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## Environmental Law

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# ENVIRONMENTAL LAW

January 1, 1980, marked the tenth anniversary of the enactment of the National Environmental Policy Act (NEPA or the Act).<sup>1</sup> The purpose of its enactment was to require federal agencies to consider the possible environmental consequences of their actions.<sup>2</sup> Toward this end, the environmental impact statement (EIS) requirement<sup>3</sup> was intended as an “action forcing” provision, insuring the preparation of a document that would demonstrate that an agency is complying with the mandated analysis examining the possible environmental impact of its actions.<sup>4</sup>

After ten years of court interpretation, there continues to be a considerable amount of litigation concerning the meaning and

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1. 42 U.S.C. §§ 4321-4361 (1976). Section 4342 of NEPA established the Council on Environmental Quality (CEQ) to promulgate guidelines for compliance with the Act to be used by federal agencies. See 40 C.F.R. § 1500.1-1500.10 (1978). Although the previous guidelines were advisory only, new guidelines issued effective July 30, 1979, are binding on all federal agencies. 43 Fed. Reg. 55,978 (1978).

2. Section 102 of the Act, 42 U.S.C. § 4332 (1976); CEQ Guidelines, 40 C.F.R. § 1500.2 (1978). See generally AMERICAN BAR ASSOCIATION, ENVIRONMENTAL LAW: PRACTICE AND PROCEDURE HANDBOOK (1976); 2 F. GRAD, *The National Environmental Policy Act of 1969*, in TREATISE ON ENVIRONMENTAL LAW ch.9 (1978 & Supp., 1979); R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH (1976); PRACTISING LAW INSTITUTE, CURRENT DEVELOPMENTS IN ENVIRONMENTAL REGULATION AND LITIGATION (1976); Sive, *Environmental Decisionmaking: Judicial and Political Review*, 28 Case W. RES. L. REV. 827 (1978); McGarity, *The Courts, the Agencies and NEPA Threshold Issues*, 55 TEX. L. REV. 801 (1977).

3. 42 U.S.C. § 4332 (2) (1976) provides, in pertinent part, as follows:

- [A]ll agencies of the Federal Government shall . . . .
- (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
- (i) the environmental impact of the proposed action,
  - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
  - (iii) alternatives to the proposed action,
  - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
  - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

See generally M. Baker, J. Kaming, and R. Morrison, *Environmental Impact Statements: A Guide to Preparation and Review* (1977); *Symposium on the Environmental Impact Statement*, 16 NAT. RESOURCES J. 243 (1976).

4. Bardach & Pugliaresi, *The Environmental Impact Statement vs. the Real World*, 49 PUB. INTEREST 22, 24 (1977).

scope of NEPA. The continued controversy has been caused in part by the unclear language of the Act, unilluminated by its legislative history.<sup>5</sup> More significantly, the Act has given environmental groups a legal and political weapon that they have used "to cancel, delay, or modify development projects that they oppose."<sup>6</sup> These plaintiffs most often use the technical and procedural requirements of NEPA to challenge agency action through lawsuits alleging a failure to prepare an EIS or, if an EIS has been prepared, attacking its scope or content.<sup>7</sup>

During the Survey period, the Court of Appeals for the Ninth Circuit, in its consideration of challenges to agency action under NEPA, focused its decisions on an interpretation of what constitutes major federal action that significantly affects the human environment. The court also considered issues relating to the timing of an EIS and standing to sue.<sup>8</sup>

## I. MAJOR FEDERAL ACTION

### A. IMPLEMENTATION BY FEDERAL AGENCY OF LONG-RANGE REGIONAL PROPOSAL FOR DEVELOPMENT

During the Survey period, the Ninth Circuit expanded the scope of NEPA by ruling that development and implementation of long-range regional proposals by federal officials were major federal actions.

In *Port of Astoria, Oregon v. Hodel*,<sup>9</sup> an action was brought to declare void a contract for the supply of electrical power by the Bonneville Power Administration (BPA)<sup>10</sup> to Alumax Pacific Corporation (Alumax). Plaintiffs<sup>11</sup> alleged that the execution of the

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5. See *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1319 (9th Cir. 1974) (en banc).

6. See Bardach and Pugliaresi, *supra* note 4, at 23.

7. Anderson & Rosencranz, *The Future of Environmental Defense*, 61 A.B.A.J. 316 (1975). The authors criticized the primary emphasis on litigation and proposed alternative strategies.

8. See *California Tahoe Regional Planning Ag'cy v. Jennings*, 594 F.2d 181 (9th Cir. Feb., 1979), for the court's most recent interpretation of the Tahoe Regional Planning Compact. Note, *Environmental Law, Ninth Circuit Survey*, 6 GOLDEN GATE U. L. REV. 571 (1976) for a survey of cases addressed by the Ninth Circuit on these and other environmental issues during the 1974-1975 Survey term.

9. 595 F.2d 467 (9th Cir. Mar., 1979) (per Tang, J.; the other panel members were Kennedy, J., and Jameson, D.J.).

