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CLF v. Andrus and Oil Drilling on George's Bank: the First Circuit Attempts to Balance Conflicting Interests

R Alan Fryer

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**CLF V. ANDRUS AND OIL DRILLING ON GEORGES
BANK: THE FIRST CIRCUIT ATTEMPTS TO
BALANCE CONFLICTING INTERESTS**

*R. Alan Fryer**

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I. INTRODUCTION

On June 3, 1979, a Mexican exploratory well in the Bay of Campeche blew out, discharging crude oil into the Gulf of Mexico for months and creating the largest oil spill in history.¹ Although the well was situated five hundred miles from the Texas coast, three million gallons of oil are estimated to have hit Texas beaches, while unknown amounts have sunk to the ocean bottom.² The regional fishing industry and tourist trade have suffered substantial economic losses, cleanup efforts have been costly, and lawsuits have been filed seeking millions of dollars in damages.³ Furthermore, while the extent of the ecological damage has not been determined, long-term adverse effects are likely.⁴ Additional large oil slicks are expected to hit the Texas coast in the spring of 1980.⁵

The oil industry and the federal government claim that an incident like Campeche is highly unlikely in American offshore drilling operations.⁶ Nevertheless, accounts show that it is only the

¹ Christian Science Monitor, Sep. 27, 1979, at 3, col. 2. A blowout occurs when a sudden surge of oil or gas pressure up the drill hole causes a loss of control over the well.

² *Id.*

³ Comment, *Voyage Into Uncertainty: Assigning Liability for the Bay of Campeche Oil Spill*, 9 ENVIR. L. REP. (ELI) 10218, 10218 (1979).

⁴ Christian Science Monitor, Sep. 27, 1979, at 3, col. 2.

⁵ 10 ENVIR. REP. (BNA) 1795 (1980). The Campeche blowout was finally capped on March 24, 1980, almost ten months after it had begun. Boston Globe, Mar. 25, 1980, at 3, col. 5. The total amount of oil spilled was at least twice as much as in the previous largest spill, from the grounding of the *Amoco Cadiz* in 1978. *Id.*

⁶ Brief for Intervenor-Appellees Atlantic Richfield, *et al.* at 56-57, *Conservation Law Foundation of New England, Inc. v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049

latest of several similar accidents over the last decade. For example, in April 1977, the Ekofisk Bravo drilling rig in the North Sea blew out during routine maintenance, raging out of control for eight days before it was capped⁷ on the fifth try in an area known for its difficult weather conditions. In 1969, a blowout in the Santa Barbara channel off the California coast caused significant damage to the coastline and to wildlife, thus bringing the danger of blowouts to national attention.⁸ In addition, there has been a long history of spills from oil tankers, the most spectacular of which, from the *Amoco Cadiz* in March 1978, devastated the shoreline of Brittany, France.⁹ These events demonstrate that the hazards of oil extraction and transportation are not of recent origin. Moreover, expanded exploration efforts in the waters of the Outer Continental Shelf,¹⁰ resulting from the need to tap new energy sources, have increased the possibility of serious accidents.¹¹

In reaction to the danger of oil spills, and under pressure from environmental groups, Congress has enacted measures to provide safeguards in the offshore drilling process, notably the Outer Continental Shelf Lands Act Amendments of 1978.¹² The nation's shortage of reliable energy sources, however, has spawned efforts

(1st Cir. Dec. 17, 1979) [hereinafter cited as *Intervenor Brief I*]; BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, FINAL SUPPLEMENT TO ENVIRONMENTAL STATEMENT, PROPOSED 1979 OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE OFFSHORE THE NORTH-ATLANTIC STATES OCS SALE No. 42, at 296-97 (1979) [hereinafter cited as *FSES*]. See BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT, PROPOSED 1977 OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE OFFSHORE THE NORTH ATLANTIC STATES OCS SALE No. 42, at 6 (1977) [hereinafter cited as *FES*].

⁷ New York Times, May 1, 1977, at 1, col. 1.

⁸ New York Times, Feb. 9, 1969, at 1, col. 2, 3.

⁹ New York Times, Mar. 26, 1978, § IV, at 1, col. 2.

¹⁰ The Outer Continental Shelf is the gently sloping plain underlying the seas adjacent to the coastal United States, extending from the coastline seaward to the point at which the ocean bottom drops off sharply. W. RODGERS, ENVIRONMENTAL LAW 513 (1977).

¹¹ The danger of serious accidents has increased not only because exploration efforts have increased in number but also because activities have been extended from the Gulf of Mexico, where the weather and other environmental conditions are relatively moderate, to more hazardous environments such as the North Atlantic and the Beaufort Sea. According to the Department of the Interior, the most severe wind conditions in the North Atlantic are comparable to those in the Beaufort Sea and the North Sea, *FES*, *supra* note 6, at 761, and extreme storm conditions may result in more severe waves in the North Atlantic than in the North Sea or the Gulf of Alaska, *id.* at 763. In light of the recent accident in the North Sea, however, in which more than a hundred workers were killed when a "hotel" platform collapsed and capsized after being hit by a huge wave during a storm, Boston Globe, Mar. 28, 1980, at 1, col. 2, Interior's intent to rely on existing technology provides little assurance that a serious accident will not likely occur.

¹² Pub. L. No. 95-372, 92 Stat. 629 (1978) (amending 43 U.S.C. §§ 1331-1343 (1976)).

to relax these environmental safeguards even before they have been fully implemented. The resulting tension between the conflicting demands for development and for protection has led, in turn, to increased litigation in order to resolve the disputes between the competing interests. That litigation has focused primarily on the sale of oil and gas leases as the significant point at which the commitment to drilling in a particular region is made.¹³

The latest major battle in this continuing series of legal confrontations over lease sales, *Conservation Law Foundation of New England, Inc. v. Andrus*,¹⁴ involves the sale of drilling rights for tracts¹⁵ lying within Georges Bank, an area off the Massachusetts coast which is one of the most productive fishing grounds in the world as well as an unusual and fragile ecological habitat.¹⁶ In an attempt to prevent the lease sale, the plaintiffs, the Conservation Law Foundation of New England, Inc. (CLF)¹⁷ and the Com-

¹³ See text at notes 35-38, *infra*. Oil and gas leases are sold by the Interior Secretary to the highest qualified bidder. A lease entitles the lessee to explore, develop, and produce the oil and gas contained within the lease area. The lease is valid for an initial period of five to ten years and is extended for as long as the lease area continues to produce oil and gas in paying quantities. Outer Continental Shelf Land Act § 8, 43 U.S.C.A. § 1337 (West Supp. 1979).

¹⁴ The case involves companion suits tried jointly at all stages of the proceedings. The case name varies among the decisions because different courts have docketed them in different orders. The Conservation Law Foundation of New England, Inc. is commonly known in the region as CLF. Throughout the article the case will be referred to as CLF v. Andrus. The history of the case is somewhat complex: *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138 (D. Mass. Jan. 28, 1978) (preliminary injunction granted), *stay pending appeal denied*, 11 *Envir. Rep. Cas.* 1147 (1st Cir. Jan. 30, 1978), *injunction dissolved*, 594 *F.2d* 872 (1st Cir. 1979), *preliminary injunction denied*, 481 *F. Supp.* 685 (D. Mass. Nov. 5, 1979), *preliminary injunction pending appeal denied sub nom.* CLF v. Andrus, 617 *F.2d* 296 (1st Cir. Nov. 6, 1979), *aff'd*, 14 *ENVIR. REP.* (*Envir. Rep. Cas.*) (BNA) 1229 (1st Cir. Dec. 17, 1979), *modified*, 14 *ENVIR. REP.* (*Envir. Rep. Cas.*) (BNA) (1st Cir. Feb. 22, 1980).

After the Court of Appeals for the First Circuit denied plaintiffs' motion for a preliminary injunction pending appeal on November 6, 1979, Supreme Court Justice William Brennan, acting as Circuit Justice, stayed the court's decision later that day. *Boston Globe*, Nov. 7, 1979, at 1, col. 1. On November 9, the Supreme Court vacated the stay. *Massachusetts v. Andrus*, 100 *S.Ct.* 417 (1979). After the court of appeals upheld the district court's decision on December 17, 1979, Justice Brennan declined to stay the decision. *Boston Globe*, Dec. 19, 1979, at 1, col. 5.

¹⁵ Each area designated for a lease sale is divided into tracts of approximately nine square miles each. FES, *supra* note 6, at 1, n.2. Bids to acquire leases conveying drilling rights are submitted for individual tracts. 43 U.S.C.A. § 1337(b)(1) (West Supp. 1979).

¹⁶ See *Christian Science Monitor*, Nov. 6, 1979, at 13, col. 1.

¹⁷ The Conservation Law Foundation of New England, Inc. (CLF) is a regional non-profit public-interest environmental law organization, providing a wide range of legal services to private citizens, governmental agencies, environmental organizations, and mem-

monwealth of Massachusetts,¹⁸ argued that the responsible federal agencies had failed to meet both their procedural and substantive obligations under several federal statutes, including the Outer Continental Shelf Lands Act,¹⁹ the Endangered Species Act,²⁰ and the National Environmental Policy Act.²¹ After extensive administrative maneuvering and several court decisions, the defendants—the Secretary of the Interior, the Secretary of Commerce, and the Administrator of the National Oceanic and Atmospheric Administration, joined by several companies in the oil and gas industry²²—finally prevailed and the Secretary of Interior held the lease sale.²³

While the Georges Bank controversy remains open, with further litigation possible, the litigation to date, involving requests for preliminary injunctive relief, raises doubts concerning the effectiveness of federal environmental law in providing for the consideration of environmental values during the development of Outer Continental Shelf oil and gas resources. This article will explore some of the issues involved in the case, focusing especially on the requirements of the National Environmental Policy Act for the preparation of an environmental impact statement for the

bers of the legal community. CLF concentrates on issues of primarily regional importance in the areas of land use, water resources, marine resources and energy.

¹⁸ Attorney General Francis X. Bellotti filed a separate suit on behalf of the Commonwealth of Massachusetts. Both suits have been tried jointly at all stages of the proceedings. The State of Maine later joined the case as an intervenor-plaintiff. State of Maine's Motion to Intervene as Plaintiff, allowed Oct. 10, 1979.

¹⁹ 43 U.S.C.A. §§ 1331-1356, 1801-1866 (West 1964 & Supp. 1979).

²⁰ 16 U.S.C. §§ 1531-1543 (1976 & Supp. II 1978) (amended 1979). The 1979 amendments were enacted after the latest decision in the case. See text and notes at notes 406-09, *infra*.

²¹ 42 U.S.C. §§ 4321-4361 (1976).

²² The original defendants were Cecil Andrus, Secretary of the U.S. Department of the Interior, and Juanita Kreps, Secretary of the U.S. Department of Commerce. Richard Frank, Administrator of the National Oceanic and Atmospheric Administration (NOAA) (a branch of Commerce) was later added as a co-defendant, since NOAA exercises Commerce's authority to manage the marine sanctuary program, under which Georges Bank was nominated for designation as a sanctuary. See text at notes 91-95, *infra*. Juanita Kreps has since resigned from her position and has been succeeded by Philip Klutznick.

The following groups have entered the case as intervenor-defendants: Atlantic Richfield Co., Chevron USA, Inc., Cities Service Co., Continental Oil Co., Exxon Corp., Gulf Oil Corp., Mobil Oil Corp., Murphy Oil Corp., Shell Oil Co., Transco Companies, Inc., and ten oil drilling service companies. Atlantic Richfield, *et al.*'s Motion to Intervene as Defendants Pursuant to Rules 24(a) and 24(b), allowed Jan. 25, 1978. The State of Rhode Island has also intervened as a defendant. State of Rhode Island's Motion to Intervene as Defendant, allowed Oct. 10, 1979.

²³ Boston Globe, Dec. 19, 1979, at 1, col. 5.

lease sale, the limits of the protection provided by the Endangered Species Act, and the extent of the Interior Secretary's duty to protect the Georges Bank fisheries while promoting oil and gas exploration, as well as the difficulties in seeking a preliminary injunction when challenging offshore drilling activities. Because the legal issues rest on a complicated historical and factual foundation, the background of the case will first be examined.

II. THE SETTING OF CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC. V. ANDRUS

A. *Lease Sales Conducted Under the Outer Continental Shelf Lands Act*

Originally, lease sales²⁴ were held and subsequent drilling occurred primarily in the Gulf of Mexico and in limited areas off the coast of California.²⁵ In 1974, however, President Nixon directed the Secretary of the Interior (the Secretary) to accelerate the leasing program in order to reduce the country's dependence on foreign oil.²⁶ In response, the Secretary scheduled lease sales in several previously undeveloped, or "frontier," areas such as the Gulf of Alaska, the Baltimore Canyon off the New Jersey coast, and Georges Bank²⁷—areas where no exploration had previously been conducted and where, consequently, potential reserves are largely unproven but considered promising because of the presence of certain geological formations normally associated with the existence of extensive petroleum deposits.²⁸

The Secretary's authority to conduct lease sales arises under the Outer Continental Shelf Lands Act²⁹ (the OCSLA), enacted in 1953.³⁰ Section 8 of the OCSLA permits the Secretary to lease tracts on the Outer Continental Shelf³¹ (OCS) that he has desig-

²⁴ See note 13, *supra*.

²⁵ H.R. REP. NO. 590, 95th Cong., 2d Sess. 65 [hereinafter cited as 1978 H.R. REP.], reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1450, 1472 [hereinafter cited as 1978 CONG. & AD. NEWS].

²⁶ 10 WEEKLY COMP. OF PRES. DOC. 72, 83-84 (Jan. 28, 1974).

²⁷ See 1978 H.R. REP., *supra* note 25, at 65, 77, 1978 CONG. & AD. NEWS at 1472, 1484.

²⁸ Boston Globe, Dec. 16, 1979, at 29, col. 2.

²⁹ 43 U.S.C. §§ 1331-1343 (1976) (amended 1978).

³⁰ Pub. L. No. 83-212, 67 Stat. 462 (codified at 43 U.S.C. §§ 1331-1343 (1976) (amended 1978)).

