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# *Union Neighbors United, Inc. v. Jewell:* A Hard Look at Procedural Compliance under NEPA

## INTRODUCTION

In August 2016, the D.C. Circuit held that the U.S. Fish and Wildlife Service (FWS) met its obligations under the Endangered Species Act (ESA) but failed to comply with the National Environmental Policy Act (NEPA) when it issued an Incidental Take Permit (ITP) for the endangered Indiana bat.<sup>1</sup> On the one hand, the D.C. Circuit concluded that FWS did not need to ensure that the proposed project's minimization and mitigation efforts were "the maximum that can be practically implemented" in order to satisfy the ESA.<sup>2</sup> On the other hand, the D.C. Circuit held that FWS violated NEPA by failing to consider a reasonable range of alternatives.<sup>3</sup> This ruling breathes "new life"<sup>4</sup> into the procedural force and requirements of NEPA, suggesting that courts may insist on greater consistency between an agency's stated goals for a project and the process by which the agency analyzes alternatives. At the same time, because this particular project posed a threat to an endangered species, the decision's influence on future cases involving impacts of lesser significance is unclear. At the very least, however, *Union Neighbors* should spur agencies to take greater care in selecting an appropriate range of alternatives for future NEPA analyses when there are important statutory values implicated by the project's impacts.

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1. *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 568 (D.C. Cir. 2016).
2. *Id.* at 583 (citing U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLANNING & INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK (1996)).
3. *Id.* at 577.
4. Marilyn Odendahl, *Fight to Protect Indiana Bat from Wind Farm Renders Mixed Ruling*, INDIANA LAWYER (Sept. 7, 2016), <http://www.theindianalawyer.com/fight-to-protect-indiana-bat-from-wind-farm-renders-mixed-ruling/PARAMS/article/41345> (quoting W. William Weeks, attorney at the Conservation Law Center).

## I. BACKGROUND

## A. NEPA

Congress enacted NEPA “to ‘prevent or eliminate damage to the environment and biosphere’ by focusing Government and public attention on the environmental effects of proposed agency action.”<sup>5</sup> NEPA’s “twin aims” require federal agencies to consider “every significant aspect of the environmental impact” of a proposed project and to ensure that the public is informed of such consideration.<sup>6</sup> To satisfy NEPA, an agency must “[r]igorously explore and objectively evaluate all reasonable alternatives,”<sup>7</sup> and publish its analysis in an Environmental Impact Statement (EIS) for public review and comment.<sup>8</sup> When there is “potentially a very large number of alternatives,” agencies must consider a “reasonable number of examples covering the full spectrum of reasonable alternatives . . . .”<sup>9</sup> The alternatives represent “the heart of the EIS” and are considered reasonable if they are “technically and economically practical or feasible and meet the purpose and need of the proposed action.”<sup>10</sup>

B. *The Project and Alternatives*

The Indiana bat was first listed as an endangered species in 1967, and while the species has made positive strides in recovering, there are continued threats to its survival.<sup>11</sup> In 2006, Buckeye Wind, LLC (Buckeye) began planning for the construction of a large wind farm in Champaign County, Ohio.<sup>12</sup> Based on concerns about the wind turbines’ adverse effects on the Indiana bat, Buckeye began consulting with FWS in 2007.<sup>13</sup> Because the Indiana bat has summer colonies near the proposed wind farm and migrates through the area in the spring and fall, Buckeye was required to obtain an ITP in order to operate the wind turbines at night between April and October.<sup>14</sup> As part of its ITP application, Buckeye submitted a Conservation Plan that proposed operational restrictions, including “turbine feathering” and increased cut-in speeds, intended to reduce the impact of the proposed wind turbines on

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5. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321 (2012)).

6. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted).

7. 40 C.F.R. § 1502.14(a) (2016).

8. §§ 1502.1, 1502.2.

9. 43 C.F.R. § 46.420(c) (2016).

