CASE SUMMARY

The facts underpinning PEER's action against the Department of the Interior (DOI) regarding the Desert Tortoise are relatively simple. The applicable law is, at least initially, not quite as clear.

Approximately ½ of the Mojave National Preserve (in southeastern California) is designated as "critical habitat" for the Mojave population of the desert tortoise, members of which are classified as threatened under the Endangered Species Act (ESA). In 2001, the National Parks Service (NPS) issued a General Management Plan/Environmental Impact Statement (GMP/EIS) (accompanied by a Record of Decision regarding the adoption of the GMP/EIS) for the Mojave National Preserve. An EIS is required (under the National Environmental Policy Act, NEPA) regarding every "Major Federal Action." Because adoption of a management plan for an entity of the National Parks System (i.e., the Mojave National Preserve) is a major federal action, the adoption of the EIS portion of the GMP/EIS was required under NEPA.

PEER's lawsuit does not challenge the adoption of the GMP/EIS. PEER's lawsuit basically alleges that the DOI (via the NPS) was unreasonable in denying a petition PEER brought that was intended to force NPS to adopt regulations "proposed"[1] as part of the GMP/EIS. That is, PEER filed the petition mentioned above in 2002, and though the DOI apparently made written comments in 2002, 2003, and 2004 that indicated it would seek hunting-related regulations similar to those outlined in the GMP/EIS, the DOI ultimately denied PEER's petition in 2010. Therefore, as of 2010, DOI confirmed it was *not* going to seek enactment of the new hunting regulations proposed in the GMP/EIS.

The basis for the DOI's denial is explained in detail in a letter dated October 14, 2010. In sum, the denial was based on the simple fact that in the nearly ten years since the GMP/EIS was adopted, NPS has not observed desert tortoise injuries or deaths that would have been prevented by enacting the hunting regulations PEER seeks. Indeed, the desert tortoise (because of its threatened status and concomitant protections under the ESA) appears to be, in part, a "stalking horse" for PEER's attempt to limit hunting (and completely eliminate varmint hunting) in the Mojave National Preserve.[2]

PEER's complaint includes two causes of action: 1) that the denial of PEER's petition

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[1] The GMP states "Hunting will follow California Department of Fish and Game (CDF&G) regulations. The Preserve will seek the following [hunting-related regulations]." GMP at page 78. Further, a comparison of the proposed regulations PEER attached to its petition shows that PEER was looking to have regulation enacted that was broader than what was proposed in the GMP. It appears to be PEER's position that the regulations it was proposing are required pursuant to the 1994 Recovery Plan for the Mojave Population of the Desert Tortoise.

[2] See http://www.peer.org/news/news_id.php?row_id=1381 ("Lawsuit to Protect Varmints in Mojave National Preserve").

was so unreasonable that it was "arbitrary and capricious and an abuse of discretion" and thus can be vacated pursuant to the generally applicable laws regarding federal agency decisionmaking (i.e., the Administrative Procedure Act, specifically 5. U.S.C. § 706), and 2) the failure to do NEPA analysis regarding the denial violated NEPA.

As to PEER's "arbitrary and capricious" allegation, PEER alleges that the decision to deny its petition (and thus deny promulgating new hunting regulations) was done "without factual support or a rational basis." The letter of October 14, 2010, however, states that NPS' "experience has not indicated that shooting of tortoises during their active season is actually occurring in the" Mojave National Preserve. Further, that letter states that "since the monitoring of desert tortoise populations was initiated in 2001, only one carcass has been discovered with a bullet hole [and that i]t is not know if the tortoise was shot and killed, or whether someone shot at the empty shell." Thus, it appears that firearms are not being use to harm desert tortoises, destroying the already flawed argument[3] that additional hunting regulations will lead to a reduction in direct use of firearms on desert tortoises.

The letter also provides evidence that the presence of hunter-shot game left in the field has not (contrary to earlier concerns) been shown to result an increased raven predation risk (a known desert tortoise predator) in the Mojave National Preserve.