³¹ The OCSLA defines the term "outer Continental Shelf" to mean "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United

nated for oil exploration.³² The statute originally contained detailed provisions for the regulation of OCS drilling activity³³ but expressed little concern for the environmental effects of such activity until amended in 1978.³⁴

Legal challenges have been mounted against several individual lease sales as well as against the leasing program itself. In most cases, the plaintiffs have alleged that the Department of the Interior failed to satisfy the environmental impact statement (EIS) requirement of the National Environmental Policy Act (NEPA).³⁵ In one case, a citizens' group unsuccessfully challenged the adequacy of the programmatic EIS issued for the decision to accelerate the OCS leasing program.³⁶ Other cases have unsuccessfully challenged the EISs prepared for individual lease sales.³⁷ Plaintiffs have had mixed success using other statutes to challenge lease sales in the last few years.³⁸

States and are subject to its jurisdiction and control." 43 U.S.C.A. § 1331(a) (West Supp. 1979). See note 10, *supra*.

³² 43 U.S.C.A. § 1337 (West Supp. 1979).

³³ See, e.g., 43 U.S.C. §§ 1335, 1337 (1976).

³⁴ Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (amending 43 U.S.C. §§ 1331-1343 (1976)).

³⁵ 42 U.S.C. § 4332(2)(C) (1976).

³⁶ *California ex rel. Younger v. Morton*, 404 F. Supp. 26 (C.D. Cal. 1975). A programmatic EIS is prepared when a long-range project will be divided into segments. The programmatic EIS is prepared at the beginning of the project to consider the total environmental impact of the project. Shorter term EISs will then be prepared for each segment of the project, focusing on the environmental impacts of that particular segment. See W. RODGERS, ENVIRONMENTAL LAW 785-86 (1977). For example, the Department of the Interior prepared a programmatic EIS for the entire accelerated leasing program, and has subsequently prepared an EIS for each lease sale conducted under the leasing program. See 40 C.F.R. § 1502.4(b) (1979).

³⁷ In *Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir. 1978), the court found the EIS prepared for Lease Sale No. 39 in the Gulf of Alaska inadequate for its failure to consider alternative methods of conducting the lease sale, but refused to invalidate the lease sale because alternatives could still be analyzed and implemented before serious harm would occur. *Id.* at 485-86. In *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), the court of appeals permitted Lease Sale No. 40 in the Baltimore Canyon to proceed after the district court had twice blocked the sale for the failure of the EIS to consider adequately the use of pipelines as an alternative to tankers in transporting oil to shore.

³⁸ In *North Slope Borough v. Andrus*, 486 F. Supp. 326 (D.D.C. Dec. 7, 1979), the district court initially refused to enjoin Lease Sale No. 49 in the Beaufort Sea even though the plaintiffs had shown that the lease sale would likely jeopardize the endangered bowhead whale (*Balaena mysticetus*) and thereby violate the Endangered Species Act. Ultimately, however, the court granted plaintiffs' motion for summary judgment and issued a permanent injunction against further activity until an adequate biological opinion had been issued. *North Slope Borough v. Andrus*, 486 F. Supp. 332, 363-64 (D.D.C. Jan. 22, 1980), *clarified*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1001 (D.D.C. Feb. 1, 1980). The

B. Lease Sale No. 42

Georges Bank is a shallow area on the OCS lying between fifty and two hundred miles offshore from Cape Cod at the convergence of two major ocean currents, the Labrador Current and the Gulf Stream.³⁹ These currents create a circular water flow or gyre over the Bank, which combines with constant turbulence to create an "upwelling" of nutrients that supports one of the most varied and productive fishing areas in the world.⁴⁰ Stocks of several species of fishes, however, are stressed from overfishing,⁴¹ and many endangered species are found on Georges Bank, including six species of whales⁴² and three species of turtles.⁴³ In addition, the geological characteristics of Georges Bank suggest that the area is a likely source of oil and gas, although the potential reserves are estimated to be comparatively small.⁴⁴

While offshore oil and gas exploration poses an obvious threat to the marine environment,⁴⁵ the proposed exploration of Georges Bank is especially hazardous because of the threat posed by oil

outcome was different in *CLF v. Andrus*, where Interior Secretary Cecil Andrus finally conducted Lease Sale No. 42 for Georges Bank on December 18, 1979, after a delay of almost two years due to legal challenges based on alleged violations of the Endangered Species Act, the OCSLA, and NEPA. See note 14, *supra*.

³⁹ Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, Georges Bank Marine Sanctuary Issue Paper at 11 (July 27, 1979) [hereinafter cited as Sanctuary Issue Paper], reprinted in FSES, *supra* note 6, at 491, 502.

⁴⁰ *Id.*

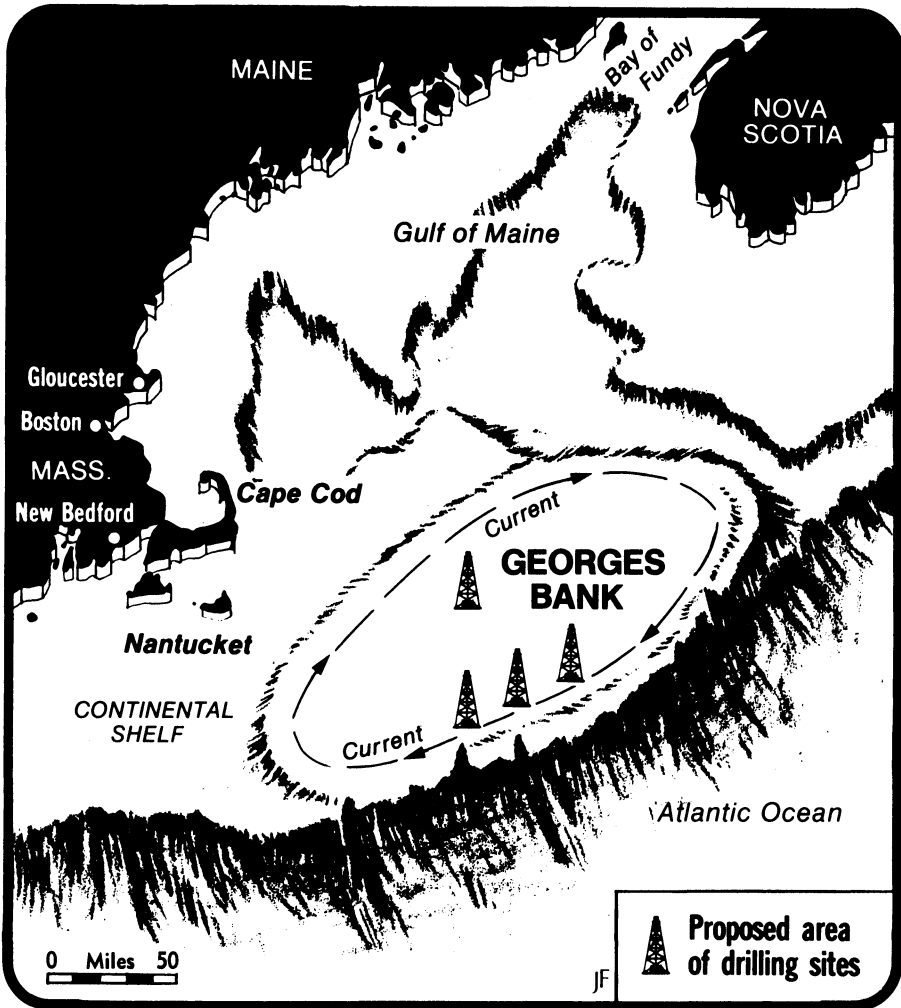
⁴¹ *Id.* at 39, FSES at 530.

⁴² FES, *supra* note 6, at 389.

⁴³ *Id.* at 397.

⁴⁴ The most recent estimate of recoverable resources is 123 million barrels of oil and 0.87 trillion cubic feet of gas. FSES, *supra* note 6, at 4. The oil estimate is equivalent to a six- to eight-day supply for the United States at current consumption rates, and the gas estimate is equal to approximately a two-week supply. Boston Globe, Dec. 19, 1979, at 1, col. 5.

⁴⁵ In the litigation spawned by the Campeche blowout, the U.S. Department of Justice has filed suit against SEDCO, Inc., the owner of the drilling rig used at Campeche and an intervenor-defendant in *CLF v. Andrus*. In its complaint the Justice Department has characterized offshore exploration operations as "ultrahazardous." Claim of the United States at 4, In the Matter of the Complaint of SEDCO, Inc., as Owner of the Mobile Drilling Unit SEDCO 135, Its Engines, Tackle, Apparel, Etc., in a Cause of Exoneration From or Limitation of Liability, No. H-79-1880 (S.D. Tex. filed Oct. 23, 1979). At least one of the attorneys representing the Justice Department in the SEDCO litigation was active in the defense of the federal defendants in *CLF v. Andrus*.



Joan Forbes in The Christian Science Monitor © 1979 TCSPS

drilling activities to the existing fishing industry.⁴⁶ A major oil spill could destroy a generation of fish eggs or larvae for several species of fishes,⁴⁷ and as a result not only destroy the short-term commercial value of those species but also significantly impair the future spawning potential of those species for ten to twenty years.⁴⁸ Even the Department of the Interior predicts that at least one major oil spill is likely to occur during the development phase of activities, and another to occur during the transportation of oil.⁴⁹ Yet the strong winds and high waves resulting from the frequently severe weather conditions in this area have been estimated to make oil spill cleanup efforts impossible at least 50 percent of the time.⁵⁰ Thus the capabilities of the spill containment equipment on which the Interior Department relies in its assumption that adequate safety precautions are available⁵¹ may not be sufficient to prevent significant damage. Compounding the possible harm, the rotary current that prevails over the Bank for much of the year could keep a spill, or the chronic seepage that occurs during normal offshore operations, enclosed on the Bank, thus polluting the area for years.⁵² In addition, although the Georges Bank area has been studied extensively, scientists still possess only a rudimentary understanding of the complex ecological interactions occurring there, and many questions concerning the potential long-term impact of oil pollution on the area remain unanswered.⁵³

Despite the environmental drawbacks of oil exploration on Georges Bank, in 1976 the Department of the Interior designated 206 tracts in the area for potential sale of exploration rights.⁵⁴ A long sequence of administrative actions and judicial decisions fol-

⁴⁶ In 1978, Georges Bank yielded a catch worth approximately \$168 million, about half of which was caught by U.S. fishermen. *Christian Science Monitor*, Nov. 6, 1979, at 12, col. 1. The total economic impact of the catch is estimated at \$712 million, obtained by using a multiplication factor of 4.24. *See FES, supra* note 6, at 871.

⁴⁷ Sanctuary Issue Paper, *supra* note 39, at 39, FSES at 530.

⁴⁸ *Id.*

⁴⁹ FES, *supra* note 6, at 6; *Massachusetts v. Andrus*, 594 F.2d 872, 876 (1st Cir. 1979).

⁵⁰ *Christian Science Monitor*, Nov. 6, 1979, at 13, col. 1. *See also* FSES, *supra* note 6, at 278-80. "Oil spill containment on the open sea then is severely limited. Any improvements in the near future will only be refinements of already existing techniques; some, as mentioned above, are already approaching their upper limits of effectiveness." *Id.* at 279.

⁵¹ *See* FSES, *supra* note 6, at 278-80; *Boston Globe*, Dec. 6, 1979, at 23, col. 5.

⁵² *Christian Science Monitor*, Nov. 6, 1979, at 13, col. 1.

⁵³ *See* Sanctuary Issue Paper, *supra* note 39, at 38, FSES at 529.

⁵⁴ *Massachusetts v. Andrus*, 594 F.2d 872, 874 (1st Cir. 1979).

lowed, bringing the case to its present form. The sequence is significant because it shows the determination of Interior Secretary Cecil Andrus to conduct the lease sale expeditiously, the efforts of the plaintiffs to ensure adequate protection for the environment and the fishing industry, and the tradeoffs made by different federal agencies in order to overcome the judicially imposed obstacles to the lease sale.

After designating tracts for potential sale, the Department of the Interior published a draft environmental impact statement (EIS)⁵⁵ for the sale in order to comply with the requirements of the National Environmental Policy Act,⁵⁶ (NEPA). The draft EIS received critical comments from several parties, including the National Oceanic and Atmospheric Administration (NOAA), the Environmental Protection Agency, and the Commonwealth of Massachusetts.⁵⁷ After public hearings, Interior issued a final EIS in August, 1977.⁵⁸ Secretary Andrus then published a notice of sale⁵⁹ announcing his decision to conduct the lease sale on January 31, 1978. At the same time, though, he took several steps to provide greater environmental safeguards for offshore exploration. These steps included the promulgation of regulations requiring the preparation of a development-phase EIS⁶⁰ and providing for the suspension of exploratory operations upon discovery of unforeseen environmental risks,⁶¹ as well as the addition of stipulations to the leases requiring additional protective measures.⁶² Doubting the capacity of the Secretary's safeguards to provide adequate environmental protection for Georges Bank, both the Conservation Law Foundation (CLF) and the Commonwealth of Massachusetts filed suit in the Federal District Court for the District of Massachusetts to enjoin the lease sale,⁶³ thus initiating the first of what may be viewed as two rounds of litigation.

In seeking the Round One injunction, the plaintiffs raised several claims regarding the obligations of the Secretary of the Inte-

⁵⁵ *Id.*

⁵⁶ 42 U.S.C. § 4332 (1976).

⁵⁷ *Massachusetts v. Andrus*, 594 F.2d 872, 874-75 (1st Cir. 1979).

⁵⁸ *Id.* at 875.

⁵⁹ 42 Fed. Reg. 65,285 (1977).

⁶⁰ 30 C.F.R. § 250.34-3(b) (1979).

⁶¹ *Id.* § 250.12(c)(1).

⁶² *Massachusetts v. Andrus*, 594 F.2d 872, 879 (1st cir. 1979). Stipulations are regulations imposed upon a specific lease by incorporation into that lease.