10. BPA, a federal agency, markets hydroelectric power generated by federal dams on the Columbia River. *Id.* at 471.

11. Plaintiffs were the Port of Astoria (Port), Concerned Citizens of Clatsop County

contract was major federal action and should be voided since no EIS had been prepared. The Ninth Circuit affirmed the district court's holding that, although an EIS would have to be prepared before implementation of the contract, the contract was not void.<sup>12</sup>

The contract between BPA and Alumax required that BPA build power lines and supply industrial firm power<sup>13</sup> to an aluminum reduction plant that Alumax planned to build in Umatilla County, Oregon (the Umatilla contract).<sup>14</sup> BPA had previously initiated the Hydro Thermal Power Program in order to meet the expanding needs of its existing and new customers.<sup>15</sup> Under Phase 2 of the program, BPA was to act as sales agent to its industrial customers for the power produced by thermal generating plants to be built by non-federal utilities. The industrial firm power contracts of Phase 2 provided an advance market for the thermal plant's output, thereby helping to partially finance the building of those plants. The contracts also provided industries with the power commitments they needed before they could build. The end result of the program was to provide for and to promote regional industrial growth and expansion.

In the district court and on appeal, plaintiffs alleged that the execution of the Umatilla contract was major federal action requiring preparation of an EIS because it: 1) changed the site of the proposed plant; 2) enabled construction and operation of the Umatilla plant and transmission lines necessary to service it; 3) obligated BPA to supply large amounts of power to Alumax; and 4) was the first industrial firm power contract thus initiating Phase 2 of the Hydro Thermal Program.<sup>16</sup> The plaintiffs further

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(Concerned Citizens), Hermiston Broadcasting Company, and five named individuals who were either members of Concerned Citizens or residents of Umatilla County. *Id.* at 473.

12. *Id.* at 479-80.

13. The grades of power to be supplied ranged from "interruptible power," subject to restriction at BPA's discretion, to "firm power" which, apart from unavoidable circumstances, had to be continuously supplied. "Industrial firm power" does not denote a particular grade of power but a method for distributing power to industry. *Id.* at 471-72.

14. In 1966, BPA contracted with Northwest Aluminum Company to supply power to a plant to be built in Clatsop County, Oregon (the Warrenton contract). In 1970, that contract was assigned to Alumax. In 1975, Alumax decided to change the proposed plant's site from Clatsop County to Umatilla County. *Id.* at 473.

15. *Id.* at 471. Under Phase 1 of the Hydro Thermal Power Program, initiated in 1968, BPA planned to buy power from non-federal utilities and sell it to its industrial customers. In response to funding and accounting problems with Phase 1, Phase 2 was initiated in 1973. *Id.* at 471-72.

16. *Id.* at 473-74.

requested that the EIS include consideration of the Phase 2 aspects of the contract.<sup>17</sup> BPA argued that its contractual commitment, the Warrenton contract, antedated NEPA, and that it was, therefore, not obligated to prepare an EIS on the Umatilla plant. The Ninth Circuit rejected this argument, finding that the Umatilla contract was, in terms of significant environmental consequences, "an entirely new project affecting an area not contemplated in earlier contracts between BPA and Alumax or its predecessors."<sup>18</sup> Therefore, this was "further major federal action" that required BPA to prepare an EIS on the Umatilla plant and the power transmission lines.<sup>19</sup>

The Ninth Circuit further required that an EIS be prepared on Phase 2 of the Hydro Thermal Power Program which would include consideration of industry's role in Phase 2 and an assessment of the new energy commitment to Alumax.<sup>20</sup> The court found that the execution of the Umatilla contract was a proposal for major federal action not only because it was a new commitment of BPA's energy resources but because it also set the stage for the initiation of Phase 2.<sup>21</sup> The court rejected BPA's assertion that Phase 2 was not a federal program in finding that BPA's participation integrated, and was essential to, the entire program.<sup>22</sup>

In *Environmental Defense Fund v. Andrus*,<sup>23</sup> the Ninth Circuit, in a ruling that relied on *Port of Astoria*, held that a regional plan to market water was major federal action. In 1967, the Department of Interior began a program to market water from the Yellowtail and Boysen Reservoirs for industrial use.<sup>24</sup> As part of this program, seventeen option contracts for the industrial use of

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17. *Id.* at 474.

18. *Id.* at 477.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 478.

23. 596 F.2d 848 (9th Cir. Apr., 1979) (*modified and rehearing den.*, June, 1979) (*per curiam*).

24. The reservoirs are located in the Northern Great Plains region, the economy of which is predominantly agricultural. However, the region contains one of the richest strippable coal deposits in the world. The availability of water for industrial uses is a key factor in making stripmining feasible. *Id.* at 850. See Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 Law and Contemp. Prob. 77, 77-78 (1976); Stewart and Leary, *How Coal Will Change the West*, S.F. Examiner, July 22, 1979, at 1, col. 4 (preview ed.).

water were executed between 1969 and 1971. No EIS was prepared for either the marketing program or the individual option contracts.<sup>25</sup> Plaintiffs, a coalition of environmental, wildlife and agricultural organizations, filed suit against the Secretary of Interior alleging that the sale of water from those projects was in violation of the Flood Control Act.<sup>26</sup>

