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ENVIRONMENTAL LAW

BRIAN J. WILLIAMS*

In the course of its 1984-85 term, the United States Court of Appeals for the Seventh Circuit decided only a handful of environmental law cases. Although the number of cases decided was small, a wide array of issues were raised by the cases and the impacts of the resolutions of the cases are of substantial import to the field of environmental law.

Among the issues presented to the Seventh Circuit during the term were the right of a public interest group to intervene in a condemnation action involving the United States of America and a private land owner[1] and the power of the Nuclear Regulatory Commission to make public a set of corporate internal documents.[2] Additionally, issues arose under the Clean Air Act,[3] the Clean Water Act[4] and the National Environmental Policy Act.[5] Under the Clean Air Act, the court was called on to decide whether the United States Environmental Protection Agency[6] had the power to alter, by partially approving, a state air pollution regulation.[7] Under the Clean Water Act, the Seventh Circuit ruled on whether the EPA unlawfully failed to promulgate Total Maximum Daily Load's for discharges of pollutants into Lake Michigan[8] and, whether the EPA in setting national wastewater pretreatment standards failed to adequately take into account petitioner's alleged unique situation.[9] Finally, the court decided whether under the National Environmental Policy Act an environmental impact statement[10] or a supplemental environmental impact statement was required to issue in specific situations.[11]

This article will address the Seventh Circuit's environmental law decisions. Additionally, this article will discuss and analyze the reasoning

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1. United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985).
2. General Elec. Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984).
3. 42 U.S.C. §§ 7401 *et seq.* (1978).
4. 33 U.S.C. §§ 1251 *et seq.* (1978).
5. 42 U.S.C. §§ 4321 *et seq.* (1969).
6. Hereinafter referred to as "EPA."
7. Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984).
8. Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984).
9. Cerro Copper Prods. Co. v. Ruckelshaus, 766 F.2d 1060 (7th Cir. 1985).
10. River Rd. Alliance, Inc. v. Corps of Eng'rs of United States Army, 764 F.2d 445 (7th Cir. 1985).
11. Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984).

used by the court in resolving the issues presented. Finally, this article will discuss the propriety of the court's conclusions and the potential effects flowing from the decisions.

PUBLIC INTEREST CASES

United States v. 36.96 Acres of Land[12] came before the Seventh Circuit on appeal from a district court denying Save The Dunes Council's[13] motion to intervene in the United States condemnation action against the Northern Indiana Public Service Company.[14] The underlying condemnation action involved a 36.96 acre tract of land—commonly known as Crescent Dune—situated in Indiana on the southern edge of Lake Michigan. The Indiana Dunes Lakeshore Act[15] authorizes the Secretary of the Interior to acquire Crescent Dune. Pursuant to the Act, the United States instituted the condemnation proceeding in 1978 against the Northern Indiana Public Service Company,[16] the owner of the land. However, the Secretary of the Interior abandoned attempts to acquire Crescent Dune in 1983; thus, the Save the Dunes' Council[17] filed a motion to intervene in the action, in essence, to assert a position on behalf of the government. The district court denied the motion and the Council appealed.[18]

On appeal, the Council argued that intervention should be granted as of right under Federal Rule of Civil Procedure 24.[19] Accordingly, the issue on appeal boiled down to whether the Council, as a proposed intervenor, possessed "a direct, significant legally protectable interest in the property or transaction subject to the action" necessary to obtain inter-

12. 754 F.2d 855 (7th Cir. 1985).

13. Save The Dunes Council is an Indiana not-for-profit corporation. It lobbies extensively for national legislation protecting the Indiana Dunes for public use and for the expansion of protected areas.

14. *36.96 Acres of Land*, 754 F.2d at 857.

15. 16 U.S.C. § 460u-12 (1976). The Act placed both time and monetary limitations on the condemnation. For example, the land could not be purchased at a cost greater than $800,000 as adjusted by the Consumer Price Index, excluding the administrative costs. *Id.*

16. Hereinafter referred to as "NIPSCO."

17. Hereinafter referred to as "Council."

18. United States v. 36.96 Acres of Land, 754 F.2d 855, 858 (7th Cir. 1984).

19. *Id.* at 858. There are four requirements to be met before intervention as of right will be granted. The proposed intervenors must satisfy each requirement before intervention will be granted. CFTC v. Heritage Capital Advisory Servs. Ltd., 736 F.2d 384, 386 (7th Cir. 1984). First, "the application must be timely (This requirement was not in dispute in the present case.). Second, the intervenor must show an interest relating to the property or transaction which is the subject of the action. Third, the intervenor must show as a practical matter the disposition will impair the intervenor's ability to protect that interest. Finally, intervenor must show that that interest is not adequately represented by the existing parties. Gauhcaux v. Pierce, 690 F.2d 616, 635 (7th Cir. 1982). The majority in *36.96 Acres of Land* did not reach the third and fourth requirement. *36.96 Acres of Land*, 754 F.2d at 858-60.

vention as of right.[20]

Initially, the court pointed out that the sovereign authority to condemn property for public use is a direct, significant legally protectable interest. However, the Council could not assert that its right to intervene derived from the sovereign authority because Congress had not delegated that authority to the Council.[21] Further, the Council manifestly had no ownership interest in Crescent Dune considering that NIPSCO owned the land.[22] The Council was in no position to assert either relevant interest.

The Council argued, however, that its members' personal aesthetic, conversational and recreational interest in the property was a sufficient interest to permit intervention.[23] The Seventh Circuit quickly noted that although such an environmental interest would be sufficient to confer standing in a claim under the Administrative Procedure Act,[24] this claim arose under Rule 24 and the direct and substantial interest required under Rule 24 is qualitatively distinct from the interest required under the APA. The interest of the Rule 24 intervenor must be greater than the interest necessary to satisfy the standing requirement of the APA. In short, the Council's environmental interest in NIPSCO's property was not a direct and substantial interest as required by Rule 24.[25] Therefore, the court affirmed the denial of the Council's motion to intervene as of right.[26]

In a sharp dissent, Judge Cudahy criticized the majority's position as being "a myopic position unsupported by any authority."[27] Considering that the Secretary of the Interior had abandoned attempts to acquire Crescent Dune, Judge Cudahy argued, Congress' interest in acquiring the land was supported only by the Council. Moreover, Judge Cudahy

20. *36.96 Acres of Land*, 754 F.2d at 858 (*quoting* Wade v. Goldschmidt, 673 F.2d 182, 185 (7th Cir. 1982)). *See also* Fed. R. Civ. P. 24(a)(2). (Hereinafter referred to as "Rule 24").

