MAJOR CASES INTERPRETING
THE NATIONAL ENVIRONMENTAL POLICY ACT

I. Agencies' Obligation to Comply with NEPA to "fullest extent possible"

A. *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972)

FACTS: The court was asked to review rules promulgated by the Atomic Energy Act on NEPA implementation. Although the rules required applicants for construction permits and operating licenses to prepare their own "environmental reports and required the AEC's regulatory staff to prepare its own detailed statement of environmental costs, benefits, and alternatives, the rules did set limits on how environmental issues would be considered in the Commission's decisionmaking process.

FINDINGS: This was one of the first cases interpreting NEPA, and set the tone for all subsequent NEPA cases. The court made several important points regarding NEPA and federal agency compliance with the statute:

(1) The general *substantive* policy in Section 101 of NEPA is flexible. "It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances."

(2) The *procedural* provisions in NEPA Section 102 are not as flexible and indeed are designed to see that all federal agencies do in fact exercise the substantive discretion given them.

(3) NEPA makes environmental protection a part of the mandate of every federal agency and department. Agencies are "not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require [all] agencies to *consider* environmental issues just as they consider other matters within their mandates."

(4) To insure that an agency balances environmental issues with its other mandates, NEPA Section 102 requires agencies to prepare a "detailed statement." The apparent purpose to the "detailed statement" is to aid in the agencies' own decisionmaking process and to advise other interested agencies and the public of the environmental consequences of the planned action.

(5) The procedural duties imposed by NEPA are to be carried out by the federal agencies "to the fullest extent possible." "This language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary'. Congress did not intend the Act to be a paper tiger." NEPA's procedural requirements "must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority."

(6) Section 102 of NEPA mandates a careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably could not reverse a substantive decision on the merits, but if the decision were reached procedurally without consideration of environmental factors--conducted fully and in good faith-- it is the responsibility of the courts to reverse.

(7) The AEC's interpretation of its NEPA responsibilities was "crabbed" and made "a mockery of the Act." Section 102's requirement that the "detailed statement" 'accompany' a proposal through agency review means more than physical proximity and the physical act of passing papers to reviewing officials. It is not enough that environmental data and evaluation merely "accompany" an application through the review process but receive no consideration from the hearing board as contemplated by the AEC regulations.

(8) The AEC improperly abdicated its NEPA authority by relying on certifications by federal, state, and regional agencies that the applicant complied with specific environmental quality standards. NEPA mandates a case-by-case balancing judgment on the part of federal agencies; in each case, the particular economic and technical benefits of an action must be weighed against the environmental costs. Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment and attend to only one aspect of the problem--the magnitude of certain environmental costs. Their certification does not mean that they found no environmental damage, only that it was not high enough to violate applicable standards. The only agency in a position to balance environmental costs with economic and technical benefits is the agency with the overall responsibility for the project.

(9) NEPA requires that an agency--to the fullest extent possible--consider alternatives to its actions that would reduce environmental damage. By refusing to consider requiring alterations of facilities (which received construction permits before NEPA was enacted) until construction is completed, the AEC may effectively foreclose the environmental protection envisioned by Congress.

(10) Delay in the final operation of the facility may occur but is not a sufficient reason to reduce or eliminate consideration of environmental factors under NEPA. Some delay is inherent in NEPA compliance, but it is far more consistent with the purposes of the act to delay operation at a stage when real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.

B. *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976)

FACTS: Plaintiffs challenged Department of Housing and Urban Development's (HUD) failure to prepare an EIS prior to approving the filing of a disclosure statement under the Interstate Land Sales Full Disclosure Act. Under this act, developers are required to disclose information by filing with HUD a statement of record regarding title of the land and conditions of the subdivision, among other things. The statement of record becomes effective automatically on the 30th day after filing, unless it is found to be materially incomplete or inaccurate.

FINDINGS: The Court held that NEPA's EIS requirement is inapplicable to this case.

(1) While NEPA's instruction that all federal agencies comply with the EIS requirement "to the fullest extent possible" is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle, nevertheless NEPA recognizes that where a clear and unavoidable conflict in statutory authority exists, NEPA must yield.

(2) The Disclosure Act does not give HUD discretion to suspend the effective date of the proposed statement of record for such time as is necessary to prepare an EIS.

II. "Reasonable Alternatives"

A. *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972)

FACTS: Secretary of the Interior Morton prepared an EIS for proposed oil and gas lease sales off the coast of Louisiana. The EIS dealt adequately with the environmental impacts of the proposed sale, and did discuss modifications to the proposal to delete some of the tracks with higher environmental risks.

FINDINGS:

(1) An EIS provides a basis for evaluation of the benefits of a proposed project in light of its environmental risks and a comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action.

(2) An agency must look at "reasonable" alternatives, but this is not limited to measures which the agency itself can adopt. When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of

alternatives that must be evaluated is broadened. While Interior did not have authority to undertake certain alternatives (such as elimination of oil import quotas), such actions are within the purview of Congress and the President to whom the EIS goes. An EIS is not only for the agency, but also for the guidance of others and must provide them with the environmental effects of both the proposal and the alternatives for their consideration.

(3) The discussion of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned, including alternatives not within the scope of authority of the responsible agency. Nor is it appropriate to disregard alternatives merely because they do not offer a complete solution to the problem.

(4) Discussion of reasonable alternatives does not require a "crystal ball" inquiry. The statute must be construed in the light of reason.

(5) The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch.

B. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975)

FACTS: Suit challenging further dumping by the Navy of polluted dredged spoil at the New London dumping site in Long Island Sound, claiming (among other things) that the Navy had not looked at all reasonable alternatives.

