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# ENVIRONMENTAL IMPACT STATEMENTS: INSTRUMENTS FOR ENVIRONMENTAL PROTECTION OR ENDLESS LITIGATION?

## I. Introduction

On January 1, 1970, Congress enacted the National Environmental Policy Act (NEPA)<sup>1</sup>. NEPA's purpose is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment."<sup>2</sup> In an effort to achieve this national policy, NEPA requires that federal agencies proposing "major Federal actions significantly affecting the quality of the human environment"<sup>3</sup> include in their proposals or recommendations an Environmental Impact Statement (EIS).<sup>4</sup> The EIS must include both an assessment of the beneficial and adverse environmental impacts of the proposed action and an analysis of the impacts in light of other circumstances.<sup>5</sup> By requiring agencies to file an EIS, Congress sought to insure that agencies consider fully all environmental effects of proposals for major federal action.<sup>6</sup>

Encompassing nearly every action that will affect the environment, even if the effect is not significant enough to require an EIS,<sup>7</sup> NEPA has given rise to litigation in a variety of contexts. Cases concerning highway proposals,<sup>8</sup> housing projects,<sup>9</sup> dams and waterways,<sup>10</sup> and

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1. 42 U.S.C. §§ 4321-4361 (1976).

2. *Id.* § 4321. In addition, NEPA's purpose is to "promote efforts which [would] prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." *Id.*

3. *Id.* § 4332(2)(C).

4. *Id.*

5. *Id.* The impacts should be analyzed in light of the probabilities or possibilities of environmental damage. *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 685 F.2d 459, 478 (D.C. Cir. 1982) (relevant factors to be considered were environmental risks, health, socioeconomic and cumulative effects). Other relevant circumstances include long-term benefits of the project, commitments of resources and alternatives to the project. 42 U.S.C. § 4332(c).

6. 115 CONG. REC. 14,347 (1969) (statement of Sen. Jackson). A major federal action is one which, for example, has a nationwide effect, receives federal funding or involves federal agencies. *See* notes 46-73 *infra* and accompanying text.

7. *See* notes 50-93 *infra* and accompanying text.

8. *See, e.g.*, Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978) (injunction of Darien Gap Highway construction vacated upon a finding that EIS not deficient); Citizens Comm. against Interstate Route 675 v. Lewis, 542 F. Supp. 496 (S.D. Ohio 1982) (injunction of highway construction project denied upon a finding that final EIS was adequate); Sierra Club v. United States Army Corps of Eng'rs, 541 F. Supp.

mineral, oil and gas drilling<sup>11</sup> have involved NEPA considerations. Other environmental litigation has involved nuclear armament storage,<sup>12</sup> nuclear energy plants<sup>13</sup> and endangerment of wildlife.<sup>14</sup>

The requirements for preparing and filing an EIS have been the subject of considerable controversy.<sup>15</sup> Regulations enacted by the

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1367 (S.D.N.Y. 1982) ("*Westway II*") (construction of proposed highway project enjoined on grounds of EIS inadequacy).

9. *See, e.g.*, *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (EIS prepared for low-income housing project found not violative of NEPA); *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935 (5th Cir. 1982) (injunctive relief denied to Texas homeowners seeking to enjoin federal subsidization of low-income families residing in already constructed middle and low-income housing development).

10. *See, e.g.*, *Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981) (Army Corps of Engineers ordered to hold public meeting concerning EIS for proposed lock and dam in upper Mississippi River Navigation System); *Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981) (Army Corps of Engineers ordered to prepare supplemental EIS for construction of Tennessee-Tombigbee Waterway); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980). In *Warm Springs*, the court denied an injunction against further construction of the Warm Springs Dam Project even after a new geological study revealed the possibility of earthquakes of greater magnitude than the Corps had taken into account in the original EIS. The court found that the Corps had studied the problem thoroughly and had "reasonably concluded that no substantial adverse environmental effects were presented." *Id.* at 1027.

11. *See, e.g.*, *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982) (U.S. Forest Service approval of plan for exploratory mineral drilling in Cabinet Mountains Wilderness Area upheld on grounds that the agency's decision not to file an EIS was not arbitrary and capricious); *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982) (Department of Interior had not violated NEPA by failing to supplement EIS during offering for competitive bidding for oil and gas lease contracts located in Santa Maria Basin).

12. *See, e.g.*, *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981) (Navy's decision not to prepare "hypothetical EIS" for operation of nuclear weapon storage facility not unreasonable because under Freedom of Information Act, Navy not required to release such information to the public).

13. *See, e.g.*, *People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n*, 678 F.2d 222 (D.C. Cir. 1982) (significant changes in psychological health effects resulting from continued operation of Three Mile Island nuclear facility after nuclear accident need not be revealed in supplemental EIS), *rev'd sub nom. Metropolitan Edison Co. v. People Against Nuclear Energy*, 51 U.S.L.W. 4371 (U.S. Apr. 19, 1983); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980) (Nuclear Regulatory Commission required to prepare EIS for project to dispose of radioactive waste water from Three Mile Island accident), *cert. denied*, 449 U.S. 1096 (1981).

14. *See, e.g.*, *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982) (Environmental Assessment contained adequate mitigation measures to counteract adverse impact on grizzly bear population resulting from exploratory drilling); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980) (Secretary of Interior not obligated to prepare EIS when deciding not to take affirmative action to prohibit State of Alaska from conducting wolf-hunt on federal land).

15. *See, e.g.*, *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (NEPA designed to insure fully-informed decision, but agency need not ele-

Council on Environmental Quality (CEQ),<sup>16</sup> a NEPA-created agency,<sup>17</sup> have sought to clarify the EIS filing procedures. The limitations of a court's power to inquire into agency action or inaction also have been the subject of litigation. In *Sierra Club v. United States Army Corps of Engineers* ("Westway"),<sup>18</sup> for example, both issues arose: (1) whether the Army Corps of Engineers had failed to fulfill its obligations under NEPA by filing an EIS of questionable accuracy;<sup>19</sup> and (2) whether the district court had abused its discretion by interfering with the agency's decision to grant a landfill permit.<sup>20</sup>

This Comment will discuss the historical background of NEPA and recent interpretations of EIS requirements. The limitations placed on judicial interference with agency action will also be reviewed. Finally, after analyzing "Westway,"<sup>21</sup> this Comment will suggest how NEPA might be improved.

## II. Historical Background

On May 29, 1969, NEPA was introduced in Congress.<sup>22</sup> Prior to that time, public interest groups generally were unsuccessful in bring-

vate environmental concerns over other concerns); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (agencies must employ at least the statutory *minima* in preparing an EIS); *Kleppe v. Sierra Club*, 427 U.S. 390, 399, 410 n.21 (1976) (NEPA requires EIS solely for major federal action and reviewing courts can only insure that agencies have taken a "hard look" at environmental consequences of their actions).

16. 40 C.F.R. §§ 1500-1517 (1982).

17. 42 U.S.C. § 4342 (1976).

18. 541 F. Supp. 1367 (S.D.N.Y. 1982); *see also* notes 240-70 *infra* and accompanying text (discussion of "Westway").

19. *Sierra Club v. United States Army Corps of Eng'rs*, No. 82-6125 (2d Cir. Feb. 25, 1983).

20. *Sierra Club v. United States Army Corps of Eng'rs* was decided on appeal to the Second Circuit in two separate opinions. The first, *Sierra Club v. Hennessy*, No. 82-6175 (2d Cir. Dec. 6, 1982), dealt with the issue of the Federal Highway Administration reimbursement for the landfill right-of-way. The district court had enjoined the reimbursement on grounds that the FHWA and the New York State Department of Transportation had violated NEPA. 541 F. Supp. 1367, 1383 (S.D.N.Y. 1982). The Second Circuit reversed, finding that the plaintiffs had not shown the requisite irreparable harm to support the injunction. *Sierra Club v. Hennessy*, slip. op. at 620.

The second opinion, *Sierra Club v. United States Army Corps of Eng'rs*, No. 82-6125 (2d Cir. Feb. 25, 1983) addressed the substantive NEPA issues. The Second Circuit decided that the FHWA and the Army Corps of Engineers had violated NEPA and ordered the agencies to prepare a supplemental impact statement discussing the impact of the Westway project on the Hudson river fisheries. Slip op. at 2041.

21. *See* notes 18-20 *supra*.

22. 115 CONG. REC. 14,346 (1969).

ing suit against agency actions that presented risks of environmental abuse.<sup>23</sup> Courts were reluctant to review or overturn agency decisions in the absence of a policy demanding judicial scrutiny of environmentally threatening activities.<sup>24</sup> By establishing a national policy on the environment,<sup>25</sup> Congress sought to provide courts with a means to compel agency consideration of the environmental impacts of their proposed actions. Congress also hoped that agencies would give greater consideration to implementing actions possibly detrimental to the environment.<sup>26</sup>

In addition to establishing a national policy on the environment, NEPA authorized expanded research to understand "our national resources, the environment, and human ecology."<sup>27</sup> NEPA also vested in the federal government an ongoing responsibility to improve and coordinate federal plans and programs to protect and preserve the environment.<sup>28</sup> Moreover, the Act recognized that the right to a healthful environment is a personal right.<sup>29</sup> Therefore, under NEPA, protection of the environment is both an individual and a collective responsibility.<sup>30</sup>

NEPA created the Council on Environmental Quality (CEQ) to serve as the coordinating body to interpret and enforce NEPA policies.<sup>31</sup> The CEQ is responsible for: reviewing and appraising federal programs and activities in light of NEPA policies; conducting investigations, studies and research of environmental subjects; and analyzing current environmental information.<sup>32</sup> The CEQ provides procedural

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23. Comment, *The National Environmental Policy Act of 1969: Analysis and Judicial Interpretation*, 25 BAYLOR L. REV. 71, 77 (1973).

24. *Id.*

25. See text accompanying notes 2-4 *supra*.

26. Comment, *supra* note 23, at 90.

27. 115 CONG. REC. 14,347 (1969), *quoted in* *Noe v. Metropolitan Rapid Transit Auth.* (MARTA), 644 F.2d 434, 438 (5th Cir.), *cert. denied*, 454 U.S. 1126 (1981). See also 42 U.S.C. § 4321 (1976) (NEPA purposes described).

28. 42 U.S.C. § 4331(b) (1976).

29. *Id.* § 4331(c).

30. *Id.* NEPA is the manifestation of the national environmental policy of "the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations." *Id.* § 4331(a). Moreover, "Congress recognizes that . . . each person has a responsibility to contribute to the preservation and enhancement of the environment." *Id.* § 4331(c).

31. NEPA also established the Environmental Protection Agency which, in contrast to the CEQ, is empowered to establish and enforce environmental protection standards, a task previously delegated to various environmental agencies. *Id.* § 4321, Reorganization Plan No. 3 of 1970.

32. The CEQ also assists and advises the President in preparing an Environmental Quality Report. 42 U.S.C. § 4334(1) (1976). See *id.* § 4341. The CEQ recom-

regulations<sup>33</sup> for NEPA obligations of agencies proposing federal actions. These regulations are applicable to and binding on all federal agencies for implementing NEPA provisions, except where compliance would be inconsistent with other statutory requirements.<sup>34</sup>

The underlying purpose of NEPA as set forth in the regulations is to assist public officials in making well-informed decisions which consider environmental factors.<sup>35</sup> Thus, accurate environmental information must be made available to both public officials and private citizens who are then requested to respond to a proposal before a decision is reached by the agency.<sup>36</sup> This requirement insures that the decision makers have weighed environmental factors with other relevant factors,<sup>37</sup> such as economic and social effects,<sup>38</sup> before action is taken. An additional safeguard is provided by the congressional mandate that all agencies include a detailed EIS with every recommendation concerning proposals for legislation and "major Federal actions significantly affecting the quality of the human environment."<sup>39</sup>

### III. Role of the EIS

#### A. Purpose

An EIS is proof that an agency has considered the environmental impacts of its proposed actions before reaching final decisions.<sup>40</sup> In

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mends to the President national policies to foster and promote the improvement of environmental quality, documents changes in the environment and issues yearly reports to the President on the state and conditions of the environment. The CEQ also furnishes studies, reports and recommendations of policy and legislation as are requested by the President. *Id.* § 4344.

33. 40 C.F.R. §§ 1500-1517 (1982). In 1978, the CEQ guidelines were changed to regulations. The new regulations apply only to impact statements filed after July 30, 1979. *See Id.* § 1506.12. *See also* *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (prior to CEQ amendment, CEQ guidelines were "entitled to substantial deference").

These regulations contain, *inter alia*, a restatement of NEPA purposes, EIS procedures, public meeting procedures, and the National Oil and Hazardous Substances Pollution Contingency Plan. 40 C.F.R. §§ 1500-1517 (1982).

34. 40 C.F.R. § 1500.3. *See also* notes 94-105 *infra* and accompanying text (discussion of statutory conflict).

