Chapter 9

FEDERAL AGENCY DISCLOSURE: NEPA'S STOP-AND-THINK LOGIC, AND THE POWER OF INFORMATION

This chapter focuses on the broadest, most coherent, and best-known statutory model of an environmental disclosure statute — the National Environmental Policy Act (NEPA) — which tries to induce federal agencies to stop and think before launching projects that harm the environment. NEPA enforces that objective with environmental impact statement (EIS) information-disclosure procedures that repeatedly have been enforced by citizen litigation.

NEPA is by no means the only environmental statute to have an information-disclosure element, although it is more central in NEPA than in many others. Much of environmental law is concerned with obtaining information, organizing it, and directing it to where it can do the most legal and political good. "Information Is Power" in environmental policymaking because if the media and the public have critical information on the negatives of a dubious proposal, the public inclinations toward environmental protection often will produce a corrective decision in court or in the political arena. Getting strategic information into open public debate is often more than half the battle, especially where the availability of direct citizen enforcement mechanisms can make information regarding environmental threats actionable by members of the public, without the intervention of governmental agencies.

Thus information-disclosure components can be found in many environmental statutes, especially federal. The biological assessment mechanism of §7 of the ESA pressures federal wildlife agencies to examine and publish the factual biological vulnerabilities of endangered species populations, forcing many potential conflicts into the open that otherwise would be lost in bureaucratic bogs. Pollution statutes often are linked to public information, requiring submission of data to governmental agencies with a strong presumption in favor of public availability.[1] Product regulation and market access statutes typically require the intensive development and production of information regarding product safety as a core regulatory element. Market-enlisting statutes can succeed or fail depending on the availability of good data on the physical conditions to be addressed as well as the economic and financial impacts of taxes and

1. See, e.g., CWA §308(a), 33 U.S.C. §1318(a).

environment must be accompanied by an EIS. Tracing some of the issues raised in the cases over the years not only clarifies the law of NEPA but also illuminates the process by which courts shape the flight of the statutory "missile" after the legislature launches it. In the case of NEPA's EIS requirement, the fact that Congress pretty clearly did not intend to create any new cause of action has had remarkably little effect on the growth of the statute in court cases over time.

Section 1. NEPA IN THE JUDICIAL PROCESS: THE *CHICOD CREEK* CONTROVERSY

No case can be a "typical" NEPA case, because of the remarkable diversity of NEPA lawsuits over the years. The legal and practical elements of the *Chicod Creek* decisions, however, offer a broadly instructive blueprint of NEPA litigation generally, as well as a fascinating example of how NEPA, which was not intended to be litigable, quickly became a highly functional cause of action when plaintiffs dragged it before federal judges.

Natural Resources Defense Council v. Grant (*Chicod Creek*)

United States District Court for the Eastern District of North Carolina, 1972
341 F. Supp. 356

LARKINS, J.... Chicod Creek Watershed, located in mideastern North Carolina, covers an area of 35,100 acres of which 29,625 acres are in Pitt County and 5,475 acres in Beaufort County. Plans for solving flooding, water management, and other resources problems have been prepared with the concurrence of local sponsors and with federal assistance under the the provisions of P.L. 566. The sponsoring local organizations are the Pitt Soil and Water Conservation District, Beaufort Soil and Water Conservation District, Pitt County Board of Commissioners, and Pitt County Drainage District Number Nine. Under the Chicod Creek Watershed Work Plan and Supplements, the local organizations assume all local responsibilities for the installation, operation and maintenance of planned structural works.

The topography of the watershed is nearly level to gently sloping. The outer perimeter is flat and well drained and the flood plains are broad swamps. Land use in the watershed consists of 15,600 acres of cropland; 15,550 acres of woodland; 350 acres of grassland; and 3,600 acres of miscellaneous uses. Approximately 10,000 acres of crop and pasture land are subject to flooding.... A loss of at least 50 percent is sustained on the crops grown on land subject to flooding about once each five years. [Such flooding] causes interrupted traffic, blocked school bus and mail delivery routes, interrupted feeding schedules of farm animals, and additional maintenance and repair on the roads. Excessive rainfall and flooding create a health hazard. Septic tanks, nitrification lines, and approved pit-privies overflow to the surface of the soil after excessive rainfall. Poor drainage often results in low quality crops and high unit cost of production.

The population of the watershed is approximately 3,000 people. The entire population is classified as rural with 25 percent being non-farm. Agriculture is the principal enterprise in the watershed. The chief cash crops are tobacco, corn, soybeans, and cotton. Livestock production, consisting of beef cattle and swine, make up 10 percent of the cash farm receipts. Value of farm products sold was under $10,000 for 77.6 percent of the 250 farms in the watershed. Fifty-five percent of the families make less than $3,000 income per year.

Chicod Creek originates about 6 miles south of Grimesland and flows generally (about 10 miles) north to its confluence with the Tar River. Cow Swamp and Juniper Branch are the two largest tributaries and they enter Chicod Creek from the west. Chicod Creek and the

surrounding area has significant value for numerous waterfowl, fur bearers and other wetland wildlife species. The streams have substantial resident fish population and support a significant spawning run of herring during the spring.

The project was developed for the purposes of flood prevention, drainage, and conservation, development, and improvement of agricultural tracts of land. These objects are to be achieved by land treatment measures and structural measures. The land treatment measures will include conservation cropping systems, cover crops, crop residue use, minimum tillage, grasses and legumes, and tile and open drains. Also, 300 acres of open land will be reforested, while 1,350 acres of land will be subject to thinning and removal of trees. Structural improvements will consist of approximately 66 miles (comprising the main stream and all the various tributaries) of channel enlargement or "stream channelization." Mitigation measures to reduce the adverse effects on fish and wildlife resources are (1) 73 acres of wildlife wetland preservation area, (2) a 12 acre warm-water impoundment area, (3) 11 channel pools, and (4) 30 swamp drainage control structures. These mitigation measures are designed to mitigate for the disruption to the fish caused by the construction of the channels and to offset the wildlife habitat destroyed by the channels and spoil areas. Certain groups feel that these mitigation measures do not sufficiently lessen the adverse effects of the project on the environment. A letter [from] the Fish and Wildlife Service [FWS], dated September 10, 1971, reflects such an opinion: "It is the opinion of the Service that the original mitigation measures plus the additional measures do *not* significantly lessen the adverse effects of the project on the ecosystem of the watershed.

The Watershed Work Plan and an agreement for the implementation thereof were executed on behalf of [the local] Soil and Water Conservation District...organizations, who are parties to the agreement and plan, and before execution by the Soil Conservation Service [SCS],[9] the plan was reviewed by the Corps of Engineers of the United States Department of the Army and the United States Department of the Interior, and other federal agencies...and approved by the Committees on Agriculture [both House and Senate]....

Pursuant to the provisions of NEPA and the [CEQ regulations], the Administrator of the SCS, through the issuance of Environment Memorandum 1 and Watersheds Memorandum 108, the Chicod Creek Watershed project was placed in Group 2, i.e., those projects having some adverse effect which can be eliminated by minor project modification.... After consideration of environmental concerns, including the unfavorable comments of the FWS, officials of the SCS determined that the project as modified was not a major federal action significantly affecting the quality of human environment and that the project should proceed.

The present action was instituted to enjoin the defendants from financing and participating in the construction of the Chicod Creek Watershed Project. The total installation cost of the project is estimated to be $1,503,831. Public Law 566 funds are to pay $706,684 and other funds will provide $797,147. There has been extensive preparation by the defendants and the intervenors for this project. The landowners have incurred approximately $13,000 of debts to create the drainage district. Easements and rights-of-way have been obtained on 282 tracts of land involving 230 landowners. The local sponsors have procured a Farmers Home Administration loan. The SCS has incurred substantial expenses on the project, having expended $50,000 for planning and $159,176 for engineering, design, and land treatment. The SCS will suffer expenses as a result of the delay caused by this action. The projected cost of delay amounts to $7,650 per month, representing salaries and increased construction costs. The cost of preparing impact statements is approximately $7,500 per project....

9. The Soil Conservation Service, in the U.S. Department of Agriculture, was renamed the Natural Resource Conservation Service in 1994. [Eds.]

COMMENTARY & QUESTIONS

1. **The factual setting.** Can you figure out what is going on here? Physically, these SCS channelization projects involve cutting a swath of trees (here about 10% of the area's woodland) along a watercourse and then, using power-scoopers called "draglines," cutting a wide open-banked canal in a straight line through the watershed. The natural meandering stream is thus replaced by a broad ditch. The judge does not seem particularly aware of what "adverse effects" might result. What kind of ecological evidence would you have brought to the hearing on a preliminary injunction to demonstrate the facts?