FINDINGS: The content and scope of the discussion of alternatives to the proposed actions depends upon the nature of the proposal. Although there is no need to consider alternatives of speculative feasibility or alternatives which could be changed only after significant changes in governmental policy or legislation, the EIS must still consider such alternatives to the proposed action as may partially or completely meet the proposal's goal and it must evaluate their comparative merits. [NOTE that the court's finding in *NRDC v. Morton*, above, that an alternative requiring a change in legislation was "reasonable," turned on the fact that the EIS dealt with a broad policy issue. In *NRDC v. Callaway*, the court indicated that for a project-specific EIS, an alternative requiring a "significant" change in legislation may not be "reasonable."]

C. *Marble Mountain Audubon Society v. Rice*, 914 F. 2d 179 (9th Cir. 1990)

FACTS: After a forest fire in 1987, the Forest Service began to plan the salvage and rehabilitation of the damaged area, and prepared a draft and final EIS that considered the environmental impacts of nine alternative salvage and harvest proposals. The alternative selected called for logging of some green timber as well as the fire-killed timber and for the addition of six miles of logging roads. Alleging that the final EIS failed to adequately consider the unique value of the area as the only significant biological corridor between two wilderness areas, plaintiffs sought declaratory and injunctive relief.

FINDINGS: The district court granted summary judgment in favor of the Forest Service, stating that the NEPA claims were barred by Section 312 of Pub. L. No. 101-121 (which denies judicial review of Forest Service plans on the sole basis that the plans, in their entirety, are outdated) and, alternatively, that the final EIS adequately addressed the biological corridor issue. The Ninth Circuit reversed. Recognizing the "strong presumption in favor of judicial review of administrative action" and "narrowly constru[ing]" Section 312's prohibition against judicial review, the court found that the biological corridor issue was not a generic issue that would enable plaintiffs to challenge the entire Timber Management Plan for the Klamath National Forest in contravention of Section 312.

The court also concluded that, based on the record before it, the Forest Service had not taken a "hard look" at the impact of the selected salvage and harvest alternative on the biological corridor. The court found that the Forest Service's conclusion that the preservation of a ½ mile corridor would be sufficient was "without supporting documentation" and found "no discussion" of the corridor issue in either of two underlying documents relied upon by the Forest Service (a 1967 Multiple Use Plan and a 1974 Klamath National Forest Timber Management Plan and accompanying EIS). Having issued an order enjoining any logging or road building, the court remanded the case to the district court for further proceedings.

D. *Citizens Against Burlington v. Busey*, 938 F.2d 190 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994, 112 S.Ct.616 (1992)

FACTS: The city of Toledo wanted to add a cargo hub to one of its airports, with the objective that the addition would create thousands of new jobs and added revenue to the local economy. The city's Port Authority submitted its proposal to the FAA for approval, and then hired a consulting firm to prepare an EIS. The EIS addressed only two alternative actions: approve the expansion, or not approve the expansion. The FAA approved both the EIS and the expansion plan. Plaintiffs argued, *inter alia*, that the FAA, in not assessing other reasonable alternatives, violated NEPA and the CEQ regulations.

FINDINGS: The court stated that a court will uphold an agency's definition of objectives as long as they are reasonable. Further, an agency need follow only a rule of reason in preparing an EIS, and this rule of reason extends both to *which* alternatives the agency must discuss, as well as the *extent* to which it must discuss them. The dissent found this reasoning contra to CEQ's regulations, noting that the FAA failed to examine all practical or feasible alternatives, and it had "the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project."

III. Defining "Significance"

A. *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973)

FACTS: Challenge to a General Services Administration (GSA) EA for construction of a jail and other facilities in New York City. GSA issued an EA that described a number of environmental impacts and concluded that the project was not an action significantly affecting the quality of the human environment.

FINDINGS:

(1) Determination of whether an EIS was required turns on meaning of "significantly." Almost every major federal action, no matter how limited in scope, has some adverse effect on the human environment. Congress could have decided that every major federal action should be the subject of an EIS, but by adding "significantly" Congress required that the agency find a greater environmental impact would occur than from "any major federal action."

(2) CEQ guidelines suggest that an EIS should be prepared where the impacts are controversial, referring not to the amount of public opposition, but to where there is a substantial dispute as to the size, nature, or effect of the major federal action.

(3) Court said that in deciding whether a major federal action will "significantly" affect the environment, an agency should be required to review the proposed action in light of the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results.

(4) Agencies in doubtful cases will prepare EISs rather than risk the delay and expense of protracted litigation on what is "significant."

(5) Agencies must affirmatively develop a reviewable environmental record for the purposes of a threshold determination under § 102(2)(C). Before a threshold determination of significance is made, the agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision.

B. *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973)

FACTS: Plaintiffs challenged a proposed low- and moderate-income apartment project in Houston, Texas, arguing that the Department of Housing and Urban Development (HUD) was barred from funding the project because the agency had failed to prepare an EIS.

FINDINGS: The court concluded that HUD was not required to file an EIS covering the proposed apartment project. According to the court, the plaintiffs "have raised no environmental factors, either beneficial or adverse, that were not considered by HUD before it concluded that this apartment project would produce no significant environmental impact." *Id*. at 426.

Having made that ruling, the court went on to address the plaintiffs' claim that HUD's determination of "significance" improperly focused only on adverse environmental impacts, contrary to the CEQ Guidelines:

> "[Plaintiffs] argue that NEPA requires that an agency file an environmental impact statement if *any* significant environmental effects, whether adverse or beneficial, are forecast. Thus, they argue, by considering only *adverse* effects HUD in effect did but one-half the proper investigation. We think this contention raises serious questions about the adequacy of the investigatory basis underlying the HUD decision not to file an environmental impact statement." *Id*. at 426-27 (emphasis in original).

Without amplification or example, the court expressed its view that "[a] close reading of Section 102(2)(C) in its entirety discloses that Congress was not only concerned with just adverse effects but with *all* potential environmental effects that affect the quality of the human environment." *Id*. at 427 (emphasis in original). Despite this, the court agreed that the project in question was not a major federal action significantly affecting the quality of the human environment.

