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UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Civ. No. 94-214

STATE OF NEW UNION,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendant-Appellant,
and
SUNPEACE,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION,
THE HONORABLE R. N. REMUS, JUDGE

APPELLANT'S BRIEF ON THE MERITS*

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QUESTIONS PRESENTED

1. Are the statutory language and legislative history of section 118 of the Clean Air Act sufficiently clear and unequivocal to satisfy the high standard required to constitute a valid waiver of the United States' sovereign immunity from punitive civil penalties?

2. Does a party that is not claiming inadequate consideration of environmental factors as its injury in fact have standing to sue under NEPA, and, if so, is there federal subject matter jurisdiction to hear such a claim?

3. Is an Environmental Impact Statement that is prepared voluntarily and after proper filing of an unchallenged Finding of No Significant Impact subject to judicial review?

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STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over appeals arising from final decisions of the District Court for the District of New Union because that District is within the Twelfth Circuit. 28 U.S.C. § 1291 (Foundation 1993). Interpretation of the Clean Air Act (CAA) is a federal question over which this Court may exercise subject matter jurisdiction. 28 U.S.C. § 1331 (Foundation 1993). While the District Court lacked subject matter jurisdiction to hear Sunpeace's claim,

this Court has proper jurisdiction for the purpose of reviewing that jurisdictional determination. 28 U.S.C. § 1291; 28 U.S.C. § 1331.

STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo as pure matters of law, where an appellate court may exercise its independent judgment to discern the intent of the legislature. *See Estate of Holl v. Commissioner*, 967 F.2d 1437, 1438 (10th Cir. 1992). A District Court's decision regarding subject matter jurisdiction is reviewed de novo. *Kunkel v. Continental Casualty Company*, 866 F.2d 1269, 1273 (10th Cir. 1989).

STATEMENT OF THE CASE

Preliminary Statement

On April 27, 1993, the New Union Department of Environmental Quality (NUDEQ) assessed $300,000 in fines against the United States Department of the Interior (DOI) for alleged violations of the New Union Clean Air Act (NUCAA) at its Coal Research Activity (CRACT) in Cathertown, New Union. (T.R. 2-3.) Although DOI claimed sovereign immunity from NUCAA and refused to pay the fines, it did make plans to bring CRACT into compliance with NUCAA. (T.R. 3.) Pursuant to the National Environmental Policy Act (NEPA), DOI prepared an Environmental Assessment (EA) and filed a Finding of No Significant Impact (FONSI) on the proposed project. (T.R. 4.) Although not required by NEPA to do so, DOI also prepared an Environmental Impact Statement (EIS) regarding these same changes. (T.R. 4.)

Sunpeace filed a complaint against DOI in the United States District Court for the District of New Union under NEPA and the Administrative Policy Act (APA) alleging defects in the EIS. (T.R. 4.) The State of New Union (New Union) later filed suit in the same court to enforce and collect the fines levied against DOI. (T.R. 4.) The two actions were consolidated for decision. (T.R. 4.) Following a bench trial, the Honorable R.N. Remus, Judge, entered verdicts against

DOI on both claims on April 23, 1994. (T.R. 5, 6.) DOI appeals the entirety of the District Court's decision. (T.R. 1.)

Statement of Facts

DOI owns and operates CRACT, a research plant focusing on ways to make coal mining more efficient and economical, in Cathertown, New Union. (T.R. 2.) CRACT employs 800 federal workers and is the principal employer in Cathertown. (T.R. 2.) CRACT helps the coal industry, which employs 20% of the New Union work force, by sharing the results of its research. (T.R. 2.) CRACT began its "Improved Coal Transport Experiment" (ICTE) in 1985. (T.R. 3.) A by-product of ICTE is a large amount of particulate matter escaping into the air. (T.R. 3.)

On September 30, 1989, NUDEQ inspected and cited the ICTE program for violating the standards for particulate matter of the NUCAA, an authorized state program under CAA. (T.R. 3.) The only action taken against the facility was a letter written by the NUDEQ administrator to CRACT explaining the NUCAA standards and asserting jurisdiction to regulate the facility. (T.R. 3.) NUDEQ did not assess penalties. (T.R. 3.) CRACT received, but did not answer, the letter. (T.R. 3.)

The ICTE program had not changed when NUDEQ inspected the facility on April 27, 1993. (T.R. 3.) This time, the NUDEQ Administrator authorized the inspectors to assess $300,000 in civil penalties in accordance with NUCAA. (T.R. 3.) CRACT acknowledged its obligation to comply substantively with NUCAA standards, but denied liability for civil penalties because the federal government had not waived sovereign immunity. (T.R. 3.) In order to comply with NUCAA, CRACT promised to build a hangar and baghouse filter, at a cost of $3,000,000 to remove particulate matter from ICTE. (T.R. 3.) Before an EA was completed, Sunpeace began a media campaign to criticize ICTE and suggest both it and the entire CRACT facility be closed. (T.R. 3.)

CRACT completed an EA and found that no significant impact would result from any operation of the facility which

complied with NUCAA standards. (T.R. 4.) CRACT published the FONSI in the Federal Register on June 26, 1993, along with an announcement that the facility would voluntarily complete an EIS on the ICTE program because of the controversy surrounding the hangar and baghouse construction. (T.R. 4.) CRACT deferred construction on the hangar and baghouse until an expedited Record of Decision was filed. (T.R. 4.) Until that decision, the ICTE program would continue at the reduced volume in compliance with NUCAA. (T.R. 4.)