What were the purposes of the project? "Flood prevention" clearly does not mean protection of lives and property from rampaging floodwaters. Rather, the flood problem appears to be drainage, and the purpose of the project is largely to promote agriculture (although traffic and sanitation consequences are mentioned). By channelizing the watershed and adding open ditches and tile drains, the project would not only have reduced seasonal drainage problems but also have created new arable land out of "useless marshes." About 17% of the benefitted acreage was owned by the Weyerhaeuser Lumber Company.

Economically, it is Public Law 566 that pushes the project along. Watershed Protection Act, 16 U.S.C. §§1001–1009 (1970). The court notes that $706,684 out of the $1,503,831 total cost is to be contributed by federal taxpayers. The "local" contribution is typically not wholly paid in dollars. By donating land rights (i.e., easements of access for the dragline, rights-of-way for ditches), landowners are credited with economic contributions toward the local share. The remainder is made up by assessments in the drainage district. As a result, local agriculture gets a construction project subsidy five to ten times its own dollar outlay (the federal contribution rate varies depending upon how much can be called "flood protection" (75%) rather than drainage (50%)). Does the fact that the private market does not build these projects on its own show that they are not cost-effective without federal subsidies?

2. **The political setting.** The political organization of SCS projects is part of the NEPA story. Originally the SCS was an erosion-control agency whose motto was "stop the raindrop where it falls" through contour plowing and other methods. The agency was so successful that it worked itself out of a job. Accordingly, the SCS shifted its focus to carrying water away from the land, an about-face that naturally brought it into the business of managing small streams since the Corps had carved out its jurisdiction over rivers. Annually, huge sums of federal money are appropriated by the congressional agricultural appropriations subcommittees for distribution around the nation to SCS projects. At the local level, agribusiness and individual farmers, who will ultimately benefit from the subsidies, are organized into Drainage Districts through the efforts of the county or regional agent who administers the local-level SCS Soil Conservation District. The drainage districts are basically state-chartered quasi-governmental units with the power to contract for construction and to assess fees. A project is proposed by one of the participants (often the local SCS agent, whose career advancement typically is linked to success in getting such projects underway). A majority of affected

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FIGURE 9-1
Stream channelization involves bulldozing or draglining the natural contours and meanders of a stream into straight-line trapezoidal cross-section ditches. The trees and shrubs naturally clustered along the streambanks are stripped away and burned or left in spoil piles. Water flows change dramatically from natural flows in terms of temperature, volume, velocity, erosion, and water quality. The pre-existing populations of fish and other aquatic life typically decline severely. In this photograph, the dragline is re-dredging a silted-in channelization done approximately five years prior.

landowners (measured by acreage rather than per capita) must approve the project; if approved, all must subsequently contribute. The project is then transmitted by the SCS's "State Conservationist" to Washington where it is "authorized" for construction by the SCS and the FHA, and the Secretary of Agriculture. (The SCS and the TVA are rare examples of agencies that have been given extraordinary powers to self-authorize projects without a congressional vote.) Appropriated money is then released to the District for sequential planning, design, and construction. Low-interest loans, moreover, are granted to finance part of the local share. The participants, throughout this process, are linked in an identity of interests. The SCS owes its existence to the continuation of the drainage function; the congressional appropriations committees derive their political power from the ability to deliver dollars throughout the country; the Department of Agriculture and its subdepartments likewise; state and local government officials may be incorporated into the District funding process; and private individuals receive direct financial benefits, some from the project's subsidized land modifications, others from the award of construction contracts. The various private and public participants have their nationwide organizations, with annual conventions, newsletters, and Washington-based lobbyists, all to assure the system's smooth functioning.

Outside the network of drainage-oriented interests are other public and private bodies. The North Carolina Wildlife Commission had received a report from its expert, George Burdick, noting the drastic ecological effects of channelization and had tried to persuade

the SCS to terminate the program. The SCS told the state agency that Chicod Creek was being pushed by local landowners and was beyond SCS control. ("Meantime," said one state official, "the SCS agents were whooping it up with the local people telling them what they wanted where.") In controversial matters like this, a state agency usually will not sue to achieve its objectives, nor even complain administratively over the SCS officer's head. The state commission did not insist on its position but did take part in some planning "at a time when the SCS had already established the design"; it did follow the litigation closely, however, and participated in subsequent negotiations. The federal FWS volunteered the letter cited, noting adverse effects. But the FWS had no legal basis to participate in the decision even if it had wanted to interfere with a sister agency. In sum, from top to bottom, no governmental body existed to defend environmental interests. This gap left things up to the local sporting and conservation groups, which happened to find out about the project and got organized in time to persuade the NRDC, a private entity, to take on the expensive task of litigating this, out of hundreds of other potential cases.

3. **Judicial attitudes towards NEPA challenges.** How do you interpret the mood of Judge Larkins at this stage of the case? Do you notice the inevitability implied in the phrasing (so common in NEPA cases) that "1350 acres of land will be [deforested]," etc.?

4. **Financial commitments and delay costs.** The judge notes the amounts of money committed to date and the cost of delay if an injunction were granted. This information is regularly emphasized by environmental defendants to show that too much project expenditure has occurred before trial to permit the project reasonably to be stopped. Has the $130,000 been spent? Were easements paid for? Can the FHA loan be returned? Do any of the SCS expenditures, for "land treatment," etc., have value irrespective of project completion? How much of this financial commitment took place after NEPA became law in January 1970? As to delay, is it relevant that the majority of costs that would inflate over the course of the suit would ultimately be paid in federal tax dollars that have likewise inflated in revenue terms? In light of the $7,500 cost of an SCS EIS, what relevance do all these numbers seem to have for the judge?

Natural Resources Defense Council v. Grant *(continued)*

Conclusions of Law: Jurisdiction. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1331 (federal question) and 5 U.S.C. §702 (Administrative Procedure Act).

NEPA requires all federal agencies, in performing their respective functions, to be responsive to possible environmental consequences of their actions. The Act makes it the "continuing" responsibility of the federal government to "use all practicable means and measures" to carry out the national policy of restoring and maintaining a quality environment....

Retroactivity. [Judge Larkins, as most other judges in the early development of NEPA, held that NEPA was applicable to ongoing projects, like the Chicod Creek channelization, on which substantial actions remained to be taken.[10]]

10. But see Oregon Nat. Res. Council v. Bureau of Reclamation, 49 F.3d 1441 (9th Cir. 1994) (agency's lowering water levels and applying aquatic herbicides in a federal impoundment is not a "major federal action" because these activities were ongoing in 1970).

Requirements of §102(2)(C) of NEPA. Section 102(2)(C) directs all agencies of the federal government to prepare an EIS for every major federal action significantly affecting the environment. The defendants contend that even though they have not filed an EIS, "a particular form," that in substance they have fulfilled all of the requirements of §102(2)(C). In support they assert that a detailed statement has been prepared and circulated; that the environmental impact has been considered by the SCS and agencies of both state and federal government; that adverse effects which cannot be avoided have been considered and weighed against the total benefit of going on with the project; that alternatives have been considered and some have been adopted; that there have been consultations with other federal agencies and with state and local agencies; and that the project has been open to and has received public comment. According to the record and the testimony received at the motion hearing on January 5, 1972, this cannot be disputed. But the fact remains that an EIS has not been prepared and filed for the Chicod Creek Watershed Project. Mr. Hollis Williams, Deputy Administrator of Watersheds, SCS, at the motion hearing testified to the effect: "We had the belief and still do, that an EIS is not needed in the Chicod Creek Project." An EIS must be filed for every major federal action significantly affecting the quality of the human environment. The District of Columbia Circuit noted in Calvert Cliffs v. AEC, 449 F.2d 1109 (D.C. Cir. 1971) that "...the §102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance...."

Administrative Discretion. It is contended that the determination of whether a project is (1) "a major Federal action" and (2) "significantly affecting the quality of the human environment" is within the discretion of the Administrator of the SCS, and that an administrative determination should not be reversed by this Court in the absence of a strong showing that it was arbitrary, capricious, or clearly erroneous. In the case at bar the administrator, with the advice of scientists and specialists, made the determination that the project as modified could not significantly affect the quality of the human environment within the meaning and intent of NEPA, and as such "going forward with the project as modified" was in compliance with the requirements of NEPA. Certainly, an administrative agency like the SCS may make a decision that a particular project is not major, or that it does not significantly affect the quality of the human environment, and, that, therefore, the agency is not required to file an impact statement. However, when the failure to file an impact statement is challenged, it is the court that must construe the statutory standards of "major federal action" and "significantly affecting the quality of the human environment," and having construed them, then apply them to the particular project, and decide whether the agency's failure violates the Congressional command.

Statutory Standards. A "major federal action" is federal action that requires substantial planning, time, resources, or expenditure. The Chicod Creed Watershed Project is a "major federal action." This project calls for sixty-six miles of channelization and the expenditure of $1,503,831, $706,684 of which is to be federally funded. The project has been in the planning and preparation stages for several years. Many persons and agencies have become involved and concerned with this project, and the construction of this project will require a substantial amount of time and labor. Certainly this can be considered to be a "major federal action."

