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WHERE HAVE ALL THE BUTTERFLIES GONE? NINTH CIRCUIT UPHOLDS DECISION TO ALLOW INCIDENTAL TAKING

I. INTRODUCTION

In *Friends of Endangered Species, Inc. v. Jantzen*,[1] the Ninth Circuit held that a U.S. Fish and Wildlife Service (Service) permit allowing the incidental taking of certain endangered butterflies from San Bruno Mountain did not violate relevant provisions of the Endangered Species Act[2] and the National Environmental Policy Act.[3] In upholding a grant of summary judgment, the court rejected the contentions that the Service had acted arbitrarily and capriciously in approving the permit, and that an Environmental Impact Statement[4] was necessary to enable the Service to adequately assess the environmental impacts of the permit and planned development.[5]

II. FACTS

San Bruno Mountain contains about 3,400 acres of undevel-

1. 760 F.2d 976 (9th Cir. 1985); (per Pregerson, J.; the other panel members were Ferguson, J., and Curtis, D.J., Central District of California, sitting by designation).

2. 16 U.S.C. §§ 1531-1543 (1982).

3. 42 U.S.C. §§ 4321-4370 (1982).

4. *Id.* § 4332(2)(C) (requiring an Environmental Impact Statement or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment). *See generally* 40 C.F.R. §§ 1502.1-1502.22 (1984) (stating the details regarding the preparation of an Environmental Impact Statement).

5. 760 F.2d at 988, 989.

oped land located on the northern San Francisco peninsula.[6] Throughout the early 1970's Visitacion Associates purchased virtually all of the land on the mountain.[7] In 1975 Visitacion Associates proposed to develop 7,655 residential units, and 2,000 square feet of office and commercial space on the mountain.[8] This proposal encountered strong opposition from a local environmental group, the Committee to Save San Bruno Mountain.[9] Following intense controversy over the appropriate level of development of the mountain, San Mateo County adopted the San Bruno Mountain General Plan Amendment in 1976. The General Plan Amendment permitted construction of 2,235 residential units, as well as some office and commercial space, and designated the remainder of the land on the mountain as open space.[10]

In 1980, litigation between Visitacion Associates and San Mateo County over the General Plan Amendment was settled. Under the terms of the settlement, Visitacion Associates sold and donated to the county and the state of California over 2,000 acres of the mountain for park land. The county and Visitacion Associates also agreed to designate about one-third of the mountain for development and two-thirds for parks.[11]

Shortly after the settlement was reached, the Service discovered that the Mission Blue Butterfly, which was on the endangered species list,[12] inhabited the mountain. Following the discovery of the Mission Blue, a two-year Biological Study[13] was initiated by the San Bruno Mountain Steering Committee[14] in

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6. *Id.* at 979.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *See generally* 50 C.F.R. §§ 424.01-424.21 (1984) (providing rules for revising the Lists of Endangered and Threatened Wildlife and Plants and, where appropriate, designating or revising their critical habitats).
13. The study technique employed was a mark-release-recapture of the butterflies. This technique entails capturing individual butterflies and giving each a unique wing identification mark. "The butterfly then is released where captured. When a butterfly is recaptured, its identity and characteristics are re-recorded. By observing the proportion of marked animals to unmarked animals in subsequent capture periods, experts infer the population size and distribution of the butterfly in the study area." 760 F.2d at 980 n.4.
14. The Steering Committee consisted of representatives of San Mateo County, the cities of Brisbane, Daly City, and South San Francisco, Visitacion Associates, other pro-

order to determine the population and distribution of the Mission Blue Butterfly on the mountain, and to determine whether development would conflict with the butterfly's continued existence.[15]

In October 1981, the Steering Committee began developing a Habitat Conservation Plan (Plan) to provide an approach by which habitat protection and real estate development on the mountain would take place at the same time.[16] Under the "Agreement with Respect to the San Bruno Mountain Area Habitat Conservation Plan" (Agreement)[17] implementing the Plan, 793 privately-owned acres were to be dedicated to local agencies as permanent open space, eighty-one percent of the open space on the mountain was to be preserved as undisturbed habitat, and another three percent of open space was to be restored after temporary disturbance during construction.[18] The Plan and the Agreement also provided for the permanent protection of eighty-six percent of the Mission Blue's habitat, for funding of $60,000 annually for habitat conservation and enhancement, and for continuing and comprehensive restrictions on land development.[19]

In July 1982, a combined Environmental Impact Report[20] and Environmental Assessment[21] of the Plan and proposed permit were made public for hearing and comment.[22] The Service received both favorable and adverse comments, and in its permit findings and final Environmental Impact Report/Environmental Assessment, considered and responded to these comments.[23] Then, in November 1982, the Service received a formal application for a permit for the incidental taking of the Mission Blue

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spective developers, landowners, the Service, the California Department of Fish and Game, and the Committee to Save San Bruno Mountain. *Id.* at 979, 980.

15. *Id.* at 980.

16. *Id.*

17. The Agreement was executed by the county, the cities, the major landowners and developers, the California Department of Fish and Game, and the California Department of Parks and Recreation. *Id.* at 980.

18. *Id.*

19. *Id.* at 984.

20. *See generally* CAL. PUB. RES. CODE §§ 21000-21165 (West 1986) (California law governing the preparation of an Environmental Impact Report).

21. *See generally* 40 C.F.R. § 1508.9 (defining an Environmental Assessment).

22. 760 F.2d at 980.

23. *Id.* at 984.

Butterfly.[24]

In March 1983, the Service issued a Biological Opinion concluding that the development planned under the permit would not jeopardize the continued existence of the Mission Blue Butterfly on San Bruno Mountain.[25] The Service also issued a Finding of No Significant Impact[26] stating that issuance of the permit would not significantly affect the quality of the human environment.[26] Subsequently, the Service issued the permit, conditioned upon implementation of the Agreement and the Plan.[28]

III. PROCEDURAL BACKGROUND

In August 1983, Friends of Endangered Species filed an action in the district court for declaratory and injunctive relief.[29] Plaintiff contended that because the field studies were methodologically flawed, the Service's findings, relying on the field data, were arbitrary and capricious, and that approval of the permit based on such findings constituted an abuse of the agency's discretion.[30] Friends of Endangered Species also alleged that the Environmental Impact Report/Environmental Assessment's discussion of environmental impacts and alternatives to development on the mountain was insufficient under NEPA, and that a full Environmental Impact Statement was required.[31]

In November 1983, plaintiff moved the district court for a temporary restraining order and a preliminary injunction to halt certain grading work on the mountain.[32] Both motions were denied by the district court, and defendant's motion for summary

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24. *Id.*

25. *Id.* 980, 981.