The Draft EIS, published in December, 1993, explored two alternatives: (1) ICTE operations carried on at the original volume, but with the construction of the hangar and baghouse; and (2) ICTE operations at the reduced volume which complied with NUCAA. (T.R. 4.) Sunpeace submitted written comments during the comment period arguing the EIS had to include an analysis of the "no action" alternative, which would be elimination of the ICTE program. (T.R. 4.) CRACT responded by saying that issue was beyond the scope and requirements of this EIS. (T.R. 4.) CRACT has now published a Final EIS and Record of Decision selecting the high-paced alternative with the hangar and baghouse. (T.R. 4.)

SUMMARY OF ARGUMENT

This Court should reverse the judgment of the District Court on the issue of sovereign immunity under CAA. The lower court erred because the statutory language and legislative intent of section 118 of CAA is not clear enough with regard to punitive civil penalties to meet the high standard for finding a waiver of sovereign immunity.

This Court should dismiss Sunpeace's action seeking judicial review of the EIS because Sunpeace lacks standing to bring its claim under NEPA. Alternatively, this Court should remand the case with instructions to dismiss because the District Court lacked subject matter jurisdiction under either NEPA or APA to hear Sunpeace's claim.

If this Court decides to reach the merits of Sunpeace's claim, it should reverse the judgment of the District Court on

the issue of judicial review of a voluntary EIS. The lower court erred because the EIS was prepared after CRACT had fully complied with NEPA and because the EIS is outside the scope of NEPA.

ARGUMENT

I. THE DISTRICT COURT ERRED BECAUSE THE STATUTORY LANGUAGE AND LEGISLATIVE INTENT OF SECTION 118 OF THE CLEAN AIR ACT IS NOT CLEAR ENOUGH WITH REGARD TO PUNITIVE CIVIL PENALTIES TO MEET THE HIGH STANDARD FOR FINDING A WAIVER OF SOVEREIGN IMMUNITY.

In order for New Union to assess civil penalties against CRACT, this Court must find that the United States waived sovereign immunity. Absent the consent of Congress, states do not possess the power to tax or otherwise to impose fees or fines upon federal facilities. *McCulloch v. Maryland*, 4 Wheat. 316, 427-29 (1819). The waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). The United States Supreme Court has also held that a court must strictly construe a waiver in favor of the sovereign and may not extend it beyond the language of the statute. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983). The waiver involved in this case, section 118 of the CAA, must meet an even higher standard because waivers of sovereign immunity affecting the federal treasury are especially subject to narrow construction. *United States v. Air Pollution Control Bd. of the Tennessee Dep't of Health and Environment*, No. 3:88-1030, 1990 U.S. Dist. LEXIS 8343, at *12 (M.D. Tenn. Jan. 11, 1990); *see Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947). Not only is section 118 subject to especially narrow construction, but a presumption exists against the United States exposure to state fines or penalties, even where a federal statute generally subjects a federal facility to state law. *Air Pollution Control Bd.*, No. 3:88-1030, 1990 U.S.

Dist. LEXIS 8343, at *13; *see Missouri Pacific R.R. Co. v. Ault*, 256 U.S. 554, 563-65 (1921).

Therefore, the difficult standard for finding a waiver of sovereign immunity should be even more strict in this particular case. Any penalty assessed against CRACT would directly impact the federal treasury since CRACT is a federally funded project. (T.R. 2.) Moreover, since the present case involves civil penalties assessed by New Union, the waiver language in section 118(a), upon which New Union relies, must be exceptionally clear in order to overcome the presumption against exposing the United States to state penalties.

A. *The plain language of section 118(a) does not clearly and unequivocally waive sovereign immunity with respect to punitive civil penalties.*

Section 118(a) of the CAA subjects federal facilities to state regulations. 42 U.S.C. § 7418(a) (West 1993); see Appendix A for the complete text of section 118(a). The language in section 118 requires federal facilities to comply with the substantive and procedural requirements of the CAA. However, the language does not clearly waive immunity with respect to punitive civil penalties. This Court must construe the waiver especially narrowly and should read the phrase "process and sanctions," which is mentioned twice in 118(a), to apply only to coercive penalties imposed in order to force federal facilities to comply with state standards. The Supreme Court described coercive penalties as those imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively. *Department of Energy v. Ohio*, 112 S. Ct. 1627, 1632 (1992). The Supreme Court defined punitive fines as those "to punish past violations." *Id.*

This Court should interpret section 118 to include only coercive penalties because the term "requirements" cannot encompass civil penalties, the words "process" and "sanction" must be read together, and such a reading would be consistent with the Supreme Court's interpretation of similar language in the Clean Water Act (CWA).

1. The term "requirements" cannot include punitive civil penalties.

Section 118(a) subjects federal facilities to "all Federal, State, interstate, and local requirements . . . ." 42 U.S.C. § 7418(a). The standard definition of "requirement" is "something called for or demanded: a requisite or essential condition . . . ." Webster's Third New International Dictionary at 1929 (3d ed. 1981). Using this definition, this Court should read that word as applying only to standards or processes which federal facilities must meet in order to operate within the state. Any penalty assessment is merely a consequence of failing to comply with the essential conditions, namely the state's regulations.

This court should not read the term "requirements" to include any of the enforcement penalties included in the CAA. A well-known canon of statutory interpretation states that courts "must avoid statutory interpretation that renders any section superfluous and does not give effect to all of the words used by Congress." *In re Oxborrow*, 913 F.2d 751, 754 (9th Cir. 1990). If the term "requirements" included penalties, the phrase "process and sanctions," located at the end of the list of provisions with which federal facilities must comply, would be rendered superfluous.

Although this Court has not addressed the issue, the Ninth Circuit Court of Appeals' decision in *California v. Walters*, 751 F.2d 977 (9th Cir. 1984), supports the exclusion of civil penalties from the term requirement. The *Walters* Court decided that "requirements" as used in the Resource Conservation and Recovery Act (RCRA), did not encompass criminal penalties. *Id.* at 978. The relevant waiver provision in RCRA is similar to the waiver in CAA and reads:

> Each department, agency, instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief

> and such sanctions as may be imposed by a court to enforce such relief).