35. 40 C.F.R. § 1500.1(c) (1982).

36. *Id.* §§ 1500.1(b), 1503.1(1), (2), (4).

37. *Id.* *See* note 5 *supra*.

38. *See* *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 477-78 (D.C. Cir. 1982) (EIS table intended to reflect environmental effects of a uranium fuel cycle found arbitrary and capricious because the table failed to allow for consideration of health, socioeconomic and cumulative effects).

39. 42 U.S.C. § 4332(2)(C) (1976).

40. As the District of Columbia Circuit stated, "decision-making under NEPA must be organized in such a manner that all of the reasonably foreseeable environ-

requiring such proof, Congress intended that agencies be fully aware of the degree of environmental impacts of their projects.<sup>41</sup> Moreover, because environmental considerations are now a priority in decision making,<sup>42</sup> these considerations must be made available to the public. Public disclosure serves as a check on proposed actions and permits public feedback relevant to the desirability of actions which could cause environmental harm.<sup>43</sup>

Agencies also must consult with other government bodies with special expertise or legal jurisdiction over the subject matter before issuing an EIS.<sup>44</sup> In short, requiring the preparation of an EIS for major federal actions affecting the environment is some protection against environmentally harmful decisions: not only must the agency show that it has considered environmental impacts, but also that suggestions and alternatives received from the public and other federal agencies have been factored into the decision.<sup>45</sup>

## B. Procedural Requirements

NEPA requires the preparation and filing of an EIS for all major federal actions "significantly affecting the quality of the human environment."<sup>46</sup> To meet this requirement, the agency action must be "final,"<sup>47</sup> the proposal must be for a "major Federal action,"<sup>48</sup> and the project must have a significant effect on the environment.<sup>49</sup>

mental effects of a proposed action enter into an agency's decision to take the action." *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459 (D.C. Cir. 1982). See Comment, *supra* note 23, at 74-75.

41. Among other things, the EIS insures that each agency decision has considered all possible alternatives to the particular project. Comment, *supra* note 23, at 75.

42. *Id.* at 72. Evidently, prior to NEPA's enactment, environmental concerns were not a substantial consideration in agency decision making. *Id.*

43. See notes 158-63 *infra* and accompanying text.

44. 42 U.S.C. § 4332(2)(C) (1976).

45. 40 C.F.R. §§ 1503.1-1503.4 (1982). Agencies must assess and consider comments both individually and collectively and respond to the comments. *Id.* § 1503.4(a). These responses must be included in the final EIS with the comments attached. *Id.* § 1503.4(b). The public comment process strengthens the EIS, and aids agencies in making better environmental decisions. Certainly without such processes, or without an EIS of any sort, agencies might make more environmentally callous decisions, a result NEPA intended to avoid. See generally 42 U.S.C. § 4331 (1976). However, agencies need not "elevate environmental concerns over other appropriate considerations." *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980). See also Milkovich, *The Decline of the Environmental Mandate:—A Modern West Side Story*, 41 LA. L. REV. 1354 (1981) (in depth analysis of *Strycker's Bay* and its impact).

46. 42 U.S.C. § 4332(2)(C) (1976).

47. See notes 50-58 *infra* and accompanying text.

48. 42 U.S.C. § 4332(2)(C) (1976). This section outlines how the agency makes such a determination. See Shea, *The Judicial Standard for Review of Environmental*

### 1. Final Agency Action

Courts have defined final agency action on a case-by-case basis. Grants of funds to acquire land for new project sites,<sup>50</sup> grants of permits to build parks and industrial complexes,<sup>51</sup> and submissions of prospecti to congressional committees for approval for construction of federal office buildings<sup>52</sup> have been construed as final.

By contrast, proposals for studies of contemplated projects<sup>53</sup> or proposals for "hypothetical" highways<sup>54</sup> are not "final," nor are non-overt acts.<sup>55</sup> For example, the failure of the Secretary of the Interior to act to prevent a state-conducted wolf-hunt on federal land was not considered a final agency action by the court.<sup>56</sup> In these cases, an EIS is not required, because, as the Second Circuit recently declared, such non-final actions have "no impact on anything."<sup>57</sup> Moreover, the court has stated that the judiciary has "no business adjudicating the legality of non-events."<sup>58</sup>

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*Impact Statement Threshold Decisions*, 9 B.C. ENVTL. AFF. L. REV. 63 (1980) (analysis of judicial review regarding CEQ regulations and NEPA mandates). See also notes 59-73 *infra* and accompanying text (discussion of "major Federal action").

49. See notes 74-87 *infra* and accompanying text.

50. See, e.g., *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317 (9th Cir. 1982) (agency's grant of funds to acquire land for site of new bus maintenance depot and exemption of project were final agency actions, although no formal action to acquire the property by condemnation had occurred).

51. See, e.g., *Kentucky ex. rel. Beshear v. Alexander*, 655 F.2d 714 (6th Cir. 1981) (permit grant to Indiana Port Commission to build port and industrial complex along Ohio River was final agency action requiring EIS).

52. See, e.g., *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977) (Draft EIS should be filed with prospectus for construction of federal office building, although final EIS not necessary until after congressional approval).

53. See, e.g., *Environmental Defense Fund v. Johnson*, 629 F.2d 239 (2d Cir. 1980) (study of a contemplated project for skimming the Hudson River as a possible solution to drought problems did not require an EIS because a study would not affect the quality of the human environment).

54. See, e.g., *National Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259 (2d Cir. 1982). In *Goldschmidt*, the court reasoned that where the ultimate decision to build a highway had not been made, no EIS was necessary. *Id.* at 263. The court demonstrated its reluctance to interfere by declaring that the spending of money on design work was not a call for judicial review. *Id.* at 264.

55. See notes 56-58 *infra* and accompanying text.

56. See, e.g., *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980) (Secretary of Interior not required to file EIS when he did not act to prevent State of Alaska from conducting wolf-hunt on federal land).

57. *Environmental Defense Fund v. Johnson*, 629 F.2d 239, 242 (2d Cir. 1980).

58. *National Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982).



## 2. Major Federal Action

Having determined that the action is final, it becomes necessary to decide whether the proposal is for a "major Federal action."<sup>59</sup> Major federal actions are those which receive large federal expenditures or require ongoing federal involvement with the project. Usually the projects have nationwide significance.<sup>60</sup> For example, the licensing of a nuclear power plant is a "well settled . . . 'major Federal action [s]ignificantly affecting the quality of the human environment.'"<sup>61</sup> Courts have accepted an agency's conclusion that a proposal for a project will not significantly affect the environment and therefore is not a major federal action.<sup>62</sup>

Courts, however, may not accept an agency's determination that an action is not a major federal action where that action would significantly affect or degrade the environment.<sup>63</sup> In such an instance, the court may determine that the action is a major federal action, despite the agency's contrary determination. Finally, an action which has already been taken or completed<sup>64</sup> will not be deemed a major federal action.<sup>65</sup> Courts have found major federal actions in proposals for

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59. 42 U.S.C. § 4332; *see also* *Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976) (further development of federal coal reserves did not constitute a major federal action).

60. *See* notes 61 & 66-73 *infra* and accompanying text.

61. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 475 (D.C. Cir. 1982) (citing 42 U.S.C. § 4332(2)(C) (1976)). *See also* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 538-39 (1978) (Atomic Energy Commission acted within its statutory authority in considering the environmental impacts of fuel processes before licensing nuclear reactors).

62. *See* notes 63-65 *infra* and accompanying text.

63. *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 597 (9th Cir. 1981) (EIS required where facts alleged which, if true, show that the proposed project "may significantly degrade some human environmental factor") (emphasis in original).

64. NEPA requires "future vision" in preparing an EIS. Thus, in *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977) (amended decision) it was not surprising that the court ordered a supplemental EIS to analyze the environmental impacts of the Trident Nuclear Submarine Program, a further development of the Polaris/Poseidon System, for a reasonable period after 1981. As the court stated, "it is imperative that [the Navy] make a reasonable effort to discern what the effects of Trident's future operation will be." *Id.* at 830. *See also* *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981) (NEPA's purpose is to assure that federal agencies are fully aware of the present and future environmental impact of their decisions).

65. In *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935, 941 (5th Cir. 1982), the court refused to order a post-completion injunction, claiming that the "basic thrust" of NEPA was "to provide assistance for evaluating proposals for

constructing interstate highways;<sup>66</sup> grants of construction and operation permits for nuclear power plants;<sup>67</sup> grants of leases to drill for oil, gas and minerals;<sup>68</sup> and proposals by the Interstate Commerce Commission for rates on recyclables.<sup>69</sup>

Courts do not require an EIS for a proposal for a state, local or "non-major" action or for an action which is a continuation of an existing project.<sup>70</sup> Moreover, an EIS is not required for a proposal not yet at the recommendation stage.<sup>71</sup> Examples of such actions are an agency's grant of a permit for a power line which received no federal funding<sup>72</sup> and an agency's approval of mining plans in one section of an area for which an EIS had already been prepared.<sup>73</sup>

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prospective federal action in the light of their future effect upon environmental factors, not to serve as a basis for after-the-fact critical evaluation subsequent to substantial completion of the construction" (citing *Aertsen v. Landrieu*, 637 F.2d 12, 19 (1st Cir. 1980) (because EIS is a forward-looking instrument, court refused to order an after-the-fact EIS and found that the demolition of existing structures on the site of a federally subsidized housing project did not constitute a "major federal action"))).

66. See, e.g., *Adler v. Lewis*, 675 F.2d 1085 (9th Cir. 1982) (injunction to prevent acquisition of right-of-way for proposed Interstate Highway 90 expansion denied); *Citizens to Preserve Wilderness Park, Inc. v. Adams*, 543 F. Supp. 21 (D. Neb. 1981), *aff'd*, No. 81-2280 (8th Cir. 1982) (injunction to prevent use of park land for highway project denied); *Sierra Club v. United States Army Corps of Eng'rs*, 541 F. Supp. 1367 (S.D.N.Y. 1982) (injunction granted to prevent construction of West-side Highway Project).

67. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (Atomic Energy Commission grant of nuclear power licenses upheld on grounds that lower courts had no authority to overturn agency decision); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977) (amended decision) (Navy ordered to consider further alternatives to the Trident Nuclear Submarine project in a supplement to an existing EIS).

68. See, e.g., *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982) (sale of leases to drill for and extract oil and gas in Outer Continental Shelf was major federal action).

69. See, e.g., *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures ("SCRAP II")*, 422 U.S. 289 (1975) (EIS required for proposed increase in transportation rates for recyclable materials).

70. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (where no legislation for major federal action proposed but rather proposal is for action of either local or state scope, EIS not required for approval of plans for further development of coal reserves).

71. See, e.g., "*SCRAP II*," 422 U.S. 289, 320-21 (1975). In "*SCRAP II*," the Supreme Court stated that an agency must prepare an EIS when making recommendations or reports on proposals for federal action. *Id.* However, in "*SCRAP II*," the Interstate Commerce Commission (ICC) had not submitted a proposal recommendation or report until Oct. 1972, when the ICC proposed new railroad rates for recyclable materials. *Id.* Thus, the Court held that submission of an EIS was not required until Oct. 1972. *Id.*

72. See, e.g., *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272 (8th Cir. 1980) (where there was no direct or even indirect federal funding, project is not a "major Federal action").

73. See *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

### 3. "Significantly affecting the quality of the human environment"

Once an agency has determined that its final proposal is for a major federal action, the agency must decide whether the action will "significantly [affect] the quality of the human environment."<sup>74</sup> The decision process begins with a determination of whether the proposal is one which normally requires an EIS. First, an Environmental Assessment (EA), a concise public document which sets forth the evidence and analysis for determining whether to prepare an EIS, is issued.<sup>75</sup> The EA acts as a mini-EIS<sup>76</sup> and includes brief discussions of the need for the proposal, alternatives, and the environmental impact of the project, as well as a list of agencies and persons consulted in the preparation of the proposal and the EA.<sup>77</sup> If, on the basis of the EA, the agency finds that no significant environmental impact would result from the proposed action, the agency need not prepare an EIS.<sup>78</sup> Instead, the agency is required to prepare a Finding of No Significant

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74. 42 U.S.C. § 4332(2)(C) (1976). In *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981), the court decided that the standard of "significantly affecting" the environment is not met unless facts have been alleged which show that the proposed project may "significantly degrade some human environmental factor." *Id.* at 597. In *Columbia Basin*, an association of farmers sought an injunction to prevent construction of a 500 kilovolt power transmission line across their lands. The Ninth Circuit found that the EIS prepared by the responsible agency conformed with NEPA's procedural mandates. *Id.* at 590. Moreover, the court determined that the decision to commence the project, a decision based on legitimate economic considerations reflected in the EIS, was neither arbitrary nor capricious. *Id.*

See also *City and County of San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980); *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975) (standard of "significantly affecting the environment" met whenever the plaintiff alleged facts which, if true, show that the proposed project *may* significantly degrade some human environmental factor).