C. *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996)

FACTS: Plaintiffs challenged the Secretary of the Interior's decision under the Endangered Species Act (ESA) to designate critical habitat for a threatened or endangered species without complying with NEPA.

FINDINGS: Holding that NEPA does not apply to such designations, the court found that ESA procedures have displaced NEPA requirements and that ESA furthers the goals of NEPA without requiring an EIS. Apart from its interpretation of ESA, the court also concluded that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." 48 F.3d at 1505. To clarify this point, the court held that

> "If the purpose of NEPA is to protect the *physical* environment, and the purpose of preparing an EIS is to alert agencies and the public to potential adverse consequences to the land, sea or air, then an EIS is unnecessary when the action at issue does not alter the natural, untouched physical environment at all." *Id*. (emphasis in original).

C. *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996)

FACTS: Similar to *Douglas County*, plaintiffs challenged a critical habitat designation that had been made without compliance with NEPA.

FINDINGS: The court specifically referenced and disagreed with the *Douglas County* decision from the 9th Circuit and held that ESA procedures did not displace NEPA requirements, that there were "actual impact flows from the critical habitat designation," and that compliance with NEPA will further the goals of ESA.

With respect to its factual conclusion that there could be impacts from the critical habitat designation, the court reiterated plaintiffs' claim that the proposed designation "will prevent continued governmental flood control efforts, thereby significantly affecting nearby farms and ranches, other privately owned land, local economies and public roadways and bridges." The court characterized these impacts as "immediate and the consequences could be disastrous." Further, the court stated that:

> "While the protection of species through preservation of habitat may be an environmentally beneficial goal, Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure...The short- and long-term effects of the proposed governmental action (and even the governmental action prohibited under the ESA designation) are often unknown or, more importantly, initially thought to be

beneficial, but after closer analysis determined to be environmentally harmful."

D. *Friends of Fiery Gizzard v. Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995)

FACTS: The Farmers Home Administration had prepared an EA for the funding of a water impoundment and treatment project in Tracy City, Tennessee. On the basis of the EA, the agency concluded that the project would have no significant environmental impacts. However, the agency also concluded that "'[t]he project will have a positive impact on the living environment of the residents of the area'" because they would be "'provided with a dependable, sanitary water supply.'" *Id*. at 503, quoting the environmental assessment. Plaintiffs sued, claiming that the existence of "significant" beneficial impacts required the preparation of an EIS.

FINDINGS: Affirming the lower court decision, the court held that if an agency reasonably concludes on the basis of an environmental assessment that the project will have no significant adverse environmental consequences, an EIS is not required. *Id*. at 504-505. The court based its conclusion on its reading of NEPA and the CEQ regulations.

(1) One of the central purposes of NEPA is to "promote efforts which will stimulate the health and welfare of man" (citing U.S.C. § 4321). The health and welfare of the residents of Tracy City will not be "stimulated" by the delays and costs associated with the preparation of an EIS "that would not even arguably be required were it not for the project's positive impact on health and welfare." *Id*. at 505.

(2) The CEQ regulations implementing NEPA direct federal agencies to make the NEPA process more useful to decisionmakers and the public, to reduce paperwork and the accumulation of extraneous background data, and to emphasize real environmental issues and alternatives (citing 40 CFR § 1500.2(b). "It was in keeping with this philosophy that the environmental assessment process was devised to screen projects where the preparation of an expensive and time-consuming environmental impact statement would serve no useful purpose."

(3) However, the court did differentiate between projects where the only "significant" impacts were beneficial ones (the *Fiery Gizzard* case) and projects where there were "significant" beneficial and adverse impacts, but that "on balance" the impacts were beneficial:

> "This is not to say, of course, that the benefits of the project would justify a finding of no significant impact if the project would also produce significant adverse effects. Where such adverse effects can be predicted, and the agency is in the position of having to balance the adverse

> effects against the projected benefits, the matter must, under NEPA, be decided in light of an environmental impact statement." *Id.*

IV. Defining "Major Federal Action"

Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974)

FACTS: Plaintiffs sought to enjoin timber sales in the Boundary Waters Canoe Area until the Forest Service completed an EIS on the management of the area. The Forest Service argued that the phrase "major federal actions significantly affecting the quality of the human environment" creates two tests: first it must be determined whether there is a major federal action, and next, if there is a major federal action, whether the impact of that action on the environment is major. The Forest Service asserted that timber sales were not "major federal actions."

FINDINGS:

(1) The court concluded that the term "major federal action significantly affecting the quality of the human environment" involved only one concept.

> "To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act, *i.e.*, to 'attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.' By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action....the activities of federal agencies cannot be isolated from their impact on the environment."

(2) The court also rejected the Forest Service's conclusion that there was no effect on the "human" environment from the timber sales because there was no evidence that human users of the area had ever seen a timber sale:

> "This appears to be too restrictive a view of what significantly affects the human environment. We think NEPA is concerned with indirect effects as well as direct effects. There has been increasing recognition that man and all other life on this earth may be significantly affected by actions which on the surface appear insignificant."

V. Judicial Review of Agency Actions

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

FACTS: Plaintiffs claimed that federal officials could not allow further development of coal reserves on federal land without a comprehensive EIS on the entire region. Court held that there was no proposal for regional development and thus that there was nothing to prepare an EIS on.

FINDINGS:

(1) The mere contemplation of a certain action is not sufficient to require an EIS.

(2) § 102 may require a comprehensive EIS in certain situations where several proposed actions are pending at the same time. Thus when several proposals for actions which have cumulative or synergistic environmental impacts on a region are pending concurrently before an agency, their environmental consequences must be considered together.

(3) NEPA does not contemplate that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. "The only for a court is to insure that the agency has taken a 'hard look' at environmental consequences."

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

FACTS: Challenge to licensing of two nuclear power plants by NRC. In one case NRC had left to another subsequent proceeding the question of nuclear waste disposal; in another, NRC did not explore energy conservation as an alternative.