The Ninth Circuit affirmed the district court's grant of summary judgment for the defendants, finding no violation of the Flood Control Act, but reversed the district court's holding that an EIS was not required.<sup>27</sup> The court found the water marketing plan to be a proposal for major federal action<sup>28</sup> and the option contracts to amount to federal action which, by its terms, made an "irreversible and irretrievable commitment of available resources."<sup>29</sup> As such, both the water marketing plan and each individual option contract required the preparation of an EIS.<sup>30</sup>

#### B. THE COURT'S REASONING

In determining whether or not there was major federal action, the court examined not only the specific action in controversy, but also whether that action was part of a larger, and more environmentally significant, program. In *Environmental Defense Fund*, the Secretary never disputed the need for preparation of an EIS for each individual option contract.<sup>31</sup> Similarly, in *Port of Astoria*, BPA did not dispute that the Umatilla contract was major federal action significantly affecting the environment. What BPA did dispute was whether that contract was further major federal action requiring an EIS.<sup>32</sup>

In response, the *Port of Astoria* court, in accord with previous

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25. 596 F.2d at 851.

26. *Id.* at 849. Enacted in 1944, the Flood Control Act authorized the establishment of water projects in the Missouri River Basin. 33 U.S.C. § 701-1 (1944). The Yellowstone and Boysen Reservoirs, which were the subject of the litigation, were both authorized water projects under the Act. *Id.* at 850.

27. *Id.* at 849-50.

28. *Id.* at 851.

29. *Id.* at 852.

30. *Id.* at 853. "These requirements are applicable even though the marketing plan and some of the option contracts were executed prior to January 1, 1970. Both . . . are ongoing and require continuing attention and action." *Id.*

31. *Id.* at 852. What was in dispute was the timing of the EIS. See text accompanying notes 87-89 *infra*.

32. 595 F.2d at 477.

Ninth Circuit decisions<sup>33</sup> and decisions of a majority of the circuits,<sup>34</sup> held that “an EIS is required to assess a major federal project initiated before the effective date of NEPA when the project entails a further major action that would occur after NEPA’s effective date and that would significantly affect the quality of the human environment.”<sup>35</sup> Here, the Umatilla contract allowed Alumax to change the site of the proposed plant, initiating an entirely new project not contemplated in the previous contract.<sup>36</sup>

In both *Port of Astoria* and *Environmental Defense Fund*, the major dispute centered around whether long-range regional proposals were major federal actions. The determinations that the proposals were major federal actions were based primarily upon the court’s concern with the possibility of long-term, significant environmental impact that might result from implementation of those programs.

The Umatilla contract, in itself a significant concern of the court in *Port of Astoria*, assumed its full importance when seen as the first step in the implementation of Phase 2 of the Hydro Thermal Power Program.<sup>37</sup> The Umatilla contract, like other firm power contracts BPA planned to make, contained a provision whereby BPA could require its industrial customers either to shift the source of power from BPA to a Phase 2 thermal plant or to accept a restrictable grade of power from BPA. This contract

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33. See *San Francisco Tomorrow v. Romney*, 472 F.2d 1021, 1024 (9th Cir. 1973) (amendments to loan contracts which increased federal funding only to provide for rising costs of San Francisco redevelopment project did not constitute further major federal action; but, change from industrial park project to neighborhood development program in Berkeley after the effective date of NEPA was major federal action); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1282-83 (9th Cir. 1973) (NEPA applies to all major federal actions taken after January 1, 1970, regardless of whether project to which the action is related was initiated prior to that date).

For a recent case in which the Ninth Circuit found no further major federal action, see *Westside Prop. Owners v. Schlesinger*, 597 F.2d 1214, 1223-24 (9th Cir. May, 1979) (post-NEPA formalization of pre-NEPA agreement not further major federal action).

34. *Accord*, *Hart v. Denver Urb. Renewal Auth.*, 551 F.2d 1178, 1181 (10th Cir. 1977); *Virginians for Dulles v. Volpe*, 541 F.2d 442, 445 (4th Cir. 1976); *Jones v. Lynn*, 477 F.2d 885, 891 (1st Cir. 1973); *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1177 (6th Cir. 1972); *Scherr v. Volpe*, 466 F.2d 1027, 1034-35 (7th Cir. 1972); *Greene County Planning Bd. v. Federal Power Comm’n*, 455 F.2d 412, 424 (2d Cir. 1972); CEQ Guidelines, 40 C.F.R. § § 1506.12, 1508.18(a) (1978). *Contra*, *Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm’n*, 464 F.2d 1358, 1366 (3d Cir. 1972), *cert. denied*, 409 U.S. 1118 (1973).

35. 595 F.2d at 477.