21. *36.96 Acres of Land*, 754 F.2d at 858-59. Only Congress has the authority to delegate the sovereign authority and Congress had delegated the authority to the Secretary of the Interior.

22. *Id.* at 858. The interest of the sovereign in the exercise of the power of eminent domain and the interest in private land ownership are the only legal interests considered in an eminent domain proceeding. *Id.* at 858.

23. *Id.* at 859. This argument was founded upon Sierra Club v. Morton, 405 U.S. 727 (1972) which was brought under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702. In *Sierra Club* the Supreme Court held that aesthetic and environmental interests alone, without allegations of individual injury, were not sufficient to establish standing under the Act. *Sierra Club*, 405 U.S. at 734-35.

24. 5 U.S.C. § 702.

25. *36.96 Acres of Land*, 754 F.2d at 859 and 860.

26. *Id.* at 860. The Seventh Circuit also affirmed the district court's ruling denying permissive intervention. The Seventh Circuit held that the denial was not an abuse of discretion. *Id.* at 860. *See also* Fed. R. Civ. P.24(b).

27. *36.96 Acres of Land*, 754 F.2d at 860 (Cudahy, J., dissenting).

noted that the majority's distinction between an interest sufficient to intervene was highly formalistic and void of precedential support.[28] After emphasizing the fact that the Secretary of the Interior and NIPSCO had entered into a stipulation to dismiss the condemnation action,[29] the dissent urged that standing should be sufficient interest to intervene where the will of Congress would be frustrated by the stipulation.[30] Finally, Judge Cudahy argued that by recognizing that a mandamus proceeding was available to the Council to protect its interest, the majority conceded that the environmental interest was legally protectable, and thus, the interest would clearly be direct and substantial enough to allow intervention.[31] In sum, the majority was in the peculiar position of having recognized that the Council had a legally protected interest for the purpose of a mandamus proceeding but not to intervene.

The majority's rigid approach to intervention operates to thwart the Congressional interest in the acquisition of the land, as well as the public interest and benefit in the use of the land. By setting forth such an exacting standard for intervention, the *39.96 Acres of Land* court has made it possible for government inaction or concerted action between the government and the landowner to frustrate the will of Congress to acquire land. Moreover, under the decision, an environmental interest alone will apparently never be enough to intervene. Although the public was to benefit from the acquisition of the land, this strict standard leaves the public without a remedy or recourse, except the extraordinary remedy of the writ of mandamus. If the government refuses to carry out the interests of Congress and the public is blocked from protecting those interests, no one remains to further the interests and the interests will become meaningless. With no practical method of protection available, the environmental interest will exist only in theory. In reality, the interest will suddenly disappear when it is sought to be protected by the public. An interest incapable of protection is tantamount to no interest at all.

A somewhat similar case decided by the Seventh Circuit involving the public interest was *General Electric Co. v. NRC*.[32] Here, the Nuclear Regulatory Commission[33] decided to make public a set of General Elec-

28. *Id.* at 861 (Cudahy, J., dissenting).

29. *Id.* at 857-58.

30. *Id.* at 861 (Cudahy, J., dissenting).

31. *Id.* at 862 n.1 (Cudahy, J., dissenting). The majority noted that a writ of mandamus was available to the council under 28 U.S.C. sec. 361. *36.95 Acres*, 754 F.2d at 860. Indeed, the Council had filed complaints for mandamus which were still pending. *Id.* at 860.

32. 750 F.2d 1394 (7th Cir. 1984).

33. Hereinafter referred to as the "NRC."

tric's internal documents known as the Reed Report.[34] The Reed Report was to be released under the Freedom of Information Act.[35] The NRC, in terse orders denied General Electric's requests not to release the Reed Report and to withdraw the report. General Electric brought suit to enjoin the release. However, the district court upheld the NRC's decision to release the report and General Electric appealed.[36]

The Seventh Circuit first determined that the Reed Report was an agency record[37] and as such was the proper subject for release under the Freedom of Information Act. The more difficult question, however, was whether Exemption 4[38] of the Act, which protects certain types of trade secrets, precluded the release of the report by the NRC. In a proceeding to decide whether to release the report, the NRC issued a brief opinion[39] concluding that Exemption 4 did not apply. The terse NRC opinion left the Seventh Circuit without a clear foundation to review the NRC conclusion. Although the court was presented with affidavits supporting the NRC opinion, the affidavits were not made part of the opinion; thus, the Seventh Circuit could not consider the affidavits and could only speculate as to the reason for the NRC's decision. Unable to provide effective appellate review based on the NRC's thin opinion, the court remanded the matter to the NRC to explain its findings in further detail.[40]

The court conceded in speculation that it was unlikely that the release of the report would cause substantial competitive harm to General Electric.[41] Moreover, it recognized that forcing the NRC to write an-

34. *General Elec.*, 750 F.2d at 1396. The Reed Report is a study of General Electric's boiling water reactor which is used to generate nuclear power. The report contains several criticisms of the reactor's design, including criticisms of its safety. *Id.*

35. 5 U.S.C. § 552.

36. General Elec. Co. v. NRC, 750 F.2d 1394, 1396 (7th Cir. 1984).

37. *Id.* at 1398. Although the Freedom of Information Act does not specifically define "agency record" the term clearly encompasses documents created by an agency, as well as, documents submitted to an agency for use in carrying out its duties. *See, e.g.*, Weisberg v. United States Dep't of Justice, 631 F.2d 824, 827-28 (D.C. Cir. 1980).

38. 5 U.S.C. § 552(b)(4). This provision provides, *inter alia*, that trade secrets not of the secret-formula type are exempt only if disclosure would; (a) inflict substantial competitive harm on the owner of the information, or (b) make it difficult for the releasing agency to acquire similar information in the future. *See, e.g.*, National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). The *General Electric* court deemed factor (b) above a "managerial judgment" beyond extensive judicial review. *General Elec.*, 750 F.2d at 1402.

39. *General Elec.*, 750 F.2d at 1403. The NRC opinion in its entirety stated only that "the staff [had] advised the Commission that it did not have an adequate basis to conclude that the release of the report would cause substantial harm to GE's competitive position." *Id.*

40. *Id.* at 1403-04.