> Ravens have not generally been observed in large numbers in the areas where hunters typically shoot non-game species [e.g., varmints], and there is no evidence that ravens feeding on carcasses left by hunters (usually jackrabbits and coyotes) are a problem for tortoises. While coyote hunters do leave carcasses behind, there has only been one observation of a raven feeding on a coyote carcass in the preserve. Jackrabbits are not normally hunted during the spring and summer, when desert tortoises are active.

(October 14 letter).

Objectively, the evidence reiterated above is not particularly strong. Because, however, a "court will compel an agency to institute rulemaking proceedings only in extremely rare instances"[4] and because decisions based on relatively minimal evidence can still defeat an

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[3] Some of the older information related to desert tortoises in the Mojave National Preserve indicated that people who were directly shooting desert tortoises would be difficult to prosecute because if they were caught, they would simply lie and say they were hunting rabbits or the like. Thus, the argument was that rabbit (and other hunting) should be curtailed so the vandals shooting tortoises would not have the hunting "excuse." Setting aside the questionable logic of that argument, the argument is now probably moot: firearms are now generally allowed in national preserves (and National Park System units generally). *See* 36 C.F.R. § 2.4(h).

[4] *Ar. Power & Light Co. v. Interstate Commerce Comm'n*, 725 F.2d 716, 723 (D.C. Cir. 1984).

"arbitrary and capricious" allegation,[5] it seems more likely than not that the denial will be upheld. To be sure, the fact that the DOI is arguably taking a position that is contrary to its previous position on the issue does weigh in favor of finding the denial to be arbitrary and capricious. That fact alone, however, seems unlikely to overcome the general deference given to agency decisions.[6] Accordingly, the legal issue regarding PEER's first cause of action is simple, and requires the court only to determine if the DOI's denial was sufficiently reasonable to put it outside the realm of "arbitrary and capricious" decisionmaking.

PEER's second cause of action is more complex from a legal standpoint. That is, though the second cause of action is (perhaps intentionally) unclear, it basically alleges that NEPA was violated because 1) the denial was arbitrary and capricious, 2) that no EIS (or alternative explanation regarding NEPA considerations) was created regarding the denial (i.e., the decision not to pursue the hunting regulations PEER seeks), and 3) that the denial required a supplement to the 2001 GMP/EIS be prepared.

As to the first two allegations in the second cause of action, it is not clear if NEPA is even applicable. NEPA applies to "Major Federal Actions," a term which does include some types of inaction.[7] Generally speaking, denial of a petition for rulemaking, in and of itself, is probably not a "Major Federal Action." It is unclear at this point if the denial could be legitimately considered an "inaction"-type major federal action because it operates as a confirmation of the failure to act regarding the potential regulations proposed in the GMP/EIS's "Plan Actions." On first blush, this seems unlikely, as there is well-established precedent indicating NEPA is about giving full consideration and public exposure regarding a proposed action, not whether the proposals found in a NEPA Document (i.e., an EIS) are actually carried out. *See Robertson v. Methow Valley*

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[5] "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*,463 U.S. 29, 43 (1983). Responsibilities of reviewing court under "arbitrary and capricious" standard of Administrative Procedure Act include ascertaining facts on which agency relied in making decision, determining whether those facts have some basis in record, and judging whether a reasonable decision maker could respond to those facts as agency did. *Recording Industry Asso. v Copyright Royalty Tribunal*, 662 F.2d 1, 8 (D.C. Cir. 1981) (citation omitted). To uphold agency action, court must find rational basis for agency's decisions in record, and must ensure that agency has demonstrated rational connection between facts found and choice made. *Wawszkiewicz v Dep't of Treasury*, 670 F2d 296, 301 (D.C. Cir. 1981).