36. *Id.*

37. *Id.*

provision was intended to provide an advance market for the thermal plant's output, helping to finance the plants and allow the non-federal utilities to build plants larger than those dictated by the current demand.<sup>38</sup> The end result was to provide for industrial expansion by establishing a reserve of electrical power. The court held that Phase 2 was clearly a long-range regional program which could have a substantial environmental impact<sup>39</sup> and, as such, was a proposal for major federal action within the contemplation of section 4332 (2)(C) of the Act.<sup>40</sup>

In *Environmental Defense Fund*, the court took a substantially similar approach in assessing the industrial water marketing program. Prior to the marketing program, no reservoir water had been set aside for industrial use. The availability of water for industrial use was a key factor of feasibility in developing the region's strippable coal deposits. Since water is a limited resource throughout the region, "[a]llocation of the region's water resources will determine the nature and extent of future development, whether agricultural or industrial."<sup>41</sup>

Although the Secretary of Interior had developed an industrial water marketing program and had executed option contracts committing hundreds of thousands of acre feet of water in accordance with that program, no EIS had been prepared for either the marketing program or the individual option contracts. In finding that there had been a proposal for major federal action which could significantly affect the environment,<sup>42</sup> the court held that an EIS must be prepared for both the marketing plan and each individual option contract.<sup>43</sup>

When the federal courts first considered whether major federal actions would have a significant cumulative regional impact, the trend was to require the preparation of an EIS not only for the specific actions, but also one for the total effect on the regional environment.<sup>44</sup> In 1976, the United States Supreme Court

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38. *Id.* at 472. The shift from BPA power to thermal power would result in higher costs to the industrial customers.

39. *Id.* at 478.

40. *Id.* 42 U.S.C. § 4332 (2)(C)(1970). For the statutory language of § 4332 (2)(C) see note 3 *supra*.

41. 596 F.2d at 850.

42. *Id.* at 851.

43. *Id.*

44. See *Cady v. Morton*, 527 F.2d 786, 795 (9th Cir. 1975) (EIS on coal leases covering



in *Kleppe v. Sierra Club*<sup>45</sup> imposed a stricter standard.<sup>46</sup>

The plaintiffs in *Kleppe*, several environmental organizations, brought suit requesting that even though an EIS had been prepared for specific coal mining plans, further development of coal reserves in the Northern Great Plains region should not be allowed until a comprehensive regional EIS was prepared. Although finding no regional plan or program, the Court of Appeals for the District of Columbia reversed the district court and required preparation of a regional EIS, concluding that such a plan was "contemplated" for the region.<sup>47</sup> The Supreme Court, in reversing the appellate court, found all proposals for development of coal resources to be of either local or national scope.<sup>48</sup> The court ruled that, "[i]n the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by [NEPA] for an impact statement."<sup>49</sup>

In both *Port of Astoria* and *Environmental Defense Fund*, the Ninth Circuit distinguished *Kleppe* in finding regional programs that required preparation of an EIS. The *Port of Astoria* court found that BPA had prepared and released a proposal for a regional program expanding the development and distribution of power resources in a document entitled "Hydro Thermal Program Phase 2."<sup>50</sup> In *Environmental Defense Fund*, the court found the option contracts to be a part of a regional industrial water mar-

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770 acres of 30,876 acre program not sufficient); see also *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086-88 (D.C. Cir. 1973); *Named Individual Members of San Antonio Conserv. Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1021-22 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972). *Contra*, *Nucleus on Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 230 (7th Cir. 1975).

45. 427 U.S. 390 (1976).

46. See generally Comment, *Environmental Law—NEPA—Regional Impact Statement is Not Required in the Absence of Formal Proposal for Regional Activity—Kleppe v. Sierra Club*, 5 Fla. St. U. L. Rev. 512, 515 (1977); Note, *National Environmental Policy Act: Federal Officials Are Not Required by the National Environmental Policy Act to File an Impact Statement on the Regional Impact of Coal Development on Federal Lands in the Northern Great Plains*, *Kleppe v. Sierra Club*, 12 GONZ. L. REV. 707 (1977); Note, *The Scope of the Program EIS Requirement: The Need for a Coherent Judicial Approach*, 30 STAN. L. REV. 767, 785-92 (1978).

47. 427 U.S. at 403.

48. *Id.* at 399.

49. *Id.* at 401. For subsequent cases finding no regional program, see *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201, 210-11 (5th Cir. 1978); *Sierra Club v. Hodel*, 544 F.2d 1036, 1040 (9th Cir. 1976); *Conservation Soc'y of S. Vt. v. Secretary of Transp.*, 531 F.2d 637, 639-40 (2d Cir. 1976). *Contra*, CEQ Guidelines, 40 C.F.R. § 1502.4 (1978).

50. 595 F.2d at 477-78.

keting program initiated by the Secretary of Interior.<sup>51</sup> In both cases, the court found these programs to be clearly within the contemplation of NEPA.<sup>52</sup>

C. THE NONEXERCISE OF POWER BY A FEDERAL OFFICIAL DOES NOT CALL FOR COMPLIANCE WITH NEPA

In *State of Alaska v. Andrus*,<sup>53</sup> the Ninth Circuit limited the scope of NEPA by ruling that inaction by the Secretary of Interior was not major federal action. The State of Alaska instituted a wolf-kill program as part of a plan to increase the size of its rapidly diminishing caribou herds. Part of the killing was done on federal lands within the state's borders. Through the federal courts, the Defenders of Wildlife and other animal-welfare groups (Defenders) attempted to force the Secretary of Interior to stop the program.<sup>54</sup> Defenders argued that the Secretary had the power to stop the program, and that he was required by NEPA to prepare an EIS before choosing to exercise or refrain from exercising that power. The District Court for the District of Columbia issued a preliminary injunction compelling the Secretary to halt the program.<sup>55</sup> The Secretary issued a directive, and the State of Alaska stopped the program. The Secretary then appealed the preliminary injunction to the Court of Appeals for the District of Columbia which remanded the case without opinion.<sup>56</sup>

