WildEarth Guardians v. Jewell: The Need for Regulations Directing Agencies to Consider the Impact of Their Decisions on Global Climate Change

Taylor Ann Whittemore

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol42/iss2/19

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38J28M
WildEarth Guardians v. Jewell: The Need for Regulations Directing Agencies to Consider the Impact of Their Decisions on Global Climate Change

INTRODUCTION

Coal mining in the Wyoming Powder River Basin is a major contributor to climate change.1 As of 2003, it was the largest source of coal in the country and was responsible for over a third of coal mining nationwide.2 Currently, the largest coal mine in the country operates within the “Wyoming portion of the Powder River Basin.”3 In WildEarth Guardians v. Jewell, environmental groups challenged the leasing of federal land for further coal mining in the Wyoming Powder River Basin.4 Specifically, the groups challenged the Bureau of Land Management’s (BLM) leasing decision under the National Environmental Policy Act (NEPA).5 The environmental organizations alleged several procedural flaws in the Final Environmental Impact Statement (FEIS) for the leases, including its failure to adequately consider the impact of the leasing decision on global climate change.6 The D.C. Circuit held that the BLM did not need to consider the project’s impacts on global climate change because the alleged impacts were too speculative.7 Thus, plaintiffs’ challenge failed on the merits because the court found that the FEIS was sufficient.8

With growing concerns about the effects of global climate change, the court’s position is dangerous and goes against NEPA’s very purpose: to ensure
agencies include environmental effects and concerns in their decision making.\(^9\) The Council for Environmental Quality (CEQ), the agency responsible for promulgating regulations to implement NEPA,\(^10\) has recently proposed new guidance that directs agencies to consider the impacts of projects’ emissions on global climate change in their environmental impact statements.\(^11\) Yet this guidance is not legally binding.\(^12\) The CEQ’s promulgation of an official regulation, by contrast, would force courts to acknowledge that agencies must consider their actions’ impacts on global climate change. This, in turn, would lead to more reasoned decision making, since agencies would have more relevant information to factor into their decisions. It could also lead to more successful NEPA challenges in future cases in which, like *WildEarth Guardians*, plaintiffs challenge the sufficiency of an agency’s climate change impacts analysis.

I. BACKGROUND

The Mineral Leasing Act authorizes the United States, through the BLM, to lease federal land that contains coal deposits.\(^13\) In 2005, Antelope Coal LLC filed an application with the BLM requesting that the publicly owned land next to their mine be offered for competitive lease sale.\(^14\) Five years later, the BLM approved the application by issuing a Record of Decision.\(^15\) The BLM issued a FEIS to support the Record of Decision.\(^16\) Various environmental groups including *WildEarth Guardians*, *Defenders of Wildlife*, and the *Sierra Club* brought a challenge to that FEIS.\(^17\)

The environmental organizations argued that increased coal mining would injure their members by contributing to climate change and causing local pollution, which would impair members’ ability to enjoy surrounding areas.\(^18\) Negative impacts would include “greater drought conditions; increased invasive species and insect infestations; increased fire frequency, severity, and extent; and a concordant reduction in biodiversity and sensitive species.”\(^19\) Overturning the district court, the D.C. Circuit held that these harms gave plaintiffs standing to pursue all claims with respect to the FEIS, and it thus

---

9. *Id.* at 302.
12. *Id.* at 1 n.4
15. *Id.*
17. *Id.* at 79, 87.
18. *Id.* at 84, 86–87.
19. *Id.* at 84.
considered plaintiffs’ claim that the FEIS failed to adequately address climate change impacts.\(^{20}\) Still, it ultimately found against plaintiffs on the merits.\(^{21}\)

II. ANALYSIS

A. Standard of Review

When reviewing a NEPA challenge, courts defer to an agency so long as its decision was not “arbitrary and capricious.”\(^{22}\) This standard creates a high bar for environmental plaintiffs to overcome, leaving little leeway for courts to rule in their favor. Moreover, CEQ guidelines are of limited use in efforts to surpass that bar. Though guidelines are given some weight as “useful,” courts hold that they are not entitled to deference.\(^{23}\) By contrast, the Supreme Court has ruled that “CEQ regulations are entitled to substantial deference.”\(^{24}\) Thus, replacing CEQ’s climate change guidelines with regulations would give more weight to environmental plaintiffs’ claims that effects on global climate change need to be considered. For, as it stands, if agencies such as the BLM reason that it is not feasible or useful to consider global climate change effects, courts must defer to that interpretation unless it is arbitrary or capricious.\(^{25}\)