[6] Courts give a "high level of deference" regarding scientific judgements within an agency's area of expertise. *See Rempfer v. Sharfsein*, 583 F.3d 860, 867 (D.C. Cir. 2009) (citations omitted).

[7] *See* 40 C.F.R. § 1508.18(a).

Citizens Council, 490 U.S. 332, 353 (1989) ("NEPA imposes no substantive requirement that mitigation measures actually be taken . . . .").

The NEPA "arbitrary and capricious" analysis will be the same as above, and needs not to be reiterated. The allegation that an EIS (or Environmental Assessment, or Categorical Exemption, as the case may be) is required as prerequisite to the denial is probably foreclosed by the fact that the denial (operating a final statement refusing to "comply" with the proposal in the GMP/EIS) simply does not constitute a major federal action. It seems more logical that, if anything, the denial is sufficiently related to the (2001) GMP/EIS that the denial needs to be treated in the context of *that action* (i.e., the adoption of the GMP) rather than independently. It may be that a supplement to the GMP/EIS is appropriate.

The issue of what steps (if any) the DOI was required to take prior to issuing the denial (and thereby confirming it has decided to not seek the proposed hunting regulations) is not clear without detailed analysis. Regardless, without delving into the intricacies of NEPA, it can be stated that the general rule is that a supplement to an EIS is required if:

> 1) The [federal] agency makes substantial changes in the proposed action that are relevant to environmental concerns, or
> 2) There are significant new circumstances or information relevant to the environmental concerns [that bear] on the proposed action or its impacts.

40 C.F.R. § 1502.9(c)(1)(ii).

> Agencies have a continuing obligation to consider new information that comes to light, even after the issuance of an EIS. *See* 40 C.F.R. § 1502.9 (c)(1)(ii) (requiring the agency to prepare supplements to either draft or final environmental impact statements if '[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts'); see also *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) ('[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. . . . On the other hand, . . . NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval.'); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000) ('When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require [a supplemental EIS].') (internal quotation marks and citation omitted) . . . .

N. Idaho Comty. Action Network v. U.S. DOT, 545 F.3d 1147, 1155 (9th Cir. 2008) (omissions in *N. Idaho* except final omission). It seems there is at least a colorable argument that failing to seek the proposed regulations is a "substantial change in the proposed action." Similarly, it does not seem unreasonable to argue that if there is new information confirming that additional hunting regulations are *not* needed to protect the desert tortoise, such information

would be contrary to statements made in the GMP/EIS, and that fact would suggest a supplement to the EIS is appropriate.

Interestingly, PEER does not frame the need for a supplement as it is discussed above on the issue of "new information," alleging instead that "[t]he decision not to adopt hunting regulations also constitutes a significant new circumstance relevant to environmental concerns and bearing on the proposed action (the GMP) and its impacts." PEER likely chose not to frame the issue based on the "new evidence" DOI has presented (i.e., the information showing new hunting regulations would not protect the desert tortoise) because doing so would force PEER to admit that NPS *does* have new evidence supporting the denial. Such admission would be devastating to PEER's claim that the denial was done "without factual support or a rational basis."

Whether based on PEER's arguments or the fact that DOI has apparently found new information that will affect the impacts of the action (i.e., the adoption of the GMP), it is plausible that the Court will vacate the denial and require a supplement to the EIS to be created. Of course, there is a very good chance that if the Court does order a Supplement to the GMP/EIS, the Supplement will be more clear in explaining why the proposed hunting regulations are unnecessary, which should be a benefit to hunters in the Mojave.

At this early point in the litigation, there is little information or legal precedent that is determinative regarding whether the "new information/circumstance" is sufficiently important to justify undoing the denial. Because federal defendants generally take a limited approach to briefing (i.e., they tend to just wait until the summary judgement phase to address their contentions, which are often heavily reliant on the deference the federal agency typically receive), there is perhaps an opportunity for NRA to intervene in this action and make good case law while also keeping up a public presence in the ongoing debate concerning the proper balance among uses of government-managed lands.

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