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Richard A. Christopher, Editor

HDR Engineering, Chicago

richard.christopher@hdrinc.com

CALIFORNIA SUPREME COURT HOLDS CEQA NOT PREEMPTED BY ICCTA FOR RAIL PROJECTS CARRIED OUT BY STATE AGENCIES

Submitted by

Christopher Chou, Perkins Coie LLP

CChou@perkinscoie.com

The California Supreme Court has issued its decision in *Friends of the Eel River v. North Coast Railroad*, California Supreme Court No. S 222472, 7/27/17, an important case regarding preemption of state environmental law by the Interstate Commerce Commission Termination Act (ICCTA), which contemplates a unified national system of railroad lines subject to federal, not state, regulation.

The court agreed that the preemptive scope of the ICCTA is broad and that the statute preempts the California Environmental Quality Act (CEQA) for private rail owners and operators. CEQA is a state law which requires the preparation of an environmental impact report and appropriate mitigation. But in a 6-1 decision, the majority held that CEQA was not preempted by the ICCTA for projects that are owned by a state agency.

Background

This case concerned a railroad line running from Napa to Humboldt County. The railroad was previously owned and operated by private railroad companies that eventually failed.

The Legislature, concerned about service on this line, created the North Coast Railroad Authority (NCRA), giving the agency the power to acquire property to operate a railroad on the line and to select a public or private entity to operate transportation services. The NCRA obtained ownership rights over the railroad line and received state and federal funding. NCRA contracted with a private operator, Northwestern Pacific Railroad Company (NWPCo) to operate freight service on the line. The Surface Transportation Board (STB) approved NWPCo's application for an exemption from the certification to operate the line.

NCRA prepared an environmental impact report under CEQA for the resumption of freight rail service on a portion of the line and for limited repair and construction projects. Several groups challenged the EIR's adequacy and NCRA responded that CEQA did not in fact apply to the project because it was preempted by the ICCTA.

Majority Opinion

Under the Supremacy Clause of the Constitution, Congress may preempt state law through federal legislation, either expressly or implicitly. The fundamental question regarding the scope of preemption is congressional intent.[1]

The majority and dissent agreed that Congress intended ICCTA's preemption of state regulation to be broad and that the ICCTA preempted CEQA in the regulation of privately owned railroads. The majority held, however, that because the railroad line here was owned by the NCRA, a state subsidiary, CEQA was not preempted by the ICCTA because there was no indication that Congress intended to preempt states' powers of self-governance.

ICCTA preemption for private railroad owners and operators. The majority noted that the regulation of the national system of railroads "is of peculiarly federal concern, rather than one involving historic state police powers" and recognized the broad preemptive scope of the ICCTA.[2] Under the ICCTA, the STB has exclusive jurisdiction over transportation by rail carrier, and its remedies are exclusive and expressly preempt state remedies with respect to regulation of rail transportation. The majority observed that:

> The ICCTA is unifying and deregulatory; it would undermine these values if states could compel the railroad industry to halt service pending compliance with regulations that conflict with federal law or invade the regulatory field of the STB.[3]

The majority further observed that requiring a private rail carrier to undergo CEQA review as a condition of operations would impose an extensive state law regulatory burden on the rail carrier as a condition of providing service and would be inconsistent with the broad deregulatory purpose of the ICCTA. The majority therefore concluded

[1] Slip. Op. 21.
[2] Slip. Op. 18.
[3] Slip. Op. 34.

that "[i]n the ordinary regulatory setting in which a state seeks to govern private economic conduct, requiring CEQA compliance as a condition of state permission to go forward with railroad operations would be preempted."[4]

For this reason, the majority held that CEQA causes of action could not be the basis for an injunctive order directed specifically at NWPCo to halt NWPCo's freight operations.

ICCTA preemption of State-owned line. The majority found the situation differed with regard to the NCRA, a state subsidiary. Here, the majority held, CEQA does not constitute regulation, rather it represents the state's self-governance—control exercised by the state over its own subdivision.