The standard "significantly affecting the quality of the human environment" can be construed as having an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment. The cumulative impact with other projects must be considered. Any action that substantially affects, beneficially or detrimentally, the depth or course of

streams, plant life, wildlife habitats, fish and wildlife, and the soil and air "significantly affects the quality of the human environment." This project will require sixty-six miles of stream channelization. As a result of such channelization there will be a substantial reduction (ninety percent) in the fish population. As a result of drainage and the clearing of right of ways, there will be significant lossage [sic] in wetland habitat which is vital to waterfowl and forest game. The Chicod Creek Watershed Project as presently proposed will have a cumulative effect upon the environment in the eastern plains of North Carolina. There are a total of forty Soil Conservation projects either authorized for construction, under construction, or completed, representing 1562 miles of stream channelization, affecting over 100,000 acres of wetlands, and having very serious repercussions upon fish and wildlife in the Coastal Plains of North Carolina. The Chicod Creek Watershed Project "significantly affects the quality of the human environment."

It is interesting to note that one of the SCS's own biologists, prior to the implementation of any mitigation, concluded that this project would have significant effects upon the environment. Also noteworthy is the fact that subsequent to Watersheds Memorandum 108, the SCS placed this project in Group 2, a category established by the Watersheds Memorandum indicating that projects placed in this group could have some adverse effect upon the environment. After certain mitigation measures were implemented, this project was placed in Group 1, signifying minor or no known adverse effect upon the environment. It is the opinion of this Court that an EIS should have been issued when this project was placed in Group 2.

Standing. It is contended that the plaintiffs lack standing to pursue this action on the grounds that they have not suffered a legal wrong and have not been adversely affected by agency action.... The plaintiffs have standing to maintain this action as they have alleged injury to conservational interests and that such interests are within the zone of interests protected by NEPA.

Laches. The mere lapse of time does not constitute laches. Laches is determined in light of all the existing circumstances and requires all delay to be unreasonable and cause prejudice to the adversary. This project has been in the planning and preliminary stages for several years. However, NEPA became effective only on January 1, 1970. The plaintiffs instituted this action on November 30, 1971. At that date no construction contract had been let or had any construction on the installation of the project taken place. Therefore, it appears to this Court that there was no unreasonable delay in the commencement of this action, and even assuming such, there does not appear to be any prejudice to the defendants or intervenors as construction of the project has yet to begin.

Injunction. The plaintiffs seek a preliminary injunction to enjoin construction of the Chicod Creek Watershed Project on the grounds that an EIS has not been issued as required by NEPA. The tests for granting such relief were recently restated by the Fourth Circuit:

> In the exercise of its discretion (to issue a preliminary injunction) it is sufficient if a court is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued, and considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury to the defendant.... W. Virginia Highlands Conservancy v. Island Creek Coal, 441 F.2d 232, 235 (4th Cir. 1971).

In summary, the movants are entitled to preliminary injunctive relief if they demonstrate (a) a substantial likelihood that they will prevail on the merits, and (b) that a balancing of the equities favors the granting of such relief. Here, the plaintiffs have shown more than a

substantial likelihood that they will prevail on the merits upon final determination of their NEPA EIS claim as NEPA requires that an EIS be filed for "major federal actions significantly affecting the quality of the human environment." The plaintiffs have shown that this project is a "major federal action significantly affecting the quality of the human environment," and that an impact statement has not been filed.

The question as to the balancing of the equities gravely concerns this Court. Basically, there are three different interests represented in this action: the conservationists, the SCS, and the landowners. In considering the various interests the public interest is a relevant consideration. This project was designed to enable the landowners to control severe drainage problems and to increase farm productivity. These farmers have spent much time, effort, and money in preparation for this project with the expectation of federal aid. This has been no easy task for farmers in an area in which fifty-five percent of the families make less than $3,000 income per year. These farmers have given up much in expectation of innumerable benefits resulting from the project.... It was only when the preparations had been made and construction ready to begin that this action was initiated to enjoin the project. The Soil Conservation Service's...primary concern in this action seems to be that if it has to issue an impact statement for this project, it will have to do the same for many other ongoing projects. This will cause delay and, in many cases, duplicity [sic]. The projected cost per project for issuing an impact statement is approximately $7,500. This cost is minute indeed in comparison to the equity of the farmers and the effect that this project will have on the environment. The conservationists are organizations dedicated to the laudable cause of conservation and preservation of our environment. They have shown that this project will have a significant effect on the environment. It is to the public's welfare that any project significantly affecting the environment comply with the procedures established by NEPA so there can be assurance that the environmental aspects have been fully considered. It would constitute irreparable damage for this project to proceed without the environmental aspects being properly considered as required by NEPA. Therefore, the equitable considerations favor the environment, the public, and the plaintiffs and require that the construction of the Chicod Creek Watershed Project be enjoined until the requirements of NEPA are satisfied.

The defendants shall have thirty days within which to prepare and file a "full disclosure" EIS. The preliminary injunction shall remain in effect thereafter until all of the procedures of NEPA have been complied with. The plaintiffs shall file a bond for the payment of costs and damages as may be suffered by any party who is found to have been wrongfully restrained herein. The amount of bond shall be commensurate to the possible damages incurred by the defendants and the intervenors as a result of the injunction. Over $200,000 has already been expended on this project by the SCS and $130,000 of debt has been incurred by the intervenors. The projected cost of delay to the SCS resulting from the institution of this suit is approximately $7,650 per month. Taking into consideration the amounts that have been expended, the costs of delay, and that other amounts are obligated, this Court sets the bond at $75,000.

Now therefore, in accordance with the foregoing, it is *ordered*, that the defendants and their agents, employees, and persons in active concert and participation with them who receive actual notice hereof, be and the same are hereby restrained and enjoined from taking any further steps to authorize, finance, or commence construction or installation of the Chicod Creek Watershed Project until an EIS is filed and circulated according to the requirements of NEPA; and, *Further ordered*, that the defendants prepare and file a "full disclosure" EIS within thirty (30) days from the filing of this Order; and, *Further ordered*, that plaintiffs file a bond for the payment of costs and damages as may be suffered by any party who is found to have been wrongfully or unlawfully restrained herein, in the amount of, or security equivalent to, $75,000.... Let this Order be entered forthwith.

COMMENTARY & QUESTIONS

1. **Standing and ripeness.** Note how little trouble the court had in finding standing to challenge agency action, despite the fact that NEPA had not explicitly given such a right. Purely economic interests, however, have consistently been held not to provide standing under NEPA. See, e.g., Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993). Moreover, a split has developed among federal circuit courts of appeals regarding standing to assert violations of NEPA where the proposed federal action would not immediately produce site-specific environmental impacts (i.e., proposals for rulemaking, planning, or policy changes). Compare Florida Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996) (en banc) (denying individuals standing to contest the failure of the Secretary of the Treasury to comply with NEPA prior to promulgating a final rule to allow a tax credit for an alternative fuel additive; plaintiffs had not demonstrated an increased risk of serious environmental harm that actually threatened their particular interests), with Citizens for Better Forestry v. Agriculture Dep't, 341 F.3d 961 (9th Cir. 2003) (rejecting the *Bentsen* standing analysis and holding that environmental plaintiffs, asserting a procedural right, can establish standing without meeting the normal standards for immediacy, and need only establish the reasonable probability of the challenged action's threat to their concrete interests; environmental plaintiffs have standing, under NEPA, to challenge not only site-specific proposals, but also higher-level planning regulations). Lack of ripeness for review has not posed a problem for NEPA plaintiffs. But challenges to Land and Resource Management Plans under the NFMA have been dismissed for lack of ripeness on the theory that plaintiffs would have an opportunity to contest future site-specific proposals based on those plans. See Sierra Club v. Thomas, 523 U.S. 726 (1998), discussed in Chapter 24.

2. **A cause of action?** The court presumes, with the other courts that encountered NEPA, that §102 must be actionable because it plainly set up a legal duty — all agencies shall prepare statements — that sounds enforceable, and if Congress had not meant that as a requirement, surely it would not have said that. This amounts to the principle of statutory interpretation that "the Emperor must be wearing clothes."

3. **Laches.** Owing to its casual congressional history, NEPA had no statute of limitations; the equitable doctrine of laches will prevent injunction suits that are "unreasonably delayed." Here, would the judge have decided differently if a construction contract had been let? Should the doctrine of laches be waived for public interest plaintiffs?

4. **The bureaucratic temptation to minimize.** NEPA's enforceability was initially unclear, and some construction agencies tended to minimize its requirements. The following is reportedly the text, in its entirety, of an EIS as it was first published by the Bureau of Reclamation as its compliance with NEPA:

> Palmetto Bend Project, Jackson County, Tex. Proposed construction of a 12.3-mile long, 64-foot high earthfill dam on the Navidad River. The purpose of the project is the supply of industrial and municipal water. Approximately 18,400 acres (11,300 of which will be inundated) will be committed to the project; 40 miles of free-flowing stream will be inundated; nine families will be displaced; fresh water inflow to the Matagorda estuary will be altered; fish and shellfish nursery areas will be

> impaired; habitat for such endangered species as the Texas red wolf, the American alligator, the Southern bald eagle, the Peregrine falcon, and the Attwater prairie chicken will be lost.