FINDINGS: NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the court of appeals would have reached if they had been members of the decisionmaking bodies.

C. *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980)

FACTS: At issue was a plan by HUD to redesignate a site in New York City for a proposed low-income housing project. The court of appeals had ordered HUD to find a solution to the problem of low income housing in a different manner.

FINDINGS: NEPA does not require an agency to elevate environmental concerns over other, admittedly legitimate considerations. Nor do the courts have the power to order a shift in priority. HUD considered the environmental consequences of its decision; NEPA requires no more.

D. *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983)

FACTS: In a generic rulemaking to evaluate the environmental effects of the nuclear fuel cycle for nuclear power plants, the Nuclear Regulatory Commission (NRC) issued a rulemaking that assumed "zero release" of radiological effluents from nuclear wastes sealed in a permanent repository. Under this rule, NRC licensing boards would assume, for purposes of NEPA, that the permanent storage of certain nuclear wastes would have no significant environmental impact and thus would not affect the decision whether to license a nuclear power plant. Plaintiffs challenged the rule as arbitrary and capricious and violative of NEPA.

FINDINGS: The Court held that the generic rulemaking complied with NEPA's requirements of consideration and disclosure of environmental impacts.

(1) NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.

(2) Congress, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it only required that the agency take a "hard look" at the environmental consequences before taking a major action.

(3) The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious. "It is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made."

E. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct 1835 (1989) (companion case to *Marsh v. Oregon Natural Resources Council*)

FACTS: A Forest Service study designated a particular national forest location as having high potential for a major ski resort. Methow Recreation applied for a special use permit to develop and operate such a resort on the site. The FS prepared an EIS on the project, including the effects of various levels of development on wildlife and air quality

and outlined steps to mitigate adverse effects. Plaintiffs brought suit challenging FS decision to issue special use permit.

FINDINGS:

(1) NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in an EIS a fully developed mitigation plan. Although the EIS requirement and NEPA's other 'action-forcing' procedures implement the statute's sweeping policy goals by ensuring that agencies will take a "hard look" at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well-settled that NEPA itself does not impose substantive duties mandating particular results. "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed--rather than unwise--agency action."

(2) One important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental effects. The requirement that an EIS contain a detailed discussion of possible mitigation measures flows from the language of NEPA and the CEQ regulations. Omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, the public would be unable to adequately evaluate the severity of the adverse effects. "There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."

(3) CEQ's amendment of its regulations to delete the requirement for a "worst case analysis" was valid. The worst case requirement was not a codification of prior NEPA case law. The regulations promulgated by CEQ are entitled to substantial deference. It is particularly appropriate where, as here, there appears to have been good reason for the change (*i.e.*, eliminating the distortion of the decisionmaking process by overemphasizing highly speculative harms).

VI. Small Federal Handle Issue

Macht v. Skinner, 916 F.2d 13 (D.C. Cir. 1990)

FACTS: The District of Columbia Court of Appeals examined the extent to which federal involvement in a non-federal project may "federalize" the project for purposes of NEPA compliance. In this case, the Maryland Mass Transit Administration decided to build a 22.5-mile light rail line near Baltimore, to be financed solely by state and local governments.

There was, however, some federal involvement. First, the state needed to obtain a Section 404 permit from the Army Corps of Engineers for 3.58 acres of wetlands. Further, using federal funds, Maryland began consideration of three extensions to the rail line. The federal grant, from the Urban Mass Transit Administration (UMTA), was provided to the state for assistance in preparing alternative analyses and draft EISs for the contemplated extensions.

The plaintiffs sued the federal agencies, claiming that there was sufficient federal involvement in the rail project to constitute a "major federal action" requiring compliance with NEPA. Affirming the lower court, the court of appeals held that neither the Army Corps wetlands permit nor the UMTA grant was enough to transform the entirely state-funded project into a federal action.

FINDINGS: With respect to the UMTA grant for the preliminary environmental analyses, the court stated that "NEPA does not require UMTA to prepare an EIS until it proposes or decides to participate in a project that will affect the environment." Addressing the Army Corps permit issue, the court noted that the plaintiffs "correctly assert that federal involvement in a nonfederal project may be sufficient to 'federalize' the project for purposes of NEPA."

The court characterized the issue as "whether the federal participation in the project is so substantial that the state should not be allowed to go forward until all the federal approvals have been granted in accordance with NEPA." In this case, the court found that the Army Corps had discretion only over a negligible portion of the entire project, that the only federal involvement in the 22.5 mile state portion of the project was the wetlands permits, and that the state had not entered into a financial partnership with the federal government. "NEPA therefore provides no basis for enjoining Maryland's construction of the Light Rail Project."

VII. Connected Actions

Blue Ocean Preservation Society v. Watkins, 745 F. Supp. 1450 (D. HI. 1991)

FACTS: The State of Hawaii developed the Hawaii Geothermal Project (HGP) consisting of four phases: 1) exploration and testing of geothermal resources; 2) research regarding the feasibility of transporting the power via underwater cables; 3) a program involving the drilling of exploration wells; 4) construction of separate geothermal power plants. The Department of Energy (DOE) provided funds for the first 2 phases; in 1988, Congress appropriated an additional $5 million for use in phase 3, the first of three such appropriations anticipated from Congress over the next three years. Congress stated in a Conference Report that while phase 3 was "research," not a major federal action subject to NEPA, DOE should nevertheless earmark some of the funds for an EA/EIS for the

project. In 1990, plaintiffs sued DOE seeking to compel preparation of an EIS, and to enjoin further federal participation in the HGP until the EIS was completed.

FINDINGS: The court rejected Congress' characterization of phase 3, and held that phases 3 and 4 were connected actions that must be considered in one EIS. The court further held that the "research work" contemplated by phase 3 "alone easily satisfies the statutory standards for 'major federal action' based simply on the extent of federal funding."

