permit applications have usually – although not invariably – failed. Sometimes these challenges have included the argument – now rejected by

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[2] The Corps NEPA regulations governing the regulatory program were referred to the Council on Environmental Quality (CEQ) pursuant to 42 U.S.C. § 7609(b). On June 8, 1987, the CEQ approved the regulations subject to several proposed modifications. See 52 Fed. Reg. 22518, 22520-22 (1987). On February 3, 1988, the Corps revised and published the regulations after adopting CEQ's proposals.

[3] These examples are offered for illustrative purposes only. Regulatory personnel must evaluate the facts of each case individually to determine whether other indicia of Federal control and responsibility exist that would warrant broadening the NEPA scope of analysis beyond the specific activity requiring a Corps permit.

many of the U.S. Circuit Courts of Appeal and by the U.S. Supreme Court – that all effects that would not have been generated "but for" the grant of the Federal permit must be encompassed within the NEPA analysis. The Ninth Circuit has drawn a distinction between the effects of activities that are merely made possible by the Corps permit – the "but for" effects – versus the effects that are more directly physically caused by activities within jurisdictional waters. It is only the latter effects that *must* be included within the Corps' NEPA evaluation in every instance.

The 2005 Save our Sonoran case is of significance because it is the first Ninth Circuit Court of Appeals decision to hold that the Corps was required to expand its NEPA scope of analysis to encompass not just the activity requiring the Corps permit (in this instance, the discharge of fill material) but also the entire upland development. Despite a result finding that the entire overall project must be included in the scope of analysis, the opinion did not overrule or modify any pre-existing case law, and in fact affirmed the validity and applicability of Appendix B. The Ninth Circuit applied the standards in Appendix B to the highly unique facts presented by the Save our Sonoran case and found that they required that the entire overall project be included in the scope of analysis. The permit applicant in the Save our Sonoran case had proposed to fill portions of numerous "braided washes" – or beds of intermittent streams – to provide road and utility crossings, pad fill, drainage, and the like, as part of a major residential development. The Save our Sonoran panel found that the facts of that case presented an inextricable interconnection between the permitted activities and their locations on the one hand, and the balance of the residential development project on the other, because the braided washes were interspersed throughout the development site "like lines through graph paper." Id. at 1122. Because any development of this site would impact jurisdictional waters, the court concluded that, in effect, the whole of the property fell under the Corps' permitting authority. Id. In distinguishing its result from the prior Ninth Circuit cases that had upheld the Corps' more limited scope of analysis, the Save our Sonoran opinion emphasized the unique physical and geographic characteristics of the development proposal before the Court. In entering its ruling, the court observed: "The district court grounded its conclusion regarding the Corps' broad permitting authority over the project on the unique geographic features of this property. Specifically, the district court determined... that the washes are a 'dominant feature of the land and that no development of the property could occur without affecting the washes.'" Id. at 1123. Consequently, the precedential value of the case is limited to fact situations presenting similarly exceptional circumstances.

The Ninth Circuit has repeatedly stated that delineation of an appropriate scope of analysis is not subject to a universal rule, and that each fact situation must be evaluated to determine if there is sufficient Federal control and responsibility over the activities occurring within and outside of jurisdictional waters to warrant broadening the scope of analysis beyond the specific activity occurring in jurisdictional waters and requiring a Corps permit. The Corps should continue to apply Appendix B to all cases, and should use precedent – including that in Save our Sonoran – to guide implementation of Appendix B where the particular factual circumstances are essentially indistinguishable from the precedential case's facts. When the Corps applies that regulation to each specific permit case within the Ninth Circuit, there is every reason to expect that reasonable determinations regarding the NEPA scope of analysis will receive deference from and will be upheld by the courts.[4]

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[4] See generally Sylvester v. USACE, 882 F.2d 407 (9th Cir. 1989) (Sylvester II).