(The Bureau subsequently realized that more was required, and the project was ultimately subjected to a full formal EIS preparation and review process.)

5. **The classic *Calvert Cliffs* case.** Part of the legal backdrop to Judge Larkins's review of the *Chicod Creek* case was a forceful decision from the D.C. Circuit that became the most important of all early NEPA cases. Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), confronted the Atomic Energy Commission's ingenious refusals to consider environmental issues in its nuclear power plant construction program until after the projects were under construction. In his admonitory and ironic majority opinion, excerpts from which are reproduced below, Judge Skelley Wright "took a stick to the federal agencies" and served notice that NEPA would have to be taken seriously:

> In these cases, we must for the first time interpret the broadest and most important of the recent [environmental] statutes: the National Environmental Policy Act. We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.... The Commission contends that the vagueness of the NEPA mandate and delegation leaves much room for discretion.... We find the policies embodied in NEPA to be a good deal clearer and more demanding than does the Commission. We conclude that the Commission's procedural rules do not comply with the congressional policy. Hence we remand these cases for further rulemaking....
>
> Of course, all of the §102 duties are qualified by the phrase "to the fullest extent possible." We must stress as forcefully as possible that 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 such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agency, a standard which must be rigorously enforced by the reviewing courts....
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> NEPA makes only one specific reference to consideration of environmental values in agency review processes. Section 102(2)(c) provides that copies of the staff's "detailed statement" and comments thereon "shall accompany the proposal through the existing agency review process."... The question here is whether the Commission is correct in thinking that its NEPA responsibilities may "be carried out *in toto* outside the hearing process" — whether it is enough that environmental data and evaluations merely "accompany" an application through the review process, but receive no consideration whatever from the hearing board. We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the requirement...if "accompany" means no more than physical proximity — mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are entitled to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany"

> must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the "detailed statement," be considered through agency review processes.
>
> The rationale of the Commission's limitation of environmental issues to hearings in which parties affirmatively raise those issues may have been one of economy. It may have been supposed that, whenever there are serious environmental costs overlooked or uncorrected by the staff, some party will intervene to bring those costs to the hearing board's attention.... NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.
>
> [As to the AEC's dilatory and grudging interpretation of NEPA], strangely, the Commission has principally relied on...pragmatic arguments. It seems an unfortunate affliction of large organizations to resist new procedures and to envision massive roadblocks to their adoption.... The introduction of environmental matters cannot have presented a radically unsettling problem. And, in any event, the obvious sense of urgency on the part of Congress should make clear that a transition, however "orderly," must proceed at a pace faster than a funeral procession.
>
> As to [multiple statutory mandates, NEPA] clearly requires obedience to standards set by other [statutes]. But obedience does not imply total abdication.... It does not suggest that other "specific statutory obligations" will entirely replace NEPA....
>
> We hold that...the Commission must revise its rules governing consideration of environmental issues. We do not impose a harsh burden on the Commission. For we require only an exercise of substantive discretion which will protect the environment "to the fullest extent possible." No less is required if the grand congressional purposes underlying NEPA are to become a reality. 449 F.2d at 1111–1124.

6. **What is a "major federal action"?** Is the Chicod Creek channelization project federal? The entire project is to be undertaken by the local District. Yet federal dollars are being spent and "many persons and agencies have become involved." Does that mean that every expenditure of federal revenue-sharing funds requires an EIS?

Note the following excerpt from the CEQ regulations, 40 C.F.R. §§1501 et seq., on the meaning and implementation of NEPA:

> §1508.18 Major Federal Action. Major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals. Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State

> and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

In addition, §1508.18 explains that federal actions tend to involve the adoption of official policy, formal plans, or programs, or the approval of specific projects. Courts also have held federal permits, licenses, contracts, or leases given to private parties to be federal actions.

As to whether it is a "major" action, isn't the Chicod Creek project's $706,684 cost a trifling amount in the federal context? Conceptual rather than financial definitions obviously are part of the decision, which depends on an analysis of surrounding circumstances. Is an armed forces plan to launch an amphibious practice assault on a beach in Maine's Acadia National Park a "major" action? What about the installation of an incinerator on a federal hospital? The courts answered "no" and "yes," respectively, perhaps making a distinction based upon short-term versus long-term actions. If Chicod Creek were only 4 miles long, would the project be "major"? Can you take notice of *cumulative* effects in order to judge whether an action is "major" or of significant effect? See 40 C.F.R. §1508.27(b)(7) in Note 8 below.

7. **The "small handle" problem.** Consider this not-so-hypothetical: Several Japanese and Korean corporations plan to open 17 wood-chipping installations throughout the southeastern United States, designed to process trees and vegetation stripped from hundreds of thousands of acres of private forests. The companies will ship the chips by barge and freighter to the Far East as raw material for paper and laminates. This activity would affect the biological and climatological character of major portions of six southern states. Assume that the only federal permit required is an Army Corps of Engineers wharf-building permit for the barge-loading facilities. With that federal permit, the operation will take place; without it, it will not. The corporate proponents and the Corps can argue, however, that a barge wharf is too minor a structure to require an EIS.

This is the small handle problem. Courts disagree on whether, in such cases, the NEPA EIS requirement is triggered by the entire factual consequences of a federal action or focuses exclusively on the effects of the federal component of the project. In Winnebago Tribe v. REA, 621 F.2d 269 (8th Cir. 1980), the court held that a federal river-crossing permit necessary for construction of a 67-mile high-tension power line was not sufficient federal involvement to require an EIS. Some courts have been more willing to note the actual effect of federal actions. Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985), held that a Corps permit for riverbank reinforcement (a practical precondition for a proposed large rural commercial and residential development) required an EIS covering the entire actual impact deriving from the federal action. NEPA, the court held, implicitly incorporates reasonable forecasting of consequential and environmental effects. In a Maine case, where construction of a major oil terminal on Sears Island depended upon grant of a Corps permit for an access road causeway, the court required an EIS covering the entire development, taking into account the "reasonably foreseeable indirect effects" of consequential industrial development because the causeway was a necessary part of the larger plan. Sierra Club v. Marsh, 769 F.2d 868, 877 (1st Cir. 1985).

8. **"Significantly affecting the human environment."** This standard echoes the preceding issues. "Significance" similarly varies according to context. What if the project allegedly has net beneficial effects? One SCS official argued that this was so in stream channelization cases, adding that "Conservation is our middle name!" NEPA is clearly aimed at adverse environmental effects (and the present CEQ regulations so direct the EIS procedure); if adverse effects exist, the courts generally have not permitted the counterbalancing of alleged benefits in order to avoid NEPA.[11] The CEQ regulations describe "significantly" in terms of "context" and "intensity":

> §1508.27 Significantly. Significantly as used in NEPA requires considerations of both context and intensity:
>
> (a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

11. After an agency has complied with NEPA, issuing an adequate EIS, it may still decide to proceed based on a balance of environmental and nonenvironmental issues (unless going forward can be shown to be "arbitrary").

> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

9. **FONSIs and mitigation.** The *Chicod Creek* case offers an example of another tack: The SCS Administrator made a "negative declaration" or "FONSI" ("finding of no significant impact"), a declaration that the project would cause no significant environmental effect. A FONSI must be based upon an initial Environmental Assessment (EA) in which the agency briefly discusses the need for the proposal as well as the "environmental impacts of, and alternatives to, the proposal."[12] The CEQ defines the FONSI and EA as follows:

> §1508.9 Environmental Assessment. Environmental assessment (a) means a concise public document for which a Federal agency is responsible that serves to: (1) briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) aid an agency's compliance with the Act when no environmental impact statement is necessary. (3) facilitate preparation of a statement when one is necessary. (b) shall include brief discussions of the need for the proposal, of alternatives..., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.
>
> §1508.13 Finding of no significant impact. Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action...will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it....

An EA is a threshold document and is held to a lower degree of analysis than an EIS. Judge Larkins rejected the SCS's argument that its decision to prepare an EA and FONSI, instead of a full-scale EIS, had to be upheld unless it was arbitrary and capricious. After many years of division among the federal circuit courts on this issue, the Supreme Court settled the matter in Marsh v. Oregon Nat. Res. Council, 490 U.S. 360 (1989) (reviewing courts must apply the "arbitrary and capricious" standard in reviewing agency decisions on "significance"). Nevertheless, federal courts — especially in the Ninth Circuit — frequently hold that an agency must prepare an EIS rather than an EA. See, e.g., Idaho Sporting Congress v. U.S. Forest Serv., 137 F.3d 1146 (9th Cir. 1998) (Forest Service must prepare an EIS for a proposed timber sale).