41. *Id.* at 1403. In determining that the release would not cause such harm, the court considered several factors. General Electric is the dominant producer of nuclear reactors. In addition part of the report had been revealed in congressional hearings. Moreover, the report was five years old when the NRC ordered its release. Finally, the court noted that those requesting the report were opponents of nuclear power in general. Those persons would rather embarrass the industry as a

other opinion would probably not lead to a different result.[42] Finally, the court acknowledged that delay accompanying the writing of the new opinion would strip the release of its impact, thus, permitting General Electric to "win" the litigation by sheer delay.[43]

The *General Electric Co.* decision is clearly a victory for form over substance. Further, it is an ineffective use of time to require the NRC to write a new opinion. The NRC already had affadavits to support its initial opinion but the NRC failed to incorporate the affidavits into its opinion. The NRC can easily include the same affidavits in the rewritten opinion. Moreover, the Seventh Circuit speculated as to the reason for the NRC's decision. The NRC may choose merely to adopt the court's reasoning by speculation and incorporate it into the rewritten opinion. The end result may be a new NRC opinion written just as the Seventh Circuit believed was necessary in the first instance. The new opinion would contain the pre-existing affidavits and the reasoning the court referred to from the first opinion. In short, all the information that was necessary for a sufficient NRC opinion was present in the first opinion: however, the information was expressed in an improper form.

The rewriting process may take years.[44] In the meantime, the public is left without access to information, from General Electric's mouth, criticizing the safety of its own nuclear reactor. Considering, as the court noted, that releasing the report would not substantially harm General Electric's competitive position, it is unclear what is to be gained from the *General Electric Co.* ruling. The message from the Seventh Circuit, however, is clear. Strict compliance with procedural rules will be required even though such compliance may bring no substantial benefit and may block public access to information it would otherwise be entitled to under the Freedom of Information Act.

Both *General Electric Co.* and *36.96 Acres of Land*[45] are decisions in which a requirement of strict adherence to procedure thwarted the environmental interest. In *General Electric Co.* by requiring the NRC to rewrite its opinion which varied from acceptable form, the public was stopped from receiving timely information calling into question the safety of certain nuclear reactors. A contrary decision in the case would have resulted in the release of the information consistent with the policy

whole than to shift business from General Electric to another producer. Thus, the competitive harm to be done by the release of the single report was too speculative. *Id.*

42. *Id.* at 1404.

43. *Id.*

44. *Id.*

45. *See infra* note 12 and accompanying text.

of the Freedom of Information Act without causing General Electric substantial competitive injury. Similarly, in *36.96 Acres of Land*, a strict adherence to Federal Rule of Civil Procedure 24's requirements for intervention precluded the condemnation of Crescent Dune. A contrary decision in the case would have resulted in the acquisition of the land consistent with the desire expressed by Congress when it authorized the land's acquisition under the Indiana Dunes National Lakeshore Act.

PARTIAL APPROVAL OF REVISED STATE IMPLEMENTATION PLANS

Bethlehem Steel Corp. v. Gorsuch[46] concerned the EPA's power to partially approve a state implementation plan[47] submitted to the EPA for implementing the EPA's air quality standards. Pursuant to the Clean Air Act's[48] mandate, in 1972 the State of Indiana submitted a SIP to the EPA for approval. The exact application of the SIP to noncumbustion emissions from Bethlehem's Burns Harbor Works was unclear. However, in 1975, Indiana submitted a revised SIP to the EPA which covered the Burns Harbor Works.[49] The revised SIP contained new limitations on noncombustion emissions, in addition to a fifteen minute exemption or blow-off period during which those limitations could be exceeded.[50] The EPA is authorized by the Clean Air Act to approve a SIP "or any portion thereof."[51] Additionally, the Seventh Circuit had previously held that the EPA has the power to partially approve *revised* SIP's although the Act does not expressly grant that power.[52] Accordingly, in

46. 742 F.2d 1028 (7th Cir. 1984).
47. Hereinafter referred to as "SIP".
48. 42 U.S.C. § 7410(a).
49. *Bethlehem Steel Corp.*, 742 F.2d at 1030. The revised SIP eliminated the distinction between combustion and noncombustion emissions and made 40 percent opacity the mandatory limitation measure for both sources. *Id.* at 1031. However, the revised SIP contained a blow-off period which allowed the opacity limits to be exceeded for up to 15 minutes every 24 hours. *Id.* at 1032. The revised SIP set, for the first time, mandatory limits on opacity of noncombustion emissions. *Id.* at 1034. Considering that the Burns Harbor Works generated significant noncombustion emissions, Bethlehem contended that it could comply with the opacity limit without the blow-off period. Thus, without the blow-off period, Bethlehem argued, the Burns Harbor Works would have to be shut down. *Id.* Although it was not greatly emphasized in the decision, the concern that the EPA modified SIP may have resulted in the closing of the works may have been a strongly influential factor in the court's decision.
50. *See infra* note 49.
51. 42 U.S.C. sec. 7410(b)(2).
52. Public Serv. Co. v. EPA, 682 F.2d 626, 631-34 (7th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). In *Public Serv. Co.*, the court upheld the disapproval of the very same blow-off period at issue in Bethlehem. The blow-off period was an attempt by Indiana to weaken its existing plan. *Id.* at 636. However, only combustion facilities were involved in *Public Serv. Co.* while noncombustion facilities were involved in *Bethlehem Steel Corp.* The combustion facilities had previously been subjected to opacity limitations, but the noncombustion had not. *Bethlehem Steel Corp.*, 742 F.2d at 1034. *See also infra* note 49.

the instant case the EPA approved the revised SIP's noncombustion limitations, but disapproved the blow-off period and ordered Bethlehem to comply with this EPA modified SIP.[53]

Although the EPA has the authority to partially approve an original or revised SIP, the case at bar presented a unique situation. By disapproving the blow-off period while approving the new limitations set by the revised SIP, the EPA effectively made the emission limits more stringent than it had ever been. The previous cases addressing partial approval arose in a situation where the revised SIP lessened the limits.[54] Thus, the issue on appeal was whether the EPA acted properly where, by its partial approval, it made a portion of the SIP substantially more strict. The question was one of first impression.[55]

The Seventh Circuit noted that the Clean Air Act establishes a procedure by which the EPA can disapprove a portion of a SIP and replace it with the EPA's own more stringent regulation.[56] Under this procedure, the EPA would be required to first reject the regulation in the SIP, next promulgate a different regulation, and then afford the state a chance to submit its own substitute regulation.[57] Nevertheless, the EPA bypassed this procedure when it merely rejected the state regulation and ordered compliance with the EPA's own version of the regulation. This procedural short-cut was unauthorized and proved to be fatal.[58]

By partially approving the revised SIP, the court continued, the EPA turned the SIP into "something completely unpalatable" to Indiana.[59] The partial approval was, in actuality, an elimination by deletion, not a partial approval of anything sought by Indiana. The court declared that to partially approve requires at least granting the proposer part of what he wanted.[60]

Moreover, the court found that the procedural short cut taken by the EPA infringed upon the state-federal partnership created by the Act. "The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states."[61] Therefore the EPA order requiring compliance

53. *See* 40 Fed. Reg. 50032, 50033 (Oct. 28, 1975).