10. *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016) (citing 40 C.F.R. § 1502.14 (2016) and 43 C.F.R. § 46.420(b) (2016)).

11. *Id.* at 570.

12. *Id.*

13. *Id.* at 570–71.

14. *Id.*

the Indiana bat.<sup>15</sup> Buckeye's plan called for variable cut-in speeds, with a higher speed of 6.0 meters per second at night from April to October, taking approximately 5.2 bats per year.<sup>16</sup> In response to the ITP application, FWS released a draft EIS and Habitat Conservation Plan in June 2012, and final versions of the documents in April 2013.<sup>17</sup> The purposes of FWS's action were "to respond to Buckeye's application for the [ITP]; to protect, conserve, and enhance the Indiana bat, its habitat, and ecosystems; and to comply with applicable federal laws."<sup>18</sup>

In the draft EIS and final EIS, FWS analyzed the impacts of Buckeye's proposal alongside three alternatives: (1) a no-action alternative, in which the wind farm would not be built; (2) a "Max Alternative," in which the turbines would shut down fully at night when the bats were active; and (3) a "Minimal Alternative," which would require only minor operational changes and was projected to take twelve bats per year.<sup>19</sup> While the Max Alternative would cause no takes of bats, rendering an ITP unnecessary, FWS determined that the Max Alternative would be economically infeasible.<sup>20</sup> Thus, the EIS did not include the consideration of any economically feasible alternative that was projected to take fewer bats than Buckeye's proposal.

In public comments on the EIS, Union Neighbors United, Inc. (Union Neighbors), a group of citizens located near the site of the proposed wind farm, requested that FWS consider an additional alternative.<sup>21</sup> Their suggested plan included a higher cut-in speed of 6.5 meters per second and was projected to take fewer bats than Buckeye's proposal while maintaining the project's economic feasibility.<sup>22</sup> FWS responded that, because it considered the Max Alternative to be a sufficient and reasonable alternative to Buckeye's plan, it was unnecessary to consider additional alternatives like the one Union Neighbors had proposed.<sup>23</sup> Ultimately, FWS selected Buckeye's proposal and issued an ITP to build and operate the wind farm based on that proposal.<sup>24</sup>

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15. *Id.* at 572. Feathering is a "reduc[tion in] the blade angle to the wind to slow or stop the turbine from spinning[] until a designated cut-in speed is reached." A cut-in speed is "the wind speed at which rotors begin rotating and producing power." *Id.* (alteration in original).

16. *Id.* at 576.

17. *Id.* at 571.

18. Response Brief for the Federal Appellees at \*8, *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016) (No. 15-5147).

19. *Union Neighbors*, 831 F.3d at 573. The Minimal Alternative called for a cut-in speed of 5.0 meters per second in the early evening from August to October, which was substantially less restrictive than both Buckeye's plan and the Max Alternative. FWS projected that the Minimal Alternative would take approximately 300 bats over the life of the project. *Id.*

20. *Id.* at 576. FWS was aware that the "higher costs and lower energy production" associated with the Max Alternative made it infeasible and that a "full nighttime option was not economically viable." *Id.*

21. *Id.* ("Union Neighbors repeatedly suggested using a cut-in speed higher than 6.0 [meters per second]. Yet [FWS] failed to consider any higher cut-in speed in either the Draft or Final EIS.")

22. *Id.* at 573.

23. *Id.*

24. *Id.*

*C. Union Neighbors' Challenge*

In September 2013, Union Neighbors filed suit in the United States District Court for the District of Columbia, claiming that FWS's decision to issue the ITP was arbitrary and capricious and a violation of NEPA and the ESA.<sup>25</sup> While it did not argue that FWS had to consider its specific proposal, Union Neighbors claimed that the agency failed to consider a reasonable range of alternatives, as required by NEPA.<sup>26</sup> Union Neighbors also alleged that the decision violated the ESA because FWS had failed to ensure that Buckeye would "to the maximum extent practicable, minimize the number of individual Indiana bats that would be taken," had used the wrong standard for "maximum extent practicable," and had not shown that a "reduced-impact alternative was impracticable."<sup>27</sup>