26. *Id.* at 981. *See generally* 40 C.F.R. § 1508.13 (1984) (defining a Finding of No Significant Impact).

27. 760 F.2d at 981. This finding obviated the need for an Environmental Impact Statement. *See* 42 U.S.C. § 4332(2)(C) (1982). *See also* Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982), where it was contended that NEPA had been violated by the failure to prepare an EIS for the Boise Downtown Center Redevelopment Project. The court held an EIS was not required as it concluded that an Environmental Assessment Finding of No Significant Impact was reasonable. *Id.* at 862.

28. 760 F.2d at 981.

29. 760 F.2d at 981.

30. *Id.*

31. *Id.*

32. *Id.*

judgment was granted.[33] Following the ruling, Friends of Endangered Species appealed the grant of summary judgment to the Ninth Circuit.[34]

IV. BACKGROUND

A. Endangered Species Act

The legislative development of endangered species protection in the United States began with the Endangered Species Preservation Act of 1966.[35] In that Act, Congress recognized the problem of the extermination of native species, and declared its intention to prevent the elimination of endangered species.[36] In this initial attempt at endangered species preservation, Congress mandated that the various federal departments should seek to protect species of native fish and wildlife threatened with extinction, and, insofar as practicable and consistent with the primary purposes of such bureaus, agencies, and services should preserve the habitats of threatened species on lands under their jurisdiction.[37]

With the enactment of the Endangered Species Act of 1973[38] Congress recognized that the provisions of the 1966 Act were not sufficient to protect endangered species. Thus, in the 1973 Act, Congress expanded the scope of endangered species protection to include endangered and threatened species, as well as the ecosystems on which such species depend.[39] Furthermore,

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33. *Id. See* 589 F. Supp. 113, 115 (N.D. Cal. 1984).

34. 760 F.2d at 981.

35. Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966), *amended by* Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 282, 283 (1969), *repealed by* Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1543 (1982).

36. "The purposes of this Act are to provide a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife . . . that are threatened with extinction." Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, 926 (1966) (repealed 1973).

37. *Id.* at 80 Stat. 926.

38. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1543 (1982)).

39.

> The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened

in this Act, Congress declared that all federal departments and agencies should seek to conserve endangered species and threatened species, and should utilize their authorities in furtherance of those purposes.[40] While there have been various amendments since the enactment of the Endangered Species Act of 1973, most recently in 1982, the purpose and policy of the Act remain essentially unchanged.[41]

Aside from its general purpose of conserving endangered and threatened species, a number of specific sections in the present version of the Endangered Species Act are relevant to the court's decision in *Friends*.[42] Section 7(a)[43] refers to federal agency actions and consultations, and stipulates that "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."[44] Section 7(c)[45] also provides for the preparation of a biological assessment to facilitate compliance with the "not likely to jeopardize" clause.[46]

While the Act generally prohibits the taking of any listed species,[47] it also provides for a number of exceptions.[48] Specifi-

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species, and to take such steps as may be appropriate . . . .

16 U.S.C. § 1531(b) (1982).

40. *Id.* § 1531(c) (1982).

41. *See generally* 16 U.S.C. §§ 1531-1543 (1982) (stating the present version of the Act).

42. *Id.*

43. 16 U.S.C. § 1536(a) (1982).

44. *Id.* § 1536(a)(2). As interpreted and implemented in 50 C.F.R. § 402.01, section 7 imposes three burdens upon federal agencies: (1) to utilize their authorities to carry out conservation programs for listed species; (2) to insure that its activities or programs will not jeopardize the continued existence of a listed species; and (3) to insure that their activities or programs do not result in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.01 (1984).

45. 16 U.S.C. § 1536(c) (1982).

46. *Id. Cf.* 50 C.F.R. § 402.04(f) (1984) (requiring a federal agency to obtain additional information if it is determined that there is insufficient information to conclude that an activity is not likely to jeopardize the continued existence of a listed species).

47. *See* 16 U.S.C. § 1538 (1982).

48. In the Endangered Species Act of 1973, the exceptions to the taking prohibition were limited to acts for scientific purposes, or acts for the enhancement of propagation or survival of the affected species. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 896 (1973). Largely due to the decision in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), the allowable exceptions were greatly expanded. *See generally*

cally, section 10[49] permits "any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[50] Under this provision an applicant must submit a conservation plan to the appropriate federal agency which may authorize an incidental taking if it determines that (1) the taking will be incidental, (2) the applicant will minimize and mitigate the impact of such taking, (3) the applicant will insure that adequate funding for the plan will be provided, and (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.[51]

The standard of review for administrative decisions under the Endangered Species Act is of crucial importance. Because the Act contains no internal standard of review, section 706 of the Administrative Procedure Act[52] governs. Under the Administrative Procedure Act, the appropriate standard of review for administrative decisions involving the Endangered Species Act is the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[53] standard. Applying this standard, administrative action is upheld if the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made."[54]

Recently the United States Supreme Court expounded on this standard and stated:

> Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider,

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16 U.S.C. § 1539(a) (1982) (stating the various exceptions as they presently stand).

49. 16 U.S.C. § 1539 (1982).

50. *Id.* § 1539(a)(1)(B).

51. *Id.* § 1539(a)(2)(A), (B).

52. 5 U.S.C. § 706 (1982).

53. *Id.* § 706(2)(A).

54. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983). The Court considered a Nuclear Regulatory Commission (NRC) decision that licensing boards should assume, for purposes of NEPA, that the permanent storage of certain nuclear wastes would have no significant environmental impact (the so-called zero release assumption) and thus should not affect the decision whether to license a particular power plant. *Id.* at 90. The NRC in its statement announcing the rule, summarized the major uncertainties of long-term storage of nuclear wastes, noted that the probability of intrusion was small, and found the evidence tentative but favorable that an appropriate storage site could be found. *Id.* at 94. The Court upheld the NRC's rule, finding its decision was not arbitrary and capricious, and was within the bounds of reasoned decisionmaking. *Id.* at 105.

> entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[55]

Furthermore, as the standard has been interpreted, the review under it is a limited one. For example, in *Citizens To Preserve Overton Park v. Volpe*,[56] the Court stated that "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[57]

In *Stop H-3 Association v. Dole*,[58] the Ninth Circuit reviewed a question similar to that at issue in *Friends*. In *Stop H-3*, the court considered whether an agency's decision was arbitrary and capricious, when the agency relied on a biological opinion regarding an endangered species.[59] The appellants had challenged the adequacy of the biological opinion as the basis for a finding that a proposed highway project was not likely to jeopardize the continued existence of a rare species of bird.[60] The court concluded as a matter of law that the decision to rely on the biological opinion was not arbitrary and capricious.[61] In the court's view, there was no doubt that the agency had complied with consultation obligations and relied on an opinion issued by an expert agency.[62] The testimony challenging the conclusions

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55. Motor Vehicle Mfr's. Ass'n v. State Farm Mut., 463 U.S. 29 (1983). The Court held that a decision by the National Highway Traffic Safety Administration rescinding the requirement that motor vehicles produced after September 1982 be equipped with passive restraints to protect the safety of the occupants of the vehicle in the event of a collision was arbitrary and capricious. *Id.* at 43.