54. *See infra* note 52.

55. *Bethlehem Steel Corp.*, 742 F.2d at 1035.

56. *Id.* at 1034. *See also* 42 U.S.C. § 7410(c)(1)(B).

57. 42 U.S.C. § 7410(c)(1).

58. *Bethlehem Steel Corp.*, 742 F.2d at 1035.

59. *Id.* at 1036.

60. *Id.* at 1025.

61. *Id.* at 1036.

with the EPA modified revised SIP was set aside.[62] In short, the EPA was not within its authority when it partially approved the revised SIP to make the regulation more stringent.

While the *Bethlehem Steel Corp.* decision broke new ground, the Seventh Circuit was careful not to stray from the concept of federalism that underlies the Clean Air Act. Admittedly, the EPA may have reached the same result it did via its short-cut as it would have reached had it followed the mandated procedure.[63] However, the procedural error was not a trivial one. It was an affront to the core of the federalism concept upon which the Clean Air Act was founded. The concept demands state-federal cooperation, not federal domination. In the instant case, to have allowed the procedural short-cut would have been at odds with the federalism concept supporting the Act.

Moreover, and maybe more importantly to the court, by demanding from the EPA compliance with the statutorily mandated procedures, the court may have prevented the closing of the Burns Harbor Works. Had the EPA modified SIP become law, the Burns Harbor Works may not have been able to comply with the new limitations. Bethlehem Steel may have been left with no alternative but to close the works.. Such a result was not intended when the State of Indiana submitted its revised SIP.

THE CLEAN WATER ACT CASES

Scott v. City of Hammond[64] reached the Seventh Circuit when plaintiff, formerly Attorney General William J. Scott, appealed from a district court dismissal of his complaint for failure to state a claim upon which relief could be granted.[65] The crux of the appeal concerned the complaint's allegation that the EPA had unlawfully failed to establish Total Maximum Daily Loads[66] for discharges of pollutants into Lake Michigan as required by the Clean Water Act.

Under the state-federal cooperative scheme of the Act, the EPA initially identifies pollutants to which TMDL's apply.[67] Next, the state is required to develop TMDL's and submit them to the EPA.[68] After re-

62. *Id.* at 1037. The court added, however, where the effect of a partial approval was to strengthen a previous limitation, if the increase is only apparent rather than real, or if real, only minor, the EPA has not exceeded its authority. *Id.*

63. *Id.* at 1036.

64. 741 F.2d 992 (7th Cir. 1984).

65. *Id.* at 993-94. For the purposes of a Rule 12(b)(6) appeal, the court assumes the truth of the complaint's factual allegation. Fed. R. Civ. Pr. 12(b)(6). *See also* Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

66. Hereinafter referred to as "TMDL."

67. *See* 33 U.S.C. § 1314(a)(2)(D).

68. *See* 33 U.S.C. § 1313(d)(1).

ceiving the state submission, the EPA has nondiscretionary duty to either approve or disapprove the submitted TMDL within 30 days. If the TMDL is disapproved, the EPA must establish the necessary TMDL.[69] In the instant case, although the EPA's initial identification was tardy, Illinois and Indiana—at the time the cast was decided—had yet to make the necessary submissions to the EPA.[70] The district court agreed with the EPA that it had no duty to proceed under the statutory scheme until the states submitted the TMDL's.[71]

The Seventh Circuit disagreed with the district court. The circuit court ruled that the states' prolonged failure over a long period of time may amount to a "constructive submission" of no TMDL's, in effect, that no TMDL's were necessary.[72] Therefore, under the Act the EPA would be under a nondiscretionary duty to either approve or disapprove the "constructive submission" within the allotted timetable.[73] Further, the court noted, the EPA's inaction in the face of the states' default appeared to be tantamount to approval of the states' decision that no TMDL's were necessary.[74]

A major basis for the decision in *Scott* was that the court did not believe that state inaction amounting to refusal to act should stand in the way of anti-water pollution policy.[75] Moreover, the court did not believe that Congress intended that the states by inaction could prevent the implementation of TMDL's.[76] Thus, the *Scott* court employed the "constructive submission" theory.[77] The theory was developed to further the policy of the Clean Water Act—to control water pollution—while avoiding the rigid procedural requirements of the Act. Arguably, the Seventh Circuit could have developed an analogous theory or taken similar steps in *General Electric Co.*.[78] Such steps would have furthered the policy of the Freedom of Information Act—providing the public with access to certain information—while avoiding strict compliance with the applicable procedure.

69. *See* 33 U.S.C. § 1313(d)(2).

70. Scott v. City of Hammond, 741 F.2d 992, 996 n.10 (7th Cir. 1984). The state submissions were due on June 26, 1979. *Id.*

71. *Id.* at 996.

72. *Id.*

73. *Id.* at 997. The Seventh Circuit left it to the district court to determine on remand whether the states made a 'constructive submission." If so, the failure of the EPA to act would amount to failure to perform a nondiscretionary duty, which was properly raised by the complaint. *Id.* at 998.

74. *Id.*

75. *Id.*

76. *Id.* at 997.

77. *See infra* notes 66-74 and accompanying text.

78. *See infra* notes 32-44 and accompanying text.

Indeed, *General Electric Co.* was apparently more readily susceptible to the use of such a theory than *Scott. In General Electric Co.* everything necessary for compliance with proper procedure was available. Moreover, use of a theory side-stepping the strict procedure would have furthered the policy of the Freedom of Information Act without causing substantial competitive harm to General Electric. However, the court did not employ such a theory. By contrast, in *Scott* neither of the elements necessary to comply with the Clean Water Act's procedure, the states' submission of TMDL's and the EPA approval, were present in the case. Further, while the decision carried out the policy of the Act, it resulted in the states being deemed to have acted in a manner they did not in fact act. Clearly, this result is more harsh than the potential result from a contrary decision in *General Electric Co.*. Nonetheless, the *Scott* court was willing to reach such a result. Reaching a similar decision in *General Electric Co.* would have allowed the public access to critical information without causing any extensive harm. Therefore, *General Electric Co.* should have been decided consistently with *Scott.*

A second case involving the Clean Water Act was *Cerro Copper Products Co. v. Ruckelshaus.*[79] The issue in the case was whether the EPA failed to adequately consider Cerro Copper's alleged unique situation when the EPA promulgated national wastewater pretreatment standards for the copper-forming industry.[80] The Clean Water Act provides that indirect dischargers[81] pretreat their wastewater before passing it on to publicly owned treatment works[82] for additional treatment.[83] In connection with this, the EPA is to establish standards for the discharge into POTW of pollutants which are determined not to be susceptible to treatment by the POTW or which would interfere with the operation of the POTW.[84] In addition, EPA regulations provide that dischargers be classified into industrial categories and standards apply universally to each category.[85] In 1983, the EPA determined it most effective to regulate the copper-forming industry as a single category and issued one set of pre-

79. 766 F.2d 1060 (7th Cir. 1985).