When CEQA conditions the issuance of a permit for private development on CEQA compliance, and thereby restricts the ability of private citizens and companies to develop their property, this seems plainly regulatory. But CEQA also operates as a form of self-government when the state or a subdivision of the state is itself the owner of the property and proposes to develop it.

According to the majority, the ICCTA's broadly deregulatory purpose creates considerable freedom "within the zone of the owner's control."[5] The majority reasoned that under the ICCTA, a private conglomerate that owns a subsidiary that is a railroad company could make its decisions based on its own internal guidelines. Likewise, the state as owner may make its decisions based on its own guidelines. And, in the majority's view, CEQA should be construed as such an "internal guideline" that governs the processes by which state agencies may develop or approve projects that may affect the environment—notwithstanding the fact that citizens can bring suit to enforce CEQA compliance.

The majority limited this holding to situations in which the specific project under consideration by the state was "within the owner's sphere of control" and thus "there was no inconsistency with regulation provided for by the ICCTA." The majority found that the track repair contemplated by the project "was within the owner's sphere under the ICCTA because the STB had chosen not to regulate track repair and renovation on existing lines." The majority also found that the resumption of freight service was within the owner's sphere of control because "the STB determined the level of service along the line did not cross a threshold that would require federal environmental review."

The majority found support for its conclusion in federal preemption cases. Courts have recognized a presumption that protects against undue federal incursions into the internal, sovereign concerns of the states. Courts have also recognized that a state's proprietary arrangements in the marketplace are presumed not to be preempted absent evidence of such expansive congressional intent.

[4] Slip. Op. 36.
[5] Slip. Op. 46.

Concurring Opinion and Dissent

Justice Kruger's concurring opinion agreed with the majority's reasoning that the ICCTA did not preempt CEQA's application to the NCRA but sought to clarify that the ICCTA might preempt particular CEQA remedies upon remand.

Justice Corrigan's dissent expressed skepticism about the majority's distinction between projects undertaken by public agencies and private projects over which an agency has power of approval: "The proposition that a law of general application may be considered a regulation of private activity, but not of public activity in the same sphere, appears to be unsupported by precedent."[6]

Conclusion

This case contains important holdings regarding federal preemption of CEQA by the ICCTA. In particular, the court has drawn an important distinction between projects on state-owned railroads and projects on privately owned railroads, and held that CEQA generally is applicable to the former but not the latter category due to ICCTA preemption. Future cases may be needed to refine the line in terms of what constitutes state ownership. The court's decision leaves many unanswered questions about where the line is drawn between state-owned and privately owned projects, and regarding the circumstances under which CEQA review may be preempted even for state-owned projects (e.g., where the application of CEQA is deemed inconsistent with STB's exclusive regulation of interstate railroads).

The court's reasoning—particularly that federal preemption of state environmental review requirements is limited where the state has a proprietary interest or is acting as a market participant—may reach beyond the ICCTA. This case may weaken claims of federal preemption of CEQA and similar laws in circumstances where a state agency is involved in carrying out, beyond merely approving, the project.

A separate case on the issue of whether CEQA is preempted by the ICCTA was recently dismissed by the U.S. Court of Appeals for the Ninth Circuit in an unpublished opinion (*Kings County v. Surface Transportation Board,* No. 15-71780). The court determined that the STB decision on CEQA preemption for the California High-Speed Rail project was not a final agency action and therefore was not judicially reviewable.

[6] Slip Op., J. Corrigan Dissenting 1–2.

APPEAL OF NEPA DECISION ON WISCONSIN HIGHWAY PROJECT CANNOT PROCEED WITHOUT THE FEDERAL GOVERNMENT

Submitted by Fred Wagner

fwagner@venable.com

A challenge to a proposal to widen Highway 23 in Wisconsin dating back to 2011 took a surprising litigation turn before the Seventh Circuit. Although the litigation was long-standing, the parties bringing the appeal were found not to have standing.