56. 401 U.S. 402 (1971). The Court, here, reviewed a decision by the Secretary of Transportation to authorize construction of an interstate highway through a public park, and reversed and remanded for a review of the Secretary's decision based upon the whole record. *Id.* at 420. According to the Court, in deciding whether the Secretary's decision was arbitrary and capricious a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416.

57. *Id.*

58. 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2344 (1985).

59. 740 F.2d at 1458.

60. *Id.* at 1459.

61. *Id.* at 1460.

62. *Id.*

contained in the biological opinion was unimportant as the testimony offered no information that had not already been evaluated by the expert agency.[63] Thus, the agency's ultimate conclusion that the highway was not likely to jeopardize the existence of the endangered species "clearly was grounded on a consideration of the relevant factors and, not being unreasonable as a matter of law, was not a clear error of judgment."[64] As a result, the court held that the agency had complied with the mandate of the Endangered Species Act.[65]

B. National Environmental Policy Act

In enacting the National Environmental Policy Act, Congress declared its intention to "encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere."[66] While such a statement seems to indicate an intention to declare a national environmental policy, the Code of Federal Regulations demonstrates that the real function of NEPA is to insure that public officials and citizens are informed about environmental effects before actions are taken.[67] In accord with such a purpose, one of the key provisions of NEPA is the requirement that all federal agencies include an Environmental Impact Statement[68] in every recommendation or

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63. *Id.*

64. *Id.*

65. *Id.*

66. 42 U.S.C. § 4321 (1982).

67. *See* 40 C.F.R. § 1500.1(b) (1982). "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id. See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), where the Court reversed a decision by the Court of Appeals for the District of Columbia requiring additional information in an Environmental Impact Statement. "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Id.* at 558.

68. Section 4332(C) defines an Environmental Impact Statement as a detailed statement of 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-

report on proposals for "major federal actions significantly affecting the quality of the human environment."[69]

As the Ninth Circuit has interpreted NEPA,[70] its purpose is "to assure that federal agencies are fully aware of the present and future environmental impact of their decisions."[71] Thus, the court's role is to ensure that the agency has taken a "hard look" at environmental consequences.[72]

When reviewing agency determinations that preparation of an Environmental Impact Statement was not necessary, the Ninth Circuit has consistently employed a reasonableness standard.[73] For example, in *City of Davis v. Coleman*,[74] the court reviewed a decision by the Federal Highway Administration not to prepare an EIS for the construction of a freeway interchange. Holding that an EIS was necessary, the court stated that its task was to determine whether the responsible agency has reasonably concluded that the project will have no significant adverse environmental consequences.[75] Thus, the court found that substantial questions about the environmental consequences of a federal action had been raised, and that the "responsible agencies should not be allowed to proceed with the proposed action in ignorance of what those consequences will be."[76]

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

42 U.S.C. § 4332(C) (1982).

69. *Id.*

70. *See* Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981), where the Ninth Circuit upheld a decision by an agency within the Department of the Interior to authorize the construction of 500 kilovolt power transmission lines across the lands of farmers. Plaintiff's primary contention was that the Environmental Impact Statement on the proposed power line was not in conformance with NEPA.

71. *Id.* at 592.

72. *Id.* (citing with approval Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

73. The Ninth Circuit has also employed a reasonableness standard in determining the adequacy of the contents of an Environmental Impact Statement. "The adequacy of the contents of an EIS is determined by a rule of reason, which requires only a reasonably thorough discussion of the significant aspects of the probable environmental consequences." Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981).

74. 521 F.2d 661 (9th Cir. 1975).

75. *Id.* at 673 (citing Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973)).

76. 521 F.2d 661, 675 (9th Cir. 1975).

In *Foundation For North American Wild Sheep v. U.S. Department of Agriculture*,[77] the court expounded upon that theme. When considering an agency's determination that reopening a road in the Angeles National Forest would not have an impact upon a herd of Bighorn sheep the court stated that "[i]t is firmly established in this Circuit that an agency's determination that a particular project does not require the preparation of an Environmental Impact Statement is to be upheld unless unreasonable."[78] In finding that preparation of an EIS was necessary, the court held that the agency had failed to take the requisite "hard look" at the environmental consequences, and that the agency's conclusion that reopening the road would have no significant effect was unreasonable.[79]

Also relevant to the court's decision in the present case, are the requirements that an agency discuss reasonable alternatives to a proposed action,[80] and include a worst-case scenario where information is incomplete or unavailable.[81] As to the requirement of a discussion of reasonable alternatives, the Ninth Circuit has made its position quite clear. In *State of California v. Block*,[82] the court reviewed an Environmental Impact Statement for a Forest Service decision to allocate roadless national forest system land among three management categories. Holding that the Forest Service did not consider an adequate range of alternatives, the court stated that "[j]udicial review of the range of alternatives considered by an agency is governed by a 'rule of reason' that requires an agency to set forth only those alternatives necessary to permit a 'reasoned choice.' "[83]

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77. 681 F.2d 1172 (9th Cir. 1982).

78. *Id.* at 1177.

79. *Id.* at 1178.

80. *See* 42 U.S.C. § 4332(2)(c)(iii) (1982).

81. *See* 40 C.F.R. § 1502.22 (1984). A worst case analysis is required if

> (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant, or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known . . . .

Id. § 1502.22(b).

82. 690 F.2d 753 (9th Cir. 1982).

83. *Id.* at 767. "An EIS, however, need not consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." *Id.* (citing Save Lake Washington v. Frank, 641 F.2d 1330, 1334 (9th Cir. 1981)).

The requirement of a worst-case scenario was considered in *Save Our Ecosystems v. Clark*[84] where the spraying of herbicides on Forest Service and Bureau of Land Management lands was challenged. Holding that the worst case analysis was inadequate, the court assessed that "[t]he purpose of the [worst case] analysis is to carry out NEPA's mandate for full disclosure to the public of the potential consequences of agency decisions, and to cause agencies to consider those potential consequences when acting on the basis of scientific uncertainties or gaps in available information.[85]

V. THE COURT'S ANALYSIS

This case involved alleged violations of two distinct acts, which the court examined independently. The analysis began with an examination of the Endangered Species Act, followed by an examination of the National Environmental Policy Act.