In *Chicod Creek*, the SCS claimed that its mitigation measures obviated a full EIS, an argument that Judge Larkins did not accept. In fact, according to the CEQ's study, "The National Environmental Policy Act: A Study of Its Effectiveness after Twenty-five Years" (1997) (hereafter "1997 CEQ Study"), the "mitigated FONSI" has become the agencies' primary means of limiting their procedural burdens under NEPA:

> Since NEPA was passed, the role of the EA has evolved to the point where it is the predominant way agencies conduct NEPA analyses. Conceived as a brief analysis to

12. An agency may designate a category of actions that do not individually or cumulatively have a significant effect on the human environment for a "categorical exclusion" from NEPA, meaning that neither an EA nor an EIS is necessary. 40 C.F.R. §1508.4. However, a categorical exclusion cannot be utilized to evade NEPA compliance responsibilities. See, e.g., Rhodes v. Johnson, 153 F.3d 785 (7th Cir. 1998) (U.S. Forest Service must prepare an EA on proposed controlled burns because these activities cannot be categorically excluded from NEPA).

> determine the significance of environmental effects, the EA today increasingly includes mitigation measures that reduce adverse effects below significant levels. With the increased use of EA's, often to the overall benefit of the environment, comes the danger than public involvement will be diminished and that individually minor actions will have major cumulative effects.... There is a great deal of confusion about what public involvement is required, appropriate, or allowed in the preparation of EAs, because NEPA regulations and guidance are primarily oriented to the preparation of EISs.... Some states, citizen groups, and businesses believe that certain EAs are prepared to avoid public involvement.... The preparation of an EA, rather than an EIS, is the most common source of conflict under NEPA....
>
> All signs point to a significant increase in EAs and a decrease in EISs. The annual number of draft, revised, supplemental, and final EISs prepared has declined from approximately 2,000 in 1973 to 608 in 1995, averaging 508 annually between 1990-1995. By 1993, a CEQ survey of federal agencies estimated that about 50,000 EAs were being prepared annually. That survey also found that five federal agencies — the U.S. Forest Service, the Bureau of Land Management, the Department of Housing and Urban Development, the U.S. Army Corps of Engineers, and the Federal Highway Administration — produce more than 80% of the EAs. While some federal agencies...provide for a public comment period on EAs, many do not.
>
> Another significant trend is that of agencies increasingly identifying and proposing measures to mitigate adverse effects of proposed actions during the preparation of EAs.... If an agency finds that such mitigation will prevent a project from having significant impacts on the environment, the agency can conclude the NEPA process by issuing a FONSI, rather than preparing an EIS. The result is a "mitigated FONSI." While mitigated FONSIs are a good way to integrate NEPA into planning..., not all EAs resulting in mitigated FONSIs are meeting the spirit and intent of NEPA. When the EIS process is viewed as merely a compliance requirement rather than a tool to improve decision-making, mitigated FONSIs may be used simply to prevent the expense and time of the more in-depth analysis required by an EIS. The result is likely to be less rigorous scientific analysis, little or no public involvement, and consideration of fewer alternatives, all of which are at the very core of NEPA's strengths. Moreover, not all agencies that commit to mitigation monitor to determine whether the mitigation was actually implemented or whether it was effective.[13] 1997 CEQ Study at 19–20.

Nevertheless, EAs must also take a "hard look" at a reasonable range of alternatives and their environmental consequences. For an example of a mitigated FONSI that was upheld by a federal circuit court of appeals, see Tillamook County v. Army Dep't, 288 F.3d 1140 (9th Cir. 2002) ("While the Corps was required to develop the proposed mitigation measures 'to a reasonable degree,' it was not required to develop a complete mitigation plan detailing the 'precise nature...of the mitigation measures' nor were the measures required to 'completely compensate for adverse environmental impacts.'" 288 F.3d at 1142, citing Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1121 (9th Cir. 2000), cert. denied, 534 U.S. 815 (2001)). But see National Parks &

13. Although the CEQ regulations require that mitigation measures be implemented (§1505.3), the U.S. Supreme Court has held that NEPA does not require an agency to either include a mitigation plan in an EA or EIS, or to actually implement identified implementation measures. Robertson v. Director of U.S. Forest Serv., 490 U.S. 332 (1989).

Conservation Ass'n v. Interior Dep't, 241 F.3d 722 (9th Cir. 2001), cert. denied, 534 U.S. 1104 (2002) (mitigated FONSI by National Park Service with regard to a proposal to increase vessel traffic in Glacier Bay National Park held to be arbitrary and capricious).

10. **Formal compliance vs. "functional equivalence."** The judge scarcely listened to the SCS's claim that even though it had not filed a formally prepared EIS, it had substantially complied with the various requirements of an EIS; yet Congress appears to have drafted the phrase "statement" instead of "formal finding" precisely in order to avoid formal requirements. This court simply says, however, that "an EIS has not been prepared and filed for the Chicod Creek Watershed Project."

In several early NEPA cases, polluters tried to use the statute against EPA itself, and courts began to develop an exception for environmental protection agencies whose procedures provide the "functional equivalent" of NEPA. "[The courts have seen] little need in requiring a NEPA statement from an agency whose raison d'etre is the protection of the environment and whose decision...is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework. To require a 'statement,' in addition to a decision setting forth the same considerations, would be a legalism carried to the extreme." International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 n. 130 (D.C. Cir. 1973); Texas Comm. on Nat. Res. v. Bergland, 573 F.2d 201, 207 (5th Cir. 1979). How similar to the EPA procedures do other agency procedures need to be in order to be deemed "functionally equivalent" to NEPA? Agencies such as the Forest Service and the Bureau of Land Management, which consider environmental protection along with other multiple-use criteria, are not exempt from NEPA under the "functional equivalent" doctrine; but federal circuit courts have split about whether designations of critical habitat under the ESA are the functional equivalent of NEPA. Contrast Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1994) (ESA procedures are the functional equivalent of NEPA), with Catron County Bd. of Comm'rs v. FWS, 75 F.3d 1429 (10th Cir. 1996) (ESA and NEPA serve different purposes). What are the consequences of this judge-made doctrine? In Alabama ex rel. Siegelman v. EPA, 911 F.2d 499 (11th Cir. 1990), EPA issued a permit to allow the ChemWaste Co. to open the nation's largest hazardous waste disposal facility at Emelle, Alabama, a low-income community of color, without preparing an EIS. The court held that the RCRA permit process was the functional equivalent of an EIS.

Does the "functional equivalence" doctrine adequately address the role of public involvement and comment in the EIS procedure under NEPA? The procedures mapped out in the CEQ's NEPA regulations include extensive provisions requiring agencies to make diligent efforts to solicit information from the public and from other agencies with relevant expertise, to provide adequate notice of NEPA-related hearings, and to respond to comments in the final EIS. Were the SCS procedures in *Chicod Creek* the functional equivalent of NEPA?

11. **Conflicting statutory mandates.** Courts have recognized a narrow exception to NEPA's EIS requirement where compliance with NEPA would result in a "clear and fundamental conflict of statutory duty." Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 791 (1976). In *Flint Ridge*, the Court held that the Secretary of HUD was not

required to prepare an EIS before allowing disclosure notices for large-scale rural subdivisions to be filed, even if the developments would significantly affect the environment. Because the Interstate Land Sales Full Disclosure Act required the Secretary to allow accurate and complete notices to go into effect within 30 days of filing, the Court found that it would be impossible simultaneously to prepare an EIS and to respond adequately to comments. While acknowledging that NEPA requires that agencies comply "to the fullest extent possible," the Court reasoned that NEPA was not intended to "repeal by implication any other statute." The Court also, however, quoted statements from House Conferees involved in drafting §102, providing that "no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid compliance [with NEPA]."

Courts have been unwilling to apply the *Flint Ridge* exception liberally. In Jones v. Gordon, 621 F. Supp. 7 (D. Alaska 1985), the district court held that the National Marine Fisheries Service (NMFS) could not issue a permit for the taking of up to 100 orca whales without preparing an EIS. The court rejected the argument that the 90-day time limit for issuing such permits under the Marine Mammal Protection Act rendered NMFS compliance with NEPA impossible. Instead, the court held that "in the rare cases where an EIS may be required, the NMFS can create time in the application process by delaying initial publication of the notice of the application in the Federal Register." The court found the conflict between statutes in this case to be minor and ultimately reconcilable. But an irreconcilable conflict was found in Westlands Water Dist. v. NRDC, 43 F.3d 457 (9th Cir. 1994) (Congress dictated that conservation releases from federal dams take place "upon enactment").

The SCS in *Chicod Creek* was clearly not prevented by conflicting statutory mandates from complying with NEPA.