Summary of the Ninth Circuit body of law, existing prior to *Save our Sonoran*, addressing the standards and considerations applicable to the NEPA scope of analysis of Corps permitting actions:[5]

As an initial matter, it is important to highlight that the Ninth Circuit courts have addressed the scope of analysis issue in distinct factual settings. First, the Corps may, on occasion, be confronted with situations in which the activity requiring the Corps' permit is merely one component of a larger non-Federal upland development. In these situations, the Corps and the Courts must identify as part of the NEPA scope of analysis the specific activity requiring a Corps permit and those portions of the entire project, if any, over which the Federal Government has sufficient control and responsibility to warrant review under NEPA. Sylvester v. USACE, 884 F.2d 394 (9th Cir. 1989) (Sylvester I); Wetlands Action Network v. USACE, 222 F.3d 1105, 1115-1118 (9th Cir. 2000), *cert. denied*, 534 U.S. 815 (2001).

Second, the Corps also may be confronted with situations in which the project undergoing regulatory review is being carried out in several phases or may be related to other projects, each of which will require a Corps permit. In such situations, the question is whether the Corps may evaluate the first project independently of the other projects or phases, or whether all the Corps permits should be evaluated in one NEPA review because they involve connected or cumulative Federal actions. In making this determination, the Corps and the Courts employ an "independent utility" test.[6] Wetlands Action Network, 222 F.3d at 1118-1119; see also Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985)(case involving the segmentation of several related Federal actions).

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[5] This memorandum addresses the state of the law within the Ninth Circuit. The case law review focuses primarily on cases involving the Corps' regulatory program. It encompasses the recent seminal Ninth Circuit cases, as well as cases its panels have treated as influential. Because scope of analysis determinations are highly fact specific, field attorneys and regulatory personnel are encouraged to review the case law for decisions addressing circumstances similar to those presented in the case under consideration.

[6] The Ninth Circuit's rulings are understandable when a Federal agency's obligations under NEPA are considered. In order to comply with NEPA, a Federal agency must first define the scope of analysis in a way that captures the full scope of the activity that is subject to Federal control and responsibility. After correctly defining the scope of analysis, the agency must proceed to analyze the direct, indirect, and cumulative effects of the activity subject to Federal control and responsibility.

An agency may not avoid issuing an EIS by defining the Federal action in a way that segments a significant Federal action into small insignificant component parts or by defining the NEPA scope of analysis in a way that fails to consider the cumulative effects of other related actions. 40 C.F.R. § 1508.27(b)(7). CEQ regulations require an agency consider "connected actions" and "cumulative actions" within a single EA or EIS. CEQ regulations provide that actions are "connected" if they: (i) automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) are interdependent parts of a large action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1). Cumulative actions are those "which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. § 1508.25(a)(2). These regulations seek to prevent segmentation of multiple Federal actions. For example, when an agency is seeking to permit only the first phase of a project, the agency must consider whether its NEPA analysis must also evaluate Federal permit decisions associated with later phases of the project. Under applicable regulations and Ninth Circuit case law, an agency may properly decline to consider these subsequent permit decisions when the phases of the project have independent utility.

This paper focuses on the first factual setting where the Corps is processing a permit for some activity occurring in jurisdictional waters, but that activity is merely one component of a larger project or work effort that also includes work in upland areas. In these situations, the question posed is under what circumstances does the field element performing the environmental review need to broaden the NEPA scope of analysis beyond the specific activity requiring the Corps permit to consider other project activities taking place in upland areas. This question is answered by Appendix B and turns on the inter-relationship between these activities and the presence of "Federal control and responsibility" over the activities.[7]