In the district court, both parties filed cross motions for summary judgment, and in March 2015, the court ruled in favor of FWS.<sup>28</sup> The court concluded that FWS met the requirements for permit issuance and that its alternatives analysis under NEPA was reasonable.<sup>29</sup> Furthermore, the court reasoned that it should defer to the agency on which alternatives to consider so long as the range of alternatives satisfied the "rule of reason."<sup>30</sup>

On appeal, the D.C. Circuit affirmed the district court's decision on Union Neighbors' ESA claims, but reversed on the NEPA claims.<sup>31</sup> The D.C. Circuit's NEPA decision hinged, in part, on FWS's acknowledgement that the more protective Max Alternative was economically infeasible.<sup>32</sup> The D.C. Circuit agreed with Union Neighbors that, in light of the agency's stated purpose to protect the Indiana bat, it was unreasonable for FWS not to consider at least one economically viable alternative that might take fewer bats than Buckeye's proposal.<sup>33</sup>

Throughout the EIS process and in the courts, FWS maintained that it had considered a sufficient range of alternatives,<sup>34</sup> reasoning that the number of projected takes in Buckeye's proposal would have "insignificant impacts" overall on the affected subpopulations of the Indiana bat.<sup>35</sup> From that perspective, the agency concluded that Buckeye's proposal did not differ

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25. *Id.* at 568, 574.

26. *Id.* at 574.

27. *Id.* at 577.

28. *Union Neighbors United, Inc. v. Jewell*, 83 F. Supp. 3d 280, 289 (D.D.C. 2015).

29. *Id.* at 286–89.

30. *Id.* at 289 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)).

31. *Union Neighbors*, 831 F.3d at 577, 583.

32. *Id.* at 576.

33. *Id.*

34. *See id.* at 574; Response Brief for the Federal Appellees, *supra* note 18, at \*30 ("FWS chose a range of alternatives for in-depth analysis that covered the full spectrum of potential impacts to the Indiana bat population . . .").

35. *Id.* at 578.

significantly from the Max Alternative, which would take no bats, and that an analysis of other variations with higher cut-in speeds was “not necessary.”<sup>36</sup> To bolster its point, FWS noted that there “exists an infinite array of potential protective measures that could be varied depending on habitat, feathering, cut-in speed, and season.”<sup>37</sup> The D.C. Circuit agreed that NEPA did not require FWS to analyze an infinite array of protective measures “nor even examine Union Neighbors’ propos[al].”<sup>38</sup> However, the D.C. Circuit held that, in light of the stated purpose of the EIS, the agency should have considered a “realistic mid-range alternative . . . that would take materially fewer bats than Buckeye’s proposal while allowing the project to go forward.”<sup>39</sup> By declining to consider any such alternative, FWS did not “consider a reasonable range of alternatives and [thus] violated its obligations under NEPA.”<sup>40</sup>

## II. ANALYSIS

Courts usually give substantial deference to agencies in fulfilling the procedural requirements of NEPA.<sup>41</sup> For example, in *Citizens Against Burlington, Inc. v. Busey*, the D.C. Circuit noted that it “review[s] an agency’s compliance with NEPA’s requirements deferentially,” adding that it would uphold an agency’s discussion of alternatives “so long as the alternatives are reasonable and the agency discusses them in reasonable detail.”<sup>42</sup> The Supreme Court has held that as long as an agency takes a “hard look” at the environmental consequences of its action, the agency has acted reasonably and a court should not “interject itself within the area of discretion of the executive as to the choice of the action to be taken.”<sup>43</sup> However, in *Citizens*, the D.C. Circuit also stressed that deference “[did] not mean dormancy,” and that it would not give agencies “license to fulfill their own prophecies.”<sup>44</sup> Similarly, the D.C. Circuit in *Union Neighbors* did not supplant FWS’s discretion in analyzing alternatives or determining which alternative to adopt, but, at the

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36. *Id.* at 576.

