

APPLEGATE CITIZENS OPPOSED TO TOXIC SPRAYS (ACOTS)
SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS (SOCATS)

IBLA 83-644

Decided June 29, 1984

Appeals from decisions of the Medford, Oregon, District Office, Bureau of Land Management, denying protests against adoption of the supplemental environmental assessment for the "1983-1984 Herbicide Program for Research/Progeny Sites," OR-110-83-35.

Vacated.

1. Environmental Quality: Environmental Statements -- Environmental Quality: Herbicides -- National Environmental Policy Act of 1969: Environmental Statements

A decision to utilize herbicides including 2,4-D in a vegetation management program will be vacated where it is based on an environmental assessment which lacks a worst case analysis and the record discloses uncertainty regarding the effect of the herbicides on the human environment.

2. Environmental Quality: Environmental Statements -- Environmental Quality: Herbicides -- National Environmental Policy Act of 1969: Environmental Statements

Although a worst case analysis may be performed in the context of an environmental assessment prepared to supplement a programmatic environmental impact statement, the environmental assessment becomes the functional equivalent of an environmental impact statement and the minimum 45-day comment period for a draft environmental impact statement is applicable.

APPEARANCES: Christopher Bratt, cochairman, for ACOTS; Phyllis Cribby, secretary, for SOCATS; Eugene A. Briggs, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Applegate Citizens Opposed to Toxic Sprays (ACOTS) and Southern Oregon Citizens Against Toxic Sprays (SOCATS) appeal from decisions of the Medford, Oregon, District Office, Bureau of Land Management (BLM), dated April 6, 1983, and April 11, 1983, respectively, denying their separate protests.

The subject of the protests was the supplemental environmental assessment (EA) for the 1983-84 herbicide spraying program for research/progeny sites, OR-110-83-35, adopted by BLM on February 23, 1983.

The proposed action reviewed by this EA was described therein as follows:

[BLM] is proposing to treat approximately 400 acres with herbicides during 1983 and up to 850 acres in 1984. The exact acreage and specific areas to be treated in 1984 will be reflected in an amendment to this EA.

The underlying need for treatment is to protect the Medford District's investment in research and progeny testing and to ensure consistency within developed research planning. Treatment will control unwanted vegetation on selected sites.

This herbicide treatment is part of BLM's 10-year vegetation management program in Oregon, for which it originally prepared a programmatic environmental impact statement (EIS) entitled "Vegetation Management with Herbicides: Western Oregon, 1978-1987." BLM annually supplements this EIS with site-specific EA's prepared by the district offices which form the basis of the decision whether to spray and, if so, how and what to spray.

In 1979, SOCATS filed suit in the United States District Court, in Oregon, 1/ to enjoin BLM from herbicide spraying in the Medford District, arguing that the annual EA's are inadequate. 2/ The District Court, Judge Frye, granted summary judgment on September 9, 1982, in favor of SOCATS and enjoined BLM from spraying. 3/ On December 15, 1982, Judge Frye modified the injunction to exclude certain research areas, progeny test sites, and tree seed orchards identified by BLM as projects which would be damaged without the proposed treatment. 4/

Pursuant to the modified injunction, BLM conducted an environmental review and prepared a draft supplemental EA, OR-110-83-35, entitled "1983-1984 Herbicide Program for Research/Progeny Sites." The EA analyzed the proposal to apply various herbicides including 2,4-D on certain sites in the Medford District. The areas proposed for spraying under the program were excluded from the injunction. This draft EA was released in February 1983.

1/ Southern Oregon Citizens Against Toxic Sprays v. Watt, Civ. No. 79-1098FR (D. Ore. 1979).

2/ SOCATS and others have also submitted previous administrative appeals to the Board of Land Appeals alleging inadequate annual EA's for the Medford District's vegetation management program. E.g., SOCATS (On Reconsideration), 72 IBLA 9 (1983); Dolores M. Lisman, 67 IBLA 72 (1982). 3/ A motion for reconsideration was denied and the injunction clarified in a supplemental order dated Oct. 20, 1982. Judgment was entered on Nov. 23, 1982.

4/ The Dec. 15, 1982, order was conditioned upon reinstatement by the Board of Land Appeals of certain administrative appeals previously dismissed as moot. Cases docketed as IBLA 81-740, 82-64, 82-648, 82-660, and 82-717 were reinstated and considered in SOCATS (On Reconsideration), supra.

SOCATS and ACOTS both commented on the draft in separate presentations to BLM. A finding of no significant impact and a decision to adopt the proposed action were issued by BLM on February 23, 1983. BLM responded to the comments made by SOCATS and ACOTS in separate letters dated March 4, 1983.

On March 22, 1983, SOCATS and ACOTS each filed a protest of the decision to adopt the program, alleging BLM's lack of consideration of issues raised by them relating to insufficiency of the EA under the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1982). The decisions denying these protests led to the appeals presently before the Board.

In anticipation of appeals of the protest denials, BLM filed a request with the Board of Land Appeals on April 18, 1983, to place the decision in "full force and effect" under 43 CFR 4.21(a). It argued that timely treatment of the research and progeny sites to ensure the program's integrity is in the best interest of the public. The Board found that the public interest required that the decision denying the protest be given full force and effect and granted the request in an order dated April 29, 1983.

[1] Subsequently, on appeal from the decision of the District Court, the Ninth Circuit Court of Appeals held that uncertainty regarding the safety of even low doses of the herbicide 2,4-D -- the possibility that the safe level of exposure to the herbicide is low or nonexistent -- creates a possibility of significant adverse effects on the human environment requiring the preparation of a worst case analysis (WCA) under 40 CFR 1502.22. 5/ Southern Oregon Citizens Against Toxic Sprays, Inc. (SOCATS) v. Clark, 720 F.2d 1475, 1479 (9th Cir. 1983). The fact that the worst case is unlikely to occur was held not to preclude the necessity of preparing a WCA: "The BLM's belief that its herbicides are safe does not relieve it from discussing the possibility that they are not, when its own experts admit that there is substantial uncertainty. When uncertainty exists, it must be exposed." Id. at 1479 (emphasis

5/ The text of the regulation provides as follows:

"When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

"(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

"(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g. the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence." 40 CFR 1502.22.

in original). In addition, the court held that the fact that a herbicide has been registered with the Environmental Protection Agency does not negate the requirement to prepare a WCA. Id. at 1480.

[2] The WCA may be performed in the context of an EA prepared to supplement a programmatic EIS. Id. at 1480-81. However, where the WCA is included in the EA so that the EA becomes the functional equivalent of an EIS, the minimum 45-day comment period for a draft EIS is applicable. 40 CFR 1506.10(c); Save Our EcoSystems (SOS) v. Clark, No. 83-3908, slip op. at 9-10 (9th Cir. Jan. 27, 1984).

Accordingly, we conclude in light of the decisions of the Ninth Circuit Court of Appeals that a determination to make a spray application of herbicides including 2,4-D requires preparation of a WCA. Although this may be accomplished by means of an EA which supplements the EIS, provisions regarding notice and opportunity for comment applicable to preparation of an EIS must be followed. Review of the record in this case discloses that the supplemental EA for application of herbicides on research/progeny sites contains no WCA. Further, it is clear that the time allowed for comment on the draft EA was far less than the required period of time.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

R. W. Mullen
Administrative Judge