A. Endangered Species Act

In reviewing the district court's grant of summary judgment, the court began with appellant's contention that the Service's issuance of a permit was a violation of sections 10(a)[86] and 7(a)(2)[87] of the Endangered Species Act. The question posed to the court was whether the appellant had raised a genuine issue of material fact in asserting that the Service acted arbitrarily and capriciously in issuing the permit under the Act.[88]

Under section 10(a)[89] of the Endangered Species Act, the Service may permit an applicant to engage in the "taking" of an endangered species under certain circumstances.[90] Appellant challenged the sufficiency of the permit findings as to whether the applicant would minimize and mitigate the impacts of the

84. 747 F.2d 1240 (9th Cir. 1984).
85. *Id.* at 1244.
86. 16 U.S.C. § 1539(a) (1982).
87. *Id.* § 1536(a)(2).
88. 760 F.2d at 982.
89. 16 U.S.C. § 1539(a) (1982).
90. "Taking" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (19) (1982).

taking to the maximum extent practicable, and whether the taking would not appreciably reduce the likelihood of the survival of the species.[91]

In its analysis of appellant's claims, the court began by examining whether the field study adequately supported the Service's finding that the taking would not appreciably reduce the likelihood of the survival of the species.[92] According to the court, the Service went beyond this minimum requirement in concluding that the permit and Plan were likely to enhance the survival of the Mission Blue Butterfly.[93] The court rejected appellant's contention that the Service's conclusion was arbitrary and capricious because of alleged shortcomings in the Biological Study upon which the conclusion was based.[94] In the court's view, the legislative history of the 1982 amendment to section 10(a) indicated that the Service acted properly in relying on the Biological Study.[95] That legislative history suggests that Congress would view appellee's conduct in the present case as the paradigm approach to compliance with section 10(a).[96]

The court also found that the appellant had failed to bring many of the purported errors and inconsistencies in the field study to the attention of the Service until after the district court had denied their motion for summary judgment.[97] Furthermore, the Service solicited and considered expert and public comment on the Biological Study before issuing the permit, and the study itself acknowledged methodological limitations.[98] There was no evidence that the permit was issued either in ignorance or delib-

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91. 760 F.2d at 982. *See generally* 16 U.S.C. § 1539(a)(2)(B) (ii), (iv), (1982) (permitting an otherwise prohibited taking under certain circumstances).

92. 760 F.2d at 982.

93. *Id.* According to the Service the species' survival would be enhanced because a substantial amount of its critical habitat would be transferred to public ownership, and a permanent program to protect its habitat would be established. *Id.* at 982 n.6.

94. *Id.* at 982. Friends of Endangered Species contended that low recapture rates and mistaken recaptures by the field crew in the mark-release-recapture phase of the study invalidated the study's conclusions. *Id.*

95. *Id.* at 983 (citing S. REP. No. 418, 97TH CONG., 2D SESS. 10 (1982), AND H.R. REP. NO. 835, 97TH CONG., 2D SESS. 31-32 (1982)).

96. 760 F.2d at 982, 983 (citing with approval S. REP. No. 418, 97th Cong., 2d Sess. 10 (1982), and H.R. REP. No. 835, 97th Cong., 2d Sess. 31-32 (1982)).

97. 760 F.2d at 983.

98. *Id.*

erate disregard of the Biological Study's limitations.[99] Instead, the Service made an effort to consider all criticisms of the Biological Study before relying on it.[100] Thus, the court held that there were no genuine issues of material fact to preclude the district court from determining that the Service had complied with the Endangered Species Act, and that the Service had not acted arbitrarily or capriciously in relying on the Biological Study.[101]

The next issue concerned whether the Service acted arbitrarily and capriciously in concluding that the Habitat Conservation Plan complied with section 10(a)'s requirement to minimize and mitigate the impact of the taking upon endangered species.[102] Appellant's primary contention was that the development of an alternative site on the mountain, the Saddle Area, would more effectively mitigate the effects of development.[103] However, the court found that the Service had considered and rejected development of the Saddle Area on the basis that it contained unique wetlands and endangered plants, and that its development would have biological impacts greater than that produced by the Saddle's proposed use as a country park.[104] Furthermore, the Plan contained various measures to minimize and mitigate the impact of development upon the Mission Blue Butterfly, and these additional measures would play a significant role in enhancing the protection of endangered species on the mountain.[105] Thus, the court concluded that there was no genuine factual dispute as to whether the Service acted arbitrarily or unreasonably in determining that the Plan complied with section 10(a)'s mitigation requirement.[106]

The court next analyzed appellant's claim that the Service failed to comply with section 7(a)(2) of the ESA.[107] Under this section, a federal agency is required to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered

99. *Id.*
100. *Id.*
101. *Id.* at 984.
102. 16 U.S.C. § 1539(a)(2)(B)(ii) (1982).
103. 760 F.2d at 984.
104. *Id.*
105. *Id.*
106. *Id.*
107. 16 U.S.C. § 1536(a)(2) (1982).

species."[108] Accordingly, the Service determined that the permit was not likely to jeopardize the continued existence of the Mission Blue Butterfly.[109] Appellant challenged this conclusion on the basis that the source relied upon by the Service did not represent the best scientific data available.[110] This contention was rejected by a finding that the Service addressed the limitations of the Biological Study, was not directed to any better available data, and considered whatever data and other materials appellant provided.[111] The court cited *Stop H-3 Association v. Dole*[112] for the proposition that when examining an alleged violation under section 7(a)(2), "the issue for review is whether–the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[113] Accordingly, the court held the Service did not act arbitrarily or capriciously, or in violation of section 7(a)(2), by considering all the data it received.[114]

B. National Environmental Policy Act

In its examination of alleged violations of NEPA in *Friends*, the court began by announcing it would proceed to review the Service's actions concerning the NEPA provisions at issue under a reasonableness standard.[115] The first alleged NEPA violation examined was appellant's contention that issuance of the permit required preparation of an Environmental Impact Statement in addition to the Environmental Impact Report/Environmental Assessment.[116] This contention essentially concerned whether the Service erred in issuing its Finding of No Significant Impact. In examining the Service's decision in this regard, the court pointed out that the decision not to prepare an EIS should be

108. *Id.*

109. 760 F.2d at 984, 985.

110. *Id.* at 985. Section 7(a) of the Endangered Species Act further states that "[i]n fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." Codified at 16 U.S.C. 1536(a)(2) (1982).

111. 760 F.2d at 985.

112. 740 F.2d 1442 (9th Cir. 1984). *See supra* text accompanying note 58. *See also* Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

113. 760 F.2d at 985 (citing Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1459 (9th Cir. 1984)).