In summary, Appendix B dictates that, where the specific activity authorized by a Corps permit is merely one component of a larger project, the scope of the NEPA evaluation should extend to the specific permitted activities and those portions of the entire project over which the Government has "sufficient control and responsibility to warrant Federal review." 33 C.F.R. Part 325, Appendix B, paragraph 7.b.(1). The Government has sufficient control and responsibility where Federal involvement is "sufficient to turn an essentially private action into a Federal action," id., at paragraph 7.b.(2), the "environmental consequences of the larger project are essentially products of the Corps permit action," id., or the cumulative involvement of the Corps and other Federal agencies is "sufficient to grant legal control over such additional portions of the project," such as where the environmental consequences of the additional portions of the project (meaning those portions of the project involving activities beyond those specifically authorized in the permit) "are essentially products of Federal financing, assistance, direction, regulation, or approval," id. at paragraph 7.b.(2)(iv)A. In short, if the Government exercises "Federal control and responsibility" over both the permitted activity and the other activity occurring upland, these activities are sufficiently interrelated to be included in the NEPA scope of analysis pursuant to the guidance provided by Appendix B.

The recent Ninth Circuit cases, notably Wetlands Action Network and Sylvester I have universally affirmed and applied the Corps' regulations "fixing the scope of its NEPA analysis"–

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[7] This analysis should not be confused with either the "Subsection 404(b)(1) Guidelines alternatives analysis" or the "public interest review" that are conducted by the Corps as part of the permit process. Under the Corps regulations, the extent of Federal control and responsibility over a private project determines the Federal scope of analysis for purposes of NEPA compliance. The Subsection 404(b)(1) alternatives analysis is a separate inquiry conducted under the CWA involving the evaluation of alternatives to the proposed project to determine "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). This analysis includes consideration of activities that do not involve discharges into waters of the United States, discharges at alternative locations, and, where possible, other project locations. 40 C.F.R. § 230.10(a)(1). Thus, this analysis envisions that the Corps will consider the broader impacts of the project for which the permit is sought, notwithstanding the definition of the scope of analysis for NEPA purposes. Sylvester II 882 F.2d 407.

The public interest review under 33 C.F.R. Part 320 involves "balancing the favorable impacts against the detrimental impacts" of the permit. It is a separate analysis reflecting "the national concerns for both the protection and utilization of important resources." 33 C.F.R. § 320.1(a)(1). "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which may reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1). The Corps conducts this balancing test irrespective of the scope of analysis under NEPA, and like the Subsection 404(b)(1) alternatives analysis, this balancing test does not alter or affect the definition of the NEPA scope of analysis.

even in the face of direct challenge – as striking "an acceptable balance between the needs of the NEPA and the Corps' jurisdictional limitations." Sylvester I, 884 F.2d at 399; *accord*, Save our Sonoran, 408 F.3d at 1121; Wetlands Action Network, 222 F.3d at 1115. The Corps' regulations at 33 C.F.R. Part 325, Appendix B, paragraph 7.b. are given deference and reasonable applications of those regulating are sustained.

The Corps' regulations specify the following typical considerations when gauging if sufficient control and responsibility exists:

- whether the regulated activity is "merely a link" in a corridor-type project (id. at paragraph 7.b.(2)(i)), in which case the scope of analysis need only address the Federally-permitted action, unless some other portion of the project might also fall within Federal control or responsibility (id. see paragraph 7.b.);
- whether there are aspects of the upland facility, in the immediate vicinity of the regulated activity, that fall under Federal control or responsibility and affect the location and configuration of the regulated activity (id. at paragraph 7.b.(2)(ii));
- the extent to which the entire project will be within Corps CWA jurisdiction (id. at paragraph 7.b.(2)(iii));
- the extent of cumulative Federal control and responsibility (id. at paragraph 7.b.(2)(iv)); and
- the extent to which the regulated activities (in conjunction with any activities regulated or funded by other Federal agencies) comprise a substantial portion of the overall project (id. at paragraph 7.b.(3)).