80. *Id.* at 1067. Cerro Copper is part of the copper-forming industry. *Id.*

81. An "indirect discharger" is a discharger whose wastewater passes through a publicly owned treatment works. Cerro Copper is an indirect discharger. *Id.* at 1061.

82. Hereinafter referred to as "POTW."

83. *See* 33 U.S.C. § 1317(b)(1).

84. For example: The EPA found that POTW's were ineffective in treating the toxic pollutants—such as chromium, copper, lead, nickel, zinc, and toxic organics—present in wastewater from copper forming facilities, 48 Fed. Reg. 36,945 (1983). Thus, those pollutants pass through POTW's. *Id.* at 36,946.

85. *See* 40 C.F.R. § 403.6 (1984).

treatment standards for the entire industry.[86]

The thrust of Cerro Copper's argument on appeal was that it should not be subject to the industry-wide standards based on its unique situation. The argument was based on the fact that Cerro Copper discharged its wastewater into a Sauget, Illinois POTW. However, in 1986 a regional POTW was to be in operation and receiving dischargers from the Sauget POTW. Thus, Cerro Copper's wastewater would be "pretreated" by the Sauget POTW before being shipped to the new regional POTW. In short, the Sauget POTW was Cerro Copper's pretreatment and any pretreatment by Cerro Copper would be merely "treatment for treatment's sake." Therefore, Cerro Copper was in a unique situation and should not be forced to comply with the industry-wide standard.

The Seventh Circuit was not persuaded by the argument. Upon looking to legislative history of the Clean Water Act, the court declared that it was clear that Congress intended that the EPA promulgate the uniform standards on a national basis.[87] Further, Congress expressly intended that EPA not take into account the specific characteristics of each individual discharger. Such individualized consideration would render settling national standards virtually impossible.[88] Considering that the EPA made a thorough and exhaustive study[89] of the copper-forming industry prior to establishing the national standards, the court upheld the standards as fair and reasonable.[90]

The ruling left Cerro Copper in a peculiar situation. Previously the EPA had a procedure to allow individual dischargers to receive a variance from the national standard. Under this procedure, an individual discharger could set forth "fundamentally different factors" to show that a variance was warranted.[91] However, in response to a Third Circuit

86. *See* 48 Fed. Reg. 36, 944 (1983). The conclusion was based on the fact that all American copper forming facilities perform the same basic operations: hot rolling, cold rolling, extrusion, drawing, and forging. These operations utilize water, oil-water emulsions, or soluble oil-water mixtures such as lubricants that are included within the wastewater discharge. *Cerro Copper Prods.*, 760 F.2d at 1064.

87. *Cerro Copper Prods. Co.*, 760 F.2d at 1067-68.

88. *Id.* at 1068.

89. The EPA solicited information from each of the 176 facilities within the copper-forming industry. *See* 48 Fed. Reg. 36,942-67 (1983).

90. *Cerro Copper Prods. Co.*, 760 F.2d at 1068.

91. *See* 40 C.F.R. § 403.13(b). The factors considered in deciding whether to grant such a variance include the nature and quality of the pollutant, the volume of wastewater discharge, the environmental impact, the energy requirements, the age, size and land availability of the industrial facility, and the cost of compliance with control technology. *See* 40 C.F.R. § 403.13(d). The factors expressly not considered include the feasibility of installing pretreatment equipment, the inability to pay for the waste treatment, and the impact of the discharge upon the quality of the POTW's receiving waters. See 40 C.F.R. § 403.13(e).

decision[92] holding that fundamentally different factors variances were prohibited by the Clean Water Act, the EPA withdrew the procedure.[93] Subsequently, the Third Circuit decision was reversed by the Supreme Court,[94] but as of the date of the present trial, the EPA had yet to reinstate the fundamentally different factors variance procedure. Thus, Cerro Copper was without a method to seek special consideration. Nonetheless, the Seventh Circuit ruled that Cerro Copper must comply with the national standards. The court added, however, that when the EPA reinstates the variance procedure,[95] Cerro Copper would be free to pursue that avenue.[96]

As in the *Scott*[97] case, the *Cerro Copper Products Co.* court was very aware of the Congressional intent underlying the litigation. The court was willing to insure that the intent be carried out even though Cerro Copper was left "between a rock and a hard place." Cerro Copper may have been able to show fundamentally different factors relevant to its facility which would have warranted a variance from the national standard. However, the variance procedure had been discontinued by the EPA. Although the EPA claimed it would reinstate the procedure in the near future, the Seventh Circuit remained firm and ordered Cerro Copper to comply with the national standard in the interim.

Though not express in its opinion, in reaching its decision the Seventh Circuit may have considered the potential for delay in the EPA's reinstating the variance procedure. Had the Court reached a contrary result, the longer the time lapse between the instant decision and the reinstatement of the variance procedure, the longer the potential time period that Cerro Copper Products would have been in non-compliance with the national standard. Moreover, there was no guarantee that Cerro Copper would have been granted a variance after the procedure was reinstated. Delays in EPA actions are not altogether unusual.[98] Thus, the Seventh Circuit's strict adherence to the then existing statutes

92. National Ass'n of Metal Finisher v. EPA, 719 F.2d 624, 646 (3d Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 1102 (1985).

93. *See* 49 Fed. Reg. 5131 (1984).

94. Chemical Mfrs. Ass'n v. National Res. Defense Coun., 105 S. Ct. 1102, 1112 (1985).

95. In view of the recent Supreme Court decision, the EPA planned to reinstate the variance procedure in the near future. *See Cerro Copper Prods. Co.*, 760 F.2d at 1070.

96. *Id.*

97. *See infra* notes 64-77 and accompanying text.