⁶³ *Id.* at 880.

rior under NEPA and his duty to protect the fisheries within his jurisdiction. The plaintiffs argued that, although the primary purpose of the OCSLA is to authorize the exploration and development of the mineral resources of the OCS, nevertheless the Secretary of the Interior has a duty under the statute to protect the Georges Bank fisheries because of a provision in the statute⁶⁴ authorizing the promulgation of rules and regulations necessary to conserve the natural resources of the OCS.⁶⁵ In addition, the plaintiffs contended that other statutes and the common law public trust doctrine indirectly reinforce that duty.⁶⁶ The plaintiffs alleged that Secretary Andrus had breached his duty by failing to provide adequate safeguards for the Georges Bank environment, such as liability funds and tanker standards,⁶⁷ by refusing to delay the lease sale pending congressional action on proposed amendments to the OCSLA that would add significant safeguards,⁶⁸ and by conducting the lease sale so as to preclude the possibility of designating Georges Bank a marine sanctuary under the Marine Sanctuaries Act.⁶⁹ In addition, the plaintiffs argued that the EIS prepared for the lease sale was inadequate, therefore putting the Interior Department in violation of NEPA, because it failed to analyze the costs and benefits of delaying the sale until Congress had acted on the proposed OCSLA amendments,⁷⁰ the impact of the sale on the consideration of Georges Bank for desig-

⁶⁴ OCSLA § 5(a)(1) reads in part: "[t]he Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf . . ." 43 U.S.C. § 1334(a)(1) (1976).

⁶⁵ Brief for the Plaintiffs-Appellees Commonwealth of Massachusetts *et al.* at 9-11, Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979) [hereinafter cited as Mass. Brief I].

⁶⁶ *Id.* at 11-22; Brief for the Plaintiffs-Appellees [CLF *et al.*] at 16-18, Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979) [hereinafter cited as CLF Brief I]. See text at notes 454-76, *infra*.

⁶⁷ Mass. Brief I, *supra* note 65, at 27-28. An oil spill liability fund would provide compensation for environmental damage and economic losses caused by oil spills from OCS drilling activities. FES, *supra* note 6, at 1321-22. Tanker standards could be established to regulate the operations of tankers used to transport oil to shore. *Id.* at 1252.

⁶⁸ CLF Brief I, *supra* note 66, at 19.

⁶⁹ *Id.* at 35. The Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1434 (1976), as part of the Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. §§ 1401-1444 (1976), authorizes the Secretary of Commerce to designate as a marine sanctuary any area of the OCS, coastal waters, or the Great Lakes if necessary to preserve or restore the area for conservation, recreational, ecological, or esthetic values. *Id.* § 1432(a). See 44 Fed. Reg. 44,831 (1979) (to be codified in 15 C.F.R. § 922).

⁷⁰ Mass. Brief I, *supra* note 65, at 37, 41.

nation as a marine sanctuary,⁷¹ and the possible effects of an oil spill on Cape Cod and Martha's Vineyard,⁷² and because the EIS failed to respond to the criticisms of certain parties.⁷³ The plaintiffs alleged that as a result of these defects in the EIS the Secretary's decision to proceed with the sale was arbitrary and capricious,⁷⁴ and that they would suffer irreparable harm because the sale of the leases would vest property rights in the lessees that could frustrate subsequent attempts to implement additional safeguards.⁷⁵

On January 28, 1978, District Judge W. Arthur Garrity granted a preliminary injunction,⁷⁶ based on his findings that the EIS was inadequate and that holding the lease sale would violate the Secretary's duty to protect the fisheries.⁷⁷ The Court of Appeals for the First Circuit heard arguments on appeal.⁷⁸ Before the court of appeals had announced its decision, however, Congress enacted amendments⁷⁹ to the OCSLA providing for increased environmental protection. The amendments' provisions included requirements for the establishment of an oil spill liability fund⁸⁰ and a fishermen's gear compensation fund,⁸¹ requirements for the use of best available and safest technology⁸² and for compensation to lessees whose leases are revoked because of a threat of environmental harm,⁸³ and authorization for cancellation of leases where severe and long-lasting environmental harm is likely.⁸⁴ The court of appeals then dissolved the injunction,⁸⁵ reasoning that with the passage of the OCSLA Amendments the most important issues raised by the district court had been mooted⁸⁶ and that, with the lease sale no longer pending, the threat of imminent harm on

⁷¹ *Id.* at 34.

⁷² *Id.* at 38.

⁷³ *Id.* at 39-40.

⁷⁴ *Id.* at 42-46; CLF Brief I, *supra* note 66, at 24-27.

⁷⁵ Mass. Brief I, *supra* note 65, at 52-53; CLF Brief I, *supra* note 66, at 33-34.

⁷⁶ *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138 (D. Mass. Jan. 28, 1978).

⁷⁷ *Id.* at 1139.

⁷⁸ *Massachusetts v. Andrus*, 594 F.2d 872, 881 (1st Cir. 1979).

⁷⁹ Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (amending 43 U.S.C. §§ 1331-1343 (1976)).

⁸⁰ 43 U.S.C.A. §§ 1811-1824 (West Supp. 1979).

⁸¹ *Id.* §§ 1841-1847.

⁸² *Id.* § 1347(b).

⁸³ *Id.* § 1334(a)(2)(C).

⁸⁴ *Id.* § 1334(a)(2)(A).

⁸⁵ *Massachusetts v. Andrus*, 594 F.2d 872, 887 (1st Cir. 1979).

⁸⁶ *Id.* at 882-83.

which the injunction had been premised no longer existed.⁸⁷ Therefore the remaining issues could be considered without the necessity of continuing the injunction.⁸⁸

The decision of the court of appeals dissolving the injunction brought Round One of the litigation to a close and at the same time set the stage for Round Two, since the court's decision to lift the injunction meant that the process of rescheduling the lease sale could begin. In response to the court of appeals' suggestion in Round One that a sanctuary analysis would be worthwhile,⁸⁹ Secretary Andrus published a draft supplemental EIS to consider the sanctuary alternative for Georges Bank.⁹⁰ In the meantime, after CLF filed with NOAA a proposal to designate Georges Bank a marine sanctuary,⁹¹ NOAA published an issue paper on the nomination,⁹² declared Georges Bank to be an Active Candidate for designation⁹³ and held public hearings on the proposal.⁹⁴ Unexpectedly, however, NOAA announced that it had decided to drop the sanctuary nomination for Georges Bank as part of an agreement that it had reached with Interior.⁹⁵ In exchange, Interior would provide additional safeguards for Georges Bank, including the deletion of environmentally sensitive tracts from the lease sale and the establishment of a Biological Task Force to monitor OCS activities and make recommendations to the Secretary.⁹⁶ Shortly thereafter, having published a final supplemental EIS,⁹⁷

⁸⁷ *Id.* at 887.

⁸⁸ *Id.*

⁸⁹ *See id.* at 885.

⁹⁰ BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, DRAFT SUPPLEMENT TO ENVIRONMENTAL STATEMENT, PROPOSED 1979 OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE OFFSHORE THE NORTH ATLANTIC STATES OCS SALE No. 42 (1979).

⁹¹ CLF, Nomination of the Area Known as the Georges Bank as a Marine Sanctuary Pursuant to Title III of the Marine Protection, Research and Sanctuaries Act of 1972 (May 10, 1979).

⁹² Sanctuary Issue Paper, *supra* note 39.

⁹³ 44 Fed. Reg. 47,132 (1979). The process of designating a marine sanctuary involves several steps. First an area must be recommended for designation. If the area meets certain criteria, it may be placed on a List of Recommended Areas. Additional factors will then be considered in determining whether to select the area as an Active Candidate. For active candidates a public workshop is held, after which an EIS may be prepared and the area then designated a sanctuary, subject to the approval of the President. *See* 44 Fed. Reg. 44,831, 44,837-39 (1979) (to be codified at 15 C.F.R. §§ 922.20-922.26).

⁹⁴ *Massachusetts v. Andrus*, 481 F. Supp. 685, 688 (D. Mass. Nov. 5, 1979).

⁹⁵ *Boston Globe*, Sep. 22, 1979, at 15, col. 5.

⁹⁶ *Id.*

⁹⁷ FSES, *supra* note 6.

Interior scheduled the lease sale for November 6, 1979.⁹⁸

The plaintiffs immediately returned to federal district court seeking another preliminary injunction,⁹⁹ thus initiating Round Two of the litigation. The plaintiffs modified their arguments from Round One, claiming that the additional safeguards provided by the OCSLA Amendments confirmed their suggestion that Secretary Andrus had a duty under the statute to protect the fisheries,¹⁰⁰ but that while the amendments provided safeguards, they were not self-enforcing—that is, they did not become effective until implemented by promulgation of the necessary regulations.¹⁰¹ The plaintiffs argued that by failing to promulgate all of the implementing regulations Secretary Andrus had violated his duty to protect the fisheries.¹⁰² In addition, they claimed that the Secretary's failure to insure that the lease sale would not jeopardize the endangered right and humpback whales on Georges Bank violated the Endangered Species Act,¹⁰³ and that the supplemental EIS's failure to consider the significance for Georges Bank of the Campeche blowout, to evaluate the sanctuary alternative adequately,¹⁰⁴ and to respond to critical comments from other parties made the EIS inadequate under the requirements of NEPA.¹⁰⁵

On November 5, 1979, with District Judge John McNaught presiding, the district court denied the request for an injunction,¹⁰⁶ reasoning that, even assuming that the lease sale would cause irreparable harm to the plaintiffs, it was unlikely that the plaintiffs would prevail on the merits.¹⁰⁷ On November 6, 1979, the court of appeals refused to issue a preliminary injunction pending appeal of the district court's decision,¹⁰⁸ but allowed time for the

⁹⁸ 44 Fed. Reg. 57,512 (1979).

⁹⁹ *Massachusetts v. Andrus*, 481 F. Supp. 685, 688 (D. Mass. Nov. 5, 1979).

¹⁰⁰ Memorandum in Support of Plaintiffs' CLF, *et al.*, Motion for Preliminary Injunction at 65-66, *Massachusetts v. Andrus*, 481 F. Supp. 685 (D. Mass. Nov. 5, 1979) [hereinafter cited as CLF Memo I].

¹⁰¹ See Brief of Plaintiffs-Appellants CLF *et al.* at 47-51, *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049 (1st Cir. Dec. 17, 1979) [hereinafter cited as CLF Brief II].

¹⁰² *Id.* at 48.

¹⁰³ CLF Memo I, *supra* note 100, at 55-63.

¹⁰⁴ Brief for Plaintiff-Appellant Commonwealth of Massachusetts at 26, *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049 (1st Cir. Dec. 17, 1979) [hereinafter cited as Mass. Brief II].

¹⁰⁵ CLF Brief II, *supra* note 101, at 21-35.

¹⁰⁶ *Massachusetts v. Andrus*, 481 F. Supp. 685, 692 (D. Mass. Nov. 5, 1979).

¹⁰⁷ *Id.*

¹⁰⁸ *CLF v. Andrus*, 617 F.2d 296 (1st Cir. Nov. 6, 1979).

plaintiffs to appeal to the Supreme Court.¹⁰⁹ Acting as Circuit Justice, Justice Brennan granted a temporary stay that same day.¹¹⁰ On November 9, 1979, the Supreme Court denied plaintiffs' petition for certiorari and vacated Justice Brennan's order,¹¹¹ but since the scheduled day of the lease sale had passed, the lease sale had to be rescheduled with thirty days notice.¹¹²

Interior rescheduled the lease sale for December 18, 1979¹¹³ and on December 17, 1979 the court of appeals, after hearing an expedited appeal of the district court's decision, upheld the district court's denial of an injunction,¹¹⁴ reasoning that the plaintiffs had not shown either irreparable harm¹¹⁵ or a likelihood of success on the merits,¹¹⁶ but declaring that the plaintiffs were still free to argue, at a later trial on the merits of their allegations, that the Secretary had violated his duty to protect the fisheries.¹¹⁷ Acting again as Circuit Justice, Justice Brennan refused to stay the decision of the court of appeals,¹¹⁸ bringing Round Two of the litigation to an end, and the lease sale was finally held on December 18 in Providence, Rhode Island, with oil and gas companies bidding a total of \$827 million for seventy-three tracts.¹¹⁹ On January 4, 1980 Interior announced its acceptance of bids on sixty-three tracts, rejecting bids on ten others because the bids were too low.¹²⁰

Because Rounds One and Two of the litigation were concerned only with motions for preliminary injunctions, the plaintiffs have

¹⁰⁹ Boston Globe, Nov. 7, 1979, at 1, col. 1.

¹¹⁰ *Id.*

¹¹¹ Massachusetts v. Andrus, 100 S.Ct. 417 (1979).

¹¹² See 43 U.S.C.A. § 1337 (l) (West Supp. 1979).

¹¹³ 44 Fed. Reg. 66,150 (1979).

¹¹⁴ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049 (1st Cir. Dec. 17, 1979).

¹¹⁵ *Id.* at 1054.

¹¹⁶ *Id.* at 1055.

¹¹⁷ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1055 (1st Cir. Dec. 17, 1979). Appellate review of a trial court decision on a motion for a preliminary injunction is limited in scope, and is normally not a final decision on the validity of the arguments put forth by the parties. See text at notes 564-67, *infra*.

¹¹⁸ Boston Globe, Dec. 19, 1979, at 1, col. 5.

¹¹⁹ *Id.* Of the 206 tracts originally designated for sale, 116 tracts were finally offered for sale. The remaining 90 tracts were deleted prior to the sale—55 because of a boundary dispute with Canada, and 35 because of potential threats to the environment or to fishing activities. See FSES, *supra* note 6, at 17-19; Boston Globe, Sep. 22, 1979, at 15, col. 5.

¹²⁰ See Boston Globe, Jan. 6, 1980, at 34, col. 1. Interior has also begun the process of scheduling another lease sale in the Georges Bank area, to be held in 1982. *Id.*

not had an opportunity to obtain a definitive ruling on the merits of many of their claims, and therefore questions remain as to how much weight the rulings of the court of appeals in those rounds will ultimately carry. Nevertheless, the court of appeals has stated that its decision in Round Two on at least two issues is conclusive.¹²¹ In addition, the court of appeals' refusal to overturn the district court suggests that the plaintiffs will have difficulty convincing a court that the Secretary has violated NEPA, the Endangered Species Act, and his duty under the OCSLA to protect the fisheries. Consequently, the decision of the court of appeals in Round Two raises questions about the usefulness of the statutes involved in the case as grounds for environmental challenges, and about the difficulties in seeking preliminary injunctive relief under those statutes. Each of these issues will be examined in turn.

III. THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE GEORGES BANK ENVIRONMENTAL IMPACT STATEMENTS

NEPA establishes certain requirements for federal agencies planning to undertake major activities that will affect the environment.¹²² The primary requirement is the preparation of an environmental impact statement (EIS). The plaintiffs in *Conservation Law Foundation of New England, Inc. v. Andrus* raised NEPA questions in both rounds of the Georges Bank litigation, challenging the adequacy of both the EIS and the supplemental EIS prepared by the Department of the Interior for the Georges Bank lease sale. Although the NEPA analysis performed by the court of appeals in Round One is consistent with the established standards of judicial review under NEPA, the court's decision in Round Two raises questions about the court's adherence to its previously articulated standards and to NEPA's purposes.

¹²¹ The court held on the merits that the lease sale would not constitute an irretrievable commitment of resources in violation of section 7(d) of the Endangered Species Act, 16 U.S.C. § 1536(d) (Supp. II 1978) (amended 1979), and that Secretary Andrus was not required to promulgate, prior to conducting the lease sale, regulations defining the best available and safest technology to be used on OCS oil and gas operations. *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1055 n.7 (1st Cir. Dec. 17, 1979).

¹²² See generally Deutsch, *The National Environmental Policy Act's First Five Years*, 4 ENV. AFF. 3 (1975).

A. NEPA Requirements for the Preparation of an EIS

In passing NEPA, Congress established a national goal of protecting and restoring the quality of the environment,¹²³ and required federal agencies to consider the environmental impacts of their actions.¹²⁴ In order to insure that federal agencies adhere to this policy, NEPA imposes several procedural obligations on the agencies. Section 102(2)(C) requires that federal agencies prepare an EIS for every recommendation or report on proposals for major federal actions that will significantly affect the human environment.¹²⁵ The EIS must discuss the environmental impact¹²⁶ and any unavoidable adverse environmental effects¹²⁷ of the proposed action, alternatives¹²⁸ to the proposed action, and any irreversible and irretrievable commitments of resources¹²⁹ involved in the action. In addition, section 102(2)(E) requires agencies to study and develop alternatives to any proposed action that involves "unresolved conflicts concerning alternative uses of available resources."¹³⁰

These NEPA requirements, and particularly the requirements of section 102(2)(C), have been the subject of much litigation during the last decade and consequently have been well defined. In *Silva v. Lynn*,¹³¹ in which the Court of Appeals for the First Circuit invalidated the EIS prepared for the construction of a federally funded housing project because it lacked a sufficient discussion of alternatives and a reasoned basis for the choices made by the federal agency, the court set forth three purposes served by the requirement for the preparation of an EIS.¹³² First, because the EIS requires the agency to explicate fully its course of inquiry, analysis, and reasoning, the EIS permits the court to determine whether the agency has made a good faith effort to consider environmental values.¹³³ Second, the requirements for an EIS serve as an environmental full disclosure law by providing infor-

¹²³ 42 U.S.C. § 4331(a) (1976).

¹²⁴ *Id.* § 4332.

¹²⁵ *Id.* § 4332(2)(C).

¹²⁶ *Id.* § 4332(2)(C)(i).

¹²⁷ *Id.* § 4332(2)(C)(ii).

¹²⁸ *Id.* § 4332(2)(C)(iii).

¹²⁹ *Id.* § 4332(2)(C)(v).

¹³⁰ *Id.* § 4332(2)(E).

¹³¹ 482 F.2d 1282 (1st Cir. 1973).

¹³² *Id.* at 1284.

¹³³ *Id.*

mation to the public.¹³⁴ Third, the requirements help to insure the integrity of the decision-making process by precluding stubborn problems from "being swept under the rug."¹³⁵ In order to fulfill these purposes, the agency must take a "hard look" at the environmental consequences of its proposed action,¹³⁶ consider all reasonable alternatives,¹³⁷ and generate enough information to permit the agency to make a reasoned decision.¹³⁸

Subsequent to NEPA's enactment, it was quickly established in *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*¹³⁹ that the statute requires a strict standard of compliance.¹⁴⁰ In that case, the Court of Appeals for the District of Columbia held that the Atomic Energy Commission's (AEC's) procedural rules restricting consideration of environmental values in its review of applications for nuclear reactor construction permits or operating licenses violated the requirements of NEPA.¹⁴¹ The court reasoned that NEPA established environmental protection as an integral part of the AEC's responsibilities, and that the statute placed the primary burden for considering environmental factors on the agency, so that the AEC could not use its procedural rules to escape its obligation to consider the environmental impacts of its actions.¹⁴² Furthermore, the court interpreted the statutory requirement of compliance with NEPA "to the fullest extent possible"¹⁴³ as setting a high standard for agencies, under which the AEC could not cite administrative difficulty or economic cost as grounds for excusing its non-compliance.¹⁴⁴ Rather, the agency must weigh the relevant environmental factors at every important stage in the decision-making process.¹⁴⁵

Section 102(2)(C)(iii) requires that an EIS include a discussion of alternatives to the proposed federal action.¹⁴⁶ In *NRDC v. Mor-*

¹³⁴ *Id.* at 1285.

¹³⁵ *Id.*

¹³⁶ *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

¹³⁷ *Id.* at 834.

¹³⁸ *Id.* at 836.

¹³⁹ 449 F.2d 1109 (D.C. Cir. 1971).

¹⁴⁰ *Id.* at 1112.

¹⁴¹ *Id.* at 1117-19.

¹⁴² *Id.* at 1119.

¹⁴³ 42 U.S.C. § 4332 (1976).

¹⁴⁴ *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

¹⁴⁵ *Id.* at 1118.

¹⁴⁶ 42 U.S.C. § 4332(2)(C)(iii) (1976).

ton,¹⁴⁷ in which the EIS for a proposed OCS lease sale off the Louisiana coast was challenged for its failure to consider alternatives to the sale, the Court of Appeals for the District of Columbia found the EIS inadequate for failing to give detailed consideration to reasonable alternatives.¹⁴⁸ The court indicated that reasonable alternatives would include the elimination of oil import quotas, increased onshore drilling, additional nuclear energy development, and changes in natural gas pricing policies.¹⁴⁹ The court stressed that the alternatives required for discussion are not limited to those within the power of the agency to adopt,¹⁵⁰ and could even include alternatives that require legislative implementation.¹⁵¹ The requirement to consider reasonable alternatives, however, does not require "crystal ball" inquiry,¹⁵² and therefore does not apply to alternatives whose effects cannot be readily ascertained, or to alternatives that are only remote possibilities.¹⁵³ Consequently a detailed discussion was not required for such remote alternatives as the development of oil shale and coal liquefaction or gasification.¹⁵⁴ Nevertheless, the EIS must consider in detail the effects of all reasonable alternatives;¹⁵⁵ since the consideration of alternatives is the "linchpin of the entire impact statement."¹⁵⁶

In spite of the strong language in early interpretations of NEPA, however, judicial evaluation of the EIS requirement has since been tempered by a "rule of reason."¹⁵⁷ NEPA does not require perfection in the preparation of an EIS;¹⁵⁸ the statement need only be sufficient to insure a fully informed and well-considered decision, and therefore need not be exhaustive.¹⁵⁹ For example, in *Sierra Club v. Morton*¹⁶⁰ the Court of Appeals for the Fifth

¹⁴⁷ 458 F.2d 827 (D.C. Cir. 1972).

¹⁴⁸ *Id.* at 833-38.

¹⁴⁹ *Id.* at 834, 837.

¹⁵⁰ *Id.* at 834.

¹⁵¹ *Id.* at 837.

¹⁵² *Id.*

¹⁵³ *Id.* at 837-38.

¹⁵⁴ *Id.* at 837.

¹⁵⁵ *Id.* at 834.

¹⁵⁶ *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1972).

¹⁵⁷ *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

¹⁵⁸ *Sierra Club v. Morton*, 510 F.2d 813, 820 (5th Cir. 1975).

¹⁵⁹ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

¹⁶⁰ 510 F.2d 813 (5th Cir. 1975).

Circuit upheld the adequacy of an EIS prepared for a lease sale in the eastern Gulf of Mexico, reasoning that although the EIS was inadequate in some specific areas, the significant environmental effects of the lease sale had been recognized, affording the decisionmaker an opportunity to consider them properly.¹⁶¹ Furthermore, according to the court, post-EIS developments that might have altered the EIS analysis of oil spill cleanup procedures could not retroactively affect the sufficiency of the analysis.¹⁶² In addition, alternatives that would result in similar or greater environmental harm did not require discussion¹⁶³ and, where the stages of a project are easily divisible, the EIS is not inadequate where the agency has deferred its analysis of possible future action to be taken at a later stage of the project.¹⁶⁴ Thus, under the "rule of reason," the reviewing court determines whether the agency has considered the environmental consequences of the proposed action and has made a reasoned decision based on a careful weighing of the competing factors.¹⁶⁵ The plaintiff has the burden of proving by a preponderance of the evidence that an EIS fails to comply with NEPA,¹⁶⁶ and although the reviewing court must enforce NEPA requirements rigorously,¹⁶⁷ it may not use minor lapses in the EIS to overturn the agency's decision¹⁶⁸ and may not substitute its judgment for that of the agency just because it would have made the decision differently.¹⁶⁹ Consequently the EIS should be upheld as adequate if it is compiled in good faith and sets forth sufficient information to enable the agency to make a fully informed decision.¹⁷⁰

¹⁶¹ *Id.* at 821.

¹⁶² *Id.* at 822. The court did not indicate what these post-EIS developments were, but stated that they contradicted as unrealistic the EIS's suggestion that oil spill cleanup operations could begin within twelve hours of a spill at any location in the lease sale area. *Id.*

¹⁶³ *Id.* at 825. The court rejected the plaintiffs' contention that the EIS should have discussed the alternative of exploration conducted by the federal government because it would present substantially the same environmental hazards. *Id.*

¹⁶⁴ *Id.* at 824. The EIS stated that, if official pipeline corridors for transporting oil to shore were established and were viewed as a major federal action requiring an EIS, then an EIS could later be prepared for that action. *Id.*

¹⁶⁵ *NRDC v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

¹⁶⁶ *Sierra Club v. Morton*, 510 F.2d 813, 818 (5th Cir. 1975).

¹⁶⁷ *See Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

¹⁶⁸ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *Massachusetts v. Andrus*, 594 F.2d 872, 884 (1st Cir. 1979).

¹⁶⁹ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 555 (1978); *Sierra Club v. Morton*, 510 F.2d 813, 829 (5th Cir. 1975).

¹⁷⁰ *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977).

In Rounds One and Two of *CLF v. Andrus*,¹⁷¹ the Court of Appeals for the First Circuit evaluated the adequacy of the Georges Bank EISs inconsistently. In reviewing the original EIS prepared by Interior for the Georges Bank lease sale, the court of appeals in Round One applied the NEPA requirements in accordance with established standards.¹⁷² The court's decision in Round Two upholding the supplemental EIS's evaluation of the Georges Bank sanctuary alternative,¹⁷³ however, suggests a departure from its prior rigorous approach. In reaching its decision, the court may have permitted the form of the statement to substitute for content and allowed a presumption of regularity to overcome the agency's failure to meet its NEPA obligations.

B. Round One

In Round One of *CLF v. Andrus*, the district court found four deficiencies in the EIS prepared for the Georges Bank lease sale. First, the EIS inadequately analyzed the alternative of delaying the lease sale pending congressional action on the proposed OC-SLA amendments.¹⁷⁴ Second, the EIS failed to discuss the alternative of designating Georges Bank a marine sanctuary.¹⁷⁵ Third, it failed to provide cost estimates for the possible fouling of Cape Cod beaches by an oil spill.¹⁷⁶ Fourth, the EIS contained an inadequate response to the Environmental Protection Agency's criticism of the sufficiency of the EIS's oil spill risk model.¹⁷⁷

The court of appeals, however, citing the "rule of reason" standard for compliance with NEPA,¹⁷⁸ overturned the district court's ruling on the latter two points and considered the other points from a perspective altered by Congress' passage of the 1978 OC-SLA amendments¹⁷⁹ subsequent to the district court's ruling.¹⁸⁰ The court found Interior's response to EPA criticism of the oil

¹⁷¹ See text at notes 63-120, *supra*.

¹⁷² *Massachusetts v. Andrus*, 594 F.2d 872, 883-87 (1st Cir. 1979).

¹⁷³ *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1052 (1st Cir. Dec. 17, 1979).

¹⁷⁴ *Massachusetts v. Andrus*, 11 Envir. Rep. Cas. 1138, 1141 (D. Mass. Jan. 28, 1978).

¹⁷⁵ *Id.* at 1142.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Massachusetts v. Andrus*, 594 F.2d 872, 884 (1st Cir. 1979).

¹⁷⁹ Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (amending 43 U.S.C. §§ 1331-1343 (1976)).

¹⁸⁰ *Massachusetts v. Andrus*, 594 F.2d 872, 884-87 (1st Cir. 1979).

spill risk model to be sufficient,¹⁸¹ and the lack of a damage estimate for Cape Cod beaches not a fatal defect.¹⁸² The court reasoned that, although more extensive consideration of the two issues might have been desirable, there was no showing of obviously incorrect results or methodology, and the general analysis was satisfactory.¹⁸³ The court of appeals' decision on these two issues demonstrates that an EIS need not be exhaustive or perfect, and that a court should not "fly speck" the EIS.¹⁸⁴ Rather, the court should look for substantial compliance with NEPA,¹⁸⁵ as it did here, and determine whether the EIS presents sufficient information to allow a fully informed decision in light of available information.¹⁸⁶

The court of appeals did not examine the adequacy of the EIS analysis for the alternative of delaying the lease sale until Congress had acted on the proposed OCSLA amendments, since the court considered the question mooted by the amendments' enactment during the pendency of the appeal.¹⁸⁷ The district court's ruling ordering an analysis of this alternative, however, followed the principle established by previous NEPA cases of requiring that an EIS consider the costs and benefits of any reasonable alternative, even alternatives beyond the agency's authority to implement or dependent on legislative action.¹⁸⁸ In this case, the proposed amendments would significantly enhance Interior's ability to provide the environmental safeguards that Secretary Andrus had declared to be essential in order to provide adequate protection for the fisheries.¹⁸⁹ Although the Secretary could not be certain whether the pending legislation would actually pass, he should easily have been able to evaluate the relatively slight cost of a few months delay compared to the admittedly significant benefits potentially resulting from passage of the amendments.¹⁹⁰

¹⁸¹ *Id.* at 886.

