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Tinian Women Association v. U.S. Department of Navy—Ninth Circuit rejects NEPA challenge to RODs implementing EIS and SEIS directed to relocating Marine Expeditionary Force from Okinawa to Guam

The United States and Japan entered into a 2005 alliance agreement that resulted in a decision to move the III Marine Expeditionary Force numbering approximately 8000 from Okinawa to Guam. The Department of the Navy issued a relocation environmental impact statement and related record of decision in 2010 addressing the Marines' relocation "including the development and construction of training facilities on Guam and Tinian, one of the three principal islands of the [Commonwealth of the Northern Mariana Islands]." Five years later, the Navy issued a relocation supplemental EIS and ROD approving the construction of a live-fire training range on Guam at a different location than in the EIS. During the latter NEPA process, it issued a notice of intent to develop a CNMI Joint Military Training Environmental Impact Statement/Overseas Environmental Impact Statement (CJMT Draft EIS) for the purpose of "propos[ing] four training range complexes on Tinian and two training range complexes on Pagan, a volcanic island to the north." The plaintiff organizations sought judicial review of the EIS and FEIS for failure "to consider (1) the impact of all mission essential training for Guam-based Marines and (2) stationing alternatives beyond Guam and the CNMI." The district court rejected the first NEPA challenge and dismissed the second on Article III standing and political question grounds. *Tinian Women Ass'n v. U.S. Dep't of Navy*, No. 16-cv-00022, 2018 WL 4189832 (D.N.M.I. Aug. 31, 2018).

The Ninth Circuit affirmed the judgment but held that the second claim should be dismissed for lack of Article III standing without reaching the political question ground. *Tinian Women Ass'n v. U.S. Dep't of Navy*, No. 18-16723, 2020 WL 5583664 (9th Cir. Sept 18, 2020). With respect to the first claim, the organizations contended that the Navy erred in not treating the "decision to relocate troops to Guam and [to] construct training facilities on the CNMI" as "connected actions" requiring a single EIS and, alternatively, that "because the proposed training sites discussed in the CJMT Draft EIS will magnify the environmental effect of relocating Marines to Guam, these 'cumulative impacts' must be addressed in the Relocation EIS." Agreeing that "connected actions must be considered in a single EIS[,]" the panel nevertheless held that "NEPA does not require an agency to treat actions as connected if they have independent utility and purpose" and that

> [a]lthough the two actions have overlapping goals—Marines on Guam will certainly take advantage of the training ranges and facilities in the CNMI—they also have independent utility. As the district court noted, "the national security and defense goals of the Guam relocation and CJMT proposals are 'overlapping,' but they are not 'co-extensive.'" ... Nor can we conclude that it would be arbitrary or irrational for the Marines to relocate to Guam and receive part of their required training elsewhere—especially given the current nature of the Marines' training in Okinawa. While it may

be more convenient for the Marines to have these training facilities closer, there is no evidence showing they *must* be.

Turning to the cumulative-impacts argument, the panel also agreed with the organizations that they satisfied the "low burden" of showing that the impacts from the proposed range and training areas at issue in the CJMT Draft EIS process might constitute "other past, present, and reasonably foreseeable future actions" under 40 C.F.R. § 1508.7 properly considered by re-opening the 2010 EIS. However, like the district court, it concluded that the Navy could address any cumulative impacts in the ongoing draft EIS process. Circuit precedent, it stated, has "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." Here, "[b]y issuing a notice of intent to prepare an EIS for the training and ranges in the CNMI, 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."

As for the second claim, the panel concluded that the organizations' procedural injury in fact met the first Article III standing requirement. "But [they do] not—and cannot— show that this right, if exercised, could protect [their] concrete interests, because doing so would require us to order the Navy to modify or set aside the Agreement between the United States and Japan. Regardless of the Navy's analysis of alternate stationing locations for the Marines, it cannot upend that agreement." Thus, "even if the Navy's action was procedurally flawed, 'a court could not set aside the next, and more significant, link in the chain—the United States' entrance into the Treaty.'" The Article III redressability requirement, therefore, could not be satisfied.

The panel, finally, found no abuse of discretion on the district court's part in deeming waived the plaintiffs' request to amend their complaint "[b]ecause [they] explicitly raised the ... claim for the first time in summary judgment briefing, more than two years after the litigation commenced and six months after the administrative record was filed, and because [they] gave no prior notice to the Navy and requested leave to amend only after moving for summary judgment."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/18/18-16723.pdf