98. *See, e.g.*, Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984). *Scott* involved the Clean Water Act. Under the Act, the EPA was required by law to identify pollutants to which TMDL's applied by October 18, 1973. 33 U.S.C. § 1314(a)(2)(D). However, the EPA did not make the required identifications until December 28, 1978, some five years late. *Scott*, 741 F.2d at 996 n.10. Considering such delays in carrying outs its mandatory duty, there is arguably some question as to the degree of promptness the EPA would use in reinstating the variance procedure.

and procedures furthered the environmental interests. The *Cerro Copper Products Co.* decision, by requiring compliance with the national standard, prevented the discharge of pollutants into waterways while the EPA took steps to reinstate the fundamentally different factors variance procedure.

THE NATIONAL ENVIRONMENTAL POLICY ACT CASES

Two of the most significant cases decided by the Seventh Circuit in its 1984-85 term fell under the National Environmental Policy Act.[99] *River Road Alliance, Inc. v. Corps of Engineers of United States Army*[100] revolved around the duty to issue an environmental impact statement.[101] Similarly, *Wisconsin v. Weinberger*[102] concerned the duty to issue a supplemental environmental impact statement.[103] Each case produced a lengthy majority opinion which was contrasted by a sharp dissent.

In *River Road Alliance, Inc.*, the Corps of Engineers of United States Army ("Corps") issued to National Marine Service a permit for a temporary barge fleeting facility[104] along a portion of the Mississippi River. That portion of river undergoes heavy barge traffic; however, the corresponding shoreline is scenic and free from commercial development.[105] After holding a public hearing, the Corps issued an "environmental assessment" concluding that the facility would have no significant environmental impact.[106] However, no EIS was issued.

NEPA requires that the appropriate government agency—in this case, the Corps—issue an EIS for any major federal action significantly affecting the quality of the environment.[107] Having found that the facility would have no significant environmental impact, the Corps concluded that no EIS was necessary, and thus, granted the permit. After the facility went into operation, a local neighborhood group filed suit to enjoin

99. Hereinafter referred to as "NEPA."
100. 764 F.2d 445 (7th Cir. 1985).
101. Hereinafter referred to as "EIS."
102. 745 F.2d 412 (7th Cir. 1984).
103. Hereinafter referred to as "SEIS."
104. The Seventh Circuit described a barge fleeting facility as a "a maratime parking lot" for barges. *River Rd. Alliance, Inc.*, 764 F.2d at 447.
105. *Id.* A road along the Illinois shore allows motorists a view of the "dramatic bluffs" and farm land near the site in question. Indeed, the Corps acknowledged that the "bluff and river areas . . . clearly provide some of the most impressive and unique vistas of any area along the Mississippi River." *See id.*
106. *Id.* Aside from aesthetic factors, *see infra* note 105, the environmental assessment addressed the impact of the facility on a large mussel bed downstream, on neighboring towns, on wintering catfish and on fishing, boating and other sports in the area. *River Rd. Alliance, Inc.*, 764 F.2d at 448.
107. *See* 42 U.S.C. § 4332(2)(C)(i).

the operation of the facility. The district court granted the injunction, shutting down the facility pending the outcome of the present appeal. Although the district court expressly declined to rule whether the Corps had a duty to issue an EIS, the thrust of the lower court's opinion was that the Corps, when it issued the Environmental Assessment, did not take a careful enough look at the environmental impacts of the facility. However, on appeal, the majority cast the issue as whether the Corps should have issued an EIS.[108] The appropriate standard of review was that the Corps' decision not to issue an EIS would be set aside only if it was an abuse of discretion.[109]

The majority's casting of the issue on appeal made it necessary for court to apply the NEPA major federal action/significant environmental effects test[110] to the Corps' decision to grant the permit. The court began its analysis of the test by assuming that the Corps' action in granting the permit was a "major" federal action.[111] Consequently, the court continued on to examine the facts to determine whether the significant environmental effects prong of the test was established. Considering that the court assumed that the Corps' action was a major action, if that action would significantly affect the quality of the environment the NEPA test would require an EIS to be issued.

Initially, it was pointed out that the Corps was not unreasonable in deeming the aesthetic objections insignificant. Moreover, "aesthetic objections alone will rarely compel the preparation of an (EIS)."[112] In addition, the Seventh Circuit characterized the other environmental effects as "trivial, indeed."[113] The floating facility would not obstruct other boats. Plenty of room existed elsewhere for fishing.

In addition, the court harshly dismissed the argument that the facility would have caused harm to the underlying mussel bed. The River Road Alliance's concern was that the mussels would be smothered by silt stirred by boat propellors. The court noted that the mussels are not an

108. *River Rd. Alliance, Inc.*, 764 F.2d at 448. In an effort to "promote clarity," on appeal the majority stated the main issue as "whether the Corps should have prepared an (EIS)." *Id.*

109. *Id.* at 449. *See, e.g.*, Wisconsin v. Weinberger, 745 F.2d 412, 417 (7th Cir. 1984).

110. "The major federal action/significant environmental effects tests" is merely a short-hand method of referring to the requisites set out by NEPA for the issuance of an EIS. *See infra* note 107 and accompanying text.

111. *River Rd. Alliance Inc.*, 764 F.2d at 450. The court noted that neither administrative regulations nor precedent establish a standard definition of "major" in the present context. However, considering cost in time and money of preparing an EIS, the court added that there has been a recent trend away from requiring EIS's. *Id.* at 450-51.

112. *Id.* at 451. The court noted that there had been some testimony that some people would enjoy the opportunity to observe a barge close up. *Id.*

113. *Id.*

endangered species. Additionally, the mussels are owned by private persons who have the right to do with the mussels as they please, including "selling them for catfood" or "burying them in silt."[114] Similarly, although the catfish are not owned until they are caught, catfish are not an endangered species and the rest of the river provided the catfish with a more than adequate habitat. Thus the impact on the catfish habitat could reasonably be categorized by the Corp as insignificant. In sum, the Corps' decision that the environmental impacts were insignificant and therefore required no EIS, was not an abuse of discretion mandating reversal.[115]

River Road Alliance's final contention was that the Corps failed to explore alternative sites for the facility as required by section 102(2)(E) of NEPA.[116] However, National Marine Service had made a study of alternative sites and found none suitable. This study was submitted unrebutted to the Corps. The Seventh Circuit added the Corps was not in the position to evaluate the feasibility of alternative sites in light of National Marine Service's business needs. Accordingly, the Corps had to rely on studies such as the one submitted by National Marine Service.[117] Finding that the Corps had not abused its discretion, the Seventh Circuit reversed the decision of the district court with directions to vacate its injunction and dismiss the suit.[118]

Judge Wood filed a strong critical dissent. Judge Wood emphasized the asethetic aspects of the case declaring that "thousands of people" would be deprived of the enjoyment of the "unique scenic area" which was "being sacrificed and . . . damaged without sufficient justification for the financial benefit of a private commercial company."[119] However, the dissent was not restricted to aesthetic concerns.