75. 40 C.F.R. § 1501.4(a)(1), (2) (1982).

76. *Id.* § 1508.9(b). The EA helps an agency comply with NEPA when an EIS is not necessary and facilitates in the preparation of an EIS when one is necessary. *Id.* § 1508.9(a)(2), (3). Neither an EIS nor an EA may be necessary if the action fits the definition of a categorical exclusion. *Id.* § 1508.4. Categorical exclusions are actions which neither individually nor cumulatively have a significant effect on the human environment, as determined by the agency in accordance with its own procedures for implementing the CEQ regulations. *Id.* The CEQ regulations mention, however, that there are certain extraordinary circumstances in which an action that would normally be a categorical exclusion may have a significant environmental effect. *Id.* § 1508.4.

77. *Id.* § 1508.9(b).

78. *Id.* § 1501.4(e).

Impact (FONSI).<sup>79</sup> The FONSI must be made available to the affected public<sup>80</sup> in the same manner as an EIS.<sup>81</sup>

An agency's determination of how the proposed action will affect the environment must be both reasonable and adequately supported.<sup>82</sup> The reasonableness of this determination may depend on such factors as: the environmental significance of new information; the probable accuracy of the information; the degree of care with which the agency considered the information and evaluated the impact; and the extent to which the agency's decision not to prepare an EIS was supported by an explanation or data.<sup>83</sup>

If an agency's decision not to file an EIS is found to be unreasonable, a court may order an agency to comply with NEPA by filing an EIS.<sup>84</sup> Preparation of the EIS could delay a project for an indefinite period of time,<sup>85</sup> should a court enjoin a project pending the issuance

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79. A FONSI is a document which briefly explains why the action will not have a significant effect on the environment, and that therefore an EIS will not be issued. *Id.* § 1508.13.

80. The "affected" public includes any individuals or group upon whom the proposed action will or may have an effect. *Id.* § 1508.3.

81. *Id.* § 1501.4(e)(1).

82. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 684 (D.C. Cir. 1982) (agency's decision not to prepare EIS for exploratory mineral drilling was reasonable because the agency provided adequate mitigation measures to counteract the possible adverse impacts on the grizzly bear population). *See also Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1027 (9th Cir. 1980) (Corps made thorough study of effect of Maacama Fault and reasonably concluded that "no substantial adverse effects were presented").

Timeliness also must be read in light of a "rule of reason." *Realty Income Trust v. Eckerd*, 564 F.2d 447, 454 (D.C. Cir. 1977). An EIS should be prepared at the earliest possible time for consideration of all alternatives. *Friedman Bros. v. Lewis*, 676 F.2d 1317, 1320 (9th Cir. 1982).

83. *California v. Watt*, 683 F.2d 1253, 1267-68 (9th Cir. 1982) (*citing Warm Springs Dam Task Force*, 621 F.2d at 1024 (9th Cir. 1980)). In *Watt*, a U.S. Geological Survey study of the Outer Continental Shelf became available one month prior to the release of an EIS for a proposed sale of oil and gas drilling leases. The new study was incorporated into an addendum to the EIS. 683 F.2d at 1258. A document (SID) assessing the environmental impact of the lease sale and concluding that a SEIS was unnecessary also was issued. *Id.* Although the addendum and SID were not sent through the public comment process, the court found this course of action reasonable. *Id.* at 1267-68.

84. *See, e.g., Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 480, 484 (D.C. Cir. 1982) (case remanded upon a finding that the agency's failure to file an adequate EIS was unreasonable).

85. *California v. Watt*, 683 F.2d 1253, 1268 (9th Cir. 1982). The court implied, however, that the avoidance of delay might be a factor in a court's determination of whether the agency had acted reasonably. *Id.* For example, in *Watt*, the court decided that the absence of public commenting process did not render the Secretary's action unreasonable. *Id.* Otherwise, as the court stated, "the threshold decision not

of the EIS.<sup>86</sup> If a court finds that an agency's decision not to file an EIS was reasonable, however, a court will not order the filing of an EIS.<sup>87</sup>

### C. Exceptions to the Filing Requirement

There are certain circumstances which courts have classified as exceptions to the NEPA requirement for filing an EIS. In the landmark case of *Andrus v. Sierra Club*,<sup>88</sup> the Supreme Court decided that an impact statement need not accompany an appropriations request.<sup>89</sup> An appropriations request suggests funds for an action already proposed.<sup>90</sup> In *Andrus*, the Court interpreted NEPA as applying to recommendations that propose actions rather than to suggestions of how to fund those actions.<sup>91</sup> Similarly, the District of Columbia Circuit has held that NEPA does not require impact statements where no overt action has taken place.<sup>92</sup> Impact statements need accompany only those decisions that an agency anticipates will lead to action.<sup>93</sup>

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to supplement an EIS would become as burdensome as preparing the [SEIS] itself, and the continuing duty to gather and evaluate new information . . . could prolong NEPA review beyond reasonable limits." *Id.*

86. See notes 232-39 *infra* and accompanying text.

87. See, e.g., *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980). In that case, the Secretary of Interior did not curtail a program to hunt wolves on federal lands. This wolf-hunt was designed to protect moose herds. The court refused to order an EIS, noting that NEPA refers to decisions which agencies anticipate will lead to action. *Id.* at 1243. The Secretary's non-overt act did not constitute a major federal action within the meaning of NEPA. *Id.* at 1239-40. As the court concluded, "[n]o agency could meet its NEPA obligations if it had to prepare an EIS every time the agency had power to act but did not do so." *Id.* at 1246.

88. 442 U.S. 347 (1979). In *Andrus*, the Sierra Club, the National Parks and Conservation Association and the Natural Resources Defense Council sued the Secretary of the Interior and the Director of the Office of Management and Budget for NEPA violations. The plaintiffs claimed that the proposed curtailments of the National Wildlife Refuge System budget would significantly affect the quality of the human environment and therefore required an EIS. The Supreme Court disagreed. *Id.* at 349.

For a more comprehensive discussion of *Andrus*, see Note, *Environmental Law—The National Environmental Policy Act—Andrus v. Sierra Club*, 26 N.Y.L. SCH. L. REV. 385 (1981); Note, *NEPA: An Ambitious Purpose; A Partial Demise*, 15 TULSA L.J. 553 (1980).

89. 442 U.S. at 362.

90. *Id.*

91. *Id.* NEPA requires that environmental concerns be integrated into the process of agency decision making. In the case of appropriations requests, however, the decisions have already been made, and therefore preparation of an EIS at the appropriations stage would serve no purpose. *Id.* at 363.

92. See *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243 (D.C. Cir. 1980).

93. *Id.* See *National Wildlife Fed'n v. Appalachian Regional Comm'n*, 677 F.2d 883 (D.C. Cir. 1981). In that case, the court determined that a programmatic EIS

An EIS will not be required where conflict exists between NEPA and another statute governing the action.<sup>94</sup> In *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*,<sup>95</sup> a conflict between NEPA and the Disclosure Act<sup>96</sup> compelled the Supreme Court to declare that where clear and unavoidable conflict in statutory authority exists, NEPA must yield.<sup>97</sup> The Court added that even if the action involved was a "major Federal action" normally requiring an EIS, under the facts of the case, the EIS requirement was inapplicable.<sup>98</sup> Consistent with the Court's statement in *Flint Ridge*, when information contained in an EIS may not be divulged under the Freedom of Information Act (FOIA),<sup>99</sup> in the interest of protecting national defense or foreign policy, NEPA requirements are superseded.<sup>100</sup>

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need not be prepared for a project which was begun prior to the passing of NEPA and which was nearly complete at the time the suit was instituted. The court reasoned that a retrospective statement would be unnecessary because it would not shed more decision making light on the parts of the federally assisted highway development project yet to be built. *Id.* at 884. A programmatic EIS deals with broad environmental consequences attendant upon wide-ranging federal programs. *Id.* at 888. In contrast, a site-specific EIS deals with the "more particularized considerations arising once the overall program reaches the 'second tier,' or implementation stage of its development." *Id.* at 888. *See also* 40 C.F.R. § 1502.20 (1982) (explanation of tiering).

94. *See* 115 CONG. REC. 39,703 (1969) (each agency should comply with the directives set out in § 102(2) of NEPA "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible"). *Id.*

95. 426 U.S. 776 (1976).

96. 15 U.S.C. §§ 1701-1720 (1976 & Supp. IV 1980). The Disclosure Act is limited to interstate land sales. *Id.* § 1701.

97. 426 U.S. at 788. In *Flint Ridge*, the respondents had requested the Department of Housing and Urban Development to prepare an EIS for a housing development project. Under the Disclosure Act, however, the Secretary had a statutory duty to allow statements of record to go into effect within 30 days of filing. The Secretary could not, therefore, simultaneously prepare EIS's on proposed developments. *Id.* at 791.

98. *Id.* *But see* *California v. Block*, 690 F.2d 753, 775 (9th Cir. 1982) (there was no "clear and unavoidable conflict" between the National Forest Management Act and NEPA and therefore no exception to the EIS requirement).

99. 5 U.S.C. § 552 (1976 & Supp. V 1981).

100. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981). In *Weinberger*, the Court ruled that where the Navy was not required to prepare an EIS under the FOIA, it need not prepare a "hypothetical EIS"—a "creature of judicial cloth, not legislative cloth . . . and not mandated by any . . . statutory or regulatory provisions," and not mentioned in NEPA. *Id.* at 140-41, 144. The Court explained that by intending the Freedom of Information Act to govern the release to the public of information in impact statements, Congress struck a balance between the needs of the public to know what is contained in an EIS and the necessity of non-disclosure for security reasons. *Id.* at 145.

Another example of statutory conflict concerns the listing of endangered species. In *Pacific Legal Foundation v. Andrus*,<sup>101</sup> the Sixth Circuit refused to require the United States Fish and Wildlife Service (FWS) to file an EIS when listing a species as endangered or threatened.<sup>102</sup> Filing an EIS is proof that an agency has considered environmental impacts before making a decision on proposed action. According to the Endangered Species Act (ESA),<sup>103</sup> however, an agency has no authority to consider environmental impacts when listing a species under the ESA.<sup>104</sup> Thus, as the court noted, preparation of an EIS in such a case would be a "waste of time."<sup>105</sup>

#### D. Supplemental EIS

An agency may be required to file a Supplemental Environmental Impact Statement (SEIS) after a draft or a final EIS has been prepared and issued. A SEIS will be required when: (1) the agency makes substantial changes in the proposed action which relate to environ-

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101. 657 F.2d 829 (6th Cir. 1981).

102. *Id.* at 835.

103. 16 U.S.C. §§ 1531-1543 (1976). Where NEPA regulations conflict with the specific statutory obligations of federal agencies to comply with criteria or standards of environmental quality, the specific statutory obligations will supersede NEPA considerations. 42 U.S.C. § 4334 (1976). Specifically, preserving endangered or threatened species has been accorded the highest priority by Congress. *TVA v. Hill*, 437 U.S. 153, 174 (1978). Moreover, the filing of an EIS would not serve the purposes of the Endangered Species Act, which are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for conservation, and to achieve the purposes of the treaties and conventions signed with foreign countries to conserve various species." *Andrus*, 657 F.2d at 835. See also 16 U.S.C. § 1531(b) (1976) (purposes of Endangered Species Act).

104. *Andrus*, 657 F.2d at 836.

105. *Id.* The court noted that listing the species as endangered or threatened furthers NEPA purposes despite the absence of an EIS because the listing seeks to "preserve the environment and prevent the irretrievable loss of a natural resource." *Id.* at 837. See also *Providence Road Community Ass'n v. Environmental Protection Agency*, 683 F.2d 80, 82 (4th Cir. 1982) (preparation of EIS not required where agency concluded that preparing one for design plans of a wastewater treatment project would be a "bureaucratic exercise, yielding only another compilation of the information already on hand"). Another example of a conflict of statutes where the more specific statute supersedes NEPA is the Alaska Natural Gas Transportation Act (ANGTA), 15 U.S.C. §§ 719-719o (1976 & Supp. V 1981). The Act provides that "no court shall have jurisdiction to consider questions respecting the sufficiency of [EIS's for action under ANGTA] under the National Environmental Policy Act of 1969." *Id.* § 719h(c)(3). See also *The NEPA and Energy Legislation: The Preemption of Judicial Review*, 14 U.S.F.L. Rev. 403 (1980) (discussion of history and analysis of ANGTA and NEPA).

mental concerns; or (2) significant new circumstances arise or new information is discovered which may be relevant to environmental concerns.<sup>106</sup> The SEIS must be prepared, circulated and filed in the same manner as a draft or final EIS.<sup>107</sup>

The Fifth Circuit recently interpreted the SEIS requirements in *Environmental Defense Fund v. Marsh*.<sup>108</sup> In *Marsh*, the court stated that a SEIS is required whenever the EIS has become deficient because certain environmental effects of the project were not discussed or design features or project purposes were modified significantly after the original EIS was filed.<sup>109</sup> The court explained that, notwithstanding the agency's intent in implementing the changes, a SEIS must be prepared whenever significant environmental impacts arise.<sup>110</sup> Thus, even if the impact is beneficial to the environment, the impact must be discussed in an EIS or SEIS.<sup>111</sup>

*Warm Springs Dam Task Force v. Gribble*<sup>112</sup> is an example of an exception to the SEIS requirement. In that case, the Army Corps of Engineers filed an EIS for the Warm Springs Dam Project several years before a United States Geological Service study became available. The study indicated that the Maacama Fault, located six miles from the dam, might generate an earthquake of greater magnitude than the dam was designed to withstand.<sup>113</sup> The Corps made an immediate "thorough study"<sup>114</sup> and concluded that no substantial adverse environmental effects would result.<sup>115</sup> The Ninth Circuit

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106. 40 C.F.R. § 1502.9 (1982).

