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## National Wildlife Federation v. Secretary of the United States Department of Transportation

Holly A. Seymour

*Alexander Blewett III School of Law at the University of Montana*, [holly.seymour@umontana.edu](mailto:holly.seymour@umontana.edu)

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*National Wildlife Federation v. Secretary of the United States  
Department of Transportation, 960 F.3d 872 (6th Cir. 2020)*

**Holly A. Seymour**

The Sixth Circuit Court of Appeals recently ruled in favor of the Department of Transportation in considering whether the district court erred in holding that an agency took a discretionary action when it approved oil spill response plans to a pipeline under the Clean Water Act. The Sixth Circuit reversed the district court's decision. It held the Department of Transportation does not need to consider the Endangered Species Act and the National Environmental Policy Act requirements in their response plans as long as the Clean Water Act criteria for such plans are met.

I. INTRODUCTION

In *National Wildlife Federation v. Secretary of the United States Department of Transportation*,<sup>1</sup> the court reversed the district court's judgment requiring oil pipeline response plans to consider the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA").<sup>2</sup> The Pipeline and Hazardous Materials Safety Administration ("the Agency") approved response plans submitted by Enbridge Energy ("the Operator") for an oil pipeline ("Line 5").<sup>3</sup> The Agency found the plans satisfied the criteria of the Clean Water Act ("CWA").<sup>4</sup>

Plaintiff, National Wildlife Foundation ("NWF"), opposed the approval, alleging the Agency violated the CWA by considering only CWA response plan requirements, and failing to consider the ESA or NEPA as well.<sup>5</sup> The district court found the response plans satisfied the enumerated criteria of the CWA, but granted NWF summary judgment on the grounds that the Agency must comply with the ESA and NEPA in order to approve the plans.<sup>6</sup> On appeal, the United States Court of Appeals for the Sixth Circuit reversed.<sup>7</sup> The court considered whether the Agency had "discretion to consider environmental criteria not listed in a statute simply because the agency exercises some degree of judgment when it considers the statutory criteria."<sup>8</sup> The court held the ESA did not require the Agency to comply with the consultation requirement because the Agency's action was non-discretionary.<sup>9</sup> Additionally, the court held NEPA did not require the Agency to prepare an environmental impact

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1. 960 F.3d 872 (6th Cir. 2020).  
2. *Id.* at 875.  
3. *Id.*  
4. *Id.*  
5. *Id.*  
6. *Id.*  
7. *Id.* at 880.  
8. *Id.* at 874.  
9. *Id.* at 877.

statement because the enumerated criteria listed under the CWA only requires the Agency to submit a response plan.<sup>10</sup> The court found the Agency met the statutory requirements of the CWA, which satisfied any further consultation process.<sup>11</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

This case involves response plans for an oil pipeline called “Line 5” that spans the Great Lakes region and has carried oil for over 60 years.<sup>12</sup> Line 5 is 30 inches in diameter and extends 641 miles across Wisconsin and Michigan, extending into Canada.<sup>13</sup> Constructed in 1953, Line 5 crosses multiple waterbodies, including the St. Clair River and the Straights of Mackinac, which connect Lake Huron and Lake Michigan.<sup>14</sup> Due to strong currents in the Straights of Mackinac that frequently reverse direction, the district court stated a Line 5 oil spill poses a significant threat to Lake Huron and Lake Michigan.<sup>15</sup>

In response to previous oil spills across the country, Congress passed the Oil Protection Act (“OPA”) in 1990, amending the CWA to prohibit oil transportation facilities from transporting oil without approved spill response plans.<sup>16</sup> Under the OPA, the Line 5 Operator, Enbridge Energy, must submit oil spill response plans to the administering agency, the Pipeline and Hazardous Materials Administration.<sup>17</sup> The plans must satisfy the following six enumerated criteria under the CWA:<sup>18</sup>

(i) be consistent with the requirements of the National Contingency Plan and Area Contingency Plans;

(ii) identify the qualified individual having full authority to implement removal actions, and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment pursuant to clause;

(iii) identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or

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10. *Id.* at 880.

11. *Id.*

12. *Id.* at 874.

13. *National Wildlife Fed’n v. Sec’y of the DOT*, 374 F. Supp. 3d 634, 642 (E.D. Mich. 2019).

14. *Id.*

15. *Id.*

16. *Id.* at 643; 33 U.S.C. 1321(j)(5)(F)(i)-(ii) (2019).

17. *National Wildlife Fed’n*, 960 F.3d at 875.

18. *Id.* at 874–75.

explosion), and to mitigate or prevent a substantial threat of such a discharge;

(iv) describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the vessel or at the facility, to be carried out under the plan to ensure the safety of the vessel or facility and to mitigate or prevent the discharge, or the substantial threat of a discharge;

(v) be updated periodically; and

(vi) be resubmitted for approval of each significant change.<sup>19</sup>

The court held that the statute requires that the Agency, acting under delegated authority of the President and the Department of Transportation (“DOT”), must approve the plans if the plans satisfy the above enumerated criteria.<sup>20</sup>

Enbridge Energy submitted two response plans in the last five years that the Agency evaluated and approved.<sup>21</sup> The NWF sued in 2017 in the United States District Court for the Eastern District of Michigan alleging the plans did not comply with NEPA or the ESA.<sup>22</sup> The district court ruled in favor of NWF.<sup>23</sup> The Sixth Circuit reversed in part, finding the Agency was not required to comply with the ESA or NEPA.<sup>24</sup>