The dissent criticized the majority's recasting of the issue as whether or not the Corps should have prepared an EIS. The lower court did not reach that issue, Judge Wood argued, the lower court found only that the Corps did not take the required "hard look"[120] at the environmental consequences in preparation of the Environmental Assessment, thus, the assessment was an inadequate basis to find no significant impact. The

114. *Id.* at 452.

115. *Id.*

116. *Id. See also* 42 U.S.C. § 4332(2)(E). This requirement is independent of the EIS issue and applies even though the appropriate agency decides that an EIS is unnecessary. *See, e.g.*, Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 232 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

117. *River Rd. Alliance, Inc.*, 764 F.2d at 453.

118. *Id.*

119. *Id.* at 454 (Wood, J., dissenting).

120. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

lower court declared that the Corps only went through the motions in preparing the assessment.[121]

Judge Wood also disagreed with the majority's findings on the environmental elements.[122] A proper focus, the dissent contended, on the facility's impact on aesthetics, recreational activities and aquatic life would clearly have warranted the conclusion that the Corps was required to take a genuine "hard look."[123] Finally, it was urged that the Corps was not entitled to accept National Marine Service's study that no alternative site was feasible. NEPA squarely placed on the Corps the burden to study alternative sites. That burden did not lie with the concerned citizens or with National Marine Service.[124]

The majority's subtle method of analysis may have a dramatic impact on the hard look approach. By neatly recasting the issue on appeal to "promote clarity,"[125] the majority was able to review a decision that the district court never made. The recasting turned the issue from merely whether the Corps failed to take a required serious or hard look at the environmental consequences, to whether the Corps had abused its discretion in determining that an EIS was unnecessary. However, the essence of the lower court's ruling was not that the Corps *abused* its discretion. On the contrary, the essence of the opinion was that by failing to take a hard look, the resulting Environmental Assessment did not suffice to put the Corps in the position to *exercise* that discretion at all. Moreover, the recasting of the issue placed the focus of the appeal to the reasonableness of *what* the Corps decided, not on *how* the Corps made the decision.

Continued and similar recasting of issues in future cases may eliminate the necessity for an agency to take a hard look at the environmental consequences when preparing an environmental assessment. As in the instant case, the agency's decision not to issue an EIS may be based on a conclusion contained in an Environmental Assessment that the project will have no significant environmental impact. If a court reviews the decision not to issue an EIS by merely analyzing the *conclusion* of the Environmental Assessment, the *basis* of the Environmental Assessment is ignored. Furthermore, when the basis of the Environmental Assessment is ignored, the process leading to that basis is also ignored. The process should be a hard look at the environmental impacts. However, if the

121. *River Rd. Alliance, Inc.*, 764 F.2d at 455 (Wood, J., dissenting).
122. *See infra* notes 114-15 and accompanying text.
123. *River Rd. Alliance, Inc.*, 764 F.2d at 455-57.
124. *Id.* at 458. *See* 42 U.S.C. § 4332(2)(E).
125. *River Rd. Alliance, Inc.*, 746 F.2d at 448.

hard look is ignored on review, the incentive of the agency to take a hard look is greatly reduced.

In addition, by allowing the Corps to rely on National Marine Service's obviously interested conclusion that no alternative site was suitable, the Seventh Circuit let the fox guard the henhouse. However, the applicable section of NEPA[126] does not contemplate such one-sided consideration. The Corps should be required at least to consider the competing interests when at issue is the feasibility of alternative sites.

Finally, the fact that the mussels and catfish threatened by the action are not on the endangered species list should not be the determinative factor in deciding that the environmental consequences are insignificant. Species do not become endangered by magic overnight. Continued commercial expansion is one way to destroy habitats of species, thus, pushing the species to the edge of the endangered list. If the courts are at all concerned with the preservation of wildlife *some* consideration should be given to the action's impact on habits and the species *before* the species are placed on the endangered list.

An issue similar to the issue in *River Road Alliance, Inc.* was raised in *Wisconsin v. Weinberger.*[127] In the instant case, the question presented was whether, based on relevant available information, the United States Navy had a duty to issue a supplemental environmental impact statement ("SEIS") when it undertook to reinstate a project which had previously been postponed.

The original project, announced in 1968, was to construct an extremely low frequency (ELF) submarine communication test facility in northern Wisconsin.[128] In 1978, President Carter decided to postpone Project ELF indefinitely. However, in 1981, President Reagan decided to reactivate the project. In accordance with the mandate of NEPA, the Navy had issued EIS's for the pre-1981 Project ELF proposals. These EIS's concluded that no adverse effects on human health would result from the exposure to extremely low frequency electromagnetic radiation produced by Project ELF. Although plaintiffs alleged that defendants had made substantial changes in the project relevant to environmental concerns and that significant new information bearing on environmental concerns had come to light, when the project was reinstated in 1981 the

126. *See* 42 U.S.C. § 4332(2)(E).

127. 745 F.2d 412 (7th Cir. 1984).

128. *Id.* at 414. The ELF communication system would allow a submarine to receive messages from land while remaining at operational speed at depths which would protect the submarine from detection. Previous land-based communication systems required submarines to surface and reduce speeds in order to receive messages, thereby putting the vessel and crew at risk. *Id.* at 414 n.1.

Navy did not issue a SEIS.[129] The lower court agreed with the plaintiff's contention and enjoined the Navy from proceeding with Project ELF.[130]

An EIS is a prerequisite to the implementation of any major federal project significantly affecting the quality of the environment.[131] Moreover, pursuant to the Council on Environmental Quality Regulations, a federal agency is required to supplement an original EIS if: "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[132] The decision to issue an EIS or a SEIS is left to the agency's discretion. Accordingly, the standard of review of an agency's decision not to issue an EIS or a SEIS is that the reviewing court must set aside the agency's determination if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[133] Therefore, the Seventh Circuit was called on to determine in the instant case whether the Navy acted arbitrarily and capriciously in deciding not to issue a SEIS in light of the new information available.

The Seventh Circuit read plaintiff's complaint as alleging that the Navy failed to prepare a SEIS in 1981. Although the duty to supplement is a continuing one, the court noted, considering that the alleged failure occurred in 1981, the only information that could be considered in reviewing the decision was the information available in 1981, not subsequently arising information.[134] In defining the phrase of "significant information" as used in the pertinent Council on Environmental Quality regulation,[135] the court held "that an agency cannot have acted arbitrarily or capriciously in deciding not to file a SEIS unless the new information provides a *seriously* different picture of the environmental landscape such that another hard look is necessary."[136] In short, the court held that NEPA could have been violated only if the new information was itself significant enough to require a SEIS.[137]

129. *Id.* at 414-15, 419 n.7.