In an unusual twist, the Wisconsin DOT and an individual state employee appealed a ruling by the district court judge. The Record of Decision (ROD) for the project had been set aside and a remand to the agency ordered to address traffic projections and modeling. Following issuance of a revised Environmental Impact Statement focused on updated traffic estimates for the proposed widened facility, the district court once again found the analysis to be inadequate and vacated the United States DOT's ROD.

However, the USDOT did not take an appeal. Only the state and one employee took the matter up to the higher court. The Seventh Circuit was clearly taken aback by this odd set of circumstances. It ordered supplemental briefing for the parties to discuss the significance of the fact that the federal decision-maker had not filed an appeal and did not file papers of any kind in support of the state appeal. "So we have a mismatch between the relief and the appellant," the court mused out loud.

The federal government told the court that its decision not to appeal foreclosed any other challenge to the district court's ruling. NEPA only applies to the federal government, after all. If Wisconsin wanted to pursue the highway widening, it could do so using its own resources, without any support (financial or otherwise) from the federal government.

The state objected, and maintained that it had standing because it was the "lead agency" for purposes of promoting the project, and producing and defending the EIS. The Seventh Circuit accepted the tremendous amount of resources the state put into the project, but concluded that the state suffered no injury that was redressable on appeal, and therefore, the state did not have standing. Without the federal government at the appellate table, the court could not "unlock the federal Treasury for the Route 23 project." Although the state suffered a concrete injury, there was no remedy available.

The dissent in this case was more than twice as long as the majority ruling. Judge Feinerman, a district court judge from Illinois sitting by designation on the panel, believed that the issue before the court was one of federalism, not solely one on standing. The state plays a huge role in developing a project. It prepares the environmental documents, applies for permits, and finances a great deal of the project.

Why would not the injury of torpedoing the road be redressed by an order reversing the district court's opinion, the judge asked.

Indeed, combing the through the record, the dissent found numerous examples of the district court referencing all the actions the state took with respect to the EIS and the ROD. "Despite all this, the court says that NEPA applies only to the national government."

But the 2-1 ruling on standing stands, and the ROD for the Route 23 project remains vacated. *1000 Friends of Wisconsin v. Wisconsin DOT,* 7th Circuit No.16-2321, 2586, 6/19/17.

UTAH PRAIRIE DOG CAN BE PROTECTED UNDER ENDANGERED SPECIES ACT EVEN THOUGH ONLY FOUND IN UTAH

Submitted By

David J. Miller, Nossaman LLP

dmiller@nossaman.com

On March 29, 2017, the U.S. Court of Appeals for the Tenth Circuit held that Congress has authority under the Commerce Clause to regulate the take of the Utah prairie dog (*Cynomys parvidens*). Because Congress has this authority, it could authorize the U.S. Fish and Wildlife Service ("Service") to do the same.

The Utah prairie dog lives only in Utah. Approximately 70 percent of the species' population is on nonfederal land. It was originally listed as an endangered species under the Endangered Species Act ("ESA") in 1973, but was reclassified as threatened in 1984. At the time it was reclassified, the Service issued a special rule to regulate its take ("Special Rule 4(d)"). *See* 50 C.F.R. § 17.40(g). Today, Special Rule 4(d) regulates the take of Utah prairie dog by limiting: (1) permissible locations of such take to agricultural lands, properties within 0.5 miles of conservation lands, and "areas where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or burial sites" (2) the permissible amount of such take; and (3) the permissible methods of such take. People for the Ethical Treatment of Property Owners ("PETPO") filed an action alleging that neither the Commerce Clause nor the Necessary and Proper Clause authorizes Congress to regulate take of the Utah prairie dog (an intrastate species) on nonfederal land.

As an initial matter, the Tenth Circuit affirmed the district court's holding that PETPO had standing to challenge Special Rule 4(d) because its alleged injuries were redressable. PETPO's challenge implicated the ESA's grant of authority to the Secretaries of the Interior and of Commerce to issue regulations extending take prohibitions to threatened species. If Congress lacked such authority under the Commerce Clause or the Necessary and Proper Clause, then the ESA could not authorize any regulation of prairie dog take.