42 U.S.C. § 6961(a) (West 1993). The Ninth Circuit did not have to address the issue of whether civil penalties were included in the phrase "all requirements." However, the reasoning the court used to reach its decision on criminal penalties would apply to punitive civil penalties as well. The court held that "[c]riminal sanctions . . . are not a 'requirement' of state law within the meaning of section 6961, but rather the means by which the standards, permits, and reporting duties are enforced." *Walters*, 751 F.2d at 978. Punitive civil penalties are also a means to enforce state standards and are, therefore, indistinguishable from criminal penalties.

The Supreme Court also addressed the issue in deciding that CWA and RCRA did not waive sovereign immunity for punitive civil penalties. *Department of Energy*, 112 S. Ct. at 1631. The Court stated "that 'all . . . requirements' 'can be reasonably interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures.'" *Id.* at 1639-40 (quoting *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990)).

2. The words "process and sanction" must be read together to apply only to coercive civil penalties.

The United States also did not waive sovereign immunity with respect to punitive civil penalties through the phrase "process and sanctions." The canons of construction require those words be read together and to only apply to coercive penalties.

The District of Columbia Circuit Court of Appeals has said that courts "must enforce the statute 'according to its terms' and pursuant to the reasonable interpretation 'mandated by [its] grammatical structure.'" *United States v. Nofziger*, 878 F.2d 442, 457 (D.C. Cir. 1989) (quoting *United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989)). The grammar of the statute mandates that the words "process"

and "sanctions" be read as one phrase because of the use of the conjunction "and" before their inclusion in the list of provisions with which federal facilities must comply. The first use of the words is at the end of the list which reads "[e]ach department, agency, and instrumentality of . . . the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, *and* process and sanctions respecting the control and abatement of air pollution . . . ." 42 U.S.C. § 7418(a) (emphasis added). Had the words "process" and "sanctions" been meant to refer to separate, unrelated aspects of CAA, Congress would not have used a conjunction both before and after the word "process." By using that conjunction, Congress has connected the word "process" to the word "sanctions" and then also attached that phrase as a whole to the list which includes local requirements and administrative authority.

The interpretation that "process" and "sanctions" are to be read together is further reinforced by the next lines of section 118 which read:

> The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any record-keeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner.

Id. This sentence separates each element in the list and explains that responsibility further. In fact, in the first list, the term requirement is not divided between the substantive and procedural aspects and the requirement of federal facilities to pay fees. The first list included both of those requirements in one word, but divides them into their own subletter in expanding on their meaning. The phrase "process and sanction" is explained together in its own lettered division. Had

the words been meant to be unrelated, Congress would have given each term its own lettered division, as it did with the different meanings of the term requirements (i.e., fees and substantive and procedural requirements). Therefore, the words "process and sanctions" must be related and considered one phrase.

3. The Supreme Court has interpreted the phrase "process and sanctions" in the Clean Water Act to refer to only coercive civil penalties.

The result of reading "process" and "sanctions" together is that they can only refer to coercive penalties. The Supreme Court has already interpreted almost identical language in CWA, which reads:

> [E]ach department, agency, or instrumentality of the . . . Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner . . . as any nongovernmental entity. . . . The preceding sentence shall apply . . . (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

33 U.S.C. § 1323(a) (West 1993). The Supreme Court found that the phrase "process and sanctions" applied only to coercive penalties. *Department of Energy*, 112 S. Ct. at 1637.

In analyzing the waiver, the Supreme Court noted three significant points. The first was the "three manifestations of governmental power to which the United States is subjected: substantive and procedural requirements; administrative authority; and 'process and sanctions,' whether 'enforced' in courts or otherwise." *Id.* The second important point the Court stressed was the "conjunction of 'sanction[s]' not with the substantive 'requirements,' but with 'process,' in each of the two instances in which 'sanctions' appears. 'Process' normally refers to the procedure and mechanics of adjudication and the enforcement of decrees or orders that the adjudicatory process finally provides." *Id.* The final important lan-

guage in the waiver is "the statute's reference to 'process and sanctions' as 'enforced' in courts or otherwise." *Id.* From this analysis, the Supreme Court concluded "the very fact, then, that the text speaks of sanctions in the context of enforcing 'process' as distinct from substantive 'requirements' is a good reason to infer that Congress was using 'sanction' in its coercive sense, to the exclusion of punitive fines." *Id.*

The analysis and conclusions of the Supreme Court should be applied to the waiver provision in the CAA. First, the language in the two waiver provisions referring to process and sanctions is identical. Therefore, the three aspects of the language which the Supreme Court used to conclude that "process and sanctions" referred only to coercive fines are also present in the CAA waiver. First, since the term "sanction" must be read in conjunction with the word "process," that phrase is separate from the substantive aspects of CAA which the term "requirements" encompass. Second, the statute gives no indication that the term "process" should mean anything different from the usual usage which the Supreme Court described. Finally, section 118(a)(D) of CAA speaks of sanctions in the context of enforcing process instead of substantive requirements. Since the same language and context appear in both CAA and CWA, the Supreme Court's reasoning and conclusion concerning punitive civil penalties should control in the present case.

B. *Legislative history does not clearly prove that Congress intended to waive sovereign immunity with respect to civil penalties.*

The legislative history on section 118 of CAA is ambiguous with regard to civil penalties and therefore, cannot be considered conclusive on the issue. The reports on section 118 indicate that the House of Representatives (House) did intend to waive immunity for all civil penalties. The Senate reports, however, are clear only with regard to coercive civil penalties.