VIII. Cumulative Impacts

A. *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985)

FACTS: This involved a challenge to an Army Corps' decision to prepare an EA on a §404 permit to fill wetlands for a development on Galveston Island (Texas). By all accounts, further development affecting those wetlands was being planned, but those plans were not yet pending before the Corps. In addition, it was acknowledged that this particular proposal would not have significant effects--the Corps said that it had to go no further. The court disagreed.

FINDINGS: The court makes a distinction between the requirement to analyze cumulative actions and the requirement for an analysis of cumulative impacts. Specifically, with respect to cumulative actions, the court noted that CEQ scoping regulations require connected, cumulative, and similar actions to be considered together in the same EIS--where proposals up for decision are functionally or economically related, those proposals must be considered in one EIS. "If proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together."

Note that only actual *proposals* (40 CFR § 1508.23) may be considered sufficiently related to require preparation of a NEPA document. This means only actions or proposals *that are ready for decision, e.g.*, several §404 permits pending before the Army Corps in one geographic region. Unlike the obligation to include cumulative actions in one EIS for analysis and decision, the obligation to address cumulative impacts is not limited to actual proposals.

With respect to cumulative impacts, the court noted that the CEQ regulations require analysis of direct, indirect, and cumulative impacts and held that in this context, the impacts were not limited to those from actual proposals, but must also include impacts from actions which are merely being contemplated (*i.e.*, are not yet ripe for decision). However, the court noted that contemplated actions must be "reasonably foreseeable," not speculative and not off in the distant future.

What a cumulative impact analysis must identify:

(1) the area in which the effects of the proposed project will be felt;

(2) the impacts that are expected in that area from the proposed project;

(3) other past, present, and reasonably foreseeable actions that have or are expected to have impacts in the area;

(4) the impacts or expected impacts from these other actions; and

(5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

B. *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471 (D.C. Cir. 1990)

FACTS: The Court of Appeals for the District of Columbia Circuit upheld a license issued by FERC for the first phase of a hydroelectric plant in Arkansas. The EIS prepared for the project looked only at the environmental impacts of Phase I, although construction of Phase II, while not inevitable, was reasonably foreseeable. The plaintiffs had challenged the issuance of the license for Phase I, asserting that FERC violated NEPA by not assessing the potential impacts of Phase II in deciding whether to approve Phase I.

FINDINGS: The court reasoned that Phase II of the project was not yet proposed and that "NEPA merely requires an agency to consider all other *proposed* actions that may, along with the proposed action in issue, have a cumulative or synergistic effect on an environment."

NOTE that this case is an example of a court confusing the requirement to consider all connected or cumulative *actions* together in the same comprehensive EIS (*see* 40 CFR § 1508.25(a), with the requirement to assess the cumulative *impacts* of the proposal and other reasonably foreseeable future actions (*see* 40 CFR §§ 1508.7, 1508.8, and 1508.25(c)). *See* the discussion of *Fritiofson v. Alexander*, above, for a good discussion. As the *Fritiofson* court noted, only actual proposals, as defined in the Council on Environmental Quality (CEQ) regulations (*see* 40 CFR § 1508.23), need be considered together in one EIS. Once the scope of the EIS has been determined, however, the agency is required to look at cumulative impacts "of other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR § 1508.7.

IX. Supplementing NEPA Documents

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851 (1989) (companion case to *Robertson v. Methow Valley Citizens Council*)

FACTS: Plaintiff non-profit organization brought suit to enjoin construction of a dam, partly because the Army Corps of Engineers did not prepare a second supplemental EIS to address concerns raised in two new reports. One report claimed that the dam would adversely affect downstream fishing; the other indicated it would cause greater downstream turbidity.

FINDINGS: The Court, noting the Corps' formal and documented review of the two reports, held that a supplemental EIS was unnecessary.

(1) An agency has a duty to continue reviewing environmental effects of a proposed action even after its initial approval. "It would be incongruous with...the Act's manifest concern with preventing uninformed action, for the blinders to adverse effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Id.* at 371.

(2) New information does not always compel an agency to prepare a supplemental EIS. "[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Id.* at 373.

(3) An agency must take a hard look at possible new environmental effects and apply a rule of reason when it makes a decision regarding EIS supplementation. "An agency must apply a 'rule of reason'....NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval....Application of the rule of reason thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major Federal actio[n]' to occur, and if the new information will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Id.* at 361, 373, 374.

(4) Agencies may rely on their own experts in the face of conflicting views. "When specialists express conflicting views, an agency must have the discretion

to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.* at 378.

(5) Reviewing courts must apply the arbitrary and capricious standard of the Administrative Procedure Act. "[R]eview is controlled by the 'arbitrary and capricious' standard of § 706(2)(A) [of the APA]....[I]n making the factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' the reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must be 'searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Id.* at 375, 376, 378, *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

(6) Although reviewing courts grant a degree of deference to any agency's decision, they should carefully review the record. "[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance - or lack of significance - of the new information." *Id.* at 378.

Other courts have developed additional criteria when reviewing an agency's decision not to supplement an EIS:

A new statute or regulation does not necessarily constitute a change in the proposed action or new information in the relevant sense. *National Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981), *citing Concerned Citizens v. Secretary of Transportation*, 641 F.2d 1, 6 (1st Cir. 1981).

Mere passage of time does not compel supplementation. *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1036 (2d Cir. 1983); *Coker v. Skidmore*, 941 F.2d 1306 (5th Cir. 1991).

If an agency decides not to prepare a supplemental EIS, it should carefully explain its reasoning, providing more than one sentence addressing supplementation. *Warm Springs Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980); *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983).