Shortly thereafter, the State of Alaska brought suit in district court seeking a declaration that the Secretary had no power to stop the wolf-kill program, or that if he did, he was not required to prepare an EIS.<sup>57</sup> The Secretary protested that he had no power to stop the wolf-kill program and that he had issued his directive only to comply with the District of Columbia court order. Defenders, as intervenors, contended that the Secretary did have that

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51. 596 F.2d at 850-51.

52. *Port of Astoria v. Hodel*, 595 F.2d at 478; *Environmental Defense Fund v. Andrus*, 596 F.2d at 851.

53. 591 F.2d 537 (9th Cir. Feb., 1979) (per Goodwin, J.; the other panel members were Wright, J., and Jameson, D.J.).

54. *Id.* at 538-39. Defenders contended that the Secretary was empowered to close federal lands to the wolf-kill program by the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1976), and the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627 (1976).

55. For the opinion of the district court, see *Defenders of Wildlife v. Andrus*, 9 ERC 2111 (D.D.C. 1977).

56. 593 F.2d 1371 (D.C. Cir. 1979).

57. 591 F.2d at 539. The suit was brought in district court in Alaska; the State of Alaska was not a party to the District of Columbia litigation.

power and that he must prepare an EIS even if he did not exercise that power.<sup>58</sup>

The Ninth Circuit, in affirming the district court ruling that the Secretary need not prepare an EIS, did not reach the question of whether the Secretary had the power to stop the program.<sup>59</sup> The court ruled that even if the Secretary had the power to stop the wolf-kill program, "his failure to exercise that power—in effect, his inaction—was not the type of conduct that requires an [EIS]."<sup>60</sup>

The court reasoned that when federal agencies propose to take a leading role in activity affecting the environment an EIS must be prepared.<sup>61</sup> Furthermore, when the primary actors are not federal, but rather state or local governments or private parties, "significant federal funding turns what would otherwise be a local project into a major federal action."<sup>62</sup> Nevertheless, the court concluded that "[t]he Ninth Circuit . . . has not been receptive to arguments that impact statements must accompany inactions, or actions that are only marginally federal."<sup>63</sup> In *State*

58. *Id.*

59. *Id.* at 538.

60. *Id.* at 540.

61. *Id.* See *Port of Astoria v. Hodel*, 595 F.2d at 478; *Virginians for Dulles v. Volpe*, 541 F.2d at 445.

62. *Id.* See *Homeowners Emergency Life Protection Comm. v. Lynn*, 541 F.2d 814, 817 (9th Cir. 1976) (per curiam) (federal disaster-relief funding for municipal dam and reservoir project was major federal action).

63. 591 F.2d at 541. See *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 328 (9th Cir. 1975) (mere federal approval of aspects of an airport expansion plan were insufficient to constitute major federal action when projects would proceed without federal funding or approval); *Molokai Homesteaders Coop. Assoc. v. Morton*, 506 F.2d 572, 580 (9th Cir. 1974) (the right to object to violations of its loan agreements was but a potential for action by a federal agency); *San Francisco Tomorrow v. Romney*, 472 F.2d at 1024-25 (the federal action was but a ministerial continuation of an ongoing redevelopment program). *Accord*, *City of Blue Ash v. McLucas*, 596 F.2d 709, 713 (6th Cir. 1979); *City of Highland Park v. Train*, 519 F.2d 681, 694-95 (7th Cir. 1975); *Rucker v. Willis*, 484 F.2d 158, 162-63 (4th Cir. 1973); *City of Boston v. Volpe*, 464 F.2d 254, 259 (1st Cir. 1972); *Bradford Township v. Illinois State Toll Highway Auth.*, 463 F.2d 537, 540 (7th Cir. 1972); *Civil Improvement Comm. v. Volpe*, 459 F.2d 957, 958 (4th Cir. 1972). *Contra*, *Virginians for Dulles*, 541 F.2d at 445; *Scenic Rivers Assoc. of Okla. v. Lynn*, 520 F.2d 240, 243-44 (10th Cir. 1975), *rev'd on other grounds sub nom. Flint Ridge Dev. Co. v. Scenic Rivers Assoc. of Okla.*, 426 U.S. 776 (1976); *Proetta v. Dent*, 484 F.2d 1146, 1149 (2d Cir. 1973); *Jones v. Lynn*, 477 F.2d at 891; *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972); *Hawthorn Envir. Preserv. Assoc. v. Coleman*, 417 F. Supp. 1091, 1101 (N.D. Ga. 1976), *aff'd mem.*, 551 F.2d 1055 (5th Cir. 1977); *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 841 (D.D.C. 1974), *aff'd mem.*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

of Alaska, the court found that no federal funds were to be spent, nor were federal agents to be employed, in the wolf-kill program.<sup>64</sup> Therefore, the court held, “[t]he Secretary’s nonexercise of any authorities and duties he may possess . . . was, at most, a nonuse of a power of supervision . . . .”<sup>65</sup>