B. Goals of NEPA

The Supreme Court has stated that NEPA has two aims. First, to “[place] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action” and, second, to ensure that “the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.”\(^{26}\) The outcome in *WildEarth Guardians* sits poorly with these goals. The BLM approved a lease for a coal mining company in the Wyoming Powder River Basin. This lease allows further mining in what is already the largest source of coal in the country, exacerbating emissions and local pollution.\(^{27}\) Furthermore, it approved the lease at a time when there were almost a dozen other pending lease applications to mine coal in the same basin, which would further contribute to pollution.\(^{28}\) This failure to consider the effect of further mining on global climate change cannot lead to reasoned decisions.\(^{29}\) Additionally, if the BLM fails to state the lease’s environmental effects, the public cannot trust that the BLM has truly considered environmental concerns in its decision.

\(^{20}\) Id. at 83, 93–94; *WildEarth Guardians*, 738 F.3d at 302, 308, 312.
\(^{21}\) *WildEarth Guardians*, 738 F.3d at 312.
\(^{22}\) Id. at 308.
\(^{23}\) Id. at 309 n.9.
\(^{25}\) *WildEarth Guardians*, 738 F.3d at 308–09.
\(^{27}\) *WildEarth Guardians*, 738 F.3d at 303, 309.
\(^{28}\) Id. at 310.
\(^{29}\) See id. at 304.
C. State of the Guidelines

In 2010, CEQ issued guidelines for agencies on how to examine an action’s effects on climate change, which the court in WildEarth Guardians considered in its analysis. These guidelines recommended that agencies consider the impacts of projects emitting more than twenty-five thousand metric tons of carbon dioxide or carbon dioxide equivalents annually. Otherwise, the guidance merely encouraged agencies to look at potential climate change impacts. When there is “significant uncertainty” as to impacts, the guidance suggested that it might be useful to consider the effects against the baseline scenario as specifically as an agency can, within scientific constraints. These guidelines were never finalized, and CEQ issued new draft guidelines in December 2014. The new guidelines maintain the same baseline of twenty-five thousand metric tons as the point after which agencies should quantify their emissions. However, that baseline only applies to quantifying emissions, not to analyzing their effects.

Instead, the draft CEQ guidelines advise agencies to consider effects, regardless of whether or not they must quantify emissions. Agencies should “discuss direct, indirect, and cumulative impacts . . . of a proposed action’s reasonably foreseeable emissions and effects.” The 2014 draft guidance also highlights the need for agencies to consider alternatives and suggests that agencies should consider emissions mitigation.

These guidelines underscore key deficiencies in agencies’ current reviews, while still only asking agencies to consider climate change within reason. The guidance does not require that agencies “undertake exhaustive research” of climate change impacts but rather asks that agencies incorporate existing research and disclose the analytical limitations of such research in their impact

30. See id. at 309; DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK § 10:26 (2014) [hereinafter CLEAN AIR ACT HANDBOOK].

31. CLEAN AIR ACT HANDBOOK, supra note 30, § 10:26. Carbon dioxide equivalent is “[a] metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential.” Global warming potential is “[a] measure of the total energy that a gas absorbs over a particular period of time . . . compared to carbon dioxide.” The carbon dioxide equivalent of a gas is calculated by “multiplying the tons of the gas by the associated [global warming potential].” Glossary of Climate Change Terms, ENVIRONMENTAL PROTECTION AGENCY, available at http://www.epa.gov/climatechange/glossary.html.

32. Id.


35. 2014 REVISED DRAFT GUIDANCE, supra note 11, at 18.

36. See id.

37. Id. at 21.

38. Id. at 4, 10–12.

39. Id. at 4, 19–20.
statements. This disclosure would inform the public about why agencies are choosing not to discuss certain climate change impacts, and obligate agencies to discuss effects when they are not limited in their capacity. Part II.D discusses how these guidelines may have impacted the court’s reasoning in *WildEarth Guardians* and how they may impact future cases.