¹⁸² *Id.* at 884.

¹⁸³ *Id.* at 884, 886.

¹⁸⁴ *Brooks v. Coleman*, 518 F.2d 17, 19 (9th Cir. 1975).

¹⁸⁵ *See Sierra Club v. Morton*, 510 F.2d 813, 820 (5th Cir. 1975).

¹⁸⁶ *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554-55, 558 (1978); *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1375 (2d Cir. 1978).

¹⁸⁷ *Massachusetts v. Andrus*, 594 F.2d 872, 883-84 (1st Cir. 1979).

¹⁸⁸ *NRDC v. Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972).

¹⁸⁹ *See Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138, 1143 (D. Mass. Jan. 28, 1978).

¹⁹⁰ *See id.* at 1145-46.

Therefore, according to the district court, NEPA's goal of assuring full consideration of the environmental effects of all reasonable alternatives could only be satisfied by the Secretary's inclusion in the EIS of a cost/benefit analysis for the delay.¹⁹¹

The court of appeals again followed established NEPA standards in holding that the EIS should have discussed the alternative of designating Georges Bank a marine sanctuary,¹⁹² qualifying its holding only to the extent that passage of the OCSLA amendments might preclude the alternative.¹⁹³ The court of appeals considered this discussion necessary because the Marine Sanctuaries Act¹⁹⁴ arguably gives the Secretary of Commerce the power to exclude drilling operations or to take other protective steps in a sanctuary area,¹⁹⁵ and because the National Oceanic and Atmospheric Administration, a branch of Commerce, was considering Georges Bank for sanctuary status at the time of the appeal.¹⁹⁶ Consequently, designating the area a marine sanctuary would vest in Commerce control over the use of the area. The court of appeals noted that the two possible controlling agencies would have different interests.¹⁹⁷ Under the sanctuary program, the controlling agency, Commerce, would consider environmental protection its top priority, whereas in the absence of sanctuary designation Interior would consider oil and gas development to be its chief concern.¹⁹⁸ Such a difference in priorities could mean that when the controlling agency is faced with a particular threat to the environment, its decision on which of the competing interests should give way could depend on which agency is in control.¹⁹⁹ Therefore sanctuary designation was a reasonable and significant alternative, and the EIS should have considered its costs and benefits.²⁰⁰

Thus in Round One the court of appeals adhered to the spirit of NEPA, overlooking two minor lapses in the EIS but requiring

¹⁹¹ *Id.* at 1141.

¹⁹² *Massachusetts v. Andrus*, 594 F.2d 872, 885 (1st Cir. 1979).

¹⁹³ *Id.*

¹⁹⁴ 16 U.S.C. §§ 1431-1434 (1976). See note 69, *supra*.

¹⁹⁵ See 44 Fed. Reg. 44,831, 44,839 (1979) (to be codified at 15 C.F.R. § 992.26(b)-(d)).

¹⁹⁶ See Reply Memorandum of Plaintiffs CLF *et al.* at 13, *Massachusetts v. Andrus*, 481 F. Supp. 685 (D. Mass. Nov. 5, 1979) [hereinafter cited as CLF Memo II].

¹⁹⁷ *Massachusetts v. Andrus*, 594 F.2d 872, 885 (1st Cir. 1979).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

an evaluation of the sanctuary possibility as a reasonable alternative to the lease sale. In Round Two, however, the court of appeals applied NEPA less strictly by failing to insist that the supplemental EIS prepared for the lease sale fulfill the three NEPA purposes of full explication, full disclosure, and protection of the integrity of the decision-making process, purposes firmly endorsed by the court in the earlier case of *Silva v. Lynn*²⁰¹ and again in Round One of *CLF v. Andrus*.²⁰²

C. Round Two

The plaintiffs raised additional claims of NEPA violations in Round Two based essentially on three grounds. First, according to the plaintiffs, the evaluation of the sanctuary alternative in the supplemental EIS was superficial and unresponsive.²⁰³ Second, the supplemental EIS failed to consider the possible impact of the Campeche blowout on prior estimates of the likelihood of an oil spill during the exploratory drilling phase.²⁰⁴ Third, the National Oceanic and Atmospheric Administration (NOAA) failed to prepare an EIS for its decision to halt consideration of the Georges Bank sanctuary proposal.²⁰⁵ Since the district court was not persuaded that the plaintiffs would prevail on the merits of their claims, it denied their motion for a preliminary injunction,²⁰⁶ a decision that the court of appeals upheld.²⁰⁷ The plaintiffs' claims, however, have merit. In rejecting those claims, the court of appeals has joined the trend toward a softer application of the "hard look" doctrine by applying the "rule of reason" limitation very flexibly and showing substantial deference to federal agencies.

The Supreme Court has recently emphasized that, although NEPA establishes some substantive goals for the protection of the environment, nevertheless it imposes essentially procedural obligations on the federal agencies.²⁰⁸ Under NEPA, the reviewing court is not to determine whether the agency's final decision in a

²⁰¹ 482 F.2d 1282, 1284-85 (1st Cir. 1973). See text at notes 131-35, *supra*.

²⁰² *Massachusetts v. Andrus*, 594 F.2d 872, 883-84 (1st Cir. 1979).

²⁰³ CLF Brief II, *supra* note 101, at 33.

²⁰⁴ *Mass. Brief II*, *supra* note 104, at 26-29.

²⁰⁵ *Id.* at 42-48.

²⁰⁶ *Massachusetts v. Andrus*, 481 F. Supp. 685, 692 (D. Mass. Nov. 5, 1979).

²⁰⁷ *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1055 (1st Cir. Dec. 17, 1979).

²⁰⁸ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

proposed action was proper,²⁰⁹ but rather whether the agency made a rational and well-informed decision.²¹⁰ The Supreme Court has stressed that the court's role under NEPA is a limited one.²¹¹ As a result, lower courts have become understandably hesitant to scrutinize closely an agency's efforts to comply with NEPA.²¹²

Reviewing courts, however, should distinguish between the breadth of review under NEPA, which is narrow, and the depth of inquiry, which should be searching. NEPA establishes certain requirements for considering environmental factors in preparing an EIS.²¹³ A court must limit its review of an EIS to determining whether the agency has fulfilled those requirements, and may not extend the scope of review to determine whether it approves of the agency's decision.²¹⁴ Yet, if the court's review of an EIS is to have significance, the court must conduct a searching inquiry, taking a "hard look"²¹⁵ at the contents of the EIS to determine whether the agency has considered the relevant factors, examined the reasonable alternatives, and set forth the basis for its reasoning.²¹⁶ The court should not view its limited scope of review as requiring undue deference to the agency's efforts. Even under the Supreme Court's limitation, the court should scrutinize the EIS closely to determine whether the agency has adequately considered environmental factors and made a fully informed and well-considered decision.²¹⁷ These standards must be enforced if NEPA is "to do more than regulate the flow of papers in the federal bureaucracy."²¹⁸

In upholding the adequacy of the sanctuary alternative analysis

²⁰⁹ *Id.* at 555.

²¹⁰ *Id.* at 558.

²¹¹ *Id.* at 555.

²¹² In *CLF v. Andrus*, the First Circuit's deferential approach to Interior's supplemental EIS, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1051-53 (1st Cir. Dec. 17, 1979), stands in marked contrast to the same court's close scrutiny of the original EIS in *Massachusetts v. Andrus*, 594 F.2d 872, 883-87 (1st Cir. 1979). See also *Bennett Hills Grazing Ass'n v. United States*, 600 F.2d 1308, 1309 (9th Cir. 1979) (refusal to enjoin preparation of final EIS before expiration of 90-day comment period on draft EIS); *Seacoast Anti-Pollution League v. NRC*, 598 F.2d 1221 (1st Cir. 1979) (no EIS required for decision to terminate late-stage inquiry into alternative sites for nuclear power plant).

²¹³ See text at notes 123-30, *supra*.

²¹⁴ *Kleppe v. Sierra Club*, 429 U.S. 390, 410 n.21 (1976).

²¹⁵ *Id.*

²¹⁶ *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973).

²¹⁷ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

²¹⁸ *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1117 (D.C. Cir. 1971).

in the supplemental EIS,²¹⁹ the court of appeals in Round Two appears to have adopted a very deferential standard of review. The opinion did not consider whether the agency had set forth its reasoning or fully explained its course of analysis, but instead referred only to superficial characteristics of the EIS, such as length and chapter headings, and to events external to, and not documented in, the record as demonstrating compliance with NEPA requirements.²²⁰ Nowhere did the court of appeals indicate that it gave any consideration to the substance of the sanctuary analysis, even though the plaintiffs had strongly questioned its quality.²²¹ The plaintiffs argued that the analysis failed to address the questions about different management schemes raised by the court of appeals in Round One,²²² and characterized the analysis as meaningless, irrelevant and repetitive.²²³

The quality of Interior's sanctuary analysis in the supplemental EIS suggests that Interior did not make a "good faith" effort to consider the environmental value of the sanctuary alternative.²²⁴ One purpose of NEPA's requirement that the agency fully ex-

²¹⁹ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1052 (1st Cir. Dec. 17, 1979).

²²⁰ First, the court of appeals cited the length of the supplemental EIS, CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1051, 1052 (1st Cir. Dec. 17, 1979), and referred to the chapter headings as suggesting the broad scope of Interior's analysis. *Id.* at 1051. Second, the court related the assurance contained in the supplemental EIS itself that Interior had analyzed all comments submitted in response to the draft EIS and that the document reflected that consideration "wherever possible," *id.*, rather than insisting that the agency include its analysis of those comments in the EIS itself. Third, the court referred to the consultations between Interior and NOAA on the adequacy of safeguards as demonstrating that NEPA's objective of identifying and seriously considering reasonable alternatives had been achieved, *id.* at 1052, even though the administrative record contained no documentation of those deliberations. Reply Brief of Plaintiffs-Appellants CLF *et al.* at 13, 14 n.13, CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049 (1st Cir. Dec. 17, 1979) [hereinafter cited as CLF Brief III]. Finally, the court discounted plaintiffs' argument that the final supplemental EIS had been published with unacceptable haste, reasoning that the supplemental nature of the document excused this alleged defect. CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1051 (1st Cir. Dec. 17, 1979).

²²¹ See CLF Brief II, *supra* note 101, at 28-35.

²²² *Id.* at 30-31.

²²³ *Id.* at 33. For example, the statement "[w]hile mortality of turtles has not been directly associated with oil spills, dead olive ridley turtles covered with oil have been observed on a beach in Ecuador" appears in the EIS three times in virtually identical form. FSES, *supra* note 6, at 136, 250, 257. In addition, within the approximately fifty pages that discuss the Georges Bank sanctuary alternative, entire paragraphs are mechanically reproduced in different sections. *Id.* at 250-51, 256-57; *id.* at 260-61, 264.

²²⁴ See Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

plain its course of inquiry and analysis is to permit a court to determine whether the agency has made such an effort.²²⁵ It is impossible for the court to ascertain whether the agency has provided that full explanation without examining the substance of the document.²²⁶ The court cannot adequately review the EIS to determine whether the agency has fulfilled its NEPA obligations by examining the length and chapter headings of the EIS and by accepting blanket assurances that all relevant information has been considered. The First Circuit's reliance on the superficial characteristics and conclusory statements of the supplemental EIS for Georges Bank carries judicial deference to an extreme, because the foundation of its reliance is a presumption of administrative regularity;²²⁷ this approach bypasses the court's obligation to insure the agency's compliance with the basic NEPA requirements, a function for which the presumption of administrative regularity was not intended.²²⁸ Such an approach to judicial review puts a premium on appearance, allowing the agency to avoid its statutory responsibility to explain fully its analysis of environmental factors.²²⁹

²²⁵ *Silva v. Lynn*, 482 F.2d 1282, 1284 (1st Cir. 1973).

²²⁶ *North Slope Borough v. Andrus*, 486 F. Supp. 332, 344-49 (D.D.C. Jan. 22, 1980), is a good example of a court thoroughly reviewing the substance of an EIS. While the First Circuit's decision in *Round Two of CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049 (1st Cir. Dec. 17, 1979), was a decision on appeal of the district court's denial of preliminary injunctive relief rather than a review of the lower court's decision on the merits, and therefore the appellate court's standard of review was theoretically less demanding, nevertheless the First Circuit decided at least two of the central issues on the merits, and its long if somewhat superficial analysis of the supplemental EIS, *id.* at 1051-53, suggests that the court was exercising a more extensive review than the nature of the appeal required. Therefore the court's effort should be evaluated according to a more demanding standard.

²²⁷ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

²²⁸ *See id.* (presumption of regularity under the Administrative Procedure Act is not to shield agency action from in-depth review to determine whether the agency was within the scope of its authority and whether its decision was arbitrary or capricious). While the reviewing court should not substitute its views for those of the agency, the court must engage in a searching review of the EIS to determine whether Interior has complied with its NEPA obligations.

