

Consideration of Cumulative Impacts Can Be Deferred to a Later EIS

A recent Ninth Circuit decision offers guidance on evaluating connected actions and cumulative impacts under



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In 2005,

the United States and Japan agreed to relocate 8,000 Marines from Okinawa to Guam. To maintain operational and training capacity, the Navy determined that it would need to develop new training facilities in Guam and the Commonwealth of the Northern Mariana Islands ("CNMI"). The Navy issued an EIS ("the Relocation EIS") and a Supplemental EIS ("SEIS") that analyzed the troop relocation as well as the development of new training facilities on Guam and Tinian (one of the islands in the CNMI) that would be necessary to accommodate the troop relocation. Around the same time, the Navy began preparing the CNMI Joint Military Training EIS/Overseas EIS ("the CJMT EIS"), which evaluated the development of additional new training complexes on Tinian and Pagan (another island in the CNMI). The plaintiffs filed a lawsuit challenging the Relocation EIS and SEIS. At the time the lawsuit was filed, the Navy had not yet published a Final CMJT EIS. **Connected Actions.** The court rejected the plaintiffs' argument that the troop relocation and all the new training facilities on the CNMI were connected actions that should have been studied in a single EIS. The court explained that they were not connected actions because although they served some of the same purposes and goals, each action had independent utility (i.e., each action reasonably could be completed without the other). As such, they were not required to be considered in the same EIS. **Cumulative Impacts.** The plaintiffs also argued that the Relocation EIS and SEIS should have considered the cumulative impacts of the additional training facilities in the CNMI that were being considered in the CMJT EIS. The court held that it was not improper for the Navy to defer consideration of cumulative impacts to the CMJT EIS: "We have consistently held that agencies can consider the

cumulative impacts of actions in a subsequent EIS when the agency has made clear it intends to comply with those requirements and the court can ensure such compliance. . . . By issuing a notice of intent to prepare [the CMJT EIS], the Navy has impliedly promised to consider the cumulative effects of the subsequent action in the future EIS and the Navy should be held to that promise." *Standing*. The plaintiffs asserted that the Navy should have considered alternative locations for the troop relocation beyond Guam and the CNMI. The court held that the plaintiffs lacked standing to raise this claim because it was not redressable by the court. The treaty between the United States and Japan stated that the troops would be relocated from Okinawa to Guam. The court explained that it could not provide the relief sought by the plaintiffs—an order directing the Navy to consider alternative locations—because it would violate separation-of-powers principles by requiring the executive branch to rescind or modify the treaty with Japan.

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