#### D. WHAT CONSTITUTES MAJOR FEDERAL ACTION—THE NINTH CIRCUIT APPROACH

In *City of Davis v. Coleman*,<sup>66</sup> the Ninth Circuit announced its standard for requiring an EIS. The City of Davis sought to enjoin the building of a highway interchange which was partially federally funded, alleging a violation of NEPA because no EIS had been prepared. The court rejected the Secretary of Interior’s argument that the action was of a purely local and private nature, holding that the project, its purposes, and its effects were federal action.<sup>67</sup> Furthermore, “the main purpose of the interchange, and its only credible economic justification, [was] to provide access . . . for future industrial development”<sup>68</sup> which would have significant environmental consequences.<sup>69</sup> The *City of Davis* court held that the threshold test for requiring preparation of an EIS was met when a plaintiff “allege[s] facts which, if true, show that the proposed project would materially degrade any aspect of environmental quality.”<sup>70</sup> The court rejected a standard requiring that “federal action that significantly affects the environment must also be ‘major’ in an economic or some other nonenvironmental sense to trigger the EIS requirement.”<sup>71</sup> The court reasoned:

To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act. . . . By bifurcating the statutory language, it would be

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64. 591 F.2d at 541.

65. *Id.*

66. 521 F.2d 661 (9th Cir. 1975).

67. *Id.* at 677.

68. *Id.*

69. *Id.* at 676.

70. *Id.* at 673, quoting *Environmental Def. Fund v. Armstrong*, 487 F.2d 814, 817 n. 5 (9th Cir. 1973). The *City of Davis* court further stated: “This standard does not require the court to determine whether a challenged project *will in fact* have significant effects. Rather, we are to determine whether the responsible agency has ‘reasonably concluded’ that the project will have no significant adverse environmental consequences.” 521 F.2d at 673 (emphasis in original).

71. 521 F.2d at 673 n.15.

possible to speak of a "minor federal action significantly affecting the quality of the human environment," and hold NEPA inapplicable to such an action. . . . [T]he activities of federal agencies cannot be isolated from their impact upon the environment.<sup>72</sup>

Although there is a significant split among the circuits on this standard, the Ninth Circuit has clearly placed itself among the growing minority.<sup>73</sup>

In this Survey period, the Ninth Circuit extended the *City of Davis* standard to cover proposals for regional action which might materially degrade any aspect of environmental quality. Although in neither *Port of Astoria* nor *Environmental Defense Fund* was the *City of Davis* standard referred to specifically, in both cases the court used similar reasoning in deciding whether or not to require preparation of an EIS.<sup>74</sup> Based on that reasoning, the courts' concern with the probability of long-term, significant environmental impacts resulting from implementation of those regional programs manifested the need for an EIS.<sup>75</sup>

*State of Alaska* was, on the other hand, one of a number of attempts by the Ninth Circuit to define the limits of what constitutes major federal action.<sup>76</sup> Arguably, there was no major federal action that would significantly effect the environment in the

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72. *Id.*, quoting *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1321-22 (8th Cir. 1974) (en banc).

73. See *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d at 1321-22; *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973); *Environmental Def. Fund v. TVA*, 468 F.2d at 1177; *CEQ Guidelines*, 40 C.F.R. § 1508.18 (1978). *But see* *Cross-Sound Ferry Serv., Inc. v. United States*, 573 F.2d 725, 731 (2d Cir. 1978); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d at 1088; *Scherr v. Volpe*, 466 F.2d at 1032-33; *City of Boston v. Volpe*, 464 F.2d at 259; *Ely v. Velde*, 451 F.2d 1130, 1137-38 (4th Cir. 1971); *San Antonio Conserv. Soc'y v. Texas Highway Dep't*, 446 F.2d at 1025; *Borough of Morrisville v. Delaware River Basin Comm'n*, 399 F. Supp. 469, 477 (E.D. Pa. 1975), *aff'd mem.*, 532 F.2d 745 (3d Cir. 1976).

74. See text accompanying notes 34-43 *supra*.

75. *Environmental Def. Fund v. Andrus*, 596 F.2d at 851; *Port of Astoria v. Hodel*, 595 F.2d at 478.

76. See cases cited in note 63 *supra* and accompanying text; see also *B. R. S. Land Investors v. United States*, 596 F.2d 353 (9th Cir. 1979) (per curiam) (contemplation of action by federal agencies does not require an EIS); *Lake Berryessa Tenants' Council v. United States*, 588 F.2d 267 (9th Cir. 1978) (per curiam) (change of management of recreational lake from county to federal agency does not require an EIS); *Friends of the Earth v. Coleman*, 513 F.2d 295 (9th Cir. 1975) (fill for highway taken from possible canal site; EIS need not take into account effect of canal); *Robinswood Community Club v. Volpe*, 506 F.2d 1366 (9th Cir. 1974) (mere participation of federal government in project subsequent to effective date of NEPA is not further major federal action).

cases the court relied on in its holding.<sup>77</sup> In *State of Alaska*, however, the court's choice of words in describing the Secretary's conduct was determinative in its ruling.