130. Wisconsin v. Weinberger, 578 F. supp. 1327 (W.D. Wis. 1984).

131. *See infra* note 105 and accompanying text.

132. 40 C.F.R. §§ 1502.9(c)(1)(i)-(ii)(1984). This regulation is explicitly incorporated into Department of Defense and Navy regulations. *See* 32 C.F.R. § 773(b)(1)(1984); 32 C.F.R. § 214 Encl. 1, D(4),(1984).

133. Wisconsin v. Weinberger, 745 F.2d 412, 417 (7th Cir. 1984) (quoting Simons v. Gorsuch, 715 F.2d 1248, 1251 (7th Cir. 1983)).

134. Wisconsin v. Weinberger, 745 F.2d 412, 418-19 (7th Cir. 1984).

135. *See infra* note 132 and accompanying text.

136. Wisconsin v. Weinberger, 745 F.2d at 418 (emphasis in original).

137. *Id.* at 431 n.4 (Cudahy, J., dissenting).

After an extensive review of the evidence and new information,[138] the court concluded that the new information did not meet the level of significance as to require a ruling that the Navy acted arbitrarily or capriciously in not responding with a SEIS.[139] Therefore, the Seventh Circuit held that the Navy had not violated NEPA.

In dissent, Judge Cudahy attacked the majority's analysis and conclusion. Initially, the dissent disagreed with the majority's "suprisingly narrow and rigid reading of the complaint."[140] A fair reading of the complaint, it was urged, showed an allegation of a *continuing* breach of a *continuing* duty. That duty is breached when an agency goes forward with a project without considering new, relevant information and continues until the material is considered.[141]

The central issue, Judge Cudahy argued, was not whether the information was so significant as to require a SEIS.[142] On the contrary, the issue was whether the Navy breached its duty to monitor relevant new information. Considering that the regulations and NEPA offer scant guidance concerning new information and ongoing projects, the dissent believed the proper analysis approach was the approach developed in *Warm Springs Dam Task Force v. Gribble*.[143]

Under the *Warm Springs Dam* approach, NEPA places a duty on an agency to continue to monitor new information, evaluate it and make a reasoned determination as to whether or not it is of sufficient significance to require the filing of a SEIS.[144] The duty to monitor is not limited to information which is significant enough to require a formal SEIS.[145] In *Warm Springs Dam*, the Ninth Circuit ruled that an agency may be in breach of its duty when it does not carefully consider new, relevant information.[146] In summarizing the *Warm Springs Dam* approach, the dissent concluded that an agency acts arbitrarily and capriciously when it

138. *Id.* at 420-24.

139. *Id.* at 424. The court found the new data uncertain. For example, one of the scientists who gathered the information acknowledged that her work was merely "exploratory" and suffered from methodological weaknesses, such as, the testing was done at higher voltages than used in Project ELF. Other scientists deemed certain results "speculative." *Id.* at 423.

140. *Id.* at 428 n.1 (Cudahy, J., dissenting).

141. *Id.* (emphasis original). The alleged breach was a violation of 40 C.F.R. § 1502.9(c) (1984). *See infra* note 132 and accompanying text.

142. Weinberger, 745 F.2d at 429 (Cudahy, J., dissenting). The district court expressly refused to conclude that the information met the level of significance which would require a SEIS. However, the lower court ruled that the information was significant enough to require careful review by the Navy. Wisconsin v. Weinberger, 578 F. Supp. 1327, 1362-63 (W.D. Wis. 1984).

143. 621 F.2d 1017 (9th Cir. 1980).

144. *Id.* at 1024.

145. *Id.* at 1025.

146. *Id.*

ignores new information even though the new information ultimately does not warrant a full-scale SEIS, and that is precisely what the lower court found.[147] Thus, Judge Cudahy would have upheld the lower court's finding of a NEPA violation.

As in *River Road Alliance, Inc. v. Corps of Engineers of United States Army*,[148] it appears that the majority's framing of the issue on appeal greatly altered the resolution of the case. In the present case, the majority cast the issue as whether the Navy had acted arbitrarily and capriciously in determining not to prepare an EIS. The district court, however, did not rule that the Navy acted in such a manner. The lower court ruled merely that the Navy acted arbitrarily and capriciously in not considering the new information.[149] Thus, the majority reviewed a ruling that the lower court did not make. The thrust of the lower court's opinion was that due to the Navy's lack of consideration of the new information, the Navy did not have an adequate basis from which to determine whether an SEIS was necessary. In short, the problem was with the basis of the determination, not with the determination itself.

Moreover, the majority's framing of the issues enabled the court to avoid confronting the Ninth Circuit's *Warm Springs Dam* approach.[150] Under an accurate casting of the issue, the *Warm Springs Dam* approach would have been applicable. An analysis of this approach in the present case would have led, at least in the dissent's view, to a result contrary to the decision arrived at by the majority. To reach its decision the majority had to slide around the central issue of the case which permitted it to skitter around a case and avenue of analysis on point. Those reasons alone make the *Wisconsin v. Weinberger* decision unsound.

CONCLUSION

The cases decided by the Seventh Circuit in its 1984-85 term consistently presented competing environmental and commercial interests. The Seventh Circuit regularly ruled in favor of the commercial interests. Although the environmental statutes are often couched in terms of environmental concerns,[151] the statutes attempt to strike a balance between competing environmental and commercial concerns.[152]

147. Wisconsin v. Weinberger, 745 F.2d at 431-32 (Cudahy, J., dissenting).
148. 764 F.2d 445 (7th Cir. 1985). *See infra* notes 104-26 and accompanying text.
149. Wisconsin v. Weinberger, 578 F. Supp. 1327, 1362-63 (W.D. Wis. 1984).
150. *See infra* notes 143-46 and accompanying text.
151. For example, Congress amended the Clean Water Act in an effort "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(1982).
152. For example, NEPA articulates "a national policy [to] encourage productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321 (1967).

Neither environmental interests nor commercial interests are so insignificant as to warrant lack of consideration. Both interests are substantial, and both are essential to a healthy society. Recognizing this, Congress struck a balance by promulgating the environmental statutes in order to achieve a fair compromise between the contrasting concerns. However, this balance is tipped heavily toward one side when the courts called on to interpret the statutes resolve cases with a decidedly commercial bent. In bare form, the statutes may strike an even balance; however, the Seventh Circuit's rulings on the statutes consistently add less weight to the environmental side of the scale.