X. Extraterritorial Application of NEPA

A. *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. HI. 1990)

FACTS: The district court of Hawaii examined the extraterritorial application of NEPA to the removal, transportation, and destruction of chemical munitions stored in the Federal Republic of Germany (FRG). Under agreements entered into by President Reagan and President Bush, and pursuant to a congressional mandate, the Department of the Army undertook a joint plan with the West German Army to remove chemical weapons from their storage site in the FRG, and to transport them to Johnston Atoll, a U. S. territory in the Pacific Ocean, for disposal in the Johnston Atoll Chemical Agent Disposal System.

The Army prepared separate EISs with respect to the construction and operation of the Johnston Atoll facility, the disposal of solid and liquid wastes that the facility would produce, and the disposal of the munitions stockpile from the facility in the FRG. The Army also prepared a Global Commons Environmental Assessment pursuant to Executive Order No. 12114 (Environmental Affects Abroad of Major Federal Actions), in which it analyzed the environmental impacts of the shipment of the munitions from an FRG port to Johnston Atoll. No environmental analysis, under either NEPA or the executive order, was conducted for the movement of the munitions within the FRG.

Plaintiffs filed suit against the Department of the Army to enjoin movement of the munitions from the FRG to Johnston Atoll on the grounds that the Army violated NEPA by failing to prepare a comprehensive EIS covering all aspects of the transportation and disposal of the FRG stockpile.

FINDINGS: In ruling on plaintiffs' motion for a preliminary injunction, the district court stated that "it is not convinced that NEPA applies extraterritorially to the movement of munitions in Germany or their transoceanic shipment to Johnston Atoll." The court recognized that "the language of NEPA indicates that Congress was concerned with the global environment and the worldwide character of environmental problems," but that actions under NEPA "should be taken 'consistent with the foreign policy of the United States.'" "Congress intended to encourage federal agencies to consider the global impact of domestic actions and may have intended under certain circumstances for NEPA to apply extraterritorially." However, "the court must take into consideration the foreign policy implications of applying NEPA within a foreign nation's borders to affect decisions made by the President in a purely foreign policy matter."

With respect to the need to assess the environmental impacts of its actions within the FRG, and in the circumstances of this case, the court concluded that:

> "Imposition of NEPA requirements to that operation would encroach on the jurisdiction of the FRG to implement a political

> decision which necessarily involved a delicate balancing of risks to the environment and the public and the ultimate goal of expeditiously ridding West Germany of obsolete chemical munitions."

Further the court found that "[t]he transoceanic movement of the munitions is a necessary consequence of the stockpile's removal from West Germany," and thus "implicates many of the same foreign policy concerns which affect the movement of the weapons through West Germany."

For the transoceanic phase of the action, the Army did prepare an environmental assessment under Executive Order No. 12114. Although the court "cannot conclude, as defendants would suggest, that Executive Order 12114 preempts application of NEPA to all federal agency actions taken outside the United States," the court was persuaded, again under the circumstances of this case, that NEPA did not require the Army to consider the global commons portion of the action in the same EIS that covers the Johnston Atoll facility.

Based on these findings, the court concluded that plaintiffs had not demonstrated a likelihood of success on the merits sufficient for the imposition of a preliminary injunction. Plaintiffs motion for such injunctive relief was denied.

B. *Environmental Defense Fund v. Massey*, 986 F.2d. 528 (D.C. Cir. 1993)

FACTS: Plaintiffs challenged the National Science Foundation's plans to incinerate waste at McMurdo Station in Antarctica, arguing that NEPA applies extraterritorially and thus that NSF should have prepared an EIS. Plaintiffs further alleged that NSF violated E.O. 12114, requiring the preparation of environmental assessments for US actions that have an impact overseas.

FINDINGS: The Court of Appeals overturned the earlier decision in *Environmental Defense Fund v. Massey*, 772 F.Supp. 1296 (D.D.C. 1991) which had held that, despite NEPA's broad mandates, there is no clear congressional intent that NEPA should apply beyond the borders of the US and that NEPA did not apply to NSF's decision to build waste incinerators in Antarctica. In this case, the Court of Appeals held that the application of NEPA to federal actions is not limited to actions occurring or having effects in the United States. Rather, NEPA is designed “to control the decisionmaking process...not the substance of agency decision” that takes place almost exclusively in the United States. The court found that the presumption against extraterritorial application did not apply in this case and held that NEPA did apply to NSF actions in the Antarctic. The court relied upon Antarctica’s unique status as a place which was not a sovereign territory.

XI. Standing

A. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177 (1990).

FACTS: The United States Supreme Court was asked to confer standing on plaintiffs who had alleged in affidavits the use of public lands "in the vicinity" of land that was the subject of 2 out of 1,250 Bureau of Land Management (BLM) orders. These orders, plaintiffs claimed, would open public lands up to mining activities, thereby destroying their natural beauty. Plaintiffs challenged all of the 1,250 BLM orders, claiming violations of the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA).

The district court, ruling on defendants' motion for summary judgment, found that plaintiffs had no standing to seek judicial review. Specifically the court held that even if the affidavits claiming use of lands "in the vicinity" of lands that were the subject of two BLM orders were sufficient to challenge those two particular orders, they were not sufficient to allow a challenge to each of the 1,250 individual orders. The Court of Appeals for the District of Columbia Circuit reversed, finding the affidavits sufficient to confer standing to challenge the two individual orders and that standing to challenge those orders conferred standing to challenge all 1,250 orders.

FINDINGS: Reversing the Court of Appeals in a 5-4 decision authored by Justice Scalia, the Supreme Court acknowledged that neither NEPA nor FLPMA provides a private right of action for violations of its provisions. Rather an injured party must seek relief under the Administrative Procedure Act (APA). To demonstrate standing under APA, a plaintiff must identify some final agency action that affects him or her and must show he or she has suffered a legal wrong because of the agency action or is adversely affected by that action within the meaning of a relevant statute. To be "adversely affected within the meaning of a statute," a plaintiff must be within the "zone of interests" sought to be protected by the statutory provision that forms the basis of the complaint.