### III. ANALYSIS

#### A. Challenge to the ESA Ruling

The ESA requires federal agencies to consult with appropriate environmental authorities in order to ensure that agency actions are not likely to jeopardize endangered or threatened species.<sup>25</sup> Consultation is required when an agency takes a discretionary action.<sup>26</sup> The NWF claimed the response plans required consultation under the ESA because the Agency has discretion in evaluating the requirements of the CWA.<sup>27</sup> The Defendants argued the plans did not trigger the ESA consultation requirement because the Agency’s approval of the plans was not

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19. *Id.*

20. *Id.* at 875 (citing *Natational Wildlife Fed’n v. Sec’y of the DOT*, 374 F. Supp. 3d 634, 642 (E.D. Mich. 2019)).

21. *Id.*

22. *Natational Wildlife Fed’n v. Sec’y of the DOT*, 374 F. Supp. 3d 634, 642 (E.D. Mich. 2019).

23. *Id.*

24. *Id.*

25. *National Wildlife Fed’n*, 960 F.3d at 874.

26. *Id.* at 875.

27. *Id.*

discretionary.<sup>28</sup> The Sixth Circuit adopted the definition of a “discretionary action” from *National Association of Homebuilders v. Defenders of Wildlife*, where the United States Supreme Court found the CWA statutory criteria left no room for agency discretion.<sup>29</sup>

The Sixth Circuit held the statute required the Agency to approve the response plans upon satisfaction of the CWA’s enumerated criteria.<sup>30</sup> The court rejected NWF’s argued standard that “some degree of judgment” was appropriate for determining whether an agency action is discretionary and followed the majority opinion in *Homebuilders*.<sup>31</sup> Further, the court pointed to statutory language as a key indicator of the discretionary nature of an action.<sup>32</sup> The court stated “may” indicates an act is discretionary, whereas “must” or “shall,” indicates flexibility.<sup>33</sup> The court found Congress gave the Agency specific instructions under the CWA in the form of enumerated criteria, and mandated action by employing the words “shall . . . approve.”<sup>34</sup>

The court also rejected NWF’s argument that discretion existed within the criteria listed in the CWA.<sup>35</sup> NWF pointed to the provision of the CWA requiring amendments for insufficient response plan paragraphs as an example of discretion.<sup>36</sup> The court found that the license to amend plans did not provide for agency discretion because amendments only allowed the Agency to correct plan paragraphs that did not conform to the CWA requirements.<sup>37</sup> Similarly, NWF argued the Agency had discretion because the CWA required the Agency to issue regulations requiring response plans—to the “maximum extent practicable”—to address oil spills.<sup>38</sup> However, the court held that the power to issue regulations did not allow the Agency to “engraft additional provisions” on the CWA, and rulemaking authority only allowed the Agency to effect the will of Congress.<sup>39</sup> Therefore, the court held rulemaking authority provided no agency discretion.<sup>40</sup>

### B. Challenge to NEPA Ruling

The NWF argued the Agency failed to comply with NEPA requirements because it did not complete an environmental impact

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28. *Id.*

29. *Id.* at 877 (citing *National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007)).

30. *Id.* at 875–76.

31. *Id.* at 876 (citing *National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007)).

32. *Id.*

33. *Id.*

34. *Id.* at 875–76.

35. *Id.* at 877; 33 U.S.C § 1321(j)(5)(D) (2019).

36. *National Wildlife Fed’n*, 960 F.3d at 877.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

statement (“EIS”).<sup>41</sup> Again, the defendants countered this claim by arguing an EIS is only required when the agency action is discretionary.<sup>42</sup> NEPA requires federal agencies to prepare an EIS for major discretionary federal actions that will affect the environment.<sup>43</sup> The court followed the Supreme Court’s decision in *DOT v. Public Citizen* to find approval of the response plan did not trigger NEPA.<sup>44</sup> First, the court found that NEPA’s “rule of reason” would not require an agency to perform an EIS for an action it could not refuse to perform.<sup>45</sup> According to the court, the “rule of reason” ensures that “agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision-making process.”<sup>46</sup> Second, the court stated that NEPA requires a “reasonably close causal relationship” between the agency action and the environmental impact.<sup>47</sup> The court held the “legally relevant cause” of the environmental impact for the response plan was not the Agency’s action, but rather Congress’s decision to limit an agency’s discretion.<sup>48</sup> Therefore, the court found the environmental impact was a result of required compliance, rather than a result of the agency action itself.<sup>49</sup> Ultimately, the court held that because the Agency lacked the discretion to refuse the action, the action did not trigger NEPA.<sup>50</sup>

#### IV. CONCLUSION

The court reaffirmed the nondiscretionary nature of approving response plans under the CWA, finding the CWA criteria for response plans leaves no space for agency discretion; thus, holding that neither the ESA nor NEPA applied to the Agency’s approval of response plans. This case will likely affect similar challenges to agency decisions under the CWA by limiting a court’s review to compliance with the authorizing statute and barring challenges to noncompliance with other federal environmental statutes.<sup>51</sup>

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41. *Id.* at 879.

42. *Id.*

43. *Id.*

44. *Id.* (citing *DOT v. Public Citizen*, 541 U.S. 752, 769 (2004)).

45. *Id.* at 879–80.

46. *DOT v. Public Citizen*, 541 U.S. 752, 767 (2004).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*