114. 760 F.2d at 985.

115. *Id.*

116. *Id.*

upheld if reasonable,[117] and that a court should not substitute its judgment for that of an agency if the agency's decision was fully informed and well considered.[118] Thus, it was noted that the Service had sought out and considered extensive comments on the Biological Study during the public comment period and afterward, and incorporated these comments into its permit findings and final Plan.[119]

Furthermore, the extensive coordination and agreement between the state and federal government was a factor supporting the Service's decision not to prepare an EIS.[120] Finally, the likelihood of the enhancement of the chances for survival of the endangered species, due to the mitigation measures in the permit and the Plan, was an additional factor in support of the Service's decision not to prepare an EIS.[121] Thus, the court concluded that the Service acted reasonably in not preparing an EIS, and that to overturn the Service's decision would represent an unjustifiable intrusion into the administrative process.[122]

Next, the court rejected appellant's claim that the Environmental Impact Report/Environmental Assessment did not adequately discuss reasonable alternatives to the proposed action.[123] Under NEPA, all agencies of the federal government are to include in any recommendation or report on major federal actions

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117. *See supra* text accompanying note 78.

118. 760 F.2d at 986 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978)). *Vermont Yankee* further stated that "[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . . not simply because the court is unhappy with the result reached." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. at 558.

119. 760 F.2d at 986.

120. *Id.* at 987.

121. Regarding the level of mitigation measures in determining whether preparation of an Environmental Impact Statement is necessary, see Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982), where the Ninth Circuit held that "modifications to the original design . . . may eliminate or mitigate the project's effects on air quality. These modifications may make the preparation of an EIS unnecessary." *Id.* at 860. Compare Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982), in which it was held that an Environmental Impact Statement was not required when a proposal is modified "by adding specific mitigation measures which *completely* compensate for any possible adverse environmental impacts stemming from the original proposal . . . ." *Id.* at 682 (emphasis added).

122. 760 F.2d at 987 (citing Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 684 (9th Cir. 1982)).

123. 760 F.2d at 987.

significantly affecting the quality of the environment, a detailed statement on alternatives to the proposed action.[124] As the court noted, this provision does not demand a full discussion of all land-use alternatives.[125] In the present case, the EIR/EA listed various alternatives to issuance of the permit, including those of no development, more limited development, and public acquisition of all private land on the mountain.[126] Additionally, the EIR/EA contained a brief discussion on the alternate development of the Saddle Area and rejected it.[127] This, according to the court, amounted to an adequate discussion of reasonable alternatives.[128]

Finally, appellant challenged the Service's action on the basis that NEPA requires the EIR/EA to contain a "worst case analysis."[129] This claim was rejected as the court concluded that the Service obtained the impact information it needed from the Biological Study and Plan, and included it in the EIR/EA.[130] Moreover, the court determined that the staged development of the mountain, and corresponding staged reconsideration of environmental impacts under the Plan, functioned to minimize the importance of a "worst case analysis" in the present case.[131]

VI. CRITIQUE

The present decision is appropriate in a number of respects. The court recognized and applied the traditional standards of review to the alleged violations of the Endangered Species Act and the National Environmental Policy Act. It realized that its function is to insure that the decision of an agency is based upon a consideration of the relevant evidence and factors, and that it is not to substitute its judgment for that of an agency. The court properly recognized and applied the "hard look" doctrine as an-

124. 42 U.S.C. § 4332(2)(C)(iii) (1982).

125. *See supra* text accompanying note 82.

126. 760 F.2d at 988.

127. *Id.*

128. *Id.* at 987.

129. *Id.* at 988.

130. *Id.*

131. *Id. See also* Village of False Pass v. Clark, 733 F.2d 605, 614 (9th Cir. 1984) (a worst-case analysis was not required at the first stage of a project where each stage remained separate, and a worst case analysis could be considered at a later stage).

nounced by the Supreme Court in *Kleppe v. Sierra Club*.[132] From the evidence presented, it was determined that the Service had considered the relevant evidence and factors, and that the Service's decision was not unreasonable in view of that information. The court properly deferred to the judgment of the appropriate agency and declined to substitute its judgment for that of the agency.

On another level, the present decision does not permit the destruction of the Mission Blue Butterfly.[133] The provisions of ESA and NEPA have successfully limited development on San Bruno Mountain to approximately one-fifth of the available space.[134] The developers voluntarily agreed to a number of requirements designed to enhance the likelihood of survival of the Mission Blue Butterfly.[135] In fact, the court found the virtual agreement among government officials, private parties, and local environmentalists on the development of the mountain to be a persuasive factor favoring the Service.[136] On this level, upholding the Service's decision to permit development, represents a valid compromise between the goals of development and the goals of preservation of endangered species and preservation of the environment.

Nevertheless, this case also presents a number of grounds for concern. For the most part, the plaintiff's contentions revolved around substantive criticism of the Biological Study, and the claim that errors in that Study rendered conclusions based upon it invalid.[137] Yet, the court did not seriously examine this claim. Despite the language of section 7(a)(2) of the Endangered

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132. 427 U.S. 390 (1976). In *Kleppe* the Court stated that "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of action to be taken.' " *Id.* at 410 n.21 (quoting Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

133. Under the Plan and the Agreement, 86% of the Mission Blue's habitat is to be protected. 760 F.2d at 984.

134. The Agreement provides that 81% of the open space on the mountain is to be preserved as undistrubed habitat with another three percent of open space to be restored after temporary disturbances during construction. *Id.* at 980.

135. *Id.* at 984.

136. *Id.* at 986. As the court stated, "the extensive coordination and agreement between the state and federal government is a factor supporting the Service's decision not to prepare an [Environmental Impact Statement]." *Id.* at 987.

137. *Id.* at 981.

Species Act,[138] requiring an agency to insure that its actions are not likely to jeopardize an endangered species, there was no showing by the Service that the study was accurate, or that its conclusions were valid. The court reasoned that the Service had examined the impact of the issuance of the permit upon the Mission Blue Butterfly, and that therefore the Finding of No Significant Impact was not arbitrary and capricious.[139] Yet, the legislative history of the 1978 amendments to the ESA[140] indicate that section 7(a)(2)[141] was intended to give the benefit of the doubt to the species, and to place the burden on the agency to demonstrate that its action will not jeopardize the continued existence of an endangered species.[142] As the court's reasoning illustrates, rather than placing the burden on the Service to demonstrate that its actions were not likely to jeopardize the Mission Blue, the court placed the burden on the plaintiff to show that the Service's action was likely to jeopardize the endangered species.

Similarly, the court found that the Biological Study adequately supported the Service's findings.[143] This conclusion is apparently based upon the congressional language surrounding a

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138. 16 U.S.C. § 1536(a)(2) (1982).