²²⁹ Furthermore, evaluating the supplemental EIS under a less demanding standard of review simply because of its supplemental nature, *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1051 (1st Cir. Dec. 17, 1979), allows the agency to subvert that same obligation of full explication, because the necessity of preparing the supplemental EIS arose from the shortcomings of the original EIS, *Massachusetts v. Andrus*, 594 F.2d 872, 884-86 (1st Cir. 1979), which thereby remain uncorrected. If the purposes of an EIS, as defined in *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973), are to be fulfilled, the supplement to an EIS must meet the same standards as the original EIS. *Sierra Club v.*

The court of appeals also rejected the plaintiffs' argument that

Callaway, 499 F.2d 982, 994 (5th Cir. 1974). See 40 C.F.R. § 1502.9(c)(4) (1979) (agencies must prepare a supplement in the same manner as a draft or final statement). Therefore where, as here, a deficiency has been found in the original EIS, see text at notes 192-200, *supra*, the supplemental statement prepared by the agency must be adequate to remedy the deficiency. See *NRDC v. Callaway*, 524 F.2d 79, 91-92 (2d Cir. 1975) (information in the supplement to a draft EIS must be adequate to remedy the original deficiency). For the reviewing court to demand less is to permit the agency to circumvent the original EIS requirements.

Another weakness of the court's reasoning in upholding the adequacy of the supplemental EIS is the court's reliance on the discussions between Interior and NOAA as fulfilling the Secretary's obligation to consider alternatives. *CLF v. Andrus*, 14 *ENVIR. REP.* (Envir. Rep. Cas.) (BNA) 1049, 1052 (1st Cir. Dec. 17, 1979). Those discussions apparently involved negotiations for the provision of additional safeguards for the Georges Bank environment, and resulted in an agreement that Interior would provide certain safeguards and NOAA would drop its consideration of the Georges Bank sanctuary nomination. See *Boston Globe*, Sep. 22, 1979, at 15, col. 5.

A reviewing court should not base its evaluation of the agency's decision-making process on evidence external to the EIS. *EDF v. Corps of Engineers*, 492 F.2d 1123, 1130 (5th Cir. 1974); *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 420-21 (2d Cir. 1972). The court should consider only evidence contained in the administrative record and therefore open to view. See *Silva v. Lynn*, 482 F.2d 1282, 1284 (1st Cir. 1973) ("[t]he objective should be to develop an administrative record which is self-sufficient for adequate judicial review"). Even if the reviewing court is content to look beyond the EIS, however, these discussions are inadequate, because the nature of the discussions between the two agencies has never been made public. *CLF Brief III*, *supra* note 220, at 13. Without publication of the content of those discussions, they cannot substitute adequately for the EIS, since they cannot serve any of NEPA's intended purposes of informing the public and the courts of the agency's analysis and protecting the honesty of the decision-making process, *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973), purposes repeatedly endorsed by the First Circuit. See, e.g., *Massachusetts v. Andrus*, 594 F.2d 872, 883-84 (1st Cir. 1979). Furthermore the discussions should not be allowed to substitute for the EIS because they occurred well after the final supplemental EIS was published, and post hoc rationalizations are not an allowable substitute for an adequate EIS. *Cady v. Morton*, 527 F.2d 786, 794 (9th Cir. 1975).

In this case the problem is particularly acute. The Department of the Interior is a mission-oriented agency, intent on expediting the development of OCS oil and gas resources. (While oil and gas development is not Interior's sole function, and therefore the agency is not like other agencies created for a single purpose, such as the ICC or the FTC, nevertheless Interior is under a clear directive to expedite OCS development pursuant to the OCSLA and a Presidential Order, and therefore can be considered a mission-oriented agency in the context of this case.) A major consideration under NEPA is to counter the "tunnel vision" that blinds such agencies to environmental concerns. Allowing closed-door discussion of the critical issues as a substitute for the full and open analysis required in an EIS invites such tunnel vision.

The plaintiffs have alleged that NOAA's decision to drop the Georges Bank sanctuary nomination was politically motivated. *CLF Brief II*, *supra* note 101, at 36. The plaintiffs pointed out that NOAA's agreement with Interior contradicted both its own evaluation and public statements before and after the agreement. *Id.* See NOAA, Comments on the Final Environmental Statement and Draft Supplemental Environmental Statement Prepared by the Department of the Interior for Proposed OCS Sale No. 42 (July 16, 1979)

the supplemental EIS should have evaluated the possible impact of the Campeche blowout on Interior's estimate that the probability of an oil spill during the exploratory phase of drilling operations was minimal.²³⁰ The court cited the continuing nature of the information-gathering process,²³¹ and summarily dismissed the argument.²³² The issue, however, deserved more careful consideration by the court.

NEPA does not generally require an agency to consider information that becomes available subsequent to the preparation of

[hereinafter cited as NOAA Comments], reprinted in FSES, *supra* note 6, at 316; Letter from Richard A. Frank, Administrator of NOAA, to James A. Joseph, Under Secretary of the Interior (Sep. 21, 1979), reprinted in CLF Memo II, *supra* note 196, at app. ("I still do not favor leasing on Georges Bank and would prefer that lease sale 42 not be held at this time"). The contradiction between NOAA's statements and its acts, according to plaintiffs, suggested that political arm-twisting had occurred. CLF Brief II, *supra* note 101, at 42. Because agency action should be set aside if it is based on extraneous considerations, such as political pressures, D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1248 (D.C. Cir. 1972), plaintiffs argued that the inter-agency agreement was arbitrary. CLF Brief II, *supra* note 101, at 42.

In addition, the plaintiffs argued that Interior had decided to proceed with the lease sale long before the final supplemental EIS had been completed, and therefore had acted in an arbitrary and capricious manner. CLF Memo I, *supra* note 100, at 48-55. They pointed out that Secretary Andrus had requested the governors of states affected by the lease sale to waive their statutory 60-day comment period, and that the Secretary's public comments suggested that a decision to proceed had been made well before the official decisional process was complete. *Id.*

That political considerations may have been controlling was no surprise to one veteran politician, Francis W. Sargent, formerly the Governor of Massachusetts and the Commissioner of the Massachusetts Department of Natural Resources, and currently a member of CLF's Board of Directors. Conversation with Francis W. Sargent (Dec. 12, 1979). The court of appeals, however, did not discuss the plaintiffs' contentions in its Round Two decision.

In addition to their claim that Interior's sanctuary analysis violated NEPA, the plaintiffs also argued that, because Interior's sanctuary analysis was inadequate, NOAA should have prepared its own EIS for its decision to drop the Georges Bank sanctuary proposal. Mass. Brief II, *supra* note 104, at 42-48. The failure to prepare an EIS is subject to strict judicial scrutiny that looks to whether the agency's decision was reasonable, Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974), since the failure to prepare an EIS precludes the full consideration of environmental factors required by NEPA. When a proposal involves joint agency action, however, the "lead agency" may assume responsibility for the preparation of the EIS. CEQ Guidelines, 40 C.F.R. § 1501.5(a) (1979). And since the court of appeals considered Interior's sanctuary analysis adequate, CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1052 (1st Cir. Dec. 17, 1979) the plaintiffs' argument was doomed to failure.

²³⁰ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

²³¹ CLF v. Andrus, 617 F.2d 296, 299 (1st Cir. Nov. 6, 1979).

²³² CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

an EIS, since such a requirement could extend the NEPA process indefinitely.²³³ In *Sierra Club v. Morton*,²³⁴ for example, the plaintiffs challenged the adequacy of the EIS prepared for a Gulf of Mexico lease sale, which stated that the lessees might be able to begin oil spill cleanup operations within twelve hours of a spill. The court rejected the challenge, reasoning that although post-EIS information indicating that the twelve-hour figure was unrealistic suggested the need for Interior to consider other approaches, it could not retroactively render the EIS inadequate.²³⁵

Even the need for finality in the NEPA process, however, does not excuse Interior's failure to analyze the Campeche incident, for several reasons. First, the Campeche blowout occurred well before preparation of the final version of the supplemental EIS,²³⁶ so that Interior could easily have made an effort at least to consider the relevance of the event to Georges Bank. More importantly, Interior's predictions of the likelihood of an oil spill during the exploratory phase of operations was based on a five-year period of only minor spills.²³⁷ Since the Campeche spill was far larger than any other spill over that period of time,²³⁸ it is possible that Campeche could alter Interior's predictions and perhaps affect the Secretary's decision whether to proceed with the lease sale. Although Interior suggested that the event was not particularly relevant to the Georges Bank lease sale,²³⁹ the significance of the event cannot be known until at least a preliminary evaluation to

²³³ Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554-55 (1978).

²³⁴ 510 F.2d 813 (5th Cir. 1975).

²³⁵ *Id.* at 822.

²³⁶ The Campeche blowout occurred on June 3, 1979, two months prior to Interior's publication of the supplemental EIS on August 3, 1979.

²³⁷ FES, *supra* note 6, at 674.

²³⁸ From 1971 to 1975, no spills of more than fifty barrels (about 2100 gallons) occurred in the Gulf of Mexico. *Id.* The Campeche blowout initially was spilling 30,000 barrels daily and, prior to being capped in late March 1980, spilled an estimated 160 million gallons of crude oil altogether. Christian Science Monitor, Feb. 21, 1980, at 3, col. 1.

Interior's original analysis of the probability of an exploratory phase oil spill, included in the original EIS, was published in 1977, just after the North Sea blowout and before the Campeche blowout. In the supplemental EIS, Interior did not revise its analysis to include either incident. Instead, Interior attributed the two incidents to inexperienced operating crews, and found the experience of American crews and the availability of various mitigating measures to provide adequate assurance against a similar event in American operations, even though Interior indicated that the cause of the Campeche incident was unknown. FSES, *supra* note 6, at 296-97.

²³⁹ *Id.*

determine the cause of the blowout has been performed.²⁴⁰

A major purpose of an EIS is to allow an agency to make an informed decision,²⁴¹ but that purpose has been frustrated here because an informed decision is impossible when information essential to that decision is missing. As one court has noted, NEPA does not answer the question, "how much information is enough?"²⁴² Yet, unless NEPA is to be a "paper tiger,"²⁴³ reviewing courts should insist that agencies gather and use critical information. Here, the Interior Department did not attempt to evaluate Campeche, when the only cost of doing so would have been a relatively short delay.²⁴⁴ While reviewing courts generally defer to agency expertise,²⁴⁵ a court does not need technical competence to realize that Campeche could have a significant impact on Interior's analysis of oil spill probabilities, so that requiring at least a preliminary evaluation of the event should pose no problem of expertise for the court of appeals. While the court has expressed sympathy for Interior's efforts to expedite the development of OCS oil and gas resources in light of the country's energy needs,²⁴⁶ Congress has also given strong support to protecting the environment from unnecessary harm.²⁴⁷ Allowing the country's

²⁴⁰ In addition, NOAA has questioned the accuracy of Interior's oil spill analysis. NOAA Comments, *supra* note 229, at 28-29, FSES at 324. NEPA requires a "good faith, reasoned analysis in response" to comments from sister agencies disclosing new or conflicting data that cast doubts on the agency's analysis. *Massachusetts v. Andrus*, 594 F.2d 872, 884 (1st Cir. 1979) (quoting *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973)). While NOAA did not base its criticism of the oil spill analysis on the Campeche incident, its criticism is certainly reinforced by Campeche. A consideration of NEPA's purposes (see text at notes 132-35, *supra*) would suggest that a response to NOAA's criticism would be appropriate in light of Campeche. For Interior to state that an event whose causes are unknown has little relevance, but that in any event the agency will take appropriate corrective measures if it finds existing OCS operating practices to have been a contributing cause, FSES, *supra* note 6, at 296-97, suggests that the problem is being "swept under the rug," *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973).

²⁴¹ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

²⁴² *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978).

²⁴³ *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 113 (D.N.H. 1975).

²⁴⁴ Delay is a natural element of the NEPA process, and should not be used to justify a failure to consider environmental factors adequately. *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422-23 (2d Cir. 1972). See text at notes 683-87, *infra*.

²⁴⁵ See, e.g., *NRDC v. SEC*, 606 F.2d 1031, 1049-50 (D.C. Cir. 1979); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976).

²⁴⁶ *CLF v. Andrus*, 617 F.2d 296, 298 (1st Cir. Nov. 6, 1979).

²⁴⁷ NEPA, 42 U.S.C. §§ 4321-4361 (1976); the Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West Pamph. 1978); the Clean Water Act, 33 U.S.C.A. §§ 1251-1376 (West 1978 & Supp. 1979); and the Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6987 (West 1977 & Supp. 1979).

energy demands to sweep aside environmental concerns ignores the requirement of informed balancing by the agency that is the essence of NEPA.²⁴⁸

In concluding its discussion of NEPA issues in Round Two the court of appeals suggested that litigants seeking to reverse the district court's denial of a preliminary injunction on NEPA grounds must overcome "formidable hurdles," including NEPA's reasonableness standard, the court's obligation to balance competing considerations, and the scope of the district court's discretion in ruling on a request for a preliminary injunction.²⁴⁹ While the willingness of the court of appeals to defer to the agency on NEPA issues is consistent with the refusal of many courts in recent years to take a "hard look" at the content of an EIS, the court's approach can be criticized on two grounds. First, NEPA litigation has often focused on requests for interlocutory relief,²⁵⁰ a focus that has not prevented reviewing courts, including the Court of Appeals for the First Circuit, from overturning lower courts and demanding that agencies comply with the requirements of NEPA.²⁵¹ Therefore the court of appeals should not now rely on the trial court's discretion as a bar to an appellate court's insistence on compliance with statutory requirements. Second, while a reviewing court's authority to balance competing consid-

²⁴⁸ A final NEPA argument raised by the plaintiffs in Round Two was Interior's alleged failure to respond to numerous comments from sister agencies and responsible experts on the original EIS and the draft supplemental EIS. CLF Brief II, *supra* note 101, at 21-28. The court of appeals condensed the points of contention into eight separate alleged deficiencies, and found that either the deficiencies did not exist, or they were not sufficiently major to render the EIS inadequate. CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1052-53 (1st Cir. Dec. 17, 1979). In discussing each point, the court showed a willingness to accept the slightest justification for Interior's analysis, as, for example, when the court excused the lack of a response to NOAA's comment that the unusual hydrography of Georges Bank might increase the damage from chronic discharges of pollutants because "NOAA itself attributed no special significance to this issue in mentioning it." *Id.* at 1053. While the court's analysis suggests undue deference to the agency, see text at notes 219-29, *supra*, the court appeared to consider the allegations insignificant, referring to the ever-narrowing focus of the litigation. CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979). Furthermore, the allegations were based on questions involving highly technical data, and courts often consider themselves lacking in the expertise necessary to deal with such issues adequately. Therefore it is not surprising that the court rejected plaintiffs' argument.