12. **Emergency exemptions from NEPA.** To what extent can agencies ignore NEPA in situations that they deem to be "emergencies" (recognizing that such a loophole could invite self-serving agency evasions of their mandates)? 40 C.F.R. §1506.11 provides that the requirements of NEPA can be bypassed in emergencies. In Crosby v. Young, 512 F. Supp. 1363 (E.D. Mich. 1981), a district court upheld the claim that Detroit's use of federal funds to raze the Poletown community in order to build a Cadillac plant (see Chapter 23) was an emergency precluding the application of NEPA. The same result occurred in Hester v. National Audubon Soc'y, 801 F.2d 405 (9th Cir. 1986), where the FWS was granted leave, without an EIS, to capture the last 26 surviving California condors for zoo propagation. Although common sense indicates that in some situations the requirements of NEPA must be inapplicable, how do courts or the CEQ fashion such exceptions to a clear legislative mandate? The crop and infrastructure flooding proposed to be addressed by the *Chicod Creek* project lacked the emergency quality that might have exempted this proposal from NEPA.

13. **NEPA and national security.** NEPA does not provide for a national security exception. The Supreme Court, however, has refused to review Defense Department compliance with NEPA where to do so inevitably would result in the disclosure of confidential matters regarding national security. Weinberger v. Catholic Action of Haw., 454

U.S. 139 (1981), involved a NEPA challenge to the Navy's construction of nuclear weapon storage structures. The Navy's regulations prohibited it from either admitting or denying that nuclear weapons were actually stored at the facility. The complaint claimed that the Navy's determination that no significant environmental hazards were present failed to take into account the enhanced risks of a nuclear accident and the potential effects of radiation from the storage of nuclear weapons in a populated location. The Court held that the Navy could not be made to disclose the military secret regarding whether it proposed to store nuclear weapons on Hawaii, even in confidential judicial chambers ex parte, and thus the entire matter was beyond judicial scrutiny.

Subsequent cases have held that some NEPA claims involving national security are justiciable. In *NO GWEN* Alliance of Lane County, Inc. v. Aldridge, 841 F.2d 946 (9th Cir. 1988), the appeals court held that a lawsuit claiming that the Air Force did not discuss environmental impacts of installing radio towers designed to send war messages to U.S. strategic forces in the event of nuclear war raised justiciable questions. See also Romer v. Carlucci, 847 F.2d 463 (8th Cir. 1988) (review of EIS for compliance with NEPA is justiciable under political question doctrine, in connection with proposed deployment and peacetime operations of MX missiles in minuteman silos). While both the Eighth and Ninth Circuits pointed out that there is no national security exemption from NEPA, the *Carlucci* court refused to require the Army EIS to discuss alternative basing modes or alternative weapons systems since such strategic considerations would "involve review of intricate and sensitive defense policy information." In addition, the *NO GWEN* court ultimately did not require the Air Force to prepare an EIS on the grounds that its EA adequately addressed non-nuclear effects and that the nexus between constructing the radio towers and nuclear war was too attenuated to trigger NEPA requirements of discussing environmental effects of nuclear war. In this post-9/11 world, the national security exemption from NEPA inevitably will become the subject of increased litigation. Should anti-terrorism military training activities held on an environmentally fragile beach require compliance with NEPA?

14. **The "human environment"?** What does that phrase mean? Chicod Creek is not human, but without much questioning courts have interpreted the phrase to cover natural environmental qualities that affect humans. What about an Army decision to close down a military depot, which will have major socioeconomic dislocation impacts on humans? See Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976) (no compliance necessary because closure is a secondary, socioeconomic impact without a primary physical impact on the environment).

The Supreme Court confronted the question about NEPA's application to the human environment in Metropolitan Edison v. PANE, 460 U.S. 766 (1983). The worst nuclear accident Americans have yet experienced occurred on March 28, 1979, at Three Mile Island (TMI), south of Harrisburg, Pennsylvania. After the accident, the two nuclear reactors at the plant were shut down. Only one of them, however, had been damaged in the accident. After a lengthy investigation and public hearings, the Nuclear Regulatory Commission (NRC) decided to allow restart of the undamaged reactor (TMI-1). During the hearings, the NRC consistently refused to consider neighboring residents' claims

that NEPA required it to study the psychological distress that allegedly would accompany the restart. People Against Nuclear Energy (PANE), a group composed primarily of neighbors of TMI, sought judicial review.

Note the definition of "human environment" articulated in the CEQ regulations:

> §1508.14 Human environment. Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.... This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

The NRC argued that NEPA requires only that effects on the "natural environment" must be studied. Psychological stress in this case is a product of area residents' fear of a second accident at Three Mile Island, and is not a product of physical changes in the environment. "Peoples' anxiety has very little to do with the environment," the NRC said. Did the psychological effects of restarting the reactor mean that it would be an "action significantly affecting the human environment"? Justice Rehnquist answered that the NRC need not consider PANE's contentions:

> First, §102(2)(C) does not require an agency to assess every impact or effect of its proposed action, but only impacts or effects on the environment. The statute's context shows that Congress was talking about the physical environment. Although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment.
>
> Second, NEPA does not require agencies to evaluate the effects of risk *qua* risk. The terms "environmental effects" and "environmental impact" in §102(2)(C) should be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. Here, the federal action that affects the environment is permitting renewed operation of TMI-1. The direct effects of this action include release of low-level radiation, increased fog, and the release of warm water into the Susquehanna River, all of which are effects the NRC has considered. The NRC has also considered the risk of a nuclear accident, but a risk of an accident is not an effect on the physical environment. In a causal chain from renewed operation of TMI-1 to psychological health damage, the element of risk and its perception by PANE's members are necessary middle links. That element of risk lengthens the causal chain beyond NEPA's reach. Regardless of the gravity of the harm alleged by PANE, if a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply.
>
> Finally, the fact that PANE's claim was made in the wake of the accident at TMI-2 is irrelevant. NEPA is not directed at the effects of past accidents and does not create a remedial scheme for past federal actions. 460 U.S. at 778–779.

Are these conclusions self-evident? What happened to the word "human" in the phrase "human environment"? Is the opinion nevertheless correct in holding that there must be some limits upon NEPA coverage of effects that occur far down a chain of indirect causation? Or does the gravity of potential harms, or NEPA's logic in general, argue for

consideration of all real consequential effects? Compare the *Pruitt* case's consideration of long-distance liability in the *Kepone* affair, in Chapter 3.

15. **The injunction.** Quite simply, the Chicod Creek project had no EIS, so NEPA was violated. Note, however, that injunctive relief was not automatic; the court traditionally balances the equities before deciding to issue an injunction. How does the judge weigh the value of NEPA compliance against the financial costs involved? In some NEPA cases, judges have permitted the agency to continue construction while preparing an EIS on the question of whether the project should be built. EDF v. Ellis Armstrong, 487 F.2d 814 (9th Cir. 1973) (New Melones Dam). How does a court determine whether an injunction is justified for an ongoing project that does not have an EIS? In another context, the Supreme Court has said that, once having found a statutory violation, it had no discretion but to see that the law was complied with. TVA v. Hill, 437 U.S. 153 (1978). As to NEPA violations, however, the Court has appeared less ready to hold defendants strictly to compliance. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987); cf. Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989). Does failure to consider environmental consequences in agency decisionmaking constitute irreparable harm?

16. **A bond requirement?** Finally, having won everything at issue, the citizens unexpectedly were faced with Judge Larkins's requirement of a $75,000 bond. Such bonds are common in commercial litigation. Why not here?

Natural Resources Defense Council v. Grant
United States Court of Appeals for the Fourth Circuit, 1972
2 Environmental Law Reporter 20,555 (1972)

HAYNSWORTH, J. In this ecology case, the District Judge issued a preliminary injunction because no environmental impact statement had been filed. It was conditioned, however, upon the filing by the plaintiffs of a bond in the amount of $75,000. The bond was not filed, and the District Judge withdrew the preliminary injunction on that account. Meanwhile, however, an EIS had been filed, substantially changing the posture of the case.

The controversy is far from ended. The plaintiffs intend to attack the adequacy of the EIS and they seek a continuing injunction against commencement of the project until that question is determined. That is a question initially for the District Court, not for us, but the plaintiffs, organizations interested in conservation and having no financial interest in this controversy, are fearful that any further injunctive order will again be conditioned upon their posting a large bond.

Thus, they seek to prosecute an appeal and have requested a stay of the order dissolving the injunction. The defendants have countered with a suggestion of mootness.

Under all the circumstances, we think an immediate remand of this case to the District Court appropriate.

Any further preliminary injunctive order should not be issued unless the District Judge, after examination of the EIS, is of the opinion that it is probably deficient, and that the plaintiffs more likely than not will prevail. If he satisfies himself on that score, there seems little or no reason for requiring more than a nominal bond of these plaintiffs, who are acting much as private attorneys general. If he finds no apparent deficiencies in the statement and little probability that the plaintiffs will ultimately prevail, he should deny all interim relief and await the conclusion of the hearing on the merits.