139. As the court stated, "the Service was aware of all relevant limitations on the Biological study and the field data, and the Service addressed those limitations in its Permit Findings." 760 F.2d at 985.

140. *See* H.R. CONF. REP. No. 697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2572, 2576. *See also* Note, *Hammond v. North Slope Borough: The Endangered Species Issue—An Exercise In Judicial Lethargy*, 1 ALASKA L. REV. 129, 137 (1984).

141. 16 U.S.C. § 1536(a)(2) (1982).

142. *See* H.R. CONF. REP. No. 697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2572, 2576:

> This language continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2). Furthermore, the language will not absolve Federal agencies from the responsibility of cooperating with the wildlife agencies in developing adequate information upon which to base a biological opinion. If a Federal agency proceeds with the action in the face of inadequate knowledge or information, the agency does so with the risk that it has not satisfied the standard of Section 7(a)(2) and that new information might reveal that the agency has not satisfied the standard of Section 7(a)(2).

Id.

143. 760 F.2d at 984.

1982 amendment to the Endangered Species Act.[144] Yet, an examination of that language reveals that both the Senate and the House were focusing primarily on the Habitat Conservation Plan rather than the Biological Study. The Senate Report focused on the Conservation Plan for San Bruno Mountain, not the Field Study.[145] In fact, in the Senate Report, the Field Study is not even mentioned.[146] In the House Report, mention is made of the Field Study, but only that it was independent and exhaustive and provided support for the Conservation Plan.[147] From the comments in the House Report, it is clear that the House did not concern itself with the *accuracy* of the Field Study.[148] Thus, the court's reliance on the language surrounding the 1982 amendment to the Endangered Species Act is misplaced. Although the Service followed the proper procedure in authorizing a Biological Study, the court did not require the Service to demonstrate the adequacy or accuracy of that study.

A secondary concern is the level of review the court utilized in this case. The court has applied the appropriate standard of review, and recognized its role as a limited one. Yet, there is a distinction between a limited role and a non-existent role. For example, the Supreme Court stated in *Citizens To Preserve Overton Park v. Volpe*[149] that the generally applicable standards of section 706 of the Administrative Procedure Act require the reviewing court to engage in a substantial inquiry.[150] An agency's

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144. S. REP. No. 418, 97th Cong., 2d Sess. 10 (1982), and H. R. REP. No. 835, 97th Cong., 2d Sess. 31-32 (1982).

145. S. REP. No. 418, 97th Cong., 2d Sess. 10 (1982) states that the "project developer, in cooperation with the U.S. Fish and Wildlife Service and State authorities is developing a conservation plan for the protection and enhancement of the butterflies habitat, to be financed through an assessment on home owners." *Id.*

146. *Id.*

147. H. R. REP. No. 835, 97th Cong., 2d Sess. 31-32 (1982) states:

> Prior to developing the conservation plan, the County of San Mateo conducted an independent, exhaustive biological study which determined the location of the butterflies, and the location of their food plants. The biological study also developed substantial information regarding the habits and life cycles of the butterflies and other species of concern. The biological study was conducted over a two year period and at one point involved 50 field personnel.

Id.

148. *Id.*

149. 401 U.S. 402 (1971).

150. *Id.* at 415.

decision may be entitled to a presumption of regularity, but such a presumption does not shield its action from a thorough review.[151] In the present decision a thorough, probing, in-depth review was not undertaken. Careful scrutiny of the agency's decision would have been possible without the court substituting its judgment for that of the Service. Yet, the review was so limited that serious questions about the accuracy of the Biological Study, and the continued existence of the Mission Blue Butterfly remain.

Finally, the present case has potentially serious implications for the future of the Endangered Species Act and the National Environmental Policy Act. The Service's decision to allow development, knowing of the limitations of the Biological Study, does not appear to be consistent with the goals of those acts.[152] Given the concern for the environment, and the purposes and policies announced by ESA and NEPA, is it enough to recognize limitations in a Biological Study, or should a decision to allow development have been postponed until such limitations could be substantively addressed? In allowing the Service's decision to stand, the implication for future activity is that an agency merely has to comply with the procedural requirements of the respective acts. If one of the goals of these acts is to foster the incorporation of biological conservation considerations into the planning process from the beginning, the present decision suggests that form is more important than substance. For example, if an agency undertakes a Biological Study and incorporates its conclusions into a development plan, it would be sufficient to pass judicial scrutiny under the standard set out in *Friends*.

While it is important that agencies follow the proper procedure under the Endangered Species Act and under NEPA, it is up to the judicial system to insure that agencies do not lose sight of the substantive goals of those acts. While a court may not be capable of resolving scientific uncertainties, and should not substitute its judgment for that of an expert agency, it can require an agency to demonstrate that its actions will not jeopardize the existence of an endangered species. Thus, while a court should properly defer to the expertise of an agency when the basis for

151. *Id.*

152. *See supra* text accompanying notes 35-41 and 66-67.

an agency's decision is called into question, an affirmative showing by the agency supporting that decision should be required.

VII. CONCLUSION

Friends follows the accepted trend of a limited role for the courts in challenges to proposed actions under the Endangered Species Act and NEPA. The Ninth Circuit has traditionally applied a deferential standard in reviewing the decisions of an agency, and this decision represents another example of that deference. Although the present decision raises questions as to whether the court has insured that the Service took a "hard look" at the environmental consequences of development on San Bruno Mountain, the court upheld the judgment of the Service, and affirmed the standards it will use in reviewing future challenges to agency decisionmaking in environmental issues.

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ENVIRONMENTAL LAW

SUMMARY

SIERRA CLUB v. F.E.R.C.: A PRELIMINARY PERMIT DOES NOT CREATE AN ENVIRONMENTAL IMPACT

I. INTRODUCTION

In *Sierra Club v. Federal Energy Regulatory Commission*[1] the Ninth Circuit decided that the Federal Energy Regulatory Commission (Commission)[2] need not prepare an Environmental Impact Statement when issuing a preliminary permit[3] for construction of a hydroelectric project, since this type of permit does not authorize any on-site activity which might affect the environment.[4] The court also concluded that the Commission may issue a preliminary permit for such a project without deciding whether it will ultimately be able to license the project.[5]

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1. 754 F.2d 1506 (9th Cir. 1985) (per Poole, J.; the other panel members were Canby, J. and Phillips, J., Senior United States Circuit Judge of the Sixth Circuit, sitting by designation).

2. The Federal Energy Regulatory Commission, the successor to the Federal Power Commission, licenses hydroelectric facilities on waters under federal jurisdiction. Applicants provide the Commission with information regarding feasibility, compliance with state law and environmental impact. 16 U.S.C. § 802 (1976); 18 C.F.R. § 4.1 (1985). The Commission is then responsible for preparation of an Environmental Impact Statement 42 U.S.C. § 4332 (2)(C) (1976).