107. *Id.*

108. 651 F.2d 983 (5th Cir. 1981). In *Marsh*, the Environmental Defense Fund claimed that the Army Corps of Engineers had violated NEPA by failing to update its EIS after instituting changes in the planning and construction of the Tennessee-Tombigbee Waterway. The court ordered the immediate preparation of a SEIS. *Id.* at 1006-07. See also Comment, *Supplemental EIS Mandated for Tennessee-Tombigbee Waterway*, 11 ENVTL. L. RPT. 10213-18 (1981) (analysis of *Environmental Defense Fund v. Marsh*).

109. 651 F.2d at 988-89. The court noted that where the purpose of supplementation was to clarify or amplify a point of concern raised after the final statement was filed with the CEQ, as opposed to instituting a significant change in the action, a document less formal than a SEIS might be filed. *Id.* at 989. The "less formal document" now takes the form of an Environmental Assessment (EA) to determine whether a supplemental EIS is required. *Id.* at 989 n.7. See notes 75-78 *supra* and accompanying text.

110. 651 F.2d at 993.

111. *Id.*

112. 621 F.2d 1017 (9th Cir. 1980).

113. *Id.* at 1019.

114. *Id.* at 1027.

115. *Id.*



found that the Corps' determination was reasonable, and did not order the preparation of a SEIS.<sup>116</sup>

#### IV. Preparation of the EIS

##### A. Contents of the EIS

Under NEPA, each EIS must include: the environmental impact and avoidable adverse effects of the proposed action, as well as alternatives to the project, including the alternative of no action.<sup>117</sup>

##### 1. Impact

The EIS should be "the means of assessing the environmental impact of proposed agency actions rather than justifying decisions already made."<sup>118</sup> Thus, the assessment of the impact should be "analytic" rather than "encyclopedic,"<sup>119</sup> and should discuss the impact in proportion to its significance.<sup>120</sup> Significant impacts are those that pose risks of environmental damage.<sup>121</sup> In *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*,<sup>122</sup> for example, the Nuclear Regulatory Commission asserted that nuclear wastes stored in a repository would have no significant impact on the

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116. *Id. Warm Springs Dam Task Force* has been litigated several times. In 1974, Justice Douglas granted a stay pending appeal. 417 U.S. 1301 (1974). In 1977, the District Court for the Northern District of California and the Ninth Circuit denied the Task Force's petition for a preliminary injunction on the basis of expert testimony that there was no evidence to indicate that the Maacama Fault would break, and because the courts were reluctant to interfere with the administrative decision making process. 431 F. Supp. 320, 323; 565 F.2d 549, 552. As the district court stated, "to allow the courts to send the Corps back to the drawing board every time new and compelling arguments or materials are developed after completion of an EIS would enable industrious and imaginative opponents of any given project to forever postpone its construction." 431 F. Supp. at 323.

117. 42 U.S.C. § 4332(2)(C) (1976). In addition, the EIS must discuss the relationship between local short term uses of the environment and the maintenance and enhancement of long term productivity and irreversible and irretrievable commitments of resources involved in the project. *Id.*

118. 40 C.F.R. § 1502.2(g) (1982).

119. *Id.* § 1502.2(a).

120. *Id.* § 1502.2(b). The statement should contain "only enough discussion to show why more study is not warranted." *Id.*

121. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 478 (D.C. Cir. 1982). The discussion of significant environmental risks entails an analysis of the probabilities or possibilities of environmental damage. See *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 830 (D.C. Cir. 1977) (amended decision) (Navy required to make reasonable effort to determine effects of project).

122. 685 F.2d 459.

environment and therefore would pose no significant risk of environmental damage.<sup>123</sup> The District of Columbia Circuit concluded that this finding was a “clear error in judgment,”<sup>124</sup> declaring that “uncertainties”<sup>125</sup> and primary health, socioeconomic and cumulative effects should be included in the discussion.<sup>126</sup> As the court noted, the discussion should reveal the meaning of impacts in terms of human health or other environmental values, considering, for example, the number of cancer deaths or genetic defects to be expected, as well as the potential social, psychological and economic disruptions that might accompany the waste repository siting.<sup>127</sup>

Insignificant impacts, by contrast, should be discussed only briefly.<sup>128</sup> For example, in *Concerned About Trident v. Rumsfeld*,<sup>129</sup> the court held that the Navy’s discussion of impacts in an EIS for the Trident nuclear submarine base need not include a detailed discussion of the minor or remote social and economic impacts of the project.<sup>130</sup>

## 2. Alternatives

A detailed discussion of alternatives<sup>131</sup> to the project, including the alternative of no action, is also of primary significance. The alterna-

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123. *Id.* at 480.

124. *Id.*

125. *Id.* at 477. The court stated that the NRC should have considered the uncertainties underlying the assumption that no radiological effluents would be released into the biosphere once the wastes were sealed in a permanent repository. *Id.*

126. *Id.* at 477-78. The court found that the NRC impact table was deficient for failing to provide for consideration of these effects. *Id.* at 467.

127. *Id.* at 486.

128. 40 C.F.R. § 1502.2(b) (1982).

129. 555 F.2d 817 (D.C. Cir. 1977) (amended decision).

130. *Id.* at 828. In general, the court found the Navy’s EIS to be reasonable. *Id.* at 824-25. However, the court ordered the Navy to supplement the statement with both an analysis of environmental impacts for a reasonable period after 1981 and further discussion of alternative systems and their environmental consequences. *Id.* at 830.

131. See *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430 (5th Cir. 1981). In *Piedmont Heights*, the Fifth Circuit explained that the purpose of requiring alternatives is to “assure that the government agency as a decision-making body has considered methods of achieving the desired goal other than the proposed action.” *Id.* at 436. The court held that the failure to consider mass transit as an alternative to widening the interstate highway did not violate NEPA. *Id.* The court explained that where a mass transit system already exists, the agency should consider the need for highway improvements “in light of the existing plans for mass transit.” *Id.*

See also *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (Forest Service’s oversight of an obvious alternative was unreasonable); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 830 (D.C. Cir. 1977) (amended decision) (SEIS ordered for further discussion of alternatives which Navy considered before choosing the dedicated site).

tives must be reasonable and supported by objective data.<sup>132</sup> The decisionmaker should be able to assess the alternatives and arrive at a reasonable conclusion concerning the proposed action.<sup>133</sup> Moreover, the agency need discuss only feasible alternatives.<sup>134</sup>

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>135</sup> the Supreme Court recognized that limits might be set regarding discussion of alternatives.<sup>136</sup> According to the Court, an EIS is not rendered inadequate "simply because the agency failed to include every alternative device and thought conceivable by the mind of man."<sup>137</sup> Lower courts, following *Vermont Yankee*, also have held that limited discussions of alternatives may not necessarily render an impact statement insufficient.<sup>138</sup> Courts generally have left the specificity of treatment of alternatives to agency discretion.<sup>139</sup>

Another area of uncertainty is whether NEPA requires the discussion of alternatives to be conclusive and whether those conclusions require supporting details. In general, the answer to both questions depends upon the circumstances of the particular case.<sup>140</sup> For example, in *Citizens to Preserve Wilderness Park, Inc. v. Adams*,<sup>141</sup> the

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132. 40 C.F.R. § 1502.14 (1982).

133. *Citizens to Preserve Wilderness Park, Inc. v. Adams*, 543 F. Supp. 21 (D. Neb. 1981), *aff'd*, No. 81-2280 (8th Cir. June 30, 1982). *See also* 40 C.F.R. § 1502.14 (1982) (alternatives requirements set forth).

134. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978); *Aertsen v. Landrieu*, 637 F.2d 12, 21 (1st Cir. 1980); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1074 (1st Cir. 1980); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 825 (D.C. Cir. 1977) (amended decision); *Citizens Comm. Against Interstate Route 675 v. Lewis*, 542 F. Supp. 496, 544 (S.D. Ohio, 1982).

135. 435 U.S. 519 (1978).

136. *Id.* at 551.

137. *Id.*

138. *See, e.g., Kentucky v. Alexander*, 655 F.2d 714 (6th Cir. 1981) (Corps had not abused its discretion by limiting alternate site consideration); *North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980), (district court overextended its power by requiring agency to take more than the requisite "hard look" at alternatives); *Citizens to Preserve Wilderness Park, Inc. v. Adams*, 543 F. Supp. 21, 34 (D. Neb. 1981) (EIS must discuss enough reasonable alternatives to enable a decision maker to make a reasoned choice about feasible and prudent alternatives).

139. *North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980).

140. *Citizens to Preserve Wilderness Park, Inc. v. Adams*, 543 F. Supp. 21, 25 (D. Neb. 1981), *aff'd*, No. 81-2280 (8th Cir. June 30, 1982).

141. *Id.* This case involved a proposed highway project which would preempt land from a public park. The court ruled that the EIS was not inadequate. *Id.* at 33. In addition, the court found that the Secretary of Transportation's decision to approve the project on a finding of no prudent and feasible alternatives was not "arbitrary or capricious, an abuse of discretion or otherwise contrary to law." *Id.* at 35.

Nebraska district court stated that “[w]here the need for the project is strong, possible alternatives are extremely limited, and the choices ‘would not greatly differ’ . . . , detail can be less than otherwise.”<sup>142</sup>

Mitigation measures also must be included in the discussion of alternatives.<sup>143</sup> A supplement to an already existing EIS may not be required, however, in two instances: (1) where the proposal is modified by the addition of specific mitigation measures which compensate completely for adverse environmental impacts stemming from the original proposal; and (2) where the “statutory threshold of significant environmental effects is not crossed.”<sup>144</sup>

### 3. *Social and Economic Factors*

If a cost-benefit analysis<sup>145</sup> relevant to the choice among alternatives of different environmental impacts is being prepared, the analysis should be incorporated or appended to the statement.<sup>146</sup> The statement should discuss the relationship between the cost-benefit analysis and “any analyses of unquantified environmental impacts, values and amenities.”<sup>147</sup> A cost-benefit analysis is not required, however, for the

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142. *Id.* at 25. “The alternative road routes were ‘essentially the same tillable farm land.’” *Id.*

143. 40 C.F.R. §§ 1502.14(f), 1508.25(b)(3) (1982). Mitigation includes:

- a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- e) Compensating for the impact by replacing or providing substitute resources or environments.

*Id.* § 1508.20.

144. *Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982). The issue of mitigation measures was also emphasized in “*Westway II*,” 541 F. Supp. 1367, 1374-76 (S.D.N.Y. 1982).

145. A cost-benefit analysis should include an adequate discussion of the comparative costs and benefits associated with each alternative. *Columbia Basin Land Protection Ass’n v. Schlesinger*, 643 F.2d 585, 593 (9th Cir. 1981). Moreover, “[t]he balancing of the environmental costs of a project against its economic and technological benefits is mandated by NEPA.” *Id.* at 594. *See also* 42 U.S.C. § 4332(2)(b). However, formal cost-benefit analyses usually are not required unless absolutely crucial for aiding decision makers. *Columbia Basin*, 643 F.2d at 594.

146. 40 C.F.R. § 1502.23 (1982).

147. *Id.*

weighing of the benefits and drawbacks of the alternatives, particularly when important qualitative considerations exist.<sup>148</sup>

Although social and economic effects do not by themselves require an EIS, they may be discussed in an existing statement if they interrelate with other environmental effects.<sup>149</sup> Recently, in *Metropolitan Edison Company v. People Against Nuclear Energy* ("PANE"),<sup>150</sup> the Supreme Court decided a case of first impression—whether a discussion of possible psychological effects must be included in an EIS.<sup>151</sup> In "PANE," the District of Columbia Circuit had held that potential harms to psychological health and well-being were cognizable under NEPA.<sup>152</sup> The court stated further that the Nuclear Regulatory Commission was required to decide whether significant new circumstances or information concerning the potential psychological effects of continuing operation of the Three Mile Island nuclear facility had arisen since the filing of the original impact statement.<sup>153</sup> In a unanimous decision, the Supreme Court reversed, holding that Congress had not intended to require federal agencies to consider the risk of psychological stress as an environmental impact.<sup>154</sup>

In short, impact statements must conform to the NEPA procedural mandates. An EIS should be as informative as possible under the circumstances to conform to the main thrust of NEPA—to induce fully informed decision making. An EIS must indicate that a project's significant environmental risks, reasonable and feasible alternatives and significant environmental impacts have been factored into an

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148. *Id.* The CEQ regulations state, however, that the EIS should at least indicate the qualitative considerations, including those factors not related to environmental concerns, which are relevant to the decision. *Id.*

149. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 51 U.S.L.W. 4371 (U.S. Apr. 19, 1983).