37. Response Brief for the Federal Appellees, *supra* note 18, at \*31.

38. *Union Neighbors*, 831 F.3d at 577.

39. *Id.* The D.C. Circuit emphasized that FWS had “recognized that ‘higher cut-in speeds may result in less bat mortality,’” and that protecting the Indiana bat was “one of the purposes behind the issuance of the ITP . . .” *Id.* at 576–77.

40. *Id.* at 577.

41. See *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (noting that the standard of review under NEPA is “deferential”). Especially in areas of scientific or technical expertise, courts “defer to ‘the informed discretion of the responsible federal agencies.’” *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

42. 938 F.2d 190, 196 (D.C. Cir. 1991).

43. *Kleppe*, 427 U.S. at 410 n.21 (quoting *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

44. *Citizens*, 938 F.2d at 196.

same time, the court was unwilling to defer to a range of alternatives that was unreasonable in light of the agency's stated goals for its NEPA analysis.<sup>45</sup>

In evaluating an agency's identified range of alternatives, courts often point to NEPA's aim of informing the public.<sup>46</sup> For example, in *Westlands Water District v. U.S. Department of Interior*, the Ninth Circuit held that the "touchstone" for courts reviewing challenges to an EIS under NEPA "is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation."<sup>47</sup> In *Union Neighbors*, the D.C. Circuit also identified NEPA as a tool for transparent decision making, noting that FWS's consideration of at least one economically viable alternative projected to take fewer bats would have "sharply defin[ed] the issues and provid[ed] a clear basis for choice among options."<sup>48</sup>

To assess an agency's choice of alternatives under a rule of reason, courts often look through the lens of the agency's stated goals. For example, in *Theodore Roosevelt Conservation Partnership v. Salazar*, the D.C. Circuit found that the Bureau of Land Management (BLM) had considered an acceptable range of alternatives in light of its stated purpose.<sup>49</sup> There, BLM's purpose in drafting an EIS was to "act upon" a proposal to increase extraction of natural gas in a project area.<sup>50</sup> Viewing the agency's action under a "rule of reason," the D.C. Circuit determined that the identified alternatives enabled BLM to act "in the most logical ways it could" by framing its NEPA analysis on whether to reject the proposal, adopt the proposal, or adopt a modified proposal.<sup>51</sup> Similarly, in *Citizens*, the D.C. Circuit held that the Federal Aviation Administration's consideration of only two alternatives was sufficient because the agency had adopted the project sponsor's goal of stimulating the Toledo economy.<sup>52</sup> In the D.C. Circuit's view, that goal "delimit[ed] the universe of the action's reasonable alternatives,"<sup>53</sup> and made it reasonable under NEPA for the agency to limit its analysis to the preferred alternative and a no-action alternative.<sup>54</sup>

In *Union Neighbors*, the D.C. Circuit also analyzed FWS's range of alternatives in the context of the agency's stated goals for the EIS, but the court

45. *Union Neighbors*, 831 F.3d 564, 577 (D.C. Cir. 2016).

46. *See, e.g., Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 143 (1981) ("Through the disclosure of an EIS, the public is made aware that the agency has taken environmental considerations into account.").

47. 376 F.3d 853, 872 (9th Cir. 2004) (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)); *see Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990) ("NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences.").

48. *Union Neighbors*, 831 F.3d at 577 (citing 40 C.F.R. § 1502.14 (2016)).

49. 661 F.3d 66, 74–75 (D.C. Cir. 2011).

50. *Id.* at 73.

51. *Id.* at 73–74.

52. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 198 (D.C. Cir. 1991).

53. *Id.* at 195.