3. Due to the lengthy licensing procedure, the Commission is authorized to issue a preliminary permit, the sole purpose of which is to preserve the applicant's priority over later applications for a maximum of three years. 16 U.S.C. § 797(f) (1976). The preliminary permit is designed to maintain the status quo while the permittee prepares a detailed license application. *Id.* § 798.

4. 754 F.2d at 1510.

5. *Id.*

Consequently, the Sierra Club's challenge to the Commission's jurisdiction under the Raker Act[6] to license the project was premature.[7]

II. FACTS

In June 1976, the Modesto and Turlock Irrigation Districts applied for a preliminary permit for a new hydroelectric project, to be known as Clavey-Wards Ferry Project.[8] The proposed 400 million watt project was to be constructed on the Tuolumne River near its confluence with the Clavey River, an area on federal land managed by the Forest Service and Bureau of Land Management.[9] Because the outstanding recreational opportunities provided by the river would be impaired by the hydroelectric development, the Sierra Club, Tuolumne Rivers Expeditions, Inc., and the State of California intervened before the Commission to oppose the application.[10] However, the Commission granted the permit in April 1983.[11] The Sierra Club and Tuolumne River Expeditions, Inc., petitioned the Ninth Circuit for a review of the Commission's issuance of the permit without prior preparation of an EIS, and for a ruling on the Commis-

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6. Raker Act, ch. 4, 38 Stat. 242 (1913). The Raker Act allowed San Francisco to flood the Hetch Hetchy Valley in Yosemite National Park, and to build water and electrical transmission systems through the Park. The Hetch Hetchy water and power system was put under the jurisdiction of the Departments of Agriculture and Interior to the exclusion of any other federal agencies. Raker Act, 38 Stat. 242 § 4.

7. 754 F.2d at 1511.

8. *Id.* at 1508. As originally proposed, the project would include the Jawbone Diversion Dam and Reservoir, the 5.2 mile Jawbone Ridge Tunnel, the Hunter Point Dam, the 2 mile Clavey Power Conduit, the Ward's Ferry Dam, and the Clavey and Ward's Ferry Powerhouses. *Id.*

9. *Id.*

10. *Id.* at 1509. This area is widely known for its whitewater and kayaking opportunities. *Id.*

After this case was first submitted to the Ninth Circuit, Congress passed the California Wilderness Act of 1984 which amended the National Wild and Scenic Rivers Systems Act by adding part of the Tuolumne River to the system. 16 U.S.C. § 1274 (1984). The court vacated submission of the case, and invited the parties to express their views on the effect of this new legislation. Subsequently, relying on the statute's plain language, the court decided that the California Wilderness Act did not preclude the issuance of a preliminary permit for this potential project because the project is outside the boundary of the statutorily designated Wild and Scenic River Area. 754 F.2d at 1509 n.1.

11. *Id.* at 1508. Under the preliminary permit, the irrigation district would be allowed to maintain priority of application, in the event of possible subsequent licensing applications. It would not be authorized to enter federal land and conduct any studies which might disturb the environment. *Id.* at 1509.

sion's jurisdiction to issue a permit under the Raker Act.[12]

III. THE COURT'S ANALYSIS

The Ninth Circuit first considered whether the Commission was required to prepare an EIS prior to the issuance of a preliminary permit. It then addressed the challenge raised by the Sierra Club to the Commission's jurisdiction to issue the permit.

A. BACKGROUND

The starting point of the Ninth Circuit's analysis of whether an EIS was required was the National Environmental Policy Act[13] which provides that a federal agency must issue an EIS whenever a major federal action significantly affects the human environment.[14] The Ninth Circuit has expanded this requirement to include those actions which *may* affect the environ-

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12. The federal courts of appeals have jurisdiction to review orders of the Commission under 28 U.S.C. § 1291 (1976).

13. 42 U.S.C. § 4332 (1976).

14. 42 U.S.C. § 4331 (b)(2) (1976) provides that all Americans are to be assured "safe, healthy, productive, and aesthetically and culturally pleasing surroundings." In order to fulfill these goals, the Act mandates that a federal agency must prepare a detailed statement called an Environmental Impact Statement (EIS) whenever "major federal actions significantly affect the human environment." *Id.* § 4332 (2)(C). The purpose of an EIS is to force all federal agencies to take environmental factors into account during the decision-making process, giving such factors the same weight as other, more traditional concerns such as productivity and efficiency. 40 C.F.R. § 1500. 1 (1985). *See* Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109, 1122 (D.C. Cir. 1971). NEPA also created the Council on Environmental Quality to carry out the Act's goals. 42 U.S.C. § 4371, Executive Order No. 11,514 (March 5, 1970), 3 C.F.R., 1966-70 comp., p. 1902. The regulations require an EIS to relate where and how the environment will be affected by the proposed federal action or decision, and also set forth alternatives to the planned action that would avoid or minimize adverse environmental impacts. Moreover, alternatives must be considered that would enhance the environment. 40 C.F.R. § 1502.1 (1985).

An Environmental Assessment is a preliminary step in the NEPA process. The Environmental Assessment must briefly provide sufficient evidence and analysis to determine if an EIS is required, facilitate preparation of an EIS if such is found to be necessary, and aid the federal agency in complying with NEPA if no EIS is required. 40 C.F.R. § 1508.9 (1985).

The scope of NEPA is intentionally broad, in that it attempts to promote across-the-board adjustment in federal agency decisionmaking. Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

ment.[15] When reviewing a federal agency's determination that no EIS is required prior to the issuance of a permit, it is firmly established in this circuit that an agency's decision will be upheld unless found to be unreasonable.[16] It is also firmly established that, if a permit does not authorize any change in the environmental status quo, it is not unreasonable to dispense with the EIS requirement prior to issuance.[17]

B. Discussion

In *Sierra Club v. Federal Energy Regulatory Commission*, the Sierra Club claimed that the Commission was required to prepare an EIS before issuing a preliminary permit to the irrigation districts for the Clavey-Wards Ferry Project.[18] However, the preliminary permit was intended only to maintain the priority of application, and it prohibited any on-site construction, testing,

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15. Found. for N. Am. Wild Sheep v. USDA, 681 F.2d 1172 (9th Cir. 1982). The Forest Service allowed the reopening of a road that crossed one of the last remaining habitats of Desert Bighorn Sheep without preparing an EIS. *Id.* at 1176. The court held this decision to be unreasonable, since the Environmental Assessment on which the Service based its decision had glaring omissions such as failing to consider the amount of traffic the road would carry and the effect of this traffic on a variety of factors that might impact on the sheep. A determination that significant effects *will in fact occur* is not necessary in order that NEPA's exceptionally broad scope may be fulfilled. If substantial questions are raised as to whether a project may have a significant effect, an EIS *must* be prepared. *Id.* at 1178 (emphases in original).