One House Report indicates that the committee amending CAA intended to waive immunity for civil penalties. The committee proposal stated:

> The amendment is also intended to resolve any question about the sanctions to which noncomplying Federal agencies, facilities, officers, employees, or agents may be subject. The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources and for the owners and operators thereof. This means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), to civil or criminal penalties, and to delayed compliance penalties.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 200 (1977). The House made it clear that it intended to include both coercive and punitive civil penalties.

The Senate history, on the other hand, is only clear with respect to coercive civil penalties. The Senate report states:

> Section 118 is amended to specify that . . . a Federal facility is subject to any Federal, State, and local requirement, respecting the control and abatement of air pollution, both substantive and procedural, to the same extent as any person is subject to these requirements. This includes, but is not limited to, requirements to obtain operating and construction permits, reporting and monitoring requirements, *any provisions for injunctive relief and such sanctions imposed by a court to enforce such relief*, and the payment of reasonable service charges.

S. Rep. No. 127, 95th Congress, 1st Sess. 58 (1977) (emphasis added). This sentence demonstrates that the Senate only intended coercive penalties to be enforceable against federal facilities.

Congress did adopt the House version of the amendment, but the Conference Report is also ambiguous as to whether federal facilities are liable for punitive civil penalties. The Conference Report states:

> The Senate concurs in the House provision with the amendments . . . The conferees intend, by adopting the House amendment, to require compliance with all procedural and substantive requirements, to authorize States to sue Federal facilities in State courts, and to subject such facilities to State sanctions.

H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 137 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1517-1518.

Under the strict requirement established to find a waiver, this Court can only read this report to include the Senate's perception of civil penalties, namely those used to coerce the federal government into compliance. This Court is limited to this reading by the last two phrases of the report which "authorize States to sue Federal facilities in State courts, and to subject such facilities to State sanctions." *Id.* By using the word "such" to modify "facilities," those words can only refer to the federal facilities mentioned in the preceding clause, namely those sued in state court. Therefore, the conference report does not include all types of civil penalties. For instance, the civil penalty involved in the present case, a penalty assessed by the Administrator of a state program, would not be covered by the conference report because the state never sued the federal facility. The only type of civil penalty which would fit the description in the conference report is a penalty assessed in order to enforce some judicial process, such as an injunction, which would have resulted from the federal facility being sued by the state to comply with state requirements.

The legislative history of CAA is ambiguous with regards to punitive civil penalties. The only clear intent which can be derived from the history is that Congress wanted to subject federal facilities to coercive civil penalties. Anything beyond that is an inference and therefore does not meet the high standard necessary to find a waiver.

C. *Public policy dictates a finding that the United States did not waive sovereign immunity for civil penalties.*

This Court should also find that the United States did not waive sovereign immunity with respect to civil penalties for public policy reasons. First, subjecting federal facilities to civil penalties would limit valuable programs, some of which actually reduce air pollution. Second, the imposition of these fines could lead to unequal enforcement against the government.

1. The imposition of punitive fines would be counter-productive.

Any punitive fine would decrease the funding available for important government projects. Such a situation could actually frustrate the intent of CAA. The present case is a perfect example of this unacceptable result. One project at the CRACT facility researches methods to burn coal more cleanly. (T.R. 2.) The results of that research are then shared with the coal industry. (T.R. 2.) Any limiting of such research would be contrary to the intent of the CAA which is "1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population; 2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution . . . ." 42 U.S.C. § 7401(b)(1)-(2) (West 1993). Therefore, the assessment of punitive fines against the government could be counter-productive, as in this case, especially when the federal facility has already come into compliance with state requirements. The fines would do nothing to improve air quality and could limit important governmental projects.

2. Finding a waiver of sovereign immunity would lead to unequal assessment of civil penalties against the government.

States vary on the criteria which they use to determine the amount of a civil penalty. *See, e.g.*, N.Y. Envtl. Conserv. Law § 71-2115 (McKinney 1984 & Supp. 1994); Cal. Health &

Safety Code § 42403 (West 1986 & Supp. 1994). However, many state's criteria are consistent with the assessment criteria established in section 113(e)(1) of CAA. *See, e.g.*, Iowa Code § 455B.109 (1993). The relevant portion of section 113 reads:

> [T]he Administrator, or court . . . shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation . . . payment of the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1) (West 1993). Under these, or similar, criteria, the government would almost always be assessed penalties, and those penalties would often be as large as the law would allow. For instance, the government is one of the largest employers in the country and the economic impact of any penalty would appear less on the government than on any other business because of the size of the federal government's budget. Therefore, these criteria would allow the states to penalize the government more often than other businesses because of its ability to pay.

The Supreme Court has recognized the possibility of unequal administration of penalties against the government. In *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Supreme Court examined the question of whether Congress had provided for jury trials in cases against the United States under the Age Discrimination in Employment Act. The Supreme Court stated that "[i]t is not difficult to appreciate Congress' reluctance to provide for jury trials against the United States. . . . Congress expressed its concern that juries 'might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict.'" *Id.* at 161 n.8 (quoting H.R. Rep. No. 659, 83d Cong., 1st Sess. 3 (1953)). The same rationale applies in the present case. State administrators might be more willing to assess civil penalties against the government because the government will be able

to pay them. Therefore, this Court should follow the Supreme Court and prevent states from unequally assessing civil penalties by preserving the government's sovereign immunity with respect to purely punitive civil penalties.