In general, the Ninth Circuit has not applied a universal rule in evaluating the proper scope of analysis in the Corps permitting context. The determination as to whether a sufficient interrelationship exists between the specific activity requiring a Corps permit and some other activity occurring upland, necessitating the inclusion of both activities in the scope of analysis for NEPA purposes, requires a case-by-case analysis of the facts and circumstances of that relationship. Wetlands Action Network, 222 F.3d at 1116; Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 329 (9th Cir. 1975), *reh'g denied*, __ F.2d __ (August 8, 1975); Enos v. Marsh, 769 F.2d 1363, 1371 (9th Cir. 1985).

The Ninth Circuit has held that the Corps need not expand its NEPA scope of analysis beyond the specific activity requiring a Corps permit in situations where some development could occur in the upland area regardless of whether the permit application is granted. Wetlands Action Network, 222 F.3d at 1115-16. In sustaining the Corps NEPA analysis in Wetlands Action Network, the court specifically noted: "The Corps here determined that the EA need not include substantial consideration of development in the uplands because development could occur in these areas regardless of whether this permit is granted." 222 F.3d at 1115.

The mere fact that the overall project could benefit from the permitted activities (and vice versa) is insufficient to require that the entire project be included in the Corps' NEPA scope of analysis. Wetlands Action Network, 222 F.3d at 1116; Sylvester I, 884 F.2d at 400. Even if the project could not proceed as planned without the permit, and the permitted activities would not occur without the overall project, that degree of connection – in and of itself – does not mandate expansion of the scope of analysis. Wetlands Action Network, 222 F.3d at 1116-17; Department Of Transportation v. Public Citizen, 541 U.S. 752, 767-68, 124 S. Ct. 2204, 2215 (2004);

Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272 (8th Cir. 1980), *cert. denied*, 449 U.S. 836 (1980).

The private activity occurring in the uplands may be more than merely incidental to the overall project without becoming part of the Corps' NEPA scope of analysis. Sylvester I, 884 F.2d at 400-01. In the Sylvester I case, although construction of a golf course was considered an integral component of the overall project, its relationship to the balance of a destination recreational resort that included major ski facilities was determined to be insufficient to compel expansion of the Corps' NEPA scope of analysis to include the entire resort development complex. If the upland activity can proceed without a Corps permit and there are no other indicia of Federal control and responsibility, such as Federal funding or Federal direction or regulation, there is not a sufficient interrelationship between the activities occurring upland and the specific activity requiring the Corps permit to necessitate including the upland activities as part of the Corps' NEPA scope of analysis.

In some unique circumstances, however, the Ninth Circuit has determined that the Corps must evaluate the "effects" of activities occurring outside of jurisdictional waters. These cases have generally been limited to those situations where no upland development could go forward without the Corps permit. See Colorado River Indian Tribes v. Marsh, 605 F.Supp. 1425, 1428 (C.D. Cal. 1985)(county officials determined that no upland development could occur without the Corps permit for bank stabilization).[8]

The Ninth Circuit opinions have identified and applied the following considerations as relevant to determining whether there is sufficient Federal control and responsibility over activities that are occurring upland outside of a jurisdictional water and beyond the specific activity requiring a Corps permit to necessitate including these activities in the NEPA scope of analysis:

- The degree of Federal funding for the overall project (Wetlands Action Network, 222 F.3d at 1116; Enos, 769 F.2d at 1372; Friends of the Earth, 518 F.2d at 329; Winnebago Tribe, 621 F.2d at 273; Alaska v. Andrus, 591 F.2d 537, 541 (9th Cir. 1979));
- The degree of Federal supervision over the overall project (Wetlands Action Network, 222 F.3d at 1116; California Trout v. Schaefer, 58 F.3d 469, 473-74 (9th Cir. 1995));
- The degree to which the overall design of the project is subject to local regulation and control (Wetlands Action Network, 222 F.3d at 1117; Enos, 769 F.2d at 1372; Friends of the Earth, 518 F.2d at 329);
- The degree to which the balance of the overall project is subject to local environmental review (Wetlands Action Network, 222 F.3d at 1117; Sylvester I, 884 F.2d at 396, 401; Enos, 769 F.2d at 1371-72; California Trout, 58 F.3d at 471-72, 474; Winnebago Tribe, 621 F.2d at 273);