150. *Id.* If the social and economic effects are deemed cognizable "secondary impacts," they must be discussed with more brevity than significant impacts. *See* 40 C.F.R. § 1502.2(b) (1982). *See also id.* § 1508.27 (definition of significant impacts).

151. "PANE," 51 U.S.L.W. at 4373. *See also* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 685 F.2d 459, 477-78 (D.C. Cir. 1982) (EIS should discuss health and socioeconomic effects); 40 C.F.R. § 1508.8 (1982).

152. *People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n*, 678 F.2d 222, 223 (D.C. Cir. 1982).

153. *Id.* at 235. The case was heard after the nuclear accident occurred in March 1979.

154. "PANE," 51 U.S.L.W. at 4373-74.

agency's decision.<sup>155</sup> These factors also must be balanced with the economic, technological and societal effects of the project.<sup>156</sup> As the District of Columbia Circuit recently stated, "[an] agency can be asked to do more than to reveal that which it knows and that which it does not know. It may not be permitted, however, to do any less."<sup>157</sup>

## B. Issuing An EIS

An impact statement purports to insure meaningful public participation in decision making at administrative and legislative levels.<sup>158</sup> Therefore, the statement must be circulated to public officials and citizens—the "affected public"—before decisions are made and action is taken.<sup>159</sup> The CEQ sought to insure public participation by requiring agencies to obtain comments from certain federal agencies.<sup>160</sup> In addition, before preparing the final EIS, an agency must request comments from appropriate state and local agencies which are authorized to develop environmental standards, from any agency asking to receive statements on actions of the kind proposed, and from the public.<sup>161</sup> The agency proposing the action may request comments on a final impact statement prior to the final decision.<sup>162</sup> After receiving comments from those solicited, the agency is required to respond to the comments by modifying or developing new alternatives, supplementing or improving its analysis, making factual corrections, or explaining why the comments do not warrant further response.<sup>163</sup>

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155. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 478-79 (D.C. Cir. 1982).

156. *See Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 825 (D.C. Cir. 1977) (amended decision) (NEPA purpose carried out by weighing of environmental costs against technical, economic and strategic benefits of each alternative). *See also Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 594 (9th Cir. 1981) ("The balancing of the environmental costs of a project against its economic and technological benefits is mandated by NEPA.").

157. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 479 (D.C. Cir. 1982).

158. *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 365 (D.C. Cir. 1981) (Army Corps of Engineers adequately fulfilled NEPA obligations by filing sufficient EIS for a proposed lock and dam for Upper Mississippi River Navigation System).

159. 40 C.F.R. § 1500.1(b) (1982); 42 U.S.C. § 4332(c) (1976).

160. 40 C.F.R. § 1503.1 (1982). These agencies have jurisdiction by law or special expertise on any environmental impacts involved or in areas of environmental concerns regarding the proposing agency's Draft EIS (DEIS). Comments must be solicited after preparation of a DEIS and before preparation of a Final EIS (FEIS). *Id.*

161. *Id.*

162. *Id.*

163. *Id.* § 1503.4(a). If the changes in response to comments are relatively minor, the agency need not rewrite the draft, but should attach the changes to the state-

Public meetings to discuss the impact statements are not required by the CEQ. Yet, a court reviewing the adequacy of the EIS procedures may order such a meeting if an agency has its own public meeting regulations and has failed to comply with them.<sup>164</sup> Moreover, should an agency decide to hold a NEPA-related meeting or hearing, the agency must publicly notify persons and agencies who may be affected by the proposed action.<sup>165</sup>

### V. Standing

Private individuals may bring suit under NEPA for an agency's failure to file an EIS.<sup>166</sup> In *Sierra Club v. Morton*,<sup>167</sup> the Supreme Court permitted individuals to seek review of agency conduct under the Administrative Procedure Act (APA),<sup>168</sup> by showing that they sustained injury in fact.<sup>169</sup> Moreover, the Court ruled that having supplied the requisite independent basis for standing, individuals also could assert the interests of the general public.<sup>170</sup>

Lower courts have extended *Morton* to NEPA cases to permit a party challenging the sufficiency of an EIS to assert the promotion of the welfare of society, provided that the party has an independent basis to bring the suit.<sup>171</sup> An independent basis, injury in fact, was established in *Sierra Club v. Adams*.<sup>172</sup> In *Adams*, the plaintiffs sought to enjoin American participation in constructing the Darien Gap Highway in Panama and Columbia because of deficiencies in the EIS.<sup>173</sup> The District of Columbia Circuit agreed that because the

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ment, which will be filed later as the final statement. All substantive comments must be attached to the FEIS. *Id.* § 1503.4(b), (c).

*See also* *California v. Block*, 690 F.2d 753, 773 (9th Cir. 1982). In *Block*, the court found an EIS inadequate on grounds that the Forest Service had neither identified nor discussed "responsible opposing viewpoints" concerning site allocations of roadless national forest system land. *Id.* The court declared that "NEPA's public comment procedures are at the heart of the NEPA review process. NEPA requires responsible opposing viewpoints to be included in the final EIS." *Id.* at 770. *See also* 42 U.S.C. § 4332(2)(C) (1976).

164. *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 364 (D.C. Cir. 1981).

165. 40 C.F.R. § 1506.6(b) (1982).

166. *See* notes 167-74 *infra* and accompanying text.

167. 405 U.S. 727 (1972).

168. 5 U.S.C. §§ 551-706 (1976 & Supp. IV 1980). *See* notes 181-82 *infra* and accompanying text.

169. 405 U.S. at 735.

170. *Id.* at 740 n.15.

171. *See* notes 172-74 *infra* and accompanying text.

172. 578 F.2d 389, 392 (D.C. Cir. 1978).

173. *Id.* at 390.

Sierra Club had standing to challenge the impact statement on the ground of injury in fact, the Sierra Club was permitted to raise "other inadequacies in the [Final EIS] based upon the 'public interest' in requiring government officials to discharge faithfully their statutory duties under NEPA."<sup>174</sup>

## VI. Judicial Review

### A. Standard of Review

In general, courts have been reluctant to interfere with agency decision making, a reluctance which may stem in part from a desire not to disrupt the constitutional balance of power. Prior to NEPA's enactment, courts did not review agency actions that threatened environmental damage,<sup>175</sup> preferring to leave agency decisions entirely to agency discretion. However, in *Calvert Cliffs Coordinating Commit-*

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174. *Id.* at 392. The court ultimately vacated the district court's injunction upon a finding that the EIS adequately discussed the information a decision maker would need to balance properly the environmental factors of a decision. *Id.* at 395. Moreover, the discussion of alternatives satisfied a rule of reason. *Id.*

See *California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982) (party alleging NEPA violation must show both "injury in fact" and that the interests sought to be protected are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"); *Save the Bay, Inc. v. United States Corps of Eng'rs*, 610 F.2d 322, 325 (5th Cir. 1980) ("An allegation of residence coupled with an allegation of injury caused by federal action affecting the area of that residence clearly demonstrates that the party seeking review is among those injured."). Cf. *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 438 (5th Cir.), *cert. denied*, 454 U.S. 1126 (1981). In *Noe*, the court refused to give an individual a right of action against MARTA for failing to comply with the information contained in the EIS which MARTA had filed. *Noe* is clearly distinguishable from other private right of action cases in which individuals sue to compel an agency to file an EIS.

Closely related to the standing question is whether a party must exhaust administrative remedies prior to filing suit in a district court. In *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), the Third Circuit answered the question in the affirmative. Because the judge made rule of exhaustion cannot affect or impair the subject matter jurisdiction of the federal judiciary, reasoned the court, the party wishing to compel agency compliance with NEPA need not exhaust administrative remedies prior to seeking relief from federal courts. *Id.* at 241, 245.

Of course, the burden of proving that an agency has failed to comply with NEPA is on the plaintiffs. See *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 142 (1981) (plaintiffs failed to show that preparation of an impact statement by the Navy was required); *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) (plaintiffs did not successfully attack the Army Corps of Engineers' conclusion that the physical impacts of an Upper Mississippi River Navigation System project were minor).

175. See generally Comment, *supra* note 23.



*tee, Inc. v. United States Atomic Energy Commission*,<sup>176</sup> one of the earliest NEPA cases, the District of Columbia Circuit declared that courts have the power to require agencies to comply with NEPA's procedural directions.<sup>177</sup>

Although agencies have considerable discretion to determine whether to prepare and file an EIS,<sup>178</sup> a court may review the reasonableness of that decision. Similarly, if an agency does file an EIS, a court may make a "pragmatic judgment"<sup>179</sup> concerning the sufficiency of the EIS to foster "both informed decision-making and informed public participation."<sup>180</sup>

The standard of review is quite narrow. An agency decision whether to prepare an EIS and what information to include falls under the aegis of the Administrative Procedure Act (APA).<sup>181</sup> The APA provides that agency action may be overruled by a court only if the agency action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."<sup>182</sup> Additionally, under NEPA, the court must inquire whether the agency followed a "rule of reason."<sup>183</sup>

The reasonableness of agency action is decided on a case-by-case basis. Once a court is satisfied that an agency has taken a "hard look"

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176. 449 F.2d 1109 (D.C. Cir. 1971). In *Calvert Cliffs*, the court was confronted with Atomic Energy Commission (AEC) rules which did not comply with NEPA. Because NEPA's procedural rules are not flexible and must therefore be complied with to the fullest extent possible absent a clear conflict of statutory authority, the court ordered the AEC to bring its rules into compliance with NEPA. *Id.* at 1115, 1129.

177. *Id.* at 1112.

178. See notes 155-57 *supra* and accompanying text.

179. *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citing *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977)).

180. *California v. Block*, 690 F.2d 753, 761. In *Block*, the court found that the EIS did not foster informed decision making and public participation and was therefore inadequate. 690 F.2d at 773.

181. 5 U.S.C. §§ 551-706 (1976). Sections 701-706 concern judicial review. The APA is binding on all "authorities" of the United States Government except Congress, federal courts, the governments of the territories or United States possessions, and the government of the District of Columbia. *Id.* § 551(1)(A)-(D).

182. *Id.* § 706(2)(A). See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971); *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982); *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 685 F.2d 459, 475 (D.C. Cir. 1982); *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc) (all follow APA § 706 standard of review).

183. *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982); *North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980); *Save the Bay, Inc. v. United States Corps of Eng'rs*, 610 F.2d 322, 325 (5th Cir. 1980).

at the environmental consequences, the review must end.<sup>184</sup> Finally, a reviewing court may not substitute its own judgment for that of an agency.<sup>185</sup>

## B. Compliance with APA Mandates

A court must set aside agency action that violates the APA mandates.<sup>186</sup> In *Grazing Fields Farm v. Goldschmidt*,<sup>187</sup> the First Circuit

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184. *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 231 (1980) (Marshall, J., dissenting) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). See *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982); *Cabinet Mountain Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982).

*Strycker's Bay* involved a dispute over a proposed low-income housing project to be constructed on Manhattan's Upper West Side. In 1971, the Trinity School, housed in a combination school/middle-income housing development, sued to enjoin the Department of Housing and Urban Development (HUD) and the New York City Planning Commission from commencing the projects. The plaintiffs claimed that HUD had failed to comply with NEPA's requirement to include alternatives in an EIS. The district court concluded that NEPA had not been violated. *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974).

The Second Circuit ordered HUD to prepare a statement of possible alternatives, consequences, facts and reasons for and against the project. 523 F.2d 88, 94 (2d Cir. 1975). On remand, the district court again found no NEPA violations. 454 F. Supp. 204, 220 (S.D.N.Y. 1978). The Second Circuit vacated and remanded because HUD had not given determinative weight to environmental factors resulting from placement of low-income housing into a concentrated area. 590 F.2d 39, 45 (2d Cir. 1978). The Supreme Court reversed. 444 U.S. 223, 228.

185. *Strycker's Bay*, 444 U.S. at 227; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

186. 5 U.S.C. § 706(2)(A), (D) (1976). See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 477-78 (D.C. Cir. 1982) (impacts table was arbitrary and capricious in failing to allow for consideration of uncertainties and health, socioeconomic and cumulative effects); *Aertsen v. Landrieu*, 637 F.2d 12 (1st Cir. 1980) (HUD's decision that action was not a major federal action significantly affecting environment was not arbitrary and capricious).