3. The unavailability of punitive civil penalties will not harm the states' ability to enforce CAA's requirements.

Other enforcement provisions in the amended version of CAA are sufficient to ensure the compliance of federal facilities. First, the state can issue an administrative order to require a federal facility to comply. *See* 42 U.S.C. § 7604(a)(1)(B) (West 1993). Secondly, the states can sue the federal facility for injunctive or declaratory relief. 42 U.S.C. § 7604(a). Under section 304(a) of CAA, a state, since it falls within the definition of "person" in 42 U.S.C. § 7602(e) (West 1993), can file suit to have the federal court enforce any of the state's standards or an order issued by the state with respect to such standard or limitation. 42 U.S.C. § 7604(a). Finally, since 1977, the federal government must comply with all procedural requirements, such as permit requirements and recordkeeping. 42 U.S.C. § 7418(a). The Supreme Court decided that federal facilities did not have to obtain state operating permits in *Hancock v. Train*, 426 U.S. 167 (1976). Congress expressly overruled that decision by amending CAA in 1977 to require federal facilities to obtain permits before beginning operations. Therefore, the states still have procedural safeguards, such as permit requirements, which allow them to enforce their state regulations. Because of the procedural safeguards, availability of injunctive and declaratory relief, and other coercive penalties, limiting the availability of punitive penalties will not frustrate the state's efforts to enforce requirements against federal facilities.

D. *The incorporation of section 118 in the citizen suit provision limits the recovery of civil penalties under section 304 to those coercive in nature.*

The Supreme Court has stated that the adoption of an earlier statute by reference makes it as much a part of the latter as though it had been completely incorporated. *Engel v. Davenport*, 271 U.S. 33, 38 (1926). The citizen suit provision states that "for provisions requiring compliance by the United States . . . see section 7418 of this title." 42 U.S.C. § 7604(e) (West 1993). By referring to the federal facilities provision, the citizen suit provision incorporated all of that section, including the limitations on civil penalties, namely that they only apply to coercive civil penalties. *See Department of Energy*, 112 S. Ct. at 1642. Because of the reference to section 118 of CAA, Congress incorporated it into the citizen suit provision and thus limited civil penalties in that section to those coercive in nature also.

II. THIS COURT SHOULD DISMISS THE CLAIM BY SUNPEACE BECAUSE SUNPEACE LACKS STANDING, AND, ALTERNATIVELY, THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION.

Sunpeace cannot claim a substantive violation of NEPA because CRACT fully complied with NEPA's requirements. Sunpeace's claim amounts to the allegation that CRACT broke an implied promise to do something it was not required to do. Since CRACT gave full consideration to the environmental consequences of the ICTE project in the FONSI, Sunpeace cannot claim an injury within the zone of interests protected by NEPA. Sunpeace thus lacks standing to bring a claim under NEPA. Even if this Court finds that Sunpeace does have standing to pursue a claim that CRACT broke an implied promise to do something it was not required to do, neither NEPA nor the APA provided the District Court with subject matter jurisdiction to hear such a claim.

A. *Sunpeace lacks standing because it has not suffered an injury in fact that is within the zone of interests protected by NEPA.*

The Supreme Court has held that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. . . . The concept of standing is part of this limitation." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37 (1976). Standing is an integral element of the Constitution's Article III limitation because the limitation prohibits federal courts from deciding questions that do not affect the rights of the litigants before them. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). The courts are not free to decide upon "a difference or dispute of a hypothetical or abstract character . . . one that is academic or moot." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). This requirement "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis*, 494 U.S. at 477.

The essence of standing is whether a party has a relationship to the subject matter of a case sufficient under the adversarial system. Justice Scalia recently summed up the three essential elements to standing, as defined by the Supreme Court;

> First, the plaintiff must have suffered an "injury in fact"- an invasion of a *legally protected interest* which is (a) concrete and particularized, and (b) "actual or imminent, not conjectural or hypothetical." Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be "likely" as opposed to merely "speculative" that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2140-41 (1992) (citations omitted) (emphasis added).

When a plaintiff brings suit under a regulatory statute and seeks review according to the APA, the court's attention is once again directed by section 702, which demands that the

plaintiff be "aggrieved by agency action within the meaning of a relevant statute" 5 U.S.C. § 702 (West 1993). The relevant inquiry is whether the interest "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The zone of interests protected by NEPA is unique in that the statute mandates procedural rather than substantive action on the part of agencies. The only right conferred by NEPA is "the procedural right to have environmental impacts considered." *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 482 (D.C. Cir. 1990) (Ginsburg, Ruth B., J., concurring). Thus, it is the "creation of a risk that serious environmental impacts will be overlooked" that establishes an injury in fact under NEPA. *Id.* at 487.

CRACT considered the environmental consequences of continued ICTE operation by preparing and filing a complete EA and FONSI. (T.R. 4.) Sunpeace had the opportunity to challenge these documents, but it did not do so. These unchallenged documents stand as adequate and complete records of the consideration given to possible environmental impacts stemming from the operation of ICTE. Sunpeace cannot claim that there is a risk that environmental impacts will not be considered because neither the EA nor the FONSI has been challenged. Sunpeace's claimed injury does not fall within the zone of interest protected by NEPA.

B. *Sunpeace lacks standing because its interest in obtaining review of the voluntary EIS, while sincere, is not legal and cannot satisfy the Constitutional requirements of Article III.*

The fact that Sunpeace sincerely opposes the operation of ICTE does not suffice to give them standing, a vital element of Article III's "bedrock requirement" for cases and controversies. *Valley Forge Christian College v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The Supreme Court has held that a "mere interest in a prob-

lem, no matter how long-standing the interest and no matter how qualified the organization in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the APA." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *see also Valley Forge*, 454 U.S. at 486 ("standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy").

DOI does not dispute the District Court's finding that the members of Sunpeace have a legitimate interest in the environment, which they allege will be affected by ICTE. (T.R. 4.) However, that fact does not suffice to give them standing. Sunpeace must not only have a generally cognizable interest, but also an alleged injury of a kind protected by the statute:

> That [the] plaintiff's interests are cognizable generally under NEPA . . . does not compel the determination that it has sustained an injury in fact to maintain [an] action. [T]he harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates.