In discussing the Secretary's conduct as "inaction," the court reasoned that such inaction could not be major federal action for the purposes of NEPA.<sup>78</sup> If the Secretary's conduct had been viewed instead as an acquiescence to the conducting of the wolf-kill program on federal lands, the application of the *City of Davis* standard would require the preparation of an EIS. Defenders met that standard when alleging that the program could materially degrade environmental quality.<sup>79</sup> Although the *State of Alaska* court found that no federal funds were spent nor federal agents employed in the wolf-kill program, the *City of Davis* court rejected the argument that "federal action that significantly affects the environment must also be 'major' in an economic or some other nonenvironmental sense. . . ."<sup>80</sup> In bifurcating the test for requiring an EIS, the *State of Alaska* court not only created a conflict within the circuit, but has done little to foster the purposes of the Act.<sup>81</sup>

## II. TIMING

### A. AN EIS SHOULD BE PREPARED AT AN EARLY STAGE WHEN ALTERNATIVES ARE STILL POSSIBLE AND ENVIRONMENTAL DAMAGE CAN BE MITIGATED

In *Port of Astoria and Environmental Defense Fund*, the Ninth Circuit addressed the question of at what stage of a project an EIS must be prepared. In *Port of Astoria*, BPA argued that preparation of an EIS on Phase 2 was premature since the execution of firm power contracts by its industrial customers other than Alumax was a "mere contingency."<sup>82</sup> The court, in rejecting this contention, found that BPA and its large industrial customers were operating under letter agreements which were, in effect, industrial firm power contracts.<sup>83</sup> Furthermore, BPA had no in-

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77. See cases cited in note 63 *supra*.

78. See text accompanying note 60 *supra*.

79. See text accompanying note 70 *supra*. For the allegations of significant environmental impact of the wolf-kill program see Defenders of Wildlife, 9 ERC at 2112-13.

80. See text accompanying note 71 *supra*. See also Defenders of Wildlife, 9 ERC at 2118.

81. See text accompanying note 72 *supra*.

82. 595 F.2d at 478.

83. *Id.*

tion of abandoning its industrial sales policy.<sup>84</sup> Although the details of Phase 2 remained unsettled, the court held that NEPA did not permit delaying assessment of environmental factors until BPA was “faced with the reality of executed contracts and the necessity of supplying power to industry . . .”<sup>85</sup> Rather, the court held that “assessment should occur at an early stage when alternative courses of action are still possible and environmental damage can be mitigated.”<sup>86</sup>

In requiring the preparation of an EIS for both the water marketing program and the option contracts, the court in *Environmental Defense Fund* held that “[a]ny uncertainty about the details of subsequent use of the diverted water does not obviate the importance of the decision to divert and the necessity to evaluate the environmental consequences of that decision.”<sup>87</sup> The court rejected the argument that an analysis of environmental impact was impossible until the option holder had developed detailed plans and exercised the option, stating that “[a]n EIS at this stage is necessary to assist the government in evaluating the impact of the water diversion itself and also alternative commitments of the water.”<sup>88</sup> The court was concerned that a delay in the preparation of an EIS could make all parties less flexible since, after a major investment of time and money, it was likely that more environmental harm would be tolerated.<sup>89</sup>

## B. TIMING—A CRUCIAL QUESTION

Since its opinion in *Lathan v. Volpe*,<sup>90</sup> the Ninth Circuit has consistently held that an EIS must be prepared at an early stage of a project so that agencies can avoid or minimize adverse environmental impacts.<sup>91</sup> The court’s main concern with delay has

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84. *Id.*

85. *Id.*

86. *Id.*

87. 596 F.2d at 851.

88. *Id.* at 852.

89. *Id.* at 853.

90. 455 F.2d 1111 (9th Cir. 1971) (even though federal officials had not given final approval for proposed interstate highway, there was sufficient major federal action to require an EIS).

91. *Id.* at 1120-21. See *Cady v. Morton*, 527 F.2d at 794; *City of Davis v. Coleman*, 521 F.2d 661, 675-76 (9th Cir. 1975); *Friends of the Earth v. Coleman*, 518 F.2d at 327. *Accord*, *Louisiana Power and Light Co. v. Federal Power Comm’n*, 557 F.2d 1122, 1125-26 (5th Cir. 1977); *Shiffler v. Schlesinger*, 548 F.2d 96, 104 (3d Cir. 1977); *Natural Resources Def. Council, Inc. v. United States Nuclear Regulatory Comm’n*, 539 F.2d 824,

been that more environmental harm would be tolerated.<sup>92</sup> Although there may exist a substantial amount of uncertainty about the environmental impact of a project, the court has held that such uncertainty is not an excuse for failure to prepare an EIS.<sup>93</sup> What is required is that an agency use its best efforts to reasonably forecast environmental impacts and consider reasonable alternatives.<sup>94</sup>

### III. STANDING

Standing to sue is the threshold question in NEPA litigation. It has been accepted by all circuits that have considered the matter<sup>95</sup> that a plaintiff has standing when he alleges "that the agency action has caused him an 'injury in fact' and that this injury is 'arguably within the zone of interests to be protected or regulated' by the statute that the plaintiff claims the agency violated."<sup>96</sup>

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845 (2d Cir. 1976); *Scientists Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d at 1086 n. 29; *Hawthorn Envir. Preserv. Assoc. v. Coleman*, 417 F. Supp. at 1101; CEQ Guidelines, 40 C.F.R. §§ 1501.2, 1502.4 (c), 1502.5 (1978). *Contra*, *Conservation Council v. Costanzo*, 528 F.2d 250, 252 (4th Cir. 1975).

