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## Sierra Club Wins Challenge to RUS Approvals of Coop Plant Expansion

A federal district court has sided with the Sierra Club in a nearly four-year battle over approvals issued by the Rural Utilities Service (RUS) to a Kansas electric cooperative. The approvals—which were given pursuant to a debt restructuring agreement—would have allowed Sunflower Electric Power Corporation to expand its coal-fired plant in Holcomb, Kansas, by 895 megawatts. The ruling could have significant implications for RUS borrowers.

In this case, public financing was not at issue—*private* funds would finance the 895-megawatt expansion. But the Sierra Club complained that the RUS approvals were invalid because the agency did not perform an environmental review under the National Environmental Policy Act (NEPA).

RUS and Sunflower had argued that NEPA review was not required under 7 C.F.R. § 1794.3. That regulation states: “Approvals provided by RUS pursuant to loan contracts and security instruments, including approvals of lien accommodations, are not actions [under NEPA].”

Sunflower also had argued that the issue was moot since RUS approvals had already been granted, and RUS had no authority to impose environmental mitigation measures on the project.

In a memorandum opinion released this week, Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia concluded in pertinent part:

- RUS’s involvement in the expansion was a “major federal action” under NEPA (thus triggering environmental review) due to the control RUS had through its debt restructuring contracts with Sunflower, which gave RUS the right to prior approval of any agreement or arrangement for development of the Holcomb expansion;
- RUS’s involvement in the expansion was also a “major federal action” under NEPA as a project “entirely or partly financed” by a federal agency since (1) the debt restructuring made the Holcomb expansion possible by reducing Sunflower’s debt burden to RUS by hundreds of millions of dollars, and (2) RUS agreed to release its lien covering the property necessary for the plant expansion if and when it is built;
- RUS’s interpretation of § 1794.3 was not entitled to deference because, among other reasons, RUS did not simply grant approvals under pre-existing contracts; rather, entirely new agreements were created. Also, RUS’s interpretation conflicted with NEPA and regulations from the Council on Environmental Quality; and
- The case was not moot since (1) effective relief, including retroactive relief, can be granted under NEPA even if the transaction or approval by an agency to which NEPA applies has been completed, and (2) RUS maintained authority to impose mitigation measures over Sunflower by contractual agreement.

The parties will next brief issues relating to the appropriate remedy.

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Though not a facial challenge to RUS regulations, the ruling could have significant implications for RUS borrowers. One of the more troublesome holdings is that RUS control of a borrower's actions stemming from loan contract approval rights can be sufficient to constitute a "major federal action" under NEPA.

*Sierra Club v. USDA*, Docket No. 1:07-cv-01860-EGS (D.D.C. filed Oct. 16, 2007).

Please click [here](#) for the opinion.



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