Chamber of Commerce of the United States v. United States Dep't of the Interior, 439 F. Supp. 762, 766 (D.D.C. 1977).

Sunpeace cannot claim that CRACT failed to take environmental factors into account because the adequacy of neither the EA nor FONSI is being challenged. Sunpeace may have a cognizable interest, but that does mean that they have an injury in fact sufficient to establish standing. Sunpeace does not have standing because its alleged injury does not fall within the zone of interests protected by NEPA.

The injury in fact requirement does more than just satisfy Article III. It serves to narrow the scope of court holdings to factual situations where litigants assert relevant injuries in fact. This allows a court to "decide the case with some confidence that its decision will not pave the way for lawsuits with some, but not all, of the facts of the case actually decided by the court." *Valley Forge*, 454 U.S. 472.

That a denial of standing in this case might limit the pool of possible litigants is not a relevant consideration. Such a view "would convert standing into a requirement that must be observed only when satisfied." *Id.* at 489.

Finally, the fact that Sunpeace cannot claim a valid injury in fact under NEPA implicates the doctrine of separation of powers. When a litigant is without standing, that person is in effect arguing for the public interest rather than her or himself.

> Whether the courts were to act on their own or at the invitation of Congress, in ignoring the concrete injury requirement . . . they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch . . . "The province of the court . . . is, solely, to decide on the rights of individuals." Vindicating the public interest . . . is the function of the Congress and the Chief Executive.

Lujan, 112 S. Ct. at 2163-64 (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803)). Thus, a court that allows a party without standing to challenge the action of an executive agency, encroaches upon the constitutionally protected domain of the Executive branch.

Sunpeace cannot claim an injury within the zone of interests protected by NEPA. Neither the sincerity of Sunpeace's belief in its position nor the possible effects of denying standing in this case can alter the inevitable conclusion that Sunpeace lacks standing. This Court's duty to the integrity of the judicial system as defined by Article III and indeed to the structure of our republican government mandates dismissal.

C. *The District Court lacked subject matter jurisdiction to hear Sunpeace's claim because CRACT's prior compliance with NEPA requirements precludes Sunpeace's access to NEPA's implied right of action.*

Even if this Court finds that Sunpeace does have standing, the District Court lacked subject matter jurisdiction to hear Sunpeace's claim. It is well-settled that, "under Art. III,

Congress alone has the responsibility for determining the jurisdiction of the lower federal courts." *Mountainbrook Homeowners Ass'n, Inc. v. Adams*, 492 F. Supp. 521, 527 (W.D. S.D. 1979). However,

> [NEPA] provides no private civil remedy. Notwithstanding the failure of the Congress to authorize either a public or private cause of action or to provide a private civil remedy federal courts all over the country have permitted the maintenance of court actions filed by private citizens and parties and have fashioned various remedies which have been enforced by the courts.

492 F. Supp. at 526.

In order to find such an implied right of action within a statute, a court must apply the prevailing standard set by the Supreme Court in *Cort v. Ash*:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. 66, 77 (1975) (citations omitted).

The Supreme Court subsequently held that "the ultimate issue is whether Congress intended to create a private right of action . . . but the four factors specified in *Cort* 'remain the criteria through which this intent is discerned.'" *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (quoting *Davis v. Passman*, 442 U.S. 228, 241 (1979)).

The first requirement of *Cort* has been summarized as follows: "the protection and benefit of the party seeking such

action must be the primary congressional goal of the statute." *Noe v. Metropolitan Atlanta RTA*, 644 F.2d 434, 437 (5th Cir. 1981). The primary goal of NEPA is to ensure that consideration of environmental consequences is part of federal decision making. *Id.* at 438. However, CRACT's FONSI stands as a record of the fact that the environmental consequences of ICTE were considered. Because it cannot claim that environmental impacts were not considered, Sunpeace cannot approach this Court as a party "for whose especial benefit the statute was enacted." Thus Sunpeace cannot satisfy the first requirement of *Cort*.

The second factor is whether there existed on the part of Congress, either explicitly or implicitly, an intent to create such a remedy. As stated above, the text of NEPA does not explicitly provide for a civil remedy of any type. *Mountainbrook*, 492 F. Supp. at 526. Courts have regularly found implied rights of action to exist under NEPA. *Id.* However, for the reasons stated above, Congress did not mean to imply a right of action when the interest claimed to be injured is not the consideration of the environment within the agency's decision-making process. This is clear not only in the opinions of the courts interpreting NEPA, *see Stryker's Bay Neighborhood Council, Inc. v. Karlin*, 444 U.S. 223, 228 (1980), but also in its legislative history. In a report on the proposed statute, the Senate Committee on Interior and Insular Affairs stated that NEPA "would provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment." S. Rep. No. 296, 91st Cong., 1st Sess. (1969).

Any civil remedy Congress intended is reserved for those situations where, as a result of a violation of NEPA, an agency does not give adequate consideration to the environmental consequences of its actions. CRACT's completed and unchallenged FONSI forecloses even the possibility that this occurred.

For the same reasons, the third prong is not satisfied in this instance. The underlying purpose of NEPA, to ensure that federal agencies give adequate consideration to the environmental consequences of their actions, will not be furthered

by a suit which does not have that as its goal. The fourth factor is not applicable since NEPA is a federal statute.

According to the Supreme Court, because the first two *Cort* prongs are not satisfied, it is unnecessary to even consider the third and fourth prongs. *California*, 451 U.S. at 297. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. Here, consideration of the first two *Cort* factors is dispositive." *Id.* The fact that the statute has already been procedurally complied with and that the substantive goals have been achieved foreclose the possibility that Congress intended an agency to be subject to such a suit.