COMMENTARY & QUESTIONS

The bond. Note the court's discussion of the only point the citizens care about, the possibility of another $75,000 bond. Does Judge Haynsworth's opinion reflect economic reality? On the other hand, what would be the result of a blanket requirement that environmental plaintiffs seeking to enforce federal laws must post bonds sufficient to cover potential damages to defendants wrongfully restrained?[14]

The case then went back to Judge Larkins's court for review of the SCS's newly prepared EIS. The citizen plaintiffs again sued for a preliminary injunction, alleging that even though there now was an EIS, it was inadequate under the terms of NEPA.

Natural Resources Defense Council v. Grant
United States District Court for the Eastern District of North Carolina, 1973
355 F. Supp. 280

LARKINS, J.:

> The River...is the living symbol of all the life it sustains or nourishes — fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent upon it or who enjoy it for its sight, its sound or its life. Justice William O. Douglas, dissenting in Sierra Club v. Morton, 405 U.S. 727 (1972)....

Findings of Fact and Conclusions of Law. There is a substantial probability that the provisions of NEPA are not satisfied by the Chicod Creek Watershed EIS.

A. Scope of Judicial Review of the EIS. As the Court views this case, the ultimate decisions must not be made by the judiciary but by the executive and legislative branches of our government. This court does not intend to substitute its judgment as to what would be the best use of Chicod Creek and its environs for that of the Congress or those administrative departments of the executive branch which are charged by the Congress with the duty of carrying out its mandate. The Court's function is to determine whether the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed, and that conclusions are substantiated by supportive opinion and data.

B. Requirements of NEPA. Section 102(2)(C) of NEPA requires, first, that federal agencies make full and accurate disclosure of the environmental effects of proposed action and alternatives to such action; and, second, that the agencies give full and meaningful consideration to these effects and alternatives in their decision-making. "At the very least, NEPA is an environmental full disclosure law...intended to make...decision-making more responsive and responsible. The 'detailed statement' required by 102(2)(C) should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public, and indeed, the Congress to all known possible consequences of proposed agency action."

But NEPA requires more than full disclosure of environmental consequences and project alternatives. NEPA requires full consideration of the same in agency decision-making. Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

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14. See Calderon, Bond Requirements Under FRCP 65(c): An Emerging Equitable Exemption for Public Interest Litigants, 13 B.C. Envtl. Aff. L. Rev. 125 (1985).

The EIS "must be written in language that is understandable to the nontechnical minds and yet contains enough scientific reasoning to alert specialists to particular problems within the field of their expertise."

C. The Final Statement Omits and Misrepresents a Number of Important Environmental Effects of the Project.

(1) The Statement Misrepresents the Adverse Environmental Effects of the Project upon Fish Habitat. The final Statement concedes that the Project will greatly increase the quantities of sediment carried downstream from the project area into the lower reaches of Chicod Creek and the Tar River. Immediately after construction, annual sediment deposit in the lower Chicod will be 11,670 tons. Sediment yield at the confluence of the Tar River is expected to be 730 tons annually. On the assumption that the banks will stabilize in two years, sedimentation will still be increased to 4,010 tons deposited annually in Chicod Creek and 250 tons in the Tar River.... While disclosing the fact of this increase in sediment load, the statement contains no discussion of its downstream effects. The statement merely concludes, without supportive scientific data and opinion that "No significant reduction in quality of the waters of the Tar River, Pamlico River, and Pamlico Sound is expected." Credible evidence suggests the opposite conclusion. Having conceded a massive increase in sedimentation, the Statement disposes of its environmental effects in one conclusory statement unsupported by empirical or experimental data, scientific authorities or explanatory information of any kind....

(2) The Statement Misrepresents the Effect of the Project upon Fish Resources. The Statement is not at all clear on the effect of the Project on the fishery resources in Chicod Creek. It suggests that there will be effects upon the resident and anadromous fish in Chicod Creek, but the Statement does not define the effects. Yet the Statement without any supportive data declares "Most of the fishery resources within the watershed will not be affected by the project's works of improvement or will be mitigated." This falls far short of the standards of NEPA.

(3) The Statement Ignores the Effect of the Project on Potential Eutrophication Problems in the Tar-Pamlico Estuary. Eutrophication problems occur in waterways which accumulate an excess of nutrients such as nitrogen and phosphorous. Nutrients may be introduced in the waterways from several sources including agricultural runoff and swamp drainage. At the present time the nearby Chowan River is suffering from a very serious eutrophication problem.... Eutrophication is a problem that needs extensive study and research. Yet the Statement is silent on eutrophication. This is a violation of the "full disclosure" requirements of NEPA.

(4) The Statement Fails to Disclose the Maintenance History of P.L. 566 Projects....Evidence indicated that local sponsors have failed to adequately perform their maintenance responsibilities in the past.... The Statement should disclose the history of success and failure of similar projects.

(5) The Statement Ignores the Serious Environmental Consequences of the Proposed Use of Kudzu. Although one may not know what it is called, a person does not have to be a scientist to recognize kudzu.... It can be seen growing on banks, stretching over shrubs and underbrush, engulfing trees, small and large, short and tall, slowly destroying and snuffing out the life of its unwilling host. Even manmade structures are susceptible to the vine — the tall slender green tree may be your telephone pole. However, if controlled, kudzu may have erosion preventing value. The defendants propose to plant one row of kudzu at the top edge of the channel slope in cultivated areas — along 23.5 miles of the new channels. As to the use of kudzu, the Statement merely discloses, "one row of kudzu will be planted at the very top edge of the channel slope through cultivated areas. The growth of kudzu will be controlled by mechanical methods." The Statement fails to disclose how the growth of kudzu can be controlled by mechanical or any other methods and in this respect fails to satisfy the requirements of NEPA.

(6) The Statement Misrepresents and Fails to Disclose Other Important Environmental Effects of the Project. The Statement fails to disclose that over 17 percent of the acreage to be benefited by the Project is held by the Weyerhaeuser Company, a large lumber company. The Statement does not contain an adequate discussion of the possible adverse effects of the Project upon downstream flooding.

D. The Statement Does not Disclose or Discuss the Cumulative Effects of the Project....The [Regulations] of the CEQ focus attention upon the "overall cumulative impact of the action proposed (and further actions contemplated)," since the effect of decision about a project or a complex of projects "can be individually limited but cumulatively considerable." Yet, the Defendants have failed to consider fully in the final Statement the cumulative impact of the Chicod Creek Watershed Project and other channelization projects on the environmental and economic resources of Eastern North Carolina.... The cumulative effect of sedimentation is ignored in the Statement. There is no discussion of the potential adverse effects of long-term accumulation of nutrients caused by this and other channelization projects in the Tar-Pamlico River Basin. There is no discussion of the cumulative impact of drainage projects upon hardwood timber or groundwater resources.... Such effects should be assessed and disclosed in the environmental impact statement.

E. The Statement Does Not Fully Disclose or Adequately Discuss Alternatives to the Project. The "full disclosure" impact statement required by NEPA must contain a full and objective discussion of (1) reasonable alternatives to the proposed project and (2) the environmental impacts of each alternative. The Statement falls far short of satisfying these important and essential standards. Several critical reasonable alternatives are not discussed at all in the Statement. The recommendation of the Bureau of Sport Fisheries and Wildlife that seven miles of channelization be deleted from the most productive portion of the Chicod ecosystem is not discussed as an alternative to the Project. The Statement fails to discuss the alternative of deferral of the Project. Deferral is particularly appropriate in view of differing opinions about the environmental effects of the Project and §102(2)(A) of NEPA which "makes the completion of an adequate research program a prerequisite to agency action." Many of the conclusions in the Statement as to the potential adverse effects of the Project are not supported by references to scientific or other sources. The Statement omits any discussion of the recommendation of the North Carolina Department of Natural and Economic Resources that vertical drainage and water level control structures be discussed in the alternatives section, specifically as they mitigate any adverse ground water effects of the proposed project.

Alternatives are discussed only superficially, and nowhere are the environmental impacts of the alternatives discussed. The Statement thus does not provide "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." Natural Resources Defense Council v. Morton. It is not the "full disclosure" statement required by NEPA.

F. Conclusions. This Court finds as a fact that the final Chicod Creek Watershed Environmental Statement does not fully and adequately disclose the adverse environmental effects of the Chicod Creek Watershed Project; nor does the Statement adequately disclose or discuss reasonable alternatives to the Project; and, therefore, there is a substantial probability that the Plaintiffs will be able to demonstrate at trial on the merits that the final Statement is not the "full disclosure" statement required by this Court's Order of March 16, 1972, and NEPA. A preliminary injunction barring further action on the Project pending a full hearing on the merits is thus appropriate....