187. 626 F.2d 1068 (1st Cir. 1980). In this case, the Massachusetts Department of Public Works (DPW) planned to extend a highway in the Buzzards Bay area of Cape Cod by traversing *Grazing Fields Farm*, a 900-acre tract including farmland, a wildlife sanctuary and a riding school. The DPW prepared an addendum to the original EIS but never incorporated the addendum into the statement. *Id.* at 1070. The court decided that information found in an administrative record but not incorporated in an EIS did not satisfy the EIS alternatives requirement. *Id.* at 1072. The court explained that to allow an otherwise insufficient EIS to pass NEPA muster in this case "would hamper the flow of information to the public by making more difficult the endeavors of watchdogs who could reasonably be expected to publicize the environmental issues present, and would tend to mute those most likely to identify problems and criticize decisions." *Id.* at 1073-74.

established a test for reviewing agency actions: (1) the court must determine whether the agency action was arbitrary and capricious; and (2) the court must assess the agency's compliance with NEPA's procedural duties.<sup>188</sup> The court also should assure itself that the agency's consideration of the environmental consequences of its actions was made in good faith,<sup>189</sup> without judging "the balance struck by the agency among competing concerns."<sup>190</sup>

In general, agency action is deemed "in good faith," and therefore not "arbitrary and capricious," if the decision was based on a consideration of relevant factors<sup>191</sup>—that is, the significant environmental risks.<sup>192</sup> Moreover, the decision must be supported by "substantial evidence" of such considerations.<sup>193</sup> One court found that an agency had satisfied the "substantial evidence" requirement by conducting a thorough analysis of the proposed action and by taking specific measures, such as discussing cumulative effects and considering mitigation measures to address the relevant environmental issues.<sup>194</sup> Courts also must consider whether the agency action involved a clear error of judgment.<sup>195</sup> Absent a showing of arbitrary action, courts will assume

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188. *Id.* at 1072; 5 U.S.C. § 706(2)(A), (D) (1976).

189. 626 F.2d at 1072.

190. *Id.* (citing *Strycker's Bay*, 444 U.S. at 227). See *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981); *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 825 (D.C. Cir. 1977) (amended decision).

191. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). See also *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 478 (D.C. Cir. 1982) (relevant factors include "significant environmental risks—probabilities or possibilities of environmental damage"). In addition, agencies must balance environmental costs of a project against its economic and technological benefits. *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 594 (9th Cir. 1981); 42 U.S.C. § 4332(2)(B) (1976).

192. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 478 (D.C. Cir. 1982). In this case, the significant environmental risks were that toxic wastes from a nuclear power reactor would emit "radiological effluents" into the atmosphere. *Id.* at 466-67.

193. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971). See also *Save the Bay, Inc. v. United States Corps of Eng'rs*, 610 F.2d 322, 323 (5th Cir. 1980) (where Environmental Assessment was reasonable and based on substantial evidence, Corps not required to prepare EIS).

194. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 684 (D.C. Cir. 1982).

195. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). *Overton Park* concerned the authorization of funds to finance construction of a proposed highway through a public park. The highway would sever the zoo from the rest of the park. The Supreme Court reversed a grant of summary judgment for the Secretary of Transportation and ordered a stay of proceedings until the Secretary

that an agency acted within its discretion.<sup>196</sup> Thus, the burden of proving that an agency acted arbitrarily weighs heavily upon the party asserting a NEPA violation.<sup>197</sup>

The limits on judicial interference with the agency decision making process were enunciated by the Supreme Court in *Kleppe v. Sierra Club*.<sup>198</sup> The judiciary has no authority, declared the Court, to disregard statutory language and balance "court-devised factors"<sup>199</sup> to determine when in the proposal's "germination process" an EIS should be prepared.<sup>200</sup> The Court expressed concern that such an assertion of judicial authority would confuse agencies about their procedural duties under NEPA and invite both litigation and excessive judicial involvement in agency decision making processes.<sup>201</sup>

### C. Review of EIS Compliance with NEPA

Once an EIS has been prepared, courts will compare it with the procedural mandates of NEPA.<sup>202</sup> In *Vermont Yankee Nuclear Power*

exhausted planning to minimize harm to the park. *Id.* at 405-06. *See also* Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 685 F.2d 459, 480 (D.C. Cir. 1982) (agency's finding that nuclear wastes sealed in a repository would have no environmental impact and therefore would pose no significant risk of environmental damage was clear error of judgment).

196. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). *See also* Save the Bay, Inc. v. United States Corps of Eng'rs, 610 F.2d 322, 325 (5th Cir. 1980) (determination must be upheld if it is reasonable and made objectively in good faith on reviewable environmental record).

197. *See* Richland Park Homeowners Ass'n v. Pierce, 671 F.2d 935, 945 (5th Cir. 1982) (injunction denied because plaintiffs failed to prove HUD's decision not to file an EIS was in bad faith).

198. 427 U.S. 390 (1976). In *Kleppe*, the Sierra Club sought an injunction compelling the Department of the Interior and other federal agencies to prepare an EIS before taking further steps to develop federal coal reserves in the Northern Great Plains Region. *Id.* at 395-96. The Court decided that because there was no proposed major federal action involved, grounds for an injunction did not exist. *Id.* at 399.

199. *Id.* at 406.

200. *Id.* The Court also demonstrated its reluctance to uphold lower court decisions based on judicial creations in *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 141 (1981). In that case, the Ninth Circuit had required the Navy to release a "hypothetical EIS" to the public. *Catholic Action of Hawaii/Peace Educ. Project v. Brown*, 643 F.2d 569, 572 (9th Cir. 1980). The Supreme Court reversed, declaring that the "hypothetical EIS" is "a creature of judicial cloth. . . , not legislative cloth, . . . [and] is not mandated by any of the statutory or regulatory provisions upon which the Court of Appeals relied." *Id.*

201. *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976).

202. 42 U.S.C. § 4332 (1976). Section 102 of NEPA is now codified in § 4332, which requires, in relevant part, that:

(2) all agencies of the Federal Government shall— . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal Actions significantly affecting the quality of

*Corp. v. Natural Resources Defense Council, Inc.*,<sup>203</sup> the Supreme Court asserted that a reviewing court may not overturn an agency's decision if the agency "employed at least the statutory *minima*."<sup>204</sup> The statutory *minima* require, *inter alia*, that the EIS contain a "reasonably thorough discussion of the significant aspects of the probable environmental consequences"<sup>205</sup> and alternatives.<sup>206</sup> The reviewing court must find that the alternatives selected and discussed in the EIS foster "informed decision-making and informed public participation";<sup>207</sup> otherwise, the EIS will be deemed insufficient.<sup>208</sup>

the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . .

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment; . . .

203. 435 U.S. 519 (1978).

204. *Id.* at 548. In *Vermont Yankee*, the Court decided that the Atomic Energy Commission had employed the statutory *minima* concerning an EIS upon which the Commission granted construction permits to utilities seeking to construct and operate nuclear power plants. *Id.* See also *Piedmont Heights Civic Club v. Moreland*, 637 F.2d 430, 441 (5th Cir. 1981) (failure to discuss all cumulative effects of highway projects in an EIS did not result in a NEPA violation).

205. *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (quoting *Trout Unlimited, Inc. v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)). NEPA, after all, was designed to insure "that federal agencies are fully aware of the present and future environmental impact of their decisions." *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981).

206. See *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (information found in an administrative record but not incorporated in an EIS did not satisfy alternatives requirement); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 827 (D.C. Cir. 1977) (amended decision) (EIS deficient by failing to mention the environmental aspects of alternatives).

207. *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (citing *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981)) (injunction denied because EIS adequately addressed the navigational risks associated with the proposed site of docking facilities).

208. *California v. Block*, 690 F.2d 753, 769 (9th Cir. 1982) (unreasonable for the Forest Service to overlook an obvious alternative).

#### D. Review of the Reasonableness of an Agency Decision

Courts will review the reasonableness of an agency's decision concerning an EIS.<sup>209</sup> For example, in *Save the Bay, Inc. v. United States Corps of Engineers*,<sup>210</sup> the Fifth Circuit upheld the Corps' decision not to prepare an EIS for the construction of an outfall pipeline from a manufacturing plant, finding that the decision was reasonable.<sup>211</sup> The Corps had followed advice from the proper agencies that no significant impacts would result, and had reached the same conclusion independently.<sup>212</sup> Thus, the court decided that the Corps had complied with NEPA, had carefully assessed the situation, and had made a reasonable decision.<sup>213</sup>

Another illustration of reasonable agency action is found in *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*,<sup>214</sup> a recent District of Columbia Circuit decision. That case involved a Forest Service decision to conduct exploratory mineral drilling which might adversely affect the grizzly bear population.<sup>215</sup> The record indicated that the agency had considered the proposal carefully,<sup>216</sup> had been well informed about the likely problems,<sup>217</sup> and had "weighed

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209. See *Adler v. Lewis*, 675 F.2d 1055, 1091 (9th Cir. 1982) (court reviewed agency action under *Overton Park* standard and decided Secretary's determination could be said to be within the small scope of alternatives and Secretary rationally believed that there were no reasonable alternatives); *North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980) (court held agency to "reasonable consideration" of all significant impacts and found that the discussion of impacts satisfied a "rule of reason"); *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978) (standard of review was what is reasonable under the circumstances).

210. 610 F.2d 322 (5th Cir. 1980).

211. *Id.* at 325.

212. *Id.* at 325-26.

213. *Id.*

214. 685 F.2d 678 (D.C. Cir. 1982).

215. *Id.* at 680.

216. The agency had prepared an Environmental Assessment and conducted an "extensive biological evaluation." *Id.* at 683.

217. The biological evaluation revealed that the bears could be affected in two ways: (1) habitat modification, and (2) increased human/bear interactions. The evaluation determined that there would be no significant adverse effect on the habitat. However, the increase in human-bear interaction would have a more substantial effect. The Forest Service made 14 mitigation recommendations to counteract the adverse impacts. *Id.* The Forest Service also considered the cumulative effects of the drilling project and implemented mitigation measures. One of these measures involved the curtailment of timber sales and the closing of roads to provide a secure bear habitat. *Id.* at 684.

the likely impacts."<sup>218</sup> Therefore, the court upheld an agency determination that an EIS was unnecessary.<sup>219</sup>

A court may, however, set aside an agency decision in certain "narrow instances," as the Supreme Court declared in *Citizens to Preserve Overton Park Inc. v. Volpe*,<sup>220</sup> where the agency action was " 'unwarranted by the facts' "<sup>221</sup> and was therefore clearly unreasonable. For example, in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*,<sup>222</sup> the District of Columbia Circuit set aside an agency finding that a project to seal nuclear wastes in a repository would have no environmental effect and therefore would pose no environmental risks.<sup>223</sup> The court concluded that the finding constituted a " 'clear error in judgment.' "<sup>224</sup>

Some jurisdictions have established criteria for determining whether an agency followed a "rule of reason." The District of Columbia, for example, will look at whether the agency: (1) took a "hard look" at the problem; (2) identified the relevant areas of concern; (3) presented a convincing case that the impacts were insignificant; and (4) established convincingly that changes in the project sufficiently reduced the significant impacts to a minimum.<sup>225</sup> The Ninth Circuit recently set out relevant factors that an agency should consider in an EIS or Environmental Assessment (EA) in a case involving a Forest Service decision to allocate national forest land.<sup>226</sup> Some of these factors were "Forest Service resource planning goals, wilderness attributes, public accessibility to wilderness areas, public comment and the economic effects of Wilderness classification."<sup>227</sup>

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218. *Id.* at 683.

219. *Id.*

220. 401 U.S. 402 (1971).

221. *Id.* at 414. In these circumstances, a court would review the agency action *de novo*. See also Administrative Procedure Act, 5 U.S.C. § 706 (1976): "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court."

222. 685 F.2d 459 (D.C. Cir. 1982).

223. *Id.* at 480.

224. *Id.* See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

225. *Cabinet Mountains Wilderness*, 685 F.2d at 682 (citing *Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973)).

226. *California v. Block*, 690 F.2d 753 (9th Cir. 1982). The EIS failed to include an obvious alternative, discuss or identify opposing viewpoints, or foster informed decision making and public participation. The court found that the EIS was unreasonable. *Id.* at 767-74.

227. *Id.* at 758.