16. *Id.* at 1177. A standard of reasonableness is a higher standard requiring a greater showing of agency effort than an arbitrary and capricious standard. *Id.* at 1177 n.24. *See also* Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 475 (9th Cir. 1984) (reasonableness standard higher than arbitrary and capricious standard), *cert. denied*, 105 S.Ct. 2358 (1985). To satisfy this standard, the federal agency is required to take a "hard look" at the environmental consequences. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21. (1976). Although the court will not substitute its judgment for that of the agency, if the plaintiff has alleged facts which, if true, show that the environment may be significantly affected, the agency must address these issues, or its determination not to issue an EIS will be held to be unreasonable. Found. for N. Am. Wild Sheep v. FERC, 681 F.2d 1172, 1178 (9th Cir. 1982) (citing City and County of San Francisco v. United States, 615 F.2d 498, 500 (9th Cir. 1980)).

17. *Sierra Club*, 754 F.2d at 1510. *See* Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115 (9th Cir. 1980). Since federal action in aiding a private group to buy an existing airport did not increase the noise level, the status quo did not change, and no EIS was required. *Id.* at 116. *See also* South Dakota v. Andrus, 614 F.2d 1190 (8th Cir.), *cert. denied* 449 U.S. 822 (1980). The granting of a mining patent by the Department of the Interior did not allow the patent holders to take any action; rather, permits from the Forest Service would be required before any on-site activity could be undertaken. Therefore, no EIS was mandated. *Id.* at 1195.

18. 754 F.2d at 1509.

or feasibility studies.[19] The permit clearly required the irrigation districts to seek approval from the Forest Service, which managed the land under consideration, before beginning work on the project.[20] The Forest Service, not the Commission, would therefore be responsible for determining the environmental effects of the irrigation districts' proposed actions when an application for a special use permit was filed.[21] Since the Sierra Club was unable to point to any environmental impact which would result from the Commission's issuance of the permit, the court upheld the agency's decision that no EIS was required.[22]

The court next turned to the Sierra Club's claim that although the proposed project is outside the original Raker Act right-of-way, it would be an extension of San Francisco's Hetch Hetchy hydroelectric system, and, as such, outside the Commission's jurisdiction under the Raker Act.[23] The Ninth Circuit disagreed, holding that the jurisdictional challenge was premature.[24] Since the proposed project would be subject to extensive change during the preliminary project planning stage, its relationship to Hetch Hetchy could not as yet be determined.[25] The Commission was not required to deny the preliminary permit on the speculative ground that it might ultimately be unable to li-

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19. *Id.*

20. *Id.*

21. *Id.* Special use permits are required by Forest Service Regulations before beginning most on-the-ground investigations. FOREST SERVICE MANUAL § 2771.2.

22. 754 F.2d at 1510. The Ninth Circuit also quickly rejected two additional arguments made by the Sierra Club. First, the Sierra Club claimed that 40 C.F.R. § 1501.4 required the Commission to file an Environmental Assessment to establish the reasonableness of its decision not to prepare an EIS. *See supra* note 14. The court concluded, however, the Commission's permit satisfied this requirement because it provided the factual basis for determining that there would be no significant effect on the environment as a result of the issuance of the permit. 754 F.2d at 1510.

Second, the Sierra Club argued that the Commission was required to hold an evidentiary hearing. *Id.* CEQ regulations require such a hearing when there is a substantial environmental controversy. 40 C.F.R. § 1508.2(b)(4) (1985). A "controversy" does not mean opposition, however, but a dispute as to environmental effects. *See* Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). In the instant case, there was no environmental controversy because there would be no environmental effect stemming from the issuance of the preliminary permit. Therefore, a hearing was not required. *Sierra Club*, 754 F.2d at 1510.

23. 754 F.2d at 1510.

24. The Act gives sole jurisdiction over the Hetch Hetchy system to the Secretaries of Agriculture and the Interior. Raker Act, 38 Stat. 242 § 4 (1913). *See supra* note 6.

25. 754 F.2d at 1511.

cense the project under the Raker Act.[26] The risk that the project will be unlicensable at some future time, the court noted, is one being eagerly borne by the irrigation district.[27]

III. CONCLUSION

The court properly found that it was premature to claim a Raker Act violation when the proposed project had not yet been finally delineated. In striking down the Raker Act challenge, the court relied upon the broad principle that the Commission need not consider potential problems with licensure at the preliminary permit stage. Indeed, since the preliminary permit is designed only to maintain priority of application while a detailed license application is being prepared, to sustain a jurisdictional challenge would predetermine issues properly raised only when the application itself is submitted.

In rejecting the Sierra Club's petition for review, the Ninth Circuit determined that although the mandate of NEPA was to force federal action to meet certain environmental criteria, the Act required an EIS only for those *major* federal actions which *significantly* affect the environment.[28] Even under the Ninth Circuit's expansive interpretation of NEPA, it correctly concluded here that the Sierra Club had failed to establish the threshold requirement for an EIS, that is, a showing of environmental impact. Simply stated, the case stands for the proposition that where no environmental effect can be demonstrated, no EIS is required. Yet the implications of the case may be far-

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26. *See* City of Bedford v. FERC, 718 F.2d 1164 (D.C. Cir. 1983) (not necessary for the Commission to determine whether an applicant for a preliminary permit will meet all the qualifications for licensing before issuing the permit).

The proposed Clavey-Ward's Ferry project has, in fact, changed considerably since the irrigation districts first applied for a preliminary permit. Two of the originally proposed dams have been dropped, and the project has been renamed the "Ponderosa Project." 754 F.2d at 1511 n.3.

27. 754 F.2d at 1511. The court noted that no other Tuolumne River hydroelectric project that has operated in conjunction with Raker Act facilities has been barred by the Act. 754 F.2d at 1511 (citing California v. FPC, 345 F.2d 917, 924 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965)). In *California v. FPC*, the Ninth Circuit reviewed the granting of licenses for the New Don Pedro Dam, which is outside the original Raker Act right-of-way, and immediately downstream from the proposed project, and concluded that the Raker Act did not bar the Federal Power Commission from issuing a license to operate. 345 F.2d at 930.

28. 42 U.S.C. § 4332(2)(C) (1976).

reaching. Environmental groups seeking to block future projects may now be foreclosed from demanding an EIS in the preliminary planning stage, and thus may have to delay an attack until the project is more mature.

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