COMMENTARY & QUESTIONS

1. **Agencies and EISs — a shotgun marriage?** What apparently was the nature and tone of the Chicod Creek EIS? Most agencies have an understandable inclination to build their projects as conveniently as possible, and EISs do not serve this end. The central problem of the §102 EIS requirement is that it presents federal agencies (especially "construction" agencies and regulatory agencies with a high level of market involvement, such as the NRC and the Department of Agriculture) with conflicting mandates. On one hand, they have specific statutory missions, backed by the elaborate reward structure of supportive congressional committees, money, and the support of the related private industries and organizations with which they work. On the other hand, they have the vague, generalized values and directives of NEPA, for which there is no affirmative administrative reward system (beyond the satisfaction of a job well done in environmental terms). At the end of a year, agency officials tend to measure their accomplishments in terms of how many miles of river were dammed or channelized or how many reactors licensed — it must be harder to measure institutional success in terms of how many wetlands have not been disrupted or how many rivers left as they are. Yet EISs, by illuminating facts and concerns that previously had no legal place in the institutional decisionmaking process, now can show, in some cases, that the country would be better off without the agency's projects. A straightforward EIS may militate against building the project at all or may indicate a less destructive way of constructing it, for the sake of newly declared ecological values that do not square with the agency's own specific mandate.

Little wonder, then, that there is a marked tendency to write EISs in a manner that is consistent with agencies' program missions. Pick up any recent EIS, review its content and prose, and you will probably be confronted with the predictable agency reaction to contradictory statutory mandates.

So the temptation is great to make the EIS a "post hoc rationalization" that is supportive of the decision the agency has already effectively made. Sometimes, project benefits are stressed, negative effects are briefly noted and rated "manageable," "mitigation" is discussed, and alternatives are cursorily noted and dismissed. Other times, the agency's strategy is to prepare an excessively long, hypertechnical, and unreadable EIS that is calculated to prevent public scrutiny. The CEQ regulations require that EISs be prepared using an interdisciplinary approach (§1502.6), that they not exceed approximate page limitations (§1502.7), and that they be written in "plain language" (§1502.8); but these commands are rarely followed and never enforced. The CEQ itself has admitted that

> frequently NEPA takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials, particularly senior leadership, is inadequate. The EIS process is still frequently viewed as merely a compliance requirement rather than as a tool to effect better decision-making. Because of this, millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decision-making. 1997 CEQ Study at 7.

Courts rarely mention the reality of this administrative inclination to write self-justifying FONSIs or impact statements, but in the *Chicod Creek* case the court seems skeptical

of the SCS's sincerity. In judicial review of agency decisions under NEPA and other environmental laws, can environmental lawyers ask judges to take account of political science and be less deferential, where applicable laws were designed to constrain the agencies' single-mindedness? Do they already do so implicitly? A number of courts have explicitly noted that deference is less when the statute, like NEPA, is directed to all agencies, not just the subject agency.[15]

2. **Judicial psychology.** Do you detect a change in Judge Larkins's tone? What happened? There is no mention now of the alleged project benefits to small farmers; rather the opinion is a catalog of the project's negative effects. Can you discern which pieces of evidence at trial got through to the judge most dramatically? How sophisticated would the various pieces of plaintiff's evidence have to be on eutrophication, sedimentation, fisheries, and kudzu? What about Weyerhaeuser's ownership? Problems of past maintenance? How do environmental plaintiffs get around a judge's natural inclination to defer to official expertise?

3. **The EIS: what must it contain?** Note the array of requirements for the preparation of EISs set out in §102 as it was drafted by Professor Caldwell. Is there any real difference between (i) "environmental impacts," (ii) "adverse environmental effects which cannot be avoided," (iii) "the relationship between short-term uses and maintenance of long-term productivity(?)"; and (iv) "irretrievable commitments of resources"? Some EISs dutifully separate out multiple sections to cover each of these, but analytically it seems that §102 just requires a statement of *effects* — §102(2)(C)(i), (ii), (iv) & (v) — and *alternatives* — (C)(ii) and (D) — prepared in consultation with other relevant agencies.

Judge Larkins's opinion follows this approach by looking at only two categories, effects and alternatives. Note the kinds of effects that were left out, insufficiently disclosed, or, worse, "misrepresented" in the EIS. What effects must be discussed, and to what extent, in order to comply with whatever it is that §102 is supposed to do? Effects on human sport? The aesthetics of a scraped-off linear canal? Slight thermal changes in the local microclimate? Is a short description of sedimentation enough to disclose the existence of a problem to whomever is intended by NEPA to read the EIS? Here, as in other areas of NEPA interpretation, courts have adopted a "rule of reason" in fashioning the common law of NEPA. However, what is reasonable to one judge or panel of judges may not be reasonable to another. Thus NEPA jurisprudence, like the common law, tends to be variable among jurisdictions — in this case, federal circuit courts of appeals. Forum shopping may be advantageous in NEPA litigation.

To what extent must environmental effects be analyzed and discussed in the EIS? The Chicod Creek EIS discussed eutrophication, for example, but not extensively enough

15. "The agency's NEPA determination 'is not entitled to the deference that courts must accord to an agency's interpretation of its governing statute' and is instead 'a question of law, subject to de novo review.'" Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 70 (D.D.C. 2003) (reviewing a FONSI). See also Citizens Against Rails-to-Trails, 267 F.3d 1144, 1150-1151 (D.C. Cir. 2001) ("The court owes no deference to the FAA's interpretation of NEPA or [of] the CEQ regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to the FAA alone"); Grand Canyon Trust v. FAA, 290 F.3d 339, 342 (D.C. Cir. 2002). The premise appears to be that statutes that apply to all agencies are intended to restrict those agencies' behavior, making deference to the agencies' restriction-avoidance determinations less appropriate.

for Judge Larkins. If, as some courts have said, the purpose is to bring the project's consequences to the attention of the agency decisionmaker, mere disclosure may be enough. If, on the other hand, the EIS is intended to demonstrate to the environmentally concerned public and a court that the agency gave "full consideration" to the impact, *Calvert Cliffs*, 449 F.2d at 1128, then more analysis must be reflected in the EIS itself. A middle ground definition was given by the Ninth Circuit: "reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS," said the court in Trout Unltd. v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974) (the decision that allowed the construction of the Teton Dam in spite of environmentalists' safety warnings; the dam collapsed, killing more than 100 people). This is another manifestation of the "rule of reason" that courts apply in interpreting most aspects of NEPA.

4. **Alternatives.** Alternatives have been part of our environmental analysis from the beginning of this book and are a critical part of NEPA's EIS requirement. Judge Larkins found that the SCS's EIS did not fully disclose or adequately discuss reasonable alternatives to the project, such as reduction in the scope of the project or project deferral. In some SCS EISs, and those of other agencies, the agency refused to consider the "do-nothing," "no-action," or "zero" alternative. Why? Other agencies refused to consider any alternatives that they themselves could not build or manage. NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), set those arguments to rest: The Interior Department had to consider all practical alternative sources of energy, regardless of whether they were within the agency's control, before deciding to lease offshore oil deposits. Note the relationship between discussions of alternatives and of environmental consequences required by the CEQ regulations:

> §1502.14 Alternatives including the proposed action. This section is the heart of the environmental impact statement.... [I]t should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis of choice among options by the decision maker and the public. In this section agencies shall:
>
> (a) Rigorously explore and objectively evaluate all reasonable alternatives and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
>
> (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
>
> (d) Include the alternative of no action....
>
> §1502.16 Environmental consequences. ...The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided...and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented....

Section 1502.16 also provides that the EIS will include discussions of direct and indirect effects and their significance; possible conflicts between the proposed action and the objectives of land use plans, policies, and controls for the area concerned; and the energy and resource requirements and conservation potential of the various

7. **Epilogue to *Chicod Creek*.** What did finally happen in our North Carolina case? As one state official put it, "Old John Larkins saw he was going to make some enemies either way he decided this thing, so he called in the attorneys for both sides and said 'Boys, we've gone through this stuff long enough now, why don't you go settle it between yourselves?' And because the handwriting was on the wall, the SCS agreed to a compromise." Confidential interview, Feb. 1981. No channelizing, channel straightening, or major tree-cutting was allowed; silt removal was permitted in the upper stretches. The lower six to seven miles of the creek were cleaned of snags and silt, but no draglines were permitted. As a result, the stream and its tributaries were, to a great degree, returned to the quality of the days before intensive agriculture, with a meandering wooded course and restored swimming holes. The redesigned project was so successful that the North Carolina legislature passed a Stream Restoration Act in 1979, mandating consultation with the State Wildlife Resources Commission for all such projects. Is this a success story? What about the poor families that Judge Larkins wrote of in his first opinion? No new subsidized farmland was created. Is this another example of élite conservationists oppressing poor folks?

The result in the *Chicod Creek* case is a typical outcome of NEPA citizen litigation: The proposal is finally implemented, but in a modified, mitigated, or redesigned manner that is less destructive of environmental values than its predecessor. Frequently, the compromise proposal completely satisfies neither the plaintiff nor the defendant but is