### D. Effect of the Guidelines

Under CEQ’s new proposed guidelines, it is possible the *WildEarth Guardians* court would have more rigorously reviewed the BLM’s analysis of climate change impacts and found it insufficient, particularly if the new guidelines were entitled to deference as regulations. Specifically, the 2014 guidelines require that agencies discuss effects, cumulative impacts, and alternatives, all of which plaintiffs insisted the BLM should have considered in its FEIS. First, the plaintiffs argued that though the BLM quantified emissions statewide, it failed to consider the impacts of those emissions, particularly with respect to the cumulative impact of the pending lease applications. The BLM did not quantify the project’s overall contribution to global emissions or discuss global impacts. The agency argued that it could not associate the project with specific global effects. It did not, however, explain why it did not quantify the contribution to global emissions.

The court concluded that the BLM did not need to discuss impacts because specific emissions could not be tied to specific impacts scientifically.

Second, as to the cumulative impacts of the large number of pending lease applications, the court concluded that it was not reasonably foreseeable that all of the lease applications would be approved. With the new emphasis on cumulative impacts in the 2014 guidelines, the court may have come out differently on this point. Third, plaintiffs argued that the BLM failed to adequately consider alternatives, particularly those that plaintiffs raised in comments on the FEIS. In response, the court deferred to the agency’s reasoning, finding that the failure to consider alternatives did not rise to the level of arbitrary and capricious.

If CEQ had promulgated its new 2014 guidelines as regulations, the court could have used them to find that the BLM should have considered other alternatives more fully, since the new guidelines...
highlight the need for a more thorough review of alternatives. Ultimately, it is difficult to predict what the result would have been in WildEarth Guardians even if CEQ’s guidance had been codified as regulations, since regulations are only entitled to a court’s deference. Yet, it is important that CEQ embed these standards in regulations to dispel agencies’ and courts’ confusion regarding what is required when agencies evaluate global climate change impacts.

Comparing WildEarth Guardians to a recent district court case demonstrates the potential for this confusion. In High Country Conservation Advocates v. U.S. Forest Service, the court found that the failure to consider the climactic impacts of greenhouse gas emissions was arbitrary and capricious, reaching the opposite conclusion of the court in WildEarth Guardians. Like the BLM in WildEarth Guardians, the agency in High Country Conservation Advocates quantified greenhouse gas emissions, gave a general discussion of the climate change effects, and then said that going beyond this general analysis was impossible. The court held that this analysis was insufficient because the agency failed to use a tool at its disposal—the social cost of carbon protocol, which can be used “to quantify a project’s contribution to costs associated with global climate change.” The 2014 guidance, if promulgated as regulations, would have required the agency to either use available analytical tools to evaluate climate change, such as the social cost of carbon protocol, or explain why it could not. Here, the agency likely would have had to use the tool since the court noted that the social cost of carbon was actually used in the draft environmental impact statement. Similarly, the court in WildEarth Guardians might have insisted, under the 2014 guidelines, that the BLM use the tools at its disposal to analyze climate change impacts, and disclose why it did not analyze certain impacts.

CONCLUSION

CEQ has thus far failed to promulgate regulations for analyzing a proposed action’s impact on global climate change. This has led to confusion among agencies, courts, and lawyers about how to assess the full environmental impact of agency action, as demonstrated by cases such as WildEarth

56. See 2014 REVISED DRAFT GUIDANCE, supra note 11, at 15–16, 27; see also High Country Conservation Advocates, 2014 U.S. Dist. LEXIS 87820, at *29.
58. See id.; WildEarth Guardians, 738 F.3d at 309; 2014 REVISED DRAFT GUIDANCE, supra note 11, at 15–16.
59. See 2014 REVISED DRAFT GUIDANCE, supra note 11, at 1 n.4 (stating that the “guidance is not a rule or regulation”).
Guardians and High Country Conservation Advocates. This confusion is dangerous because it allows agencies to circumvent consideration of how to minimize climate change impacts. Furthermore, it prevents the public from having the information necessary to criticize agency decisions. Though CEQ’s 2014 draft guidance can aid a court in analyzing an agency’s reasoning, the guidance is not entitled to deference. On the other hand, adopting regulations would give environmental plaintiffs a tool that is entitled to deference. As such, CEQ should adopt its guidance as regulations, thus paving the way for agencies and courts to consider global climate change when making and reviewing decisions.

Taylor Ann Whittemore

---

61. WildEarth Guardians, 738 F.3d at 309 n.5.  

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.