Absent a substantial procedural or substantive reason mandated by statute,<sup>228</sup> an agency decision must be upheld even if the court disapproves of the result.<sup>229</sup> A reviewing court may not attempt to resolve conflicting scientific opinions.<sup>230</sup> As the Second Circuit declared, “[t]he district court does not sit as a super-agency empowered to substitute its scientific expertise on testimony presented to it *de novo* for the evidence received and considered by the agency which prepared the EIS.”<sup>231</sup>

### E. May an Injunction be Granted?

Once a court has decided that an action violates NEPA, an injunction may be appropriate to curtail that action until the agency complies with the Act.<sup>232</sup> An injunction will not be issued, however, until a court has analyzed carefully the violations which have occurred, possibilities for relief and “any countervailing societal interests that might be adversely affected by . . . an injunction.”<sup>233</sup> The party

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228. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

229. *Id.* See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (NEPA designed to insure a fully informed decision but not necessarily the decision that the court would make if it were a member of the decision making committee); *Adler v. Lewis*, 675 F.2d 1085, 1094 (9th Cir. 1982) (“Even if the decision of the Secretary be different from the one this court would make if it were our responsibility to choose, we will not substitute our judgment for that of the Secretary.”); *Citizens for Balanced Env't & Transp., Inc. v. Volpe*, 650 F.2d 455, 462 (2d Cir. 1981) (court may not act as a decision maker “in the guise of securing procedural compliance”).

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978), the Supreme Court ruled that agency decisions may not be set aside “simply because the court is unhappy with the result reached.” See also *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 371 n.67 (D.C. Cir. 1981) (reviewing court may not substitute its own judgment as long as agency decision not arbitrary and capricious); notes 184-85 *supra* and accompanying text.

230. *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 372 (D.C. Cir. 1981) (citing *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977)).

231. *Citizens for Balanced Env't & Transp., Inc. v. Volpe*, 650 F.2d 455, 462 (2d Cir. 1981) (quoting *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977)).

232. *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935, 945 (5th Cir. 1982) (injunction not ordered because plaintiffs failed to prove HUD violated NEPA); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 458 (D.C. Cir. 1977) (injunction not ordered because alleged NEPA violation was lack of timeliness and therefore not serious enough to warrant injunction). See generally W. RODGERS, *HANDBOOK ON ENVIRONMENTAL LAW* 798-809 (1977).

233. *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935, 942 (5th Cir. 1982) (injunction denied because injury to public interest outweighed the need for



alleging a NEPA violation must show that the agency blatantly violated NEPA<sup>234</sup> and that irreparable harm will ensue if the injunction is denied,<sup>235</sup> a heavy burden of proof. A court should "tailor its relief to fit each particular case"<sup>236</sup> by balancing NEPA's environmental concerns against interests of society that might be affected adversely by an injunction.<sup>237</sup> A court may not issue an injunction under NEPA as a prophylactic or punitive measure.<sup>238</sup> However, a court may issue an injunction even when a project is in an advanced stage of completion, if the court finds that an agency has blatantly violated NEPA's procedural requirements.<sup>239</sup>

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injunctive relief). *See also* Environmental Defense Fund v. Marsh, 651 F.2d 983, 1005-06 (5th Cir. 1981) (court found Army Corps of Engineers blatantly violated NEPA and enjoined construction of Tennessee-Tombigbee Waterway until Corps prepared and filed SEIS).

234. *See* Richland Park Homeowners Ass'n v. Pierce, 671 F.2d 935, 942 (5th Cir. 1982) In this case, the plaintiffs failed to show that HUD had acted in bad faith by not filing an EIS when providing federal financial assistance for constructing and operating a Dallas low-income apartment project. As the court noted, the factual showing was "open to the interpretation that the homeowners represented by the plaintiffs mostly oppose[d] the project because they fear[ed] that the low-income residents of the project [would] cause a material degradation of their neighborhood 'environment.'" *Id.* at 938.

The plaintiffs also had the burden of proving that the value of the injunction would greatly outweigh the adversely affected public interests. *Id.* at 942. The court found that the injury to the public interest caused by the uprooting of low-income families from their homes and the "lack of environmental relief that would result from their eviction" were factors weighing heavily against the demand for an injunction. *Id.* at 943. Moreover, the NEPA violations were minor. *Id.* at 945. Thus, an injunction that would prevent the payment of rent subsidies to low-income families was inappropriate under the circumstances. *Id.*

235. Environmental Defense Fund v. Marsh, 651 F.2d 983, 1006 (5th Cir. 1981) (major changes in project could have significant environmental impacts).

236. *Id.*

237. *Id.*

238. Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977) (citing Cady v. Morton, 527 F.2d 786, 799 n.12 (9th Cir. 1975)) (injunction denied because EIS adequate except for lack of timeliness).

239. Environmental Defense Fund v. Marsh, 651 F.2d 983, 1006 (5th Cir. 1981) (court enjoined project which was 55% completed). *See* Richland Park Homeowners Ass'n v. Pierce, 671 F.2d 935, 942 (5th Cir. 1982) (project in post-completion stage not enjoined because of failure to show that HUD acted in bad faith or that public interest would be irreparably harmed). *See also* TVA v. Hill, 437 U.S. 153 (1978) (the Tellico Dam case). In *TVA v. Hill*, the Supreme Court enjoined a project which was 80% completed where continuation of the project would have violated the Endangered Species Act (ESA), the purpose of which, according to the Court, was to "halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. The Court stated that an injunction was the proper remedy for a violation of the ESA. *Id.* at 172. While the case did not concern NEPA, an analogy may be drawn, and it would appear that an obvious NEPA violation should be similarly enjoined.

## VII. Westway

The recent "*Westway*"<sup>240</sup> litigation involves the two major NEPA issues: compliance with NEPA procedures and the extent of judicial review under the Act. The principal issue in *Sierra Club v. United States Army Corps of Engineers*<sup>241</sup> ("*Westway II*") was whether the Army Corps of Engineers (the Corps) had fulfilled its obligation under NEPA by relying on an EIS issued in 1977 by the Federal Highway Administration (FHWA) and the New York State Department of Transportation (NYSDOT).<sup>242</sup> The issue on appeal ("*Westway III and IV*")<sup>243</sup> was whether the district court was justified in interfering with the agencies' decision making processes by enjoining the project when the court found that the Corps had failed to fulfill its NEPA obligations.<sup>244</sup>

In "*Westway II*," the United States District Court for the Southern District of New York decided that the 1977 EIS was inadequate.<sup>245</sup>

Another analogous situation occurred in *Weinberger v. Carlus-Romero-Barcelo*, 50 U.S.L.W. 4434 (U.S. Apr. 27, 1982), in which the Court decided that ordering an injunction for a violation of the Federal Water Pollution Control Act (FWPCA), 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1976)) was not an abuse of judicial discretion. The FWPCA, stated the Court, permits a court to order the relief it deems necessary to comply with the Act. Such relief may include an order of immediate cessation. 50 U.S.L.W. at 4437.

240. Westway is a proposed 4.2 mile six lane interstate highway link to be constructed on the West Side of Manhattan between the Brooklyn-Battery Tunnel and 42nd Street. A landfill in the Hudson River was proposed to create 234 acres of land for highway ramps, new development and recreational parks. Most of the highway will be underground. According to the recent FHWA estimates, Westway will cost \$1.8 billion, \$1.4 billion of which is eligible for federal funding. 1982 COMPTROLLER GEN. TRISTATE GEN. REGIONAL PLAN. COMM'N, APPROVAL OF THE WESTWAY HIGHWAY PROJECT, NEW YORK CITY [hereinafter cited as GAO REPORT]. See also *Sierra Club v. United States Army Corps of Eng'rs*, No. 82-6125 (2d Cir. Feb. 25, 1983) ("*Westway IV*"); *Sierra Club v. Hennessy*, No. 82-6175 (2d Cir. Dec. 6, 1982) ("*Westway III*").

241. 541 F. Supp. 1367 (S.D.N.Y. 1982).

242. This issue was decided in March, 1982, *Sierra Club v. United States Army Corps of Eng'rs*, No. 81 Civ. 3000 (S.D.N.Y. Apr. 21, 1982) ("*Westway I*"), and in June, 1982, *Sierra Club v. United States Army Corps of Eng'rs*, 541 F. Supp. 1367 (S.D.N.Y. 1982) ("*Westway II*"). In both opinions, Judge Griesa found that the Corps should not have relied on the 1977 EIS, but rather should have prepared a SEIS disclosing new information. See 541 F. Supp. at 1369.

243. "*Westway IV*," No. 82-6125 (2d Cir. Feb. 25, 1983); "*Westway III*," No. 82-6175 (2d Cir. Dec. 6, 1982).

244. "*Westway III*," slip op. at 616.

245. "*Westway II*," 541 F. Supp. at 1370. See also GAO REPORT, *supra* note 240 (description of the Westway project). In 1975, the project was approved by the Tri-State Regional Planning Commission, a metropolitan planning organization and an areawide clearinghouse required by the Office of Management and Budget. Tri-State is responsible for developing a coordinated regional transportation plan and pro-

Following approval of the EIS and before major funding was received, new information concerning the environmental impacts of the project had become available.<sup>246</sup> The most significant information included: a fishery study ("LMS study") revealing that the proposed landfill site is an important overwintering habitat for striped bass; and comments submitted by the National Marine Fishery Service (NMFS), the Fish and Wildlife Service (FWS), and the Environmental Protection Agency (EPA), indicating that the proposed landfill was likely to have a serious adverse impact on Hudson River fisheries.<sup>247</sup> The

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gram, and deals with comments on proposed federally funded projects. GAO REPORT, *supra* note 240, at i.

The legal controversy centers around an EIS prepared by the NYSDOT and approved by the FHWA in 1977. The Secretary of Transportation approved Westway for federal funding in Jan., 1977. *Id.* at ii. According to NEPA, where a federal action involves a grant of funds to a state, the EIS may be prepared by a state agency so long as the responsible federal official insures that the EIS scope, objectivity and content are proper. 42 U.S.C. § 4332(2)(D) (1976).

The question of the validity of the 1977 EIS has been litigated several times. Action for Rational Transit v. West Side Highway, 536 F. Supp. 1225 (S.D.N.Y. 1982) ("ART II") involved two suits against the Westway project. The first, brought by ART, alleged violations of both NEPA and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1976 & Supp. IV 1980). ART asserted that because of the air pollution problems which would be caused by Westway, the project should be enjoined. Moreover, preference for an alternative and less expensive highway, coupled with a trade-in of the excess funds for mass transit improvement was stressed. The claim was dismissed. "ART II," 536 F. Supp. at 1254. However, the court ordered a further hearing to determine whether to issue an injunction against the Secretary of Transportation to prevent funding for Westway because the Department of Transportation failed to comply with NEPA regarding the adverse environmental effects on fisheries. *Id.*

The second suit, brought by the Sierra Club, alleged that the Army Corps of Engineers had violated NEPA by relying on the 1977 EIS which failed to reveal that the proposed landfill was an important habitat for juvenile striped bass. *Id.* at 1229. The court found that the Corps had failed to make any effort of its own to corroborate the information in the EIS and violated its NEPA obligations by failing to disclose to the public the significant adverse environmental impact of the landfill. The court issued a preliminary injunction, setting aside the permit for the landfill. *Id.* at 1253-54.

*See also* Action for Rational Transit v. West Side Highway, 517 F. Supp. 1342 (S.D.N.Y. 1981) ("ART I") (motion for preliminary injunction denied because petitioners failed to show either irreparable harm or a balance of hardships tipped in their favor).

246. "Westway II," 541 F. Supp. at 1369.

247. *Id.* at 1369-70. Additional new information included: (1) proposals for several new alternatives to the project were made; (2) the urban development aspects of the project were rendered less attractive and important because of urban renewal in the West Side area; (3) the project costs were increased and adequate funding became less certain; (4) the estimated levels of pollution resulting from construction and operation of the project rose. *Id.* However, the court in "Westway I" found that the plaintiffs had not proven the need for supplementation as to items (1)-(4) above. *Id.* at 1370.

FHWA did not supplement the 1977 EIS with this new information.<sup>248</sup> Moreover, in October 1980, the FHWA and the NYSDOT informed the Corps, the agency responsible for granting the landfill permit, that no significant new information had been released.<sup>249</sup> In November 1980, the Division Engineer recommended issuance of the landfill permit.<sup>250</sup>

In an action instituted by the Sierra Club and other concerned groups,<sup>251</sup> the district court held that: (1) the 1977 EIS was inadequate

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248. *Id.* The court found that the 1977 EIS was insufficient even before the new fishery study. *Id.* at 1371. The EIS asserted that the interpier area (the proposed site for the landfill) was a "biological wasteland," Brief for Respondent at 8, *Sierra Club v. Hennessy*, No. 82-6175 (2d Cir. Dec. 6, 1982), a statement made on the basis of a 1974 sampling. The NMFS, in its comment in response to the 1974 Draft EIS, stated that the sampling information was insufficient to evaluate the impacts because the sampling had taken place in the summer when fish could not have been present because of low oxygen levels in the water. Brief for Respondent at 9-10, "*Westway II*," 541 F. Supp. at 1372. The court concluded that "those responsible for preparing the fishery material in the January 1977 EIS knew, or should have known, of the lack of factual basis for what was stated." 541 F. Supp. at 1372.