D. *The District Court lacked subject matter jurisdiction to hear Sunpeace's claim because the APA does not provide an independent right of action.*

An implied right of action does not exist under NEPA for Sunpeace's claim. Sunpeace cannot rely on the APA for a grant of jurisdiction because it does not grant jurisdiction. The APA "simply provides a process by which agency actions can be reviewed and does not give a person the right to seek injunctive or declaratory relief for alleged violations of agency regulations or of the underlying statute." *Carson v. Alvord*, 487 F. Supp. 1049, 1052 (N.D. Ga. 1980).

The fact that the APA does not of itself provide a right of action is apparent within the text of the act itself; "A person suffering *legal* wrong because of agency action, or *adversely affected or aggrieved by agency action within the meaning of a relevant statute*, is entitled to judicial review thereof." 5 U.S.C. § 702 (emphasis added). Thus, in order to subject an agency action to APA review, a party must be able to demonstrate a legally cognizable injury as a result of agency action or a violation of the statute sued under. Sunpeace cannot meet this requirement and is left without a private right of action authorizing its claim. Therefore, the District Court lacked subject matter jurisdiction to hear Sunpeace's claim.

III. THE DISTRICT COURT ERRED BECAUSE CRACT'S VOLUNTARY EIS IS NOT SUBJECT TO JUDICIAL REVIEW SINCE IT WAS PREPARED AFTER CRACT HAD FULLY COMPLIED WITH THE REQUIREMENTS OF NEPA AND IT IS OUTSIDE THE SCOPE OF NEPA.

When the EA and FONSI that CRACT filed were not challenged within the specified time period, CRACT had fulfilled its duties under NEPA. CRACT subsequently produced a document on a purely voluntary basis which it called an EIS. The sole purpose of this voluntary document was to more thoroughly explain the results of the FONSI to the community of which CRACT is such an integral part. The only error CRACT may have committed was using the phrase "Environmental Impact Statement" as the title of the voluntary document. It was not meant to serve as a traditional EIS, and it was not meant to be subject to judicial review. Legislative intent and judicial interpretation of NEPA support the contention that such a document should not be subject to judicial review.

A. *CRACT fully complied with NEPA when it completed and filed both an Environmental Assessment and a Finding Of No Significant Impact.*

NEPA requires that federal agencies "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." 42 U.S.C. 4332(2) (West 1993). This statement is known as an Environmental Impact Statement (EIS). 40 C.F.R. 1502.3 (West 1993). When an agency is unsure as to whether an action will require an EIS, NEPA requires that it produce an Environmental Assessment (EA). 40 C.F.R. 1501.4(b) (West 1993). An EA is a "concise public document" that provides "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. 1508.9(a)(2) (West 1993). A Finding Of No Significant Impact (FONSI) explains why an action "will

not have a significant impact on the environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. 1508.13 (West 1993).

In the case at bar, CRACT fully complied with the above procedures. CRACT prepared both an EA and a FONSI and then made both available to the public. (T.R. 4.) Sunpeace concedes that it did not make a timely challenge to the FONSI. (T.R. 5.) Once the required period for challenging the FONSI passed, CRACT's responsibilities under NEPA were fulfilled.

B. *Any action taken by CRACT beyond the scope of NEPA is not reviewable by this Court.*

CRACT complied with NEPA when it filed the unchallenged EA and FONSI, so its obligations under NEPA are fulfilled. This Court cannot require CRACT to do more than NEPA itself requires.

1. CRACT fulfilled its duty to comply with NEPA's procedural requirements.

The Supreme Court has held that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences." *Stryker's Bay*, at 227. NEPA thus provides "procedural rather than substantive protection" and dictates only how an agency must act in considering an action, but not in deciding upon one. *Noe*, 644 F.2d at 438. "Although the procedural requirements of NEPA must be satisfied, the courts will require only the 'statutory minima,' refusing to substitute their judgment for the judgment of the administrative agencies charged with satisfying the requirements of NEPA." *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 436 (5th Cir. 1981).

CRACT had a duty under NEPA to consider the environmental consequences of the operation of ICTE. It did so in preparing the EA, which led CRACT to the conclusion that any operation of ICTE that complied with NUCAA standards would not have a significant impact. (T.R. 4.) Thus CRACT

fully complied with the duties imposed by NEPA. Any further procedural steps by CRACT in relation to this same proposed action are not subject to judicial review.

2. This Court cannot require more from CRACT than that which is required by NEPA itself.

The primary purpose of NEPA is the "full disclosure of the environmental consequences of federal governmental activities." *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972). Thus, it makes sense that once the "statutory minima" is fulfilled, "NEPA requires only that the agency take a hard look with good faith objectivity at the environmental consequences of a particular action." *Piedmont Heights*, 637 F.2d at 436.

The fact that NEPA requires only the consideration of environmental consequences is made clear by the refusal of courts to allow actions under NEPA to enforce substantive compliance with EIS's. *Noe*, 644 F.2d at 435. "Plaintiffs do not have a cause of action, either express or implied, under the provisions of The National Environmental Policy Act to compel strict compliance with the Environmental Impact Statement." *Mountainbrook*, 492 F. Supp. at 530.

If NEPA cannot even support a claim to enforce substantive compliance with an EIS, it is certainly unable to support a claim alleging inadequate decision-making procedures outside the scope of NEPA. Once CRACT submitted its FONSI, the only recourse available within a court was the assessment of the EA and FONSI to see if they were the result of a "hard look" at the environmental consequences of such an action. However, as Sunpeace concedes, there was no challenge made to the FONSI within the statutory period for such a challenge. (T.R. 5.) Thus, the FONSI stands as a record of adequate consideration of environmental consequences by CRACT, and "NEPA requires no more." *Stryker's Bay*, 444 U.S. at 228.