[8] The Court in Colorado River Indian Tribes rested its holding on the requirement under NEPA to assess the direct, indirect, and cumulative effects of the Federal action. Moreover, the applicability of the Colorado River Indian Tribes' effects analysis must be read in light of the United States Supreme Court's subsequent decision in Public Citizen, 541 U.S. 752 (2004), that sets forth how Federal agencies must identify the "effects" of Federal actions under NEPA. In Public Citizen, the Court found that a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." Id. at 767. Instead, the Court found, NEPA requires "a reasonably close causal relationship between the environmental effect and the alleged cause" which the Court analogized to the doctrine of "proximate causation." Id.

Summary of the impact of the *Save our Sonoran* holding and opinion on the Ninth Circuit body of law regarding the NEPA scope of analysis in Corps permitting matters:

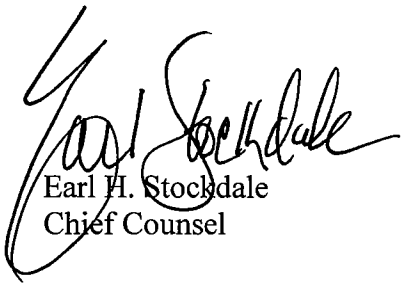
The Save our Sonoran opinion did not overturn or expressly modify any existing case law within the Ninth Circuit. Furthermore, as previously indicated, the opinion validated and applied the Corps' regulations at 33 C.F.R. Part 325, Appendix B, paragraph 7.b.

The permit applicant in Save our Sonoran had proposed to fill portions of numerous "braided washes," or beds of intermittent streams, to provide road and utility crossings, pad fill, drainage, and the like as part of a major residential development. The Save our Sonoran panel found that the facts of that case presented an inextricable interconnection between the permitted activities and locations, and the balance of the residential development project, because the braided washes ran through the development site "like lines through graph paper." Because any development of this site would impact jurisdictional waters, the court concluded that, in effect, the whole of the property falls under the Corps' permitting authority. The rarity of such a fact situation is indicated by the Ninth Circuit's election to rely on a district court case in the 5th Circuit for analogous precedent. See Stewart v. Potts, 996 F.Supp. 668 (S.D. Tex. 1998).[9] In distinguishing its result from the prior Ninth Circuit cases that had applied a more limited scope of analysis to various Corps permitting scenarios, the Save our Sonoran opinion emphasized the unique physical and geographic characteristics of the applicant's development proposal. In entering its ruling, the court observed: "The district court grounded its conclusion regarding the Corps' broad permitting authority over the project on the unique geographic features of this property. Specifically, the district court determined... that the washes are a 'dominant feature of the land and that no development of the property could occur without affecting the washes.'" Save our Sonoran, 408 F.3d at 1123. Consequently, the precedential value of the ruling of the case is limited to fact situations presenting similarly exceptional circumstances. Again, in Save our Sonoran, the Court concluded it reasonably could be said that the entire project was subject to Federal control and responsibility since no development could occur without a Corps permit.

The Save our Sonoran opinion contained the following statement: "Although the Corps' permitting authority is limited to those aspects of a development that directly affect jurisdictional waters, it has responsibility under NEPA to analyze all of the environmental consequences of a project." Save our Sonoran, 408 F.3d at 1122. This statement simply recognizes that under NEPA the Corps is required to consider all of the environmental effects (direct, indirect and cumulative) of the activities within the Corps' NEPA scope of analysis (which in this unique fact setting included the permitted activity and the entire upland development, because these activities were inextricably related and made the entire development, in effect, subject to the Corps permitting authority). As the Court expressly acknowledges, the U.S. Supreme Court's decision in Public Citizen establishes controlling precedent – requiring proximate causation between the environmental effect and the alleged cause – a requirement that cannot be reconciled