On the merits of PETPO's challenge, the Tenth Circuit concluded that the district court erred in holding that Special Rule 4(d) is not authorized by the Commerce Clause. The district court held that the Commerce Clause did not authorize the regulation because it did not have a substantial effect on interstate commerce. The Tenth Circuit disagreed. It noted that the Commerce Clause authorizes regulation of noncommercial, purely intrastate activity where it is an essential part of a broader regulatory scheme that, as a whole, substantially affects interstate commerce. "Therefore, to uphold the challenged regulation . . . [the court] need only conclude that Congress had a rational basis to believe that such a regulation constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce."

The Tenth Circuit held that Special Rule 4(d) was within the broader regulatory scheme of the ESA's protections, including Congress' broad authorization to use regulations to extend the take protections to threatened species. Because the court concluded that the ESA has a substantial relationship with interstate commerce, and because Congress had a rational basis to believe that regulating take of purely intrastate species like the Utah prairie dog is essential to the ESA's comprehensive regulatory scheme, the Tenth Circuit held that the "regulation on nonfederal land of take of a purely intrastate species, like the Utah prairie dog, under the ESA is a constitutional exercise of authority under the Commerce Clause." Because Congress had the authority to implement the challenged regulation, it could delegate that authority to the Secretary of Interior to promulgate regulations to achieve that end.

The Tenth Circuit's decision is consistent with decisions from the Fourth, Fifth, Ninth, Eleventh, and D.C. Circuits addressing similar challenges that have upheld the ESA as a valid exercise of Congress' Commerce Clause power. *E.g.*, *Gibbs v. Babbitt*, 214 F.3d 483, 497-98 (4th Cir. 2000); *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 477-78; *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080, 355 U.S. App. D.C. 303 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049-57, 327 U.S. App. D.C. 248 (D.C. Cir. 1997).

People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv., 852 F.3d 990 (10th Cir. 2017)

9TH CIRCUIT DEFERS TO USFWS DESERT BALD EAGLE DISTINCT POPULATION SEGMENT DETERMINATION

Submitted By

Ashley J. Remillard and Paul S. Weiland

aremillard@nossaman.com

On August 28, 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court decision upholding a U.S. Fish and Wildlife Service ("Service") determination that the Sonoran Desert Area bald eagle does not constitute a distinct population segment ("DPS") under the Endangered Species Act ("ESA"). *Ctr. for Biological Diversity v. Zinke*, No. 14-17513, 2017 WL 3687443 (9th Cir. Aug. 28, 2017). The court deferred to the Service's interpretation of its DPS policy, holding that the Service reasonably applied the relevant factors and considered scientific evidence to support its decision.

The ESA makes reference to, but does not define, the term "distinct population segment." As a consequence, the Service has developed a DPS policy, which states that a population segment must be both discrete and significant. The parties agreed that the desert eagle population was discrete, but disputed whether the population was significant. Pursuant to the Service's DPS policy, a determination regarding significance requires consideration of the following factors:

1. Persistence of the DPS in an ecological setting unusual or unique for the taxon,
2. Evidence that loss of the DPS would result in a significant gap in the range of a taxon,
3. Evidence that the DPS represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the DPS differs markedly from other populations of the species in its genetic characteristics.

Plaintiffs challenged the Service's determination with respect to the first two factors.

To begin with, the Service concluded that the proposed desert eagle DPS satisfied the first factor relating to persistence, but found that satisfaction of that factor alone did not necessarily compel a conclusion that the desert eagle population was significant. Plaintiffs argued that this decision was improper because the Service has in the past always found significance when it found that one of the four factors was satisfied. While the Service disputed this contention, the court's decision did not turn on the Service's prior practices. Rather, the Ninth Circuit held as a matter of law that the Service's DPS policy is open-ended, and provides the Service with the discretion to consider whether various characteristics of a proposed DPS are ecologically or biologically significant for a taxon as a whole. The court's decision makes it clear that where a population

satisfies one significance factor, the Service is not compelled to make a finding that the proposed DPS is significant.