²⁴⁹ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1053-54 (1st Cir. Dec. 17, 1979).

²⁵⁰ See Leshy, *Interlocutory Injunctive Relief in Environmental Cases: A Primer for the Practitioner*, 6 ECOLOGY L.Q. 639 (1977); see text at notes 613-14, *infra*.

²⁵¹ See, e.g., *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973).

erations is unquestioned,²⁵² that authority should not be used to balance away an agency's obligation to meet the NEPA requirements for preparation of an EIS.²⁵³ Although the test of reasonableness allows a reviewing court to overlook minor flaws in an EIS,²⁵⁴ the court should not use the "rule of reason" to frustrate NEPA's purpose of insuring a fully informed and well-considered decision²⁵⁵ by failing to scrutinize carefully the content of the EIS. For if NEPA's standards are not going to be enforced, the courts are in effect overriding the mandate of Congress that agencies give full consideration to environmental factors in their decision-making,²⁵⁶ the same mandate that courts so often cited as authority for their original interpretations of NEPA as requiring strict compliance.²⁵⁷

In Round Two of *CLF v. Andrus*, the court of appeals marshalled the principle of limited scope of review to uphold the supplemental EIS prepared by Interior. The court's failure to conduct a thorough analysis of the EIS is consistent with the use by reviewing courts in recent years of the "rule of reason" to overlook agency noncompliance with NEPA requirements. Yet the court has used its limited scope of review to lower its standard of review and to justify a superficial examination of the supplemental EIS. The court had ample grounds for finding deficiencies in the supplemental EIS, according to the standard of review that the court had established in Round One, and at the least the court should have attempted a thorough analysis of the document to determine whether the EIS fulfilled the purposes of NEPA which the court had previously articulated.

IV. THE LEASE SALE AND THE ENDANGERED SPECIES ACT

In Round Two of *CLF v. Andrus*, in addition to their NEPA claims, the plaintiffs alleged violations by Secretary Andrus of the Endangered Species Act,²⁵⁸ challenging the lease sale on the ground that it would jeopardize two endangered species of whales,

²⁵² *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 962-63 (1st Cir. 1976).

²⁵³ *See Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

²⁵⁴ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

²⁵⁵ *Id.*

²⁵⁶ 42 U.S.C. § 4332 (1976).

²⁵⁷ *See, e.g., Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1128 (D.C. Cir. 1971); *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

²⁵⁸ 16 U.S.C. §§ 1531-1543 (1976 & Supp. II 1978), as amended by Act of Dec. 28, 1979, Pub. L. No. 96-159, 93 Stat. 1225.

the right and the humpback, which frequent the Georges Bank area. The plaintiffs' claims raise questions under the Endangered Species Act not previously addressed by the courts, including the extent to which a lease sale can be considered an irretrievable commitment of resources, the allocation between contending parties of the burden of proof in demonstrating compliance with the statute, and the directness of the harm required to constitute jeopardy to an endangered species. While the answers to these questions are still not clear, the outcome of Round Two suggests that the Endangered Species Act (ESA) may be traveling the same road as NEPA, with courts shifting from an early requirement of strict compliance to a subsequent relaxation of standards.

A. *The Background of the Statute*

A review of the language and history of the ESA shows that it was passed in 1973 in an effort to slow the disappearance of species as much as possible.²⁵⁹ At the time *CLF v. Andrus* was decided, section 7(a) of the statute required that "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . does not jeopardize the continued existence of any endangered species" or destroy the critical habitat of any endangered species.²⁶⁰ Section 7(d) further required that if the action agency has begun consultation with the Secretary of Commerce or the Interior²⁶¹ in order to determine whether jeopardy to an endangered species exists, the agency "shall not make any irfeversible or irretrievable commitment of resources" that would preclude the use of any reasonable alternatives to avoid jeopardy to an endangered species.²⁶²

"Jeopardy" is not defined by the statute. An "endangered spe-

²⁵⁹ Section 2(b) of the ESA declares that a purpose of the statute is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . ." 16 U.S.C. § 1531(b) (1976). See *TVA v. Hill*, 437 U.S. 153, 174-88 (1978), for a review of the history of the statute.

²⁶⁰ 16 U.S.C. § 1536(a) (Supp. II 1978). The language of section 7(a) was changed slightly after *CLF v. Andrus* was decided, but the requirement remains essentially unchanged. See text and notes at notes 406-09, *infra*.

²⁶¹ The ESA is jointly administered by the Secretaries of Commerce and the Interior. 16 U.S.C.A. § 1532(15) (West Supp. 1979). Supervisory responsibilities for particular species are divided between the two — Commerce's jurisdiction includes primarily whales and sea turtles, 50 C.F.R. § 222.23 (1978), while Interior is responsible for all other species. See 50 C.F.R. § 17.2(b) (1978).

²⁶² 16 U.S.C. § 1536(d) (Supp. II 1978).

cies" is defined by section 3(6) of the ESA to mean "any species which is in danger of extinction throughout all or a significant portion of its range."²⁶³ Section 4 authorizes the Secretary of the Interior to designate as endangered any species found to meet that definition.²⁶⁴ Section 9 of the ESA makes it unlawful for any person to "take" an endangered species,²⁶⁵ with "take" defined by section 3(19) to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."²⁶⁶ Section 11 imposes civil²⁶⁷ and criminal²⁶⁸ penalties for violations of the Act, and section 11(g) allows any person to file a civil suit in federal district court to enjoin any person or agency from violating the statute.²⁶⁹ The effect of these provisions is to establish a high standard of protection for endangered species, including a positive mandate to federal agencies to carry out programs for the conservation of endangered species,²⁷⁰ a mandate that has been interpreted by one court as requiring an agency not only to avoid the elimination of protected species, but also to use all methods to bring species "back from the brink" and remove them from the protected class.²⁷¹

The Supreme Court in 1978 provided the seminal interpretation of the ESA in *TVA v. Hill*,²⁷² a case in which the almost completed Tellico Dam project was halted because its completion would eradicate the only known habitat of the endangered snail darter fish (*Percina Imostoma tanasi*).²⁷³ The Supreme Court up-

²⁶³ *Id.* § 1532(6).

²⁶⁴ *Id.* § 1533(a)(1).

²⁶⁵ 16 U.S.C. § 1538(a)(1) (1976).

²⁶⁶ 16 U.S.C. § 1532(19) (Supp. II 1978).

²⁶⁷ *Id.* § 1540(a)(1).

²⁶⁸ *Id.* § 1540(b).

²⁶⁹ 16 U.S.C. § 1540(g) (1976).

²⁷⁰ Section 2(c) of the ESA declares it to be the policy of Congress that "all Federal departments and agencies shall seek to conserve endangered species." *Id.* § 1531(c). Section 3(3) defines "conserve" as using "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C.A. § 1532(3) (West Supp. 1979).

²⁷¹ *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C. 1977).

²⁷² 437 U.S. 153 (1978).

²⁷³ Construction of the Tellico Dam on the Little Tennessee River began in 1967. In 1973, the snail darter, a previously unknown species of perch, was discovered to inhabit a portion of the river just upstream from the dam. Four months later Congress passed the Endangered Species Act of 1973. The snail darter, one of more than a hundred known species of darters, was subsequently declared endangered by the Secretary of the Interior, since its only known habitat would be inundated once the dam was completed. *Id.* at 156-

held the decision by the Court of Appeals for the Sixth Circuit²⁷⁴ overturning the district court²⁷⁵ and permanently enjoining completion of the dam, reasoning that the terms of the ESA were plain and that the language of the statute provided no exceptions to the Tennessee Valley Authority's obligation to insure against jeopardy to an endangered species.²⁷⁶ The Court found it "beyond doubt that Congress intended endangered species to be afforded the highest of priorities,"²⁷⁷ and that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."²⁷⁸ Thus the Court interpreted the statute to require that, even where a project such as the Tellico Dam was substantially complete and Congress had continued to provide funds for it, the absolute terms of the statute required that it be halted in order to avoid jeopardizing an endangered species.²⁷⁹

The Supreme Court decided *TVA v. Hill* not long before the authorization of funds for the ESA was due to expire.²⁸⁰ In the process of renewing the funding, Congress did not react to the Supreme Court's decision by watering down the essential mandate to avoid jeopardy contained in section 7(a).²⁸¹ Instead Congress left that mandate intact,²⁸² adding separate provisions to authorize exemptions in narrowly confined situations²⁸³ for projects that are unable to comply with the strict requirements of section 7(a). At the same time, Congress added the additional restriction in section 7(d) prohibiting any irretrievable commitment of resources during the consultation process.²⁸⁴

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²⁷⁴ *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977).

²⁷⁵ *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976).

²⁷⁶ *TVA v. Hill*, 437 U.S. 153, 173 (1978).

²⁷⁷ *Id.* at 174.

²⁷⁸ *Id.* at 184.

²⁷⁹ *Id.* at 187-88.

²⁸⁰ 16 U.S.C. § 1542 (1976).

²⁸¹ 16 U.S.C.A. § 1536(a) (West Supp. 1979).

²⁸² In the original statute, section 7 was not divided into subsections. The 1978 amendments lengthened section 7 considerably, and the resulting subsection (a) contained the original mandate with its language unchanged. The 1979 amendments further divided subsection (a) and changed the wording of the mandate slightly, but without changing its basic import. See text and notes at notes 406-09, *infra*.

²⁸³ See 16 U.S.C. § 1536(e), (g), (h) (Supp. II 1978).

²⁸⁴ 16 U.S.C.A. § 1536(d) (West Supp. 1979). The discussion focuses on the version of the ESA prior to its amendment in 1979 because *CLF v. Andrus* was decided prior to the amendments and was therefore controlled by the former version of the statute. For a dis-

There has been very little litigation under the ESA other than *TVA v. Hill*, so the limits of the statute's coverage remain largely undefined. For example, although the Supreme Court made it clear in *TVA v. Hill* that an element of reason could not be read into the statute in order to allow the completion of projects already under way or even almost completed, no matter how substantial the investment of resources that had occurred,²⁸⁵ the Court was confronted in that case with the certain extinction of an endangered species. In contrast, in *CLF v. Andrus*, although the project had not yet begun and was therefore easier to halt, the jeopardy to endangered species was far harder to determine because, even though OCS oil activities would generate substantial amounts of chronic pollution and posed the threat of a significant oil spill, the effect of that pollution on the endangered species was difficult, if not impossible, to ascertain.²⁸⁶ Therefore the case presented for the first time the issue of how direct and demonstrable the jeopardy would have to be in order for the provisions of the ESA to apply. In addition, even if the provisions of the ESA were applicable, the additional question arose as to whether the lease sale itself was enjoined as an "irreversible or irretrievable commitment of resources" in violation of section 7(d), since holding a lease sale would not, of itself, appear to constitute an irretrievable commitment of resources.

B. *The Lease Sale as an Irretrievable Commitment*

The issue of whether the lease sale in *CLF v. Andrus* constituted an "irreversible or irretrievable commitment of resources" in violation of section 7(d) of the ESA arose because of the presence in the Georges Bank area of two endangered species of whales, the right (*Eubalaena glacialis*) and the humpback (*Megaptera novaeangliae*).²⁸⁷ The Department of Commerce has jurisdiction over these two species;²⁸⁸ its authority is exercised by

cussion of the 1979 amendments and their effect on the nature of the statute's requirements, see text and notes at notes 406-09, *infra*. For a discussion of the history of the ESA and the 1978 amendments, see Stromberg, *The Endangered Species Act of 1973: Is the Statute Itself Endangered?*, 6 ENV. AFF. 511 (1978), and Stromberg, *The Endangered Species Act Amendments of 1978: A Step Backwards?*, 7 B.C. ENV. AFF. L. REV. 33 (1978).

²⁸⁵ *TVA v. Hill*, 437 U.S. 153, 194 (1978).

²⁸⁶ Sanctuary Issue Paper, *supra* note 39, at 51-53, FSES at 542-44.

²⁸⁷ FSES, *supra* note 6, at 657.

²⁸⁸ The Department of Commerce has jurisdiction primarily over whales and sea turtles. See 50 C.F.R. § 222.23(a) (1978).

the National Oceanic and Atmospheric Administration (NOAA),²⁸⁹ a branch of Commerce. On January 20, 1978 Interior initiated consultation with NOAA to determine whether the Georges Bank lease sale would jeopardize certain endangered species, including the right and humpback whales.²⁹⁰ NOAA considered the right and the humpback vulnerable because they are surface feeders and would therefore be exposed to the surface pollution inevitably resulting from an oil spill, and because the populations of both species are quite low.²⁹¹ NOAA first concluded that the lease sale would jeopardize the right whale,²⁹² since it had been depleted to near extinction and "[a]ny effect on individual animals could have an effect on the entire population due to their low numbers."²⁹³ Subsequently, however, NOAA withdrew its conclusion of jeopardy and declared that insufficient information was available to determine whether the lease sale would jeopardize either the right or the humpback.²⁹⁴ Therefore the consultation process continued, and was still in progress at the time of the lease sale.²⁹⁵

The consultation process required under section 7 of the ESA involves several steps. In order to insure that a project will not jeopardize any endangered species, as required by section 7(a),²⁹⁶ an agency must first request a biological assessment from the Secretary of either Commerce or the Interior, as appropriate, pursu-

²⁸⁹ The National Marine Fisheries Service is the subdivision of NOAA that carries out NOAA's responsibilities under the ESA.

²⁹⁰ FSES, *supra* note 6, at 633.

²⁹¹ Sanctuary Issue Paper, *supra* note 39, at 52, FSES at 543. The regional population of humpbacks is estimated at 1200, and of right whales, at low tens to low hundreds. *Id.* at 23, FSES at 514.

²⁹² FSES, *supra* note 6, at 637-39.

²⁹³ *Id.* at 638.