Using this test of standing, the Court found that plaintiffs' interest in recreational use and aesthetic enjoyment of the federal lands were within the "zone of interests" protected by NEPA and FLPMA. However the Court concluded that plaintiffs, by simply claiming use "in the vicinity" of immense tracts of land managed by BLM, had not shown they would be "adversely affected" by the BLM actions. Moreover the Court found that plaintiffs were attempting to challenge BLM operation of its land management program generally, not a final agency action in particular. Given these findings, the Court ruled that plaintiffs had not set forth "specific facts" in their affidavits sufficient to survive defendants' motion for summary judgment.

A dissent authored by Justice Blackmun noted that the showing required to overcome a motion for summary judgment is more extensive than that required for a motion to dismiss, but concluded that the allegations in the affidavits were adequate to defeat a

summary judgment motion. The dissent emphasized that the question was not whether plaintiffs had demonstrated standing, but whether the affidavits before the district court established that a genuine issue existed for trial.

B. *Foundation on Economic Trends v. Department of Agriculture*, 943 F.2d. 79, (D.C. Cir. 1991)

FACTS: Plaintiffs challenged the lack of an EIS for a "germplasm" program within the Department of Agriculture. Their standing to sue was based upon harm to their ability to disseminate information or "informational standing."

FINDINGS: The court stated that it had never sustained an organization's standing in a NEPA case solely on the basis of informational injury, *i.e.*, damage to the organization's interest in disseminating the environmental data that an EIS could be expected to contain. "If such injury alone were sufficient, a prospective plaintiff could bestow standing upon itself merely by requesting the agency to prepare the detailed statement NEPA contemplates, which in turn would prompt the agency to engage in 'agency action' by failing to honor the request. The court concluded that plaintiffs had failed to allege specific agency action that injured them and triggered a violation of NEPA.

C. *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994)

FACTS: Plaintiffs challenged the U.S. Forest Service's Amended Land and Resource Management Plan for Ouachita National Forest on the grounds that NEPA had been violated. Plaintiffs did not complain of a particular action, but rather environmental injury based on the plan alone.

FINDINGS: The court found plaintiffs lacked standing to sue, citing three requirements that must be met to establish standing under *Lujan*. According to the court, plaintiffs must show: (1) they have suffered “injury in fact,” (2) a causal connection between the injury and the conduct complained of that is “fairly...trace[able] to the challenged conduct of the defendant,” and (3) that it is “likely” (as opposed to merely “speculative”) that the injury is redressable by a decision favorable to the plaintiffs.

The court held that, while complaints of environmental and aesthetic harms are sufficient to lay the basis for standing (*citing Sierra Club v. Morton*, 405 U.S. 727,734 (1972)), alleging an injury to a cognizable interest is not enough. Plaintiffs must make an adequate showing that the injury is actual or certain to ensue. Assertions of potential future injury do not satisfy the injury-in-fact test.

The court found that the Forest Service plan was a general planning tool but did not dictate any particular site-specific action causing environmental injury of which the plaintiffs could complain. The court would not confer standing to challenge the plan per se.

XII. Functional Equivalence Doctrine

In a series of cases, courts have found that EPA's activities in furtherance of various environmental statutes are the "functional equivalent" of compliance with NEPA and therefore EPA is not required to comply with NEPA in those circumstances. The following cases have found EPA actions to be the functional equivalent of NEPA compliance:

Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (EPA need not comply with NEPA prior to its actions under the Clean Air Act)

Maryland v. Train, 415 F.Supp. 116 (D. Md. 1976) (EPA need not comply with NEPA prior to its actions under the Ocean Dumping Act)

Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 145 (1987) (EPA need not comply with NEPA prior to its actions under the Federal Insecticide, Fungicide, and Rodenticide Act)

Alabamians for a Clean Environment v. EPA, 871 F.2d 1548 (11th Cir. 1989) and *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990) (EPA need not comply with NEPA prior to its actions under the Resource Conservation and Recovery Act)

Western Nebraska Resources Council v. EPA, 943 F.2d 867 (8th Cir. 1991) (EPA need not comply with NEPA prior to its actions under the Safe Drinking Water Act)

Courts have found functional equivalency based on three criteria:

1) The agency's organic statute must provide "substantive and procedural standards that ensure full and adequate consideration of environmental issues." *Environmental Defense Fund v. Environmental Protection Agency*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

2) The agency must afford public participation before a final alternative is selected. *Maryland v. Train*, 415 F.Supp. 116, 122 (D. Md. 1976).

3) The action must be undertaken by an agency engaged primarily in the examination of environmental issues. *Warren County v. North Carolina*, 528 F.Supp. 276, 286 (E.D.N.C. 1981).

Courts have declined to apply the doctrine to any agency other than EPA, including departments that have substantial environmental responsibilities: *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 208

(5th Cir. 1978) (does not apply to U.S. Forest Service); *Jones v. Gordon*, 621 F.Supp. 7, 13 (D. Alaska 1985), *aff'd in part, rev'd in part*, 792 F.2d 821 (9th Cir. 1986) (does not apply to National Marine Fisheries Service).

XIII. Miscellaneous

A. CEQ NEPA Regulations: *Andrus v. Sierra Club*, 442 U.S. 347 (1979)

In this case, the Supreme Court agreed with CEQ's interpretation of NEPA with respect to whether EISs were required for appropriations requests. The Court described CEQ's regulations as a "single set of uniform, mandatory regulations applicable to all federal agencies." In addition, the Court said that "CEQ's interpretation of NEPA is entitled to substantial deference."

B. CEQ's Emergency Provision: *Valley Citizens' for a Safe Environment v. Vest*, D. Mass. May 6, 1991

FACTS: In 1987, Westover Air Force Base issued an EIS to evaluate the likely effects that the presence and operation of C-5A transport planes would have on the environment. Pursuant to the EIS, night flights were prohibited, yet in September 1990, the Air Force began to fly the planes in and out on a 24-hour schedule, due to the events relating to Operation Desert Storm. CEQ determined that the developing situation in the Middle East constituted an emergency within the meaning of its regulations, thus allowing the Air Force to operate the flights. See 40 CFR § 1506.11. Plaintiffs challenged both CEQ's authority to allow such arrangements in an emergency, as well as the application of the regulation to the situation at Westover.