Furthermore, the Service found that, if the proposed desert eagle DPS was extirpated, this would not result in a significant gap in the range of the bald eagle taxon. Plaintiffs argued that this conclusion was flawed because in a draft document prepared by the Service, the agency concluded that the desert eagle population constituted a "peripheral population." Plaintiffs further argued that, in multiple prior cases, the Service concluded that the loss of a peripheral population resulted in a gap in the range of a taxon. The Ninth Circuit found this argument unpersuasive, reasoning that, while relevant, prior agency documents are not determinative. The court explained that agencies may change course, and that the court's role is "to review the change of course to ensure that it is based on new evidence or otherwise based on reasoned analysis." The court concluded that, despite not expressly discussing "peripheral populations" in its final decision, the substance of the Service's analysis took into account the benefits of such populations. Thus, the court found that it was reasonable for the Service to conclude, based on a lack of evidence of distinctive traits or genetic variations among the desert eagle population, that loss of the population would not have a negative effect on the bald eagle species as a whole.

Lastly, plaintiffs asserted that the Service failed to consider climate change when making its determination regarding the desert bald eagle. Based on the record, the Ninth Circuit found this argument unpersuasive.

DC CIRCUIT KEEPS WESTERN GREAT LAKES GREY WOLF LISTED AS THREATENED

Submitted By

Stephanie N. Clark, Nossaman LLP

sclark@nossaman.com

On August 1, 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in *Humane Society of the U.S. v. Zinke*, Case No. 15-5041 (Aug. 1, 2017) affirming a U.S. District Court decision that keeps the Great Lakes Distinct Population Segment ("DPS") of Grey Wolves (*Canis lupis*) on the List of Endangered and Threatened Species. Plaintiffs in the case alleged that the Secretary of the Interior and U.S. Fish and Wildlife Service's (collectively, "Service") 2011 Final Rule ("Rule") removing the DPS from the List of Endangered and Threatened Species failed to consider two key impacts of the Rule. Specifically, plaintiffs argued that the Service failed to (1) "reasonably analyze or consider . . . the impacts of partial delisting and" (2) "the historical range loss on the already-listed species . . . ."

Regional subspecies of gray wolf were listed as "endangered" under the Endangered Species Act ("ESA") between 1966 and 1976 – the timber wolf (*Canis lupus lycaon*) was listed in 1967, the Northern Rocky Mountain wolf (*Canis lupus irremotus*) was listed in 1973, and the Mexican wolf (*Canis lupus baileyi*) and Texas wolf (*Canis lupus monstrabilis*) were listed in 1976. The Service later revised these listings to be a single listing for the gray wolf split between the Minnesota population, which had recovered enough to qualify as "threatened," and the gray wolf population in the remaining 47 states that comprise its range, which remained "endangered."

In 2003, the Service again reclassified the gray wolf, splitting the listed populations into three DPSs – the Eastern DPS, Western DPS, and Southwestern DPS – and downgrading the Eastern and Western DPSs to "threatened" from "endangered." The Minnesota gray wolf population remained in the Eastern DPS, along with "any gray wolf population that existed in the Northeast region of the United States." The 2003 reclassification was struck down by two separate court decisions finding that the Service had failed to meet the ESA's requirements for such reclassifications, sparking the Service's successive attempts to designate and delist the Great Lakes Population, ultimately leading to this lawsuit. *See Defs. of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1168-69 (D. Or. 2005); *see also Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 564-64 (D. Vt. 2005). The two courts found that the Service's decision to arbitrarily add all Northeast region wolves into the Eastern DPS violated the ESA and that the Service's failure to consider the species' status throughout the entirety of its range also violated the ESA.