[9] In this case, the District court concluded that the Corps limited its analysis without a rational or legally sound basis. The District court concluded that the Corps had jurisdiction over the upland wooded area because the pockets of wetlands were immediately adjacent to, underneath, and surrounding the trees. The construction of the golf course that involved the filling of wetlands therefore could not be considered a separate and distinct project from the plans to fell the trees. The "tasks necessary to accomplish [the development of the proposed golf course] are so interrelated and functionally interdependent as to bring the entire project within the jurisdiction of the Corps, and therefore under the mandate of NEPA." Stewart, 996 F.Supp. at 683.

with a broad and unrestricted reading of the foregoing statement. Moreover, prior Ninth Circuit law is inconsistent with such a statement of unrestricted scope, and the Save our Sonoran opinion explicitly declined to overrule any Ninth Circuit precedent. In particular, the Court acknowledges (by carefully distinguishing the facts of that case from those of Save our Sonoran) the validity and precedential effect of Wetlands Action Network, and generally acknowledges the precedential effect of Sylvester I, all of which express a limited standard for determining the appropriate scope of the Corps' NEPA analysis in the permitting context. Save our Sonoran, 408 F.3d at 1121, 1124. All Ninth Circuit cases on scope of analysis, including Save our Sonoran, can be understood as turning on the questions of whether some development could occur in the upland regardless of whether the permit application is granted and whether there is any showing of other indicia of Federal control and responsibility over such activity.[10] Additionally, the Court cites to and applies the regulatory considerations in 33 C.F.R. Part 325, Appendix B "to determine the circumstances under which the potential environmental consequences in non-jurisdictional land are such that the Corps has control and responsibility," Save our Sonoran, 408 F.3d at 1122 – again indicating that this statement should not be construed over-broadly. Finally, the Save our Sonoran opinion itself subsequently expresses and applies a limited standard of determining when a Corps scope of analysis must be expanded to encompass project components outside of jurisdictional waters, which is inconsistent with a broad and unrestricted reading of the Court's statement. In summary, the Save our Sonoran Court provided the following overlay on the Ninth Circuit's pre-existing descriptions of the standard for determining the Corps' scope of analysis, finding that it must be expanded to encompass activities outside of jurisdictional waters when no development could occur upland without a Corps' permit and construction of the overall project is dictated by the inextricable interconnectedness of activities within and outside of jurisdictional waters (id., at 1122), as when the footprints of the jurisdictional waters are widely interspersed throughout the uplands not subject to CWA jurisdiction (id., at 1124).



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[10] As is made clear by the recent ruling of the United States District Court for the District of Arizona in White Tanks Concerned Citizens v. Strock, No. CV-06-0703 (D. Ariz. Feb. 21, 2007), now on appeal within the Ninth Circuit. In that case, the Corps restricted "the scope of analysis to jurisdictional waters and limited upland acreage." In upholding the Corps' action, the Court observed: "the Corps NEPA implementing regulations govern its scope of analysis in situations where a permit applicant proposed an activity 'which is merely one component of a larger project.' The scope of analysis in an EA or EIS must 'address the impacts of the specific activity requiring a Corps permit and those portions of the entire project over which the District Engineer has sufficient control and responsibility to warrant Federal review." White Tanks, No. CV-06-0703, slip op. at 11. In issuing this decision, the Court quoted with approval the factors that are outlined in Appendix B and that are to be taken into account in making this determination. It also embraced the Corps rationale for distinguishing this case from the Save our Sonoran case by noting, in White Tanks, "the large majority of the site could be developed in some fashion absent a permit, albeit not in a manner that would fulfill the project purpose in a less environmentally damaging manner. Therefore, a narrower scope of review as utilized for this preparation of this NEPA compliance/permit decision is appropriate." White Tanks, No. CV-06-0703, slip op. at 15.