²⁹⁴ *Id.* at 652. NOAA's focus on the lease sale as the step creating jeopardy to the whales presumes that the lease sale is the first step of the overall project and is the time at which the project should be halted until a lack of jeopardy can be insured. The court of appeals, however, seeing no possibility of physical harm from the lease sale itself, did not appear to view the lease sale as a point at which jeopardy could occur. See text at notes 329-77, *infra*.

²⁹⁵ Regulations promulgated jointly by Interior and Commerce require that, when a biological opinion is issued based on inadequate information, consultation shall continue until concluded by issuance of an opinion based on adequate information. 50 C.F.R. § 402.04(f) (1978). One court has held that under the terms of the ESA, the duty to consult continues until such an opinion is issued. *North Slope Borough v. Andrus*, 486 F. Supp. 332, 354 (D.D.C. Jan. 22, 1980).

²⁹⁶ 16 U.S.C. § 1536(a) (Supp. II 1978).

ant to section 7(c),²⁹⁷ in order to determine whether any endangered species are present in the area of the contemplated project. If no such species are present, the agency is free to proceed with the project. Otherwise, the agency must begin consultation with the Secretary under section 7(b) in order to determine whether any of the species would be jeopardized by the project, and the Secretary is required to issue a written statement including his opinion on whether jeopardy will occur, a summary of the information on which the opinion is based, and a suggestion of reasonable and prudent alternatives that would avoid jeopardy.²⁹⁸ Section 7(d) requires that, during consultation, the agency and the license applicant (in this case, the lessees) not make any irreversible or irretrievable commitment of resources having the effect of foreclosing alternatives that would avoid jeopardy.²⁹⁹ Once consultation has concluded, the project can proceed if no jeopardy will occur, but the project cannot proceed if jeopardy is found unless an exemption is first obtained under sections 7(g)³⁰⁰ and (h).³⁰¹

The court of appeals held that the lease sale would not violate section 7(d) as an irretrievable commitment of resources made during consultation,³⁰² and therefore upheld the district court's refusal to issue a preliminary injunction.³⁰³ The plaintiffs had argued that the lease sale would constitute an irretrievable commitment of resources for two reasons. First, the lessees would be entitled to compensation if the Secretary were subsequently to disapprove their exploration plans and cancel their leases based on a threatened ESA violation.³⁰⁴ Second, because the OCSLA authorizes the Secretary to disapprove exploration plans only under certain limited conditions,³⁰⁵ the endangered whales would

²⁹⁷ *Id.* § 1536(c).

²⁹⁸ *Id.* § 1536(b).

²⁹⁹ *Id.* § 1536(d).

³⁰⁰ *Id.* § 1536(g).

³⁰¹ *Id.* § 1536(h). The nature of the consultation process is unchanged by the 1979 amendments. See text at notes 406-09, *infra*.

³⁰² *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1055 n.7 (1st Cir. Dec. 17, 1979).

³⁰³ *Id.* at 1054.

³⁰⁴ CLF Brief II, *supra* note 101, at 13.

³⁰⁵ Section 5(a)(2)(A) permits the Secretary to cancel a lease if he determines that:

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine,

receive less protection following the lease sale than the ESA would otherwise provide.³⁰⁶ The court rejected the plaintiffs' arguments, however, reasoning that the leases would be issued subject to an implied condition that the Secretary would act lawfully,³⁰⁷ and that the provisions of the ESA would therefore continue to apply in full force, so that the Secretary could refuse to approve exploration plans in order to avoid jeopardizing the whales in violation of the ESA.³⁰⁸ The court first disputed, then accepted, the argument that the lessees would be entitled to compensation if the Secretary were to disapprove exploration plans.³⁰⁹ Despite its ultimate recognition of the compensation requirement, however, the court refused to regard the lease sale as an irretrievable commitment in violation of section 7(d).³¹⁰

The court's reasoning is suspect on two grounds. First, the court overlooked the fact that, because the lease sale creates an obligation to pay compensation to the lessees if the Secretary disapproves their exploration plans in order to avoid jeopardizing the endangered whales, the lease sale is the type of agency action that Congress intended to prevent by establishing the section 7(d) prohibition and therefore should be considered an irretrievable commitment of resources in violation of section 7(d). Second, the court failed to consider adequately other aspects of the lease sale that should require it to be viewed as an irretrievable commitment of resources.

The OCSLA contains detailed provisions defining the circumstances under which lessees will be entitled to compensation. The statute distinguishes three phases of activity: the lease sale and

coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force. . . .

43 U.S.C.A. § 1334(a)(2)(A) (West Supp. 1979).

³⁰⁶ CLF Brief II, *supra* note 101, at 14-16.

³⁰⁷ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1050 (1st Cir. Dec. 17, 1979). Under the law of contracts, a contract will not be construed to require a party to the contract to violate existing law in order to perform its obligations under the contract. See *Otis & Co. v. SEC*, 323 U.S. 624, 638 (1945); RESTATEMENT OF CONTRACTS § 512 (1932); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 22-1 (2d ed. 1977).

³⁰⁸ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1050 (1st Cir. Dec. 17, 1979).

³⁰⁹ See note 328, *infra*.

³¹⁰ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1055 n.7 (1st Cir. Dec. 17, 1979).

pre-exploratory operations,³¹¹ exploratory drilling activities,³¹² and production and development operations.³¹³ Prior to the second and third phases, lessees are required to submit plans for their activities to the Secretary for approval.³¹⁴ If the Secretary disapproves the lessees' plans under certain conditions,³¹⁵ the lessees may be entitled to compensation³¹⁶ equal to the lesser of 1) the fair value of the cancelled lease rights at the date of cancellation, or 2) the cost of the lease plus all direct expenditures of the lessee pursuant to the lease minus any revenues derived from the lease.³¹⁷

The conditions under which the lessees are entitled to compensation, however, will differ depending on whether the plans submitted are for the exploration phase or the production phase of activities. Section 25(h) of the OCSLA requires that the Secretary disapprove a production plan if the lessee cannot comply with the terms of the OCSLA or other applicable law,³¹⁸ and further states that the lessee shall not be entitled to compensation based on that disapproval.³¹⁹ Therefore, if the lessee cannot comply with the terms of the ESA, the Secretary must disapprove the lessee's production plan and cancel the lease without compensating the lessee.³²⁰ In contrast, OCSLA section 11(c)(1) specifically provides that the lessee shall be entitled to compensation if the Secretary disapproves an exploration plan in order to prevent long-term harm to life, including aquatic life,³²¹ so that the lessee would re-

³¹¹ See 43 U.S.C.A. § 1337 (West Supp. 1979).

³¹² *Id.* § 1340.

³¹³ *Id.* § 1351.

³¹⁴ *Id.* §§ 1340(c)(1), 1351(a)(1).

³¹⁵ *Id.* § 1334(a)(2)(A).

³¹⁶ *Id.* § 1340(c)(1).

³¹⁷ *Id.* § 1334(a)(2)(C).

³¹⁸ Section 25(h)(1) states in part that "[t]he Secretary shall disapprove a plan — (A) if the lessee fails to demonstrate that he can comply with the requirements of this subchapter or other applicable Federal law . . ." 43 U.S.C.A. § 1351(h)(1) (West Supp. 1979) (emphasis added).

³¹⁹ Section 25(h)(2)(A) states that "[i]f a plan is disapproved — (i) under subparagraph (A) of paragraph (1) . . . the lessee shall not be entitled to compensation because of such disapproval." 43 U.S.C.A. § 1351(h)(2)(A) (West Supp. 1979).

³²⁰ *Id.* Under section 7(d) of the ESA, the lessee as well as the federal agency is prohibited from making any irreversible or irretrievable commitment of resources during consultation. 16 U.S.C. § 1536(d) (Supp. II 1978).

³²¹ Section 11(c)(1) provides, in part, that:

the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title [a long-term threat of serious harm to life, including aquatic life], and (B)

ceive compensation even if the Secretary's disapproval were based on a threatened ESA violation.

Because the compensation which the OCSLA requires the Secretary to pay is not simply equal to the purchase price of the lease, but rather is based on either the current value of the lease or the original cost of the lease plus all subsequent expenditures of the lessee under that lease,³²² the amount of compensation required could substantially exceed the price paid by the lessee to acquire the exploration and development rights.³²³ Therefore the compensation provisions of the OCSLA establish the lease sale as an irretrievable commitment of resources. In addition, the lease sale has the effect of foreclosing the implementation of prudent alternative measures, such as refusing to lease and explore the area, that would avoid jeopardizing the endangered whales. Since the Secretary had not completed the consultation process and therefore had not insured that post-lease sale activities would not jeopardize the endangered whales, conducting the lease sale violated section 7(d) of the ESA as an irretrievable commitment of resources which had the effect of foreclosing reasonable alternatives that would avoid jeopardy.³²⁴

The OCSLA's compensation requirements make the lease sale exactly the type of action that Congress intended to stop by establishing the section 7(d) prohibition.³²⁵ By failing to find an ESA violation, the court of appeals has allowed the Secretary to proceed with steps that could result in a significant and irretrievable loss of resources,³²⁶ and could create strong pressures to continue with the project even if it were found to jeopardize an endangered species.³²⁷ In doing so, the court has bypassed the

such proposed activity cannot be modified to avoid such condition. If the Secretary disapproves a plan under the preceding sentence, he may . . . cancel such lease and *the lessee shall be entitled to compensation . . .*

43 U.S.C.A. § 1340(c)(1) (West Supp. 1979) (emphasis added).

³²² See text at notes 315-17, *supra*.

³²³ The cost of pre-exploration activities is extremely high. See note 344, *infra*. If pre-exploration testing were to indicate that the lease area was likely to contain large petroleum reserves, the value of the lease could become substantially greater than the original cost of the lease. Consequently, the amount of compensation required for the Secretary's disapproval of exploration plans could be significant.

³²⁴ See 16 U.S.C. § 1536(d) (Supp. II 1978).

³²⁵ See text at notes 340-42, *infra*.

³²⁶ See note 323, *supra*.

³²⁷ See text at notes 337-38, *infra*.

congressional mandate established in section 7(d).³²⁸

³²⁸ There are two versions to the court's analysis of the applicability of the ESA to the facts of *CLF v. Andrus*. The court initially published its slip opinion on Dec. 17, 1979. At that time, relying on arguments set forth by the defendants, the court concluded that the Secretary could disapprove exploration plans based on a threatened ESA violation without having to compensate the lessees. 14 *ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1050* (1st Cir. Dec. 17, 1979). The court reasoned that the leases contained an implied condition of legality, see note 307, *supra*, that would justify disapproval without compensation. The difficulty with the court's analysis was that it contained a fundamental contradiction — the Secretary, by refusing to violate the provisions of the ESA, would have to cancel the lease to avoid jeopardizing an endangered species, but his refusal to compensate the lessee would violate section 11(c)(1) of the OCSLA.

After the court published its slip opinion, counsel for the federal defendants wrote a letter informing the court that its reasoning contradicted the explicit requirement of the OCSLA that the lessee be compensated if exploration plans are disapproved, and asking the court to correct the "error" before official publication of its decision. Letter from Maryann Walsh, Attorney for the Federal Defendants, to Dana H. Gallup, Clerk of the United States Court of Appeals (Jan. 9, 1980). The plaintiffs countered by pointing out to the court that the "error" referred to by the government was the fundamental premise upon which the court rejected the plaintiffs' arguments concerning the ESA, and that if the defendants wanted to abandon their former argument that compensation would not be required, the proper procedure would be for the defendants to request a rehearing. Letter from Douglas I. Foy, Attorney for Plaintiffs *CLF, et al.*, to Dana H. Gallup, Clerk of the United States Court of Appeals (Jan. 16, 1980).

The court of appeals responded by issuing a Memorandum and Order, *CLF v. Andrus*, 14 *ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1229* (1st Cir. Feb. 22, 1980) [hereinafter cited as *Memo*], adopting the defendants' suggestion and deleting the references to the court's conclusion that compensation would not be required for disapproval of exploration plans. *Id.* at 1230. In doing so, the court chided the defendants for their "possibly disingenuous claim" that they had not advocated the position originally adopted by the court, but acknowledged that the OCSLA explicitly provided for compensation and that its use of an implied condition of legality was not intended to contradict explicit statutory language. *Id.* The court stated, however, that the change did not alter the court's holding, *id.*, in spite of the fact that it had based its conclusion that the lease sale would not constitute an irretrievable commitment in violation of ESA section 7(d) on its interpretation that compensation would not be required for disapproval of exploration plans. See *CLF v. Andrus*, 14 *ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1050-51* (1st Cir. Dec. 17, 1979) [hereinafter cited as *Decision*].

In attempting to justify its continued adherence to the position that the lease sale did not violate the ESA, the court directly contradicted its original opinion on two points. First, the court stated that "CLF in fact never contended that the possibility that compensation would be paid in the event of disapproval of the exploration plans rendered the lease sale an irreversible commitment of resources." *Memo, supra*, at 1230. In its original decision, however, the court had characterized the plaintiffs as arguing that "the resource which will forever be lost once the sale is held is the ability of the Secretary to conform his actions to the strict standards of the ESA without being forced to compensate the lessees for violating the terms of the lease." *Decision, supra*, at 1050. Second, the court stated that plaintiffs' failure to raise this argument "does not itself foreclose appellants from raising it in the future." *Memo, supra*, at 1230. In its original opinion, however, the court had stated that its decision was intended to resolve finally (against the plaintiffs) the issue of whether the lease sale violated the ESA. *Decision, supra*, at 1055 n.7.

Not only does the OCSLA's compensation requirement suggest that the lease sale is an irretrievable commitment of resources in violation of section 7(d) of the ESA, but also the historical context of section 7(d) suggests that the lease sale, as the first in a series of steps leading toward the single overriding objective of oil and gas exploitation,³²⁹ is the point at which Congress intended to halt such a project until the agency could insure a lack of jeopardy to endangered species. The Supreme Court decided *TVA v. Hill*³³⁰ before section 7(d) was added to the ESA.³³¹ Although the Court was interpreting the statute in a context in which the endangered species was threatened with certain extinction, the