The Service again reclassified populations of gray wolves in 2007, creating the Western Great Lakes gray wolf DPS and removing it from the ESA's protections. Within a year, the 2007 reclassification was reversed by a federal court. *See Humane Soc'y of the U.S. v. Kempthorne*, 579 F.Supp.2d 7, 9 (D.D.C. 2008). Specifically, the U.S. District Court for the District of Columbia noted that the 2007 reclassification "fail[ed] to acknowledge and address crucial statutory ambiguities" concerning the creation of a DPS for the sole purpose of delisting it. *Id.*

In 2008, the Solicitor of the Department of the Interior issued a memorandum analyzing whether or not the Service possessed the statutory authority to create a DPS for the sole purpose of delisting that DPS, and concluded that the ESA unambiguously allows the Service to do so. *See* U.S. Fish and Wildlife Service Authority under Section 4(c)(1) of the Endangered Species Act to Revise Lists of Endangered Species and Threatened Species to "Reflect Recent Determinations," Office of the Solicitor, U.S. Dep't of Interior (Dec. 12, 2008) at 3-5. Based largely on the Solicitor's memorandum, the Service attempted to delist the Western Great Lakes DPS again in 2009. This attempt consisted of the Service merely re-publishing the 2007 reclassification without notice and comment, and with an added discussion of "Issues on Remand." 74 Fed. Reg. 15,070, 15,075 (April. 2, 2009). This attempt was again rebuffed by a federal court, following the Service's acknowledgement that it had promulgated the rule without the

necessary notice and comment, and agreement to settle the case. *Humane Soc'y of the U.S. v. Salazar*, No. 09-1092, Dkt. Entry No. 27 (D.D.C. July 2, 2009). This settlement resulted in the status of gray wolves remaining as it had existed in 1978 – the Minnesota DPS listed as "threatened," with the populations in 47 other states collectively listed as "endangered."

Finally, the Service issued the Rule in 2011, which revised the boundaries of the existing Minnesota gray wolf population by creating the Western Great Lakes DPS, and then delisted that DPS. The Western Great Lakes DPS included the gray wolf populations in Minnesota, Wisconsin, and Michigan, as well as portions of North Dakota, South Dakota, Iowa, Illinois, Indiana, and Ohio. The Service concluded, based on its interpretation of "range" to include only the species' current range, and its interpretation of "significant" to mean a portion of the species range that is "important to the conservation of the species" because it contributes meaningfully to the representation, resiliency, or redundancy of the species, that the Western Great Lakes DPS did not qualify as either endangered or threated under the ESA. *See* 76 Fed. Reg. 81,666, 81,721-81,723 (Dec. 28, 2011).

Plaintiffs filed suit, challenging the Service's action and alleging that the Service's carve out of a DPS from a listed population for the sole purpose of delisting that DPS violated the ESA and the Administrative Procedure Act. Although the Court held that the Service is permitted to create a DPS for the sole purpose of removing it from the ESA's protections, the Court found that such action is appropriate "only when the Service first makes the proper findings." When making those "proper findings," the Court noted that the Service cannot "review a single segment with blinders on, ignoring the continuing status of the species' remnant. The [ESA] requires a comprehensive review of the entire listed species and its continuing status. Having started the process, the Service cannot call it quits upon finding a single [DPS]." When designating a DPS, the effect on the remainder of the species is of particular import because "omitting analysis of the effect of the designation on the already-listed species would divest the extant listing of legal force." This means that the Service, when making a DPS designation for the sole purpose of delisting that DPS, must ensure that the remnant of the species, if still eligible for listing under the ESA, is not rendered an unlisted and unlistable non-species.

Here, the Court found that the Service failed to make the proper findings in two material respects. First, the Service failed to evaluate the impact to the species as a whole if the DPS were removed from the ESA's protections – reviewing only the Western Great Lakes DPS in a vacuum. Second, the Service failed to evaluate whether or not the remaining U.S. gray wolves constitute either a subspecies or a segment. This left the question of how and whether the remaining gray wolf populations' existing "endangered" status would continue unresolved and unexplained.

The Service did, however, determine that the remaining gray wolf populations outside of the Western Great Lakes DPS were no longer a protectable "species" under the ESA and proposed to delist them for that reason alone. The Court took issue with this

approach, noting that "[t]he Service' power is to designate genuinely discrete population segments; it is not to delist an already-protected species by balkanization," and pointing out that the Service's sole focus on designating and delisting the Western Great Lakes DPS had the practical effect of rendering the other, remaining gray wolf populations an "orphan to the law" because they no longer qualified as a listable "species" under the ESA.