FINDINGS: The court upheld CEQ's authority to issue the emergency regulation and its application to Westover. The Court first noted that under § 102 of NEPA requires compliance "to the fullest extent possible," indicating that an EIS is not mandatory in all circumstances. Thus, the Court noted that "...before a federal agency takes environmentally significant action, emergency circumstances may make completion of an EIS...unnecessary." The Court also held that the decision by CEQ and the Air Force to deem the Westover situation an emergency was reasonable, given the military's operational and scheduling difficulties during "the hostile and unpredictable" Persian Gulf crisis.

C. Disposition of Federal Property/Scope of Analysis: *Conservation Law Foundation v. General Services Administration*, 707 F. 2d. 626 (1st Cir. 1983)

This case concerned the preparation of an EIS by GSA for the disposal of excess property under the Federal Property and Administrative Services (FPAS) Act. The court held (1) that disposal of excess federal property is a major federal action requiring the preparation

of an EIS, (2) that the EIS must discuss the environmental effects of potential uses of the property by a new owner in order to permit a reasoned choice between retention or disposal of each parcel, and (3) that GSA is not required to obtain development plans from the party whose bid GSA intends to accept and to supplement the EIS because GSA has no power to see that the implementation plans are ever implemented. The court also held that GSA is not required under either NEPA or the FPAS act to consider environmental factors in the initial choice of buyers.

D. Scope of Analysis/"Psychological Stress": *Metropolitan Edison Co. v. People Against Nuclear Energy (PANE)*, 460 U.S. 766, 103 S.Ct. 1556 (1983)

FACTS: Plaintiffs challenged NRC decision not to address the psychological health and community well being of residents of the area surrounding the Three Mile Island nuclear power plant in its NEPA analysis of the restart of that facility.

FINDINGS: The Court held that NEPA did not require NRC to consider the psychological health damage from the risk of a nuclear accident to residents near the nuclear plant that restarting the plant would cause.

(1) NEPA does not require an agency to assess every impact of its proposed action, but only the impact on the physical environment. Although NEPA states its goals in terms of sweeping terms of human health and welfare, these goals are the ends that Congress has chosen to pursue by means of protecting the physical environment.

(2) NEPA does not require agencies to evaluate the effects of risk. The term "environmental impact" in NEPA section 102(2)(C) includes a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. The risk of an accident is not an effect on the physical environment.

E. Classified Information: *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 102 S.Ct. 1917 (1981)

FACTS: Plaintiffs sued to compel preparation of an EIS for alleged plans to store nuclear weapons in a proposed facility on Hawaii. The Navy had prepared an environmental assessment on the construction of facilities for weapons storage; the facilities were capable of storing nuclear weapons but any plans for storing nuclear weapons at those facilities were classified. The District Court concluded that NEPA applied to the Navy's actions, but given the national security provisions of the Atomic Energy Act and the Navy's own regulations, the Navy had complied with NEPA to the fullest extent possible. The Court of Appeals disagreed and required the agency to prepare and release a "Hypothetical EIS" with regard to the operation of a facility capable of storing nuclear weapons.

FINDINGS: The U.S. Supreme Court overturned the Court of Appeals decision, finding that a "hypothetical" EIS was a creature of judicial cloth and not mandated by any statutory or regulatory provisions. Recognizing the twin aims of NEPA (injecting environmental considerations into federal agency decisionmaking and informing the public that the agency has considered environmental concerns in its decisionmaking), the Court stated that the two goals were compatible but not necessarily coextensive. "Thus, § 102(2)(C) contemplates that in a given situation a federal agency might have to include environmental considerations in its decisionmaking process, yet withhold public disclosure of any NEPA documents, in whole or in part, under the authority of a [Freedom of Information Act] exemption." The Court concluded that the Navy must consider environmental consequences in its decisionmaking process, even if it is unable to meet NEPA's public disclosure goals by virtue of FOIA exemption 1 (national security).

F. Readability Issue: *Oregon Environmental Council v. Kunzman*, 614 F.Supp. 657 (D. Ore. 1985)

FACTS: Debate over sufficiency of a USFS EIS for the suppression and eradication of gypsy moths

FINDINGS: Worst case analysis required under § 1502.22 was a mandatory part of the EIS, but was not "readable." One of NEPA's purposes is to inform the public of possible environmental consequences of actions. Section 1502.28 requires that EISs be "readable"--this requirement is not trivial. Court invalidated EIS on that ground. Agency has a duty to provide the public with comprehensive information regarding environmental consequences of a proposed action and to do so in a readily understandable manner.

G. Environmental Assessments: *Sierra Club v. Watkins*, 808 F.Supp. 852 (D.D.C. 1991)

FACTS: Plaintiffs challenged the adequacy of an EA prepared by the Department of Energy (DOE) for the importation of spent nuclear fuel rods from Taiwan to the United States.

FINDINGS: The court found the EA to be inadequate, despite finding that plaintiffs had failed to demonstrate that the proposed action would have a significant environmental impact and upholding the agency's finding of no significant impact. The court premised its decision on a discussion of the purpose and function of EAs:

> (1) The court relied on that portion of the CEQ regulations that states that an EA serves to aid an agency's compliance with NEPA when no EIS is necessary (40 CFR § 1508.9(a)(2)) and on § 102(2)(E) of NEPA which requires agencies to

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

(2) The court noted that the examination of alternatives was bounded by the rule of reason and that the level of analysis should be commensurate with the severity of impacts. However, the court found the agency's choice of alternatives and analysis of cumulative risks of radiation exposure to be inadequate.

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