54. *Id.* at 198.

came to a different conclusion on the reasonableness of the agency's identified alternatives.<sup>55</sup> In contrast to *Theodore Roosevelt*, where the purpose of BLM's action was simply to respond to a proposal, here FWS had identified the protection of an endangered species as one of its stated goals.<sup>56</sup> Furthermore, FWS had acknowledged that there was at least one additional viable alternative that "may result in less bat mortality."<sup>57</sup> As a result, the D.C. Circuit concluded that it was unreasonable for the agency to consider only an alternative at each extreme of the spectrum and a single mid-range alternative that the project sponsor had proposed.<sup>58</sup>

The D.C. Circuit's conclusion that NEPA required an additional mid-range alternative is a departure from past cases in which courts have deferred to agencies on the identification of alternatives.<sup>59</sup> In part, the ESA's strict protections afforded to endangered species, which undoubtedly was the impetus for the FWS's goal of protecting the Indiana bat, appears to have influenced the D.C. Circuit's reasoning.<sup>60</sup> This consideration of an underlying statutory authority echoes the reasoning of other courts that have assessed the degree of deference owed to an agency in a NEPA analysis. The court in *Citizens*, for example, held that in defining the goals of the project, an agency must consider the interests of all involved parties, as well as "the views of Congress" reflected in "the agency's statutory authorization to act."<sup>61</sup> In *Union Neighbors*, the D.C. Circuit followed a similar approach by evaluating the reasonableness of FWS's range of alternatives in light of the strong protections contemplated for endangered species under the ESA.<sup>62</sup> Thus, in order to satisfy its NEPA obligations and "inform both the public and the decisionmaker," FWS should have analyzed at least one alternative to Buckeye's proposal that was feasible and might take fewer bats.<sup>63</sup>

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55. *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 576 (D.C. Cir. 2016).

56. *See Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011); *Union Neighbors*, 831 F.3d at 575.

57. *Union Neighbors*, 831 F.3d at 576.

58. *Id.* at 577.

59. *See, e.g., Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 871 (9th Cir. 2004); (holding that the agency "was not required to consider more mid-range alternatives to comply with NEPA," even though the EIS only contemplated three of six possible alternatives); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978) ("Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.").

60. *Union Neighbors*, 831 F.3d at 576–77.

61. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991); *see City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) ("Statutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to identify . . . and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives.").

62. At oral arguments, the D.C. Circuit noted the significance of the fact that the Indiana bat is an endangered species and that the projected takes would add up over time. Oral Argument at 35:20, *Union Neighbors*, 831 F.3d 564 (No. 15-5147), <https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201603>.

63. *Union Neighbors*, 831 F.3d at 577 (citing *Citizens*, 938 F.2d at 195).

There are multiple ways to view the D.C. Circuit's departure from the broad deference generally given to agencies for NEPA analyses. One could view the decision narrowly as merely a court's insistence on strict consistency between an agency's stated goals for an EIS and the range of alternatives that the agency selects.<sup>64</sup> However, the D.C. Circuit also recognized that the lack of an additional alternative meant that the agency and the public were uninformed of a viable alternative that would take fewer bats and would, therefore, be more consistent with the goals of the ESA. Thus, one could read the D.C. Circuit's opinion as an indication that courts will be less willing to defer to agencies on NEPA analyses when the impacts of a proposed action collide with environmental protections provided by other statutes.

#### CONCLUSION

The D.C. Circuit's ruling in this case furthers the goals of NEPA by tightening the reins on deference given to agencies and requiring agencies to take greater care to ensure that the chosen range of alternatives is adequate to inform the decision maker and the public about a proposed project's significant impacts. In this case, the outcome led to a harder look at the impacts on the Indiana bat, while also requiring a sharper comparison between the project sponsor's proposal and other viable options. In future cases, other courts should follow the D.C. Circuit's approach of questioning agencies' self-defined ranges of alternatives, especially when the proposed projects similarly threaten highly valued public resources, like an endangered species. Ideally, this stricter stance will result in more thoughtful and informed analyses of environmental consequences.

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64. *See id.* at 574.