C. *CRACT complied with NEPA in good faith, and it would be unreasonable to subject the voluntary document to judicial review.*

1. CRACT complied with NEPA in good faith.

Although CRACT had already satisfied its statutory obligations under NEPA, it decided to go further toward making public the information contained within the FONSI. (T.R. 4.) CRACT realized that there was some concern within the community despite the fact that future operation of ICTE would have no significant environmental impacts. (T.R. 4.) In the spirit of NEPA, CRACT produced a voluntary EIS to insure that all relevant information would be "available to public officials and citizens before decisions [were] made and actions [were] taken." 40 C.F.R. 1500.1(b) (West 1993).

However, the voluntary document was not meant to serve as a reconsideration of the FONSI. Such a procedure would be redundant. Rather, the document was prepared outside of the scope of NEPA and was meant simply to provide a further illustration of the two alternatives available to CRACT, neither of which would impact the environment.

The voluntary document was not an EIS, nor was it a Supplemental EIS. The only error CRACT may have committed was in choosing to term this document an "Environmental Impact Statement." Certainly, CRACT had no intent to commit a fraud of any kind, nor did CRACT anticipate that any confusion would arise. To the contrary, the document was prepared in good faith as an attempt to provide the community more information regarding the conclusions reached in preparing the FONSI. At the very least, it is understandable that CRACT would call the voluntary document an EIS, since it did contain the assessment of the environmental consequences of available alternatives. (T.R. 4.)

Despite the apparent confusion caused by the voluntary document's title, its nature was made clear when, in response to Sunpeace's complaint that the voluntary document was lacking a no action alternative, CRACT responded that such a concern was "outside the scope of *this* EIS and beyond the requirements of *this* EIS." (T.R. 4. (emphasis added)) As a

federal agency, the Department of the Interior is aware that CEQ regulations require consideration of the no action alternative within an EIS. 40 C.F.R. 1502.14(d) (West 1993). The alternative was not considered, because this was not a formal EIS.

2. The legislative intent behind NEPA, evident in CEQ regulations and judicial interpretations, support the contention that procedures beyond the scope of NEPA should not be subject to judicial review.

Requiring review of the voluntary document after CRACT has already fully complied with NEPA would do nothing to further NEPA's purpose of consideration of environmental consequences. Instead, it would encourage waste, delay, and inefficiency. Such a result is clearly contrary to the mandate of NEPA, which "requires only that, prior to beginning construction of a project likely to affect the environment, an EIS be produced so that the individuals responsible for making the decision . . . do so on a well-informed basis." *Noe*, 644 F.2d at 438.

NEPA's focus on lack of waste and efficiency is evident in many sources. The Executive Order which provided for establishment of the Council on Environmental Quality was amended in 1978 to insure that regulations "reduce paperwork and the accumulation of extraneous background data, in order to focus on the real environmental issues and alternatives." Exec. Order No. 11,514, 35 Fed. Reg. 4,247 (March 7, 1970), *as amended by* Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 25, 1977).

The actual CEQ regulations make clear that "it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action." 40 C.F.R. 1500.3 (West 1993). The regulations further counsel against "amassing needless detail" and state that NEPA's purpose is not "to generate paperwork—even excellent paperwork—but to foster excellent action." 40 C.F.R. 1500.1(b-c) (West 1993). Indeed, the Council decided to devote entire sections to "Reducing delay," 40 C.F.R. 1500.5

(West 1993), and "Reducing paperwork," 40 C.F.R. 1500.4 (West 1993).

Categorical exclusions are another telling example of how waste and delay is discouraged. CEQ regulations allow agencies to exempt from NEPA requirements certain actions which have been found to have no significant impact. 40 C.F.R. 1508.4 (West 1993). Analogous to the CEQ-created categorical exclusion exception is the judicially-created functional equivalent exception. As an example of the latter, it has been held that "section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement," thus eliminating the need for production of an independent EIS. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973).

Both of these exceptions to NEPA reflect a desire that form not be allowed to devour substance, that waste and delay not be allowed to exist by charading as actual consideration of environmental consequences. CRACT has complied with NEPA, this Court should require no more.

Holding this voluntary document to judicial review would serve no reasonable purpose. The FONSI prepared by CRACT already considered all of the potential environmental consequences and found that there would be none. (T.R. 4.) The public (including Sunpeace) had an adequate opportunity to submit comments and raise challenges to the FONSI and it failed to do so. If this Court upholds the injunction and allows review of the voluntary EIS, it will necessarily cause delays in the operation of ICTE. Any such delay will result in tremendous financial losses, not just to the federal government, but to the economy of Cathertown as well. To require compliance with NEPA following the completion of a valid FONSI would be to mandate an exercise in waste and futility.

In preparing the voluntary document, CRACT simply took to heart the NEPA directives that the purposes of the statute be furthered by "all practicable means," 42 U.S.C. 4331(b) (West 1993), and "to the fullest extent possible." 42 U.S.C. 4332 (West 1993). It should not be penalized for doing so.

CONCLUSION

For the above reasons, DOI respectfully requests that this Court reverse the judgment of the District Court and hold CRACT to be immune from the civil penalties sought by New Union. Additionally, DOI respectfully requests that this Court dismiss Sunpeace's claim for lack of standing, or, alternatively, that this Court remand to the District Court with instructions to dismiss for lack of subject matter jurisdiction.

Dated: November 30, 1994
Respectfully submitted,

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APPENDIX A

42 U.S.C. § 7418(a). GENERAL COMPLIANCE.

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirements whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.