Among other issues with the Service's analysis, the Court held that the Service failed to analyze the Western Great Lakes DPS' candidacy for delisting within the context of the historical range of gray wolves. Although the Court found the Service's decision to construe "range" to mean the current range of the species was a permissible construction, the Court found that the Service's decision to "categorically exclude[] the effects of loss of historical range from its analysis" rendered the Service's conclusions about threats to the Western Great Lakes DPS arbitrary and capricious. In particular, the Service failed to analyze or even address the loss of approximately 95% of the gray wolf's historical range and whether or not that loss impacted the survival of gray wolves as a whole, the remnant populations outside of the Western Great Lakes DPS, or on the Western Great Lakes DPS itself. Throughout the decision, it is apparent that, while the Court concluded that the Service's interpretation of its powers and authority under the ESA was permissible, the Service failed to apply its interpretations to the designation and listing decisions before it in a manner that complied with the ESA's requirements.

Due to the particular history of this case and the seriousness of the Service's missteps, the Court held that *vacatur* of the Rule rather than remand to the Service was appropriate. This, for the time being, retains the Minnesota population's listing status as threatened and the remaining gray wolf population listed as endangered.

Given the history of the Service's actions, it appears likely that the Service will start anew and attempt to again designate and delist some iteration of the Western Great Lakes DPS. How and whether that attempt will be successful remains to be seen. The Court's ruling and its emphasis on the fact that the remainder of the gray wolf population cannot be rendered an "orphan to the law" should the Service designate a new DPS for the purpose of removing it from the ESA's protections will certainly complicate any future attempts by the Service to designate and delist a DPS, and puts the onus on the Service to determine whether or not the remnant populations would comprise a subspecies or cognizable segment. The decision establishes that, for other species that the Service wishes to segment and delist, the Service must articulate both why a DPS designation is appropriate and what becomes of the remainder of the listed species both as a result of the DPS designation and any decision to delist the DPS.

NEW EXECUTIVE ORDER AND CEQ NOTICE CALL FOR COORDINATED NEPA AND PERMIT APPROVALS FOR INFRASTRUCTURE PROJECTS

Submitted by Richard A. Christopher

richard.christopher@hdrinc.com

On August 25, 2017 the President issued Executive Order 13807 (EO) which could significantly change the way transportation projects go through the National Environmental Policy Act (NEPA) approval and permitting processes. Section 4 of the EO calls for NEPA approval to take no longer than 2 years and for a tracking system to follow the progress toward approval of projects. Section 5 of the EO calls for one Record of Decision (ROD) for complex projects involving multiple agencies and the issuance of permits within 90 days of the ROD whenever possible. The Council on Environmental Quality (CEQ) is directed to issue the necessary guidance to carry out these goals and

> "(C) provide for agency use, to the maximum extent permitted by law, of environmental studies, analysis, and decisions conducted in support of earlier Federal, State, tribal, or local environmental reviews or authorization decisions."

On September 8, 2017 the CEQ signed a notice which was published in the Federal Register on September 14, 2017 (82 *Federal Register* 43226). The Notice summarizes the things CEQ will do to carry out the EO. Among other responsibilities, CEQ will revisit its NEPA guidance and NEPA rules at 40 CFR 1500-1508. In addition, CEQ is going to publish a NEPA practitioners' handbook which will address at least the following issues:

> "i. public involvement, including meetings and sufficiency of notice;
>
> ii. deference to the lead Federal agency with regard to key NEPA elements such as the development of the statement of purpose and need and range of alternatives;
>
> iii. appropriate cumulative impacts analysis methodologies or tools for infrastructure projects;
>
> iv. sources of information that may be relied upon in analyzing impacts;
>
> v. reliance on prior studies, analyses or decisions for projects within the same general locations; and
>
> vi. reliance on State, local and tribal environmental impacts analyses for purposes of NEPA."

There have been EO's and other directives in the past to streamline NEPA and push the approval process for high priority projects. None of the previous proposals in this area has been as ambitious as this one.