92. *Environmental Def. Fund v. Andrus*, 596 F.2d at 853.

93. *City of Davis v. Coleman*, 521 F.2d at 676. *Accord*, *Natural Resources Def. Council, Inc. v. United States Nuclear Regulatory Comm'n*, 539 F.2d at 841; *Arkansas Power and Light Co. v. Federal Power Comm'n*, 517 F.2d 1223, 1236-37 (D.C. Cir. 1975); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d at 1098. *Contra*, *Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976); *Nucleus of Chicago Homeowners v. Lynn*, 524 F.2d at 230; *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 17 (8th Cir. 1973); *Upper Pecos Assoc. v. Stans*, 452 F.2d 1233, 1236-37 (10 Cir. 1971).

94. *City of Davis v. Coleman*, 521 F.2d at 676; CEQ Guidelines, 40 C.F.R. §§ 1502.14, 1502.16 (1978).

95. *See Texas Comm'n on Natural Resources v. Bergland*, 573 F.2d at 204 n. 1; *Shiffler v. Schlesinger*, 548 F.2d at 102; *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976); *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d at 1325; *Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235, 1242 (6th Cir. 1974); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d at 1079; *Upper Pecos Assoc. v. Stans*, 452 F.2d at 1235.

96. *Port of Astoria v. Hodel*, 595 F.2d at 474 *quoting* *Association of Data Processing Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Supreme Court held that injury to noneconomic interests, such as aesthetic and environmental well-being, was a cognizable injury. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 734-35. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP I)*, 412 U.S. 669, 689-90 (1973), the Court applied the *Sierra Club* test and found that respondents, who asserted injury to their aesthetic and environmental well-being, had standing to sue under NEPA when challenging an agency for failure to prepare an EIS.

For a more expansive and progressive view of standing, *see* Justice Douglas' dissent in *Sierra Club v. Morton*, 405 U.S. at 741-52; C. STONE, SHOULD TREES HAVE STANDING? (1974).



The Ninth Circuit most recently discussed the issue of standing in *Port of Astoria*. Although finding that all other plaintiffs had standing, the court denied standing to the Port, since its injuries represented "only pecuniary losses and frustrated financial expectations," which allegedly occurred as a result of the relocation of the Alumax plant.<sup>97</sup> In addition, the court rejected the Port's asserted interest in preventing estuary and stream pollution within its district that would be caused by the Alumax plant, finding that the Port had only a remote interest and was not an agency primarily responsible for environmental quality.<sup>98</sup>

In denying the Port standing, the court disregarded the growing trend to allow standing to any plaintiff who alleges injury of anything more than a purely economic interest.<sup>99</sup> When the area of control and expertise of a state agency may be environmentally affected by a federal project, that agency should be entitled to standing.<sup>100</sup>

#### CONCLUSION

Although the Ninth Circuit has been reluctant to require an EIS for every federal action or to allow every plaintiff standing, it has established relatively low threshold tests.<sup>101</sup> In *City of Davis*, the court enunciated good, workable standards for major federal action and timing. Unfortunately, in its subsequent attempts to define the breadth and limitations of NEPA, the court has continued to rely on a case-by-case analysis instead of one based on the *City of Davis* standards with results such as *State of Alaska*. Ten years of court interpretation of NEPA should provide a sufficient basis for the enunciation of clear and precise rules. If it is concerned with the growing volume of litigation, the Ninth Circuit should explicitly adopt and apply the *City of Davis* standards so that government agencies, environmental plaintiffs

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97. 595 F.2d at 475. Although the injury to Hermiston Broadcasting Company was economic (the power transmission lines for the Alumax plant would interfere with its radio broadcasts), the court held that Hermiston's injuries were "causally related to an act that lies within NEPA's embrace." *Id.* at 476.

98. *Id.* at 475 (citing legislative history of NEPA and the CEQ Guidelines, 40 C.F.R. § 1500.9 (c) (1977)).

99. See Sherwin, *On the Firing Line of Environmental Law*, 13 CAL. TRIAL LAW. J. 9, 11 (1974); CEQ Guidelines, 40 C.F.R. § 1508.14 (1978).

100. See 595 F.2d at 480 (concurring opinion per Kennedy, J.).

101. Unlike some other circuits, the Ninth Circuit has not taken a broad substantive review approach. See Note, *Environmental Law, Ninth Circuit Survey*, 6 GOLDEN GATE U. L. REV. 571, 571-572 (1976).

and, most importantly, the district courts will clearly understand the court's basis for assessing agency compliance with NEPA.

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