249. Brief for Respondent at 21.

250. *Id.* at 21-22. The NMFS then conducted its own study of the project and submitted alternative proposals which would provide an adequate replacement highway without landfilling. *Id.* at 24. Moreover, this alternative highway would be less expensive than *Westway* and the leftover funds might be traded in for mass transit improvement. *Id.*

Much of the opposition to the *Westway* project involves this alternative of "trading in" the *Westway* funds. See GAO REPORT, *supra* note 240, at iii. These funds must be traded in by September 1983. See Letter from N.Y. Congressmen and State Senators to Governor Carey (July 19, 1982). Congressman Ted Weiss (D-N.Y.), a leading anti-*Westway* proponent, has mentioned that a "less grandiose" highway would "not exacerbate existing traffic problems, . . . pose environmental hazards and . . . disrupt the West Side for the next decade or so." Statement of Congressman Ted Weiss at the *Westway/Trade-in* Press Conference, in New York City (July 19, 1982). Congressman Weiss has stressed the need for funds for mass transit improvements. "Any responsible government," claimed Congressman Weiss, "offered the choice of rejuvenating a suffering mass transit system or wasting billions on an ill-conceived, pie-in-the-sky highway, would choose to help mass transit." *Id.* In addition to desiring a trade-in, anti-*Westway* advocates have expressed concern over the \$352 million gap between federal and state estimates of *Westway's* total cost. Cong. Ted Weiss News, Nov. 17, 1981.

On the other side, there is some concern that the trade-in will be futile. The already collapsed lower portion of the West Side Highway must be replaced, as must the existing upper portion of the West Side Highway. The trade-in funds may not cover the expenses, particularly because federal trade-in funds have a budget of \$550 million for 1983 and already twenty-five states and localities are requesting trade-ins totalling nearly \$6 billion. N.Y. Times, Sept. 30, 1982, at A30, col.1.

251. The other plaintiffs are: The City Club of New York, Business for Mass Transit, Committee for Better Transit, Inc., N.Y.C. Clean Air Campaign, Inc., West 12th Street Block Association, Hudson River Fisherman's Association, Hudson

because the contents had no factual basis;<sup>252</sup> (2) the EIS should have been supplemented when data from the new fishery study became available;<sup>253</sup> and (3) the failure of the responsible agencies, most notably the FHWA, to file a SEIS was unreasonable and in bad faith.<sup>254</sup> The FHWA failed to comply with NEPA, and compliance "was and is a predicate for any lawful action . . . in approving . . . or providing funding for Westway."<sup>255</sup> The court voided actions taken by the FHWA in approving the design and location of and funding for Westway and remanded the matter to the FHWA, ostensibly to prepare a SEIS.<sup>256</sup> In addition, the court issued a final injunction preventing federal reimbursement for the landfill right-of-way acquisition.<sup>257</sup>

On appeal, the Second Circuit reversed the district court's permanent injunction against the reimbursement of the landfill acquisition under the Rivers and Harbors Act ("*Westway III*").<sup>258</sup> In reversing, the Second Circuit decided that the plaintiffs would not be harmed irreparably by the commitment of federal funds for the right-of-way.<sup>259</sup> The court ruled that the district court had erred further by failing to weigh the adverse effects of the injunction on New York

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County Citizens for Clean Air, Seymour Durst, Otis Burger, Mary Rowe, and Howard Singer.

252. "*Westway II*," 541 F. Supp. at 1371.

253. *Id.* at 1381.

254. *Id.* The court concluded that the FHWA and "the Project" failed to issue a SEIS "not because the new fisheries information was insignificant, but because the information revealed a highly significant environmental impact which they wished to avoid disclosing." *Id.* Moreover, the court stated that the FHWA, "in collaboration with the New York State DOT, acted in willful derogation of the requirements of law in failing to issue a corrective supplemental environmental impact statement. The FHWA fully recognized the serious nature of the environmental impact which had been revealed by the new fisheries data, but refrained from making the required public disclosure." *Id.* at 1383.

255. *Id.*

256. *Id.*

257. *Id.* As the court emphatically stated, "the paramount consideration is that the FHWA and the State have failed to fulfill the conditions of federal law necessary to enable the FHWA to provide, and the State to receive, federal funding." *Id.* This final injunction was issued under the Clean Water Act and Rivers and Harbors Act of 1899. This injunction was reversed by the Second Circuit. *Sierra Club v. Hennessy*, No. 82-6175, slip op. at 622 (2d Cir. Dec. 6, 1982). However, the Second Circuit ordered the Corps to file a supplemental EIS discussing the impacts of the project on the fisheries. *Sierra Club v. United States Army Corps of Eng'rs*, No. 82-6125, slip op. at 2091 (2d Cir. Feb. 25, 1983).

258. "*Westway III*," No. 82-6175, slip op. at 622.

259. *Id.* at 617. The court reasoned that the FHWA's payment of funds is not irrevocable because the state must refund the FHWA if Westway is not built or if the land is not used for an alternative highway. *Id.* (citing 23 U.S.C. § 103(e)(7) (Supp. III 1980)).

State and New York City,<sup>260</sup> an egregious error in light of the court's belief that such a weighing would show that the possible injuries to the State and City far outweigh the potential benefits to the plaintiffs.<sup>261</sup>

In a second opinion, ("*Westway IV*"),<sup>262</sup> the Second Circuit upheld the district court's finding that the Corps and the FHWA had violated NEPA.<sup>263</sup> The EIS did not indicate that the agencies involved were fully aware of the present and future environmental consequences of their decision; on the contrary, the EIS omitted the most significant environmental fact involving the fisheries.<sup>264</sup> Failure to inform the public and the decision makers (the Corps) of this crucial fact was a blatant violation of NEPA, particularly in light of the studies by environmental agencies, both public and private. The district court, therefore, was justified in enjoining the Westway project until the agencies prepare a supplemental EIS containing "adequate and accurate information with respect to the fisheries issues."<sup>265</sup> As the Second

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260. "*Westway III*," No. 82-6175, slip op. at 620. The court expressed its belief that where "public consequences" are implicated, a district court must "balance the conveniences of the parties and possible injuries to them according (sic) as they may be affected by the granting or withholding of the injunction." *Id.* at 622 (citing *Weinberger v. Carlus-Romero-Barcelo*, 50 U.S.L.W. 4434, 4435 (U.S. Apr. 27, 1982); *Yakus v. United States*, 321 U.S. 414, 440 (1944)).

261. "*Westway III*," No. 82-6175, slip op. at 622. The court noted that precluding the NYSDOT from receiving 90% of the funds from the FHWA will have a strong adverse impact on the State's fiscal policies. *Id.*

262. *Sierra Club v. United States Army Corps of Eng'rs*, No. 82-6125 (2d Cir. Feb. 25, 1983) ("*Westway IV*").

263. "*Westway IV*," slip op. at 2034. The court found further that the Corps violated the Clean Water Act by relying on the FEIS that inadequately discussed the issue of aquatic impact. Thus, both the landfill permit granted by the Corps and the FEIS with respect to fisheries issues were invalidated. However, the court modified the district court's order that a supplemental EIS include material relating to non-fishery issues and vacated the district court's appointment of a special master to oversee the preparation of the supplement. Finally, the Second Circuit overruled the district court's prohibition against the FHWA and the Corps acting as joint lead agencies in preparing the supplement, but upheld the requirement that the agencies maintain records for judicial review of their final decision. Slip op. at 2027-28.

264. "*Westway IV*," slip op. at 2040. The court added that the agencies responsible for preparing the EIS had neither adequately compiled fisheries data, compiled information in good faith, nor paid attention to experts' warnings that important information was lacking. Thus, as the court concluded, the agencies

had reached the erroneous conclusion that the interpier area was a biological wasteland. The baseless and erroneous factual conclusion then became a false premise in the decision-makers' evaluations of the overall environmental impact of Westway and their balancing of the expected benefits of the proposed action against the risks of harm to the environment.

*Id.*

265. *Id.*

Circuit noted, the 1977 EIS fisheries conclusions lacked a “ ‘substantial basis in fact.’ ”<sup>266</sup> Thus, a decision maker relying on the EIS could not make a fully informed decision about the environmental impacts of the project.<sup>267</sup>

The Second Circuit also found that the district court’s rulings were within the proper scope of its review power.<sup>268</sup> The district court had found that the EIS contained false statements and an inadequate compilation of relevant information—findings which permit a court to invalidate an EIS.<sup>269</sup> Thus, the district court properly concluded that the Corps and the FHWA had failed to live up to their NEPA obligations, in light of the

cavalier manner in which the Project had reached its conclusion that the interperier area was a biological wasteland, and . . . FHWA’s failure to make an independent evaluation or to react in any way to sister agencies’ pointed comments that the draft EIS did not provide adequate information for a reasoned assessment of impact on fisheries.<sup>270</sup>

### VIII. Recommendations

Enacted to protect the environment, NEPA mandates the publication of the maximum amount of information, in an effort to obtain the most well-informed decisions about the environmental impact of proposed federal projects. Agencies failing to comply with NEPA run the risk of litigation brought by private or public groups to force the agencies to comply. This may be, however, too insignificant a risk for so vital a requirement.

At the present time, as “*Westway*” demonstrates, a court, after finding a blatant violation of NEPA, is limited to requiring an agency to file a SEIS containing the proper information—information which the Act mandates to begin with. Therefore, an agency runs little risk by violating NEPA, while the public may assume a substantial risk.

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266. *Id.* at 2034.

267. *Id.* Certainly, the district court’s finding of harm to the plaintiffs was not misguided; after all, once destroyed, the important fish habitat may not be repaired or replaced. The proposed landfill presents the risks of “direct population losses” of fish and adverse effects on the level of future fishery stocks in the Hudson River. “*Westway II*,” 541 F. Supp. at 1377. Although the agencies attempted to remedy the problem by suggesting mitigation measures, the new fisheries data revealed that these measures would “in no way provide the kind of habitat lost to the landfill, nor would it offer substantial mitigation.” *Id.* at 1376.

268. “*Westway IV*,” slip op. at 2031. See notes 175-239 *supra* and accompanying text.

269. “*Westway IV*,” slip op. at 2031.

270. *Id.* at 2033-34.

There is no assurance that the private sector will perceive a violation or fund a court attack, even if the violation is detected. Moreover, once the litigation process is undertaken by the private sector, it may necessarily delay an otherwise worthwhile project. There also is the danger that public funds will be misused in massive litigation and that the project costs will rise because of the delay in obtaining agency compliance. Both time and money would, at the very minimum, be inefficiently utilized, if not wasted.

Agency compliance with NEPA is crucial, and to this end steps should be taken to broaden the Act to compel compliance. In view of the limitations on the powers of the courts to issue injunctions, as "*Westway*" points out, an attempt to expand this judicial weapon is hardly useful. An expansion of administrative power would be both easier and more beneficial. One solution would be to create an ombudsman-type agency with a "watch-dog" function. In the area of environmental protection, such an agency already exists, the CEQ, which interprets and enforces NEPA policies, but does not have the power to halt or veto a project for non-compliance with NEPA.<sup>271</sup> Presently, the CEQ is limited to suggesting to the President that a specific action should not be taken.<sup>272</sup>

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271. Under the Clean Air Act, 42 U.S.C. § 7609 (1976 & Supp. IV 1980), the Environmental Protection Agency must review and comment publicly on the environmental impacts of federal activities, including those for which EIS's are prepared. If the EPA determines that the action is "unsatisfactory from the standpoint of public health or welfare or environmental quality," the matter must be referred to the CEQ. 40 C.F.R. § 1504.1(b) (1982).

Once the CEQ receives the referral, it may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendations to the President for action.

*Id.* § 1504.3(f). See note 31 *supra*.

272. See note 271 *supra*.



The power of the CEQ should be broadened to include the power to veto a project; the CEQ would then effectively possess the injunctive power which courts presently lack. As an ombudsman, the CEQ would process all complaints from individuals or groups. All proposals for major federal actions would be required to pass CEQ muster before the action could be taken. Thus, the CEQ would become the reviewing agency for all federal action encompassed by NEPA, with a view toward minimizing non-compliance by agencies and thereby reducing excessive litigation.

The exercise of the CEQ's powers should be reviewable in courts of law. Agencies that are unhappy with the CEQ's decisions should be permitted to seek judicial review of the CEQ action. In addition, the already existing private right of action<sup>273</sup> to sue an agency for failure to comply with NEPA should be expanded to include a right to sue the CEQ for failure to police the non-complying agencies.

### IX. Conclusion

In the last analysis, NEPA's purpose—to protect the environment—should not be diluted by limiting the weapons to achieve agency compliance with the EIS requirements. Courts, with their overloaded dockets and limited expertise in environmental matters, should be the last resort in the process to achieve NEPA compliance, not the only one. An ombudsman type agency, such as a greatly expanded CEQ, is eminently suited to fill a crucial gap in the existing process of environmental protection.

*Fran Hoffinger*

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273. See notes 166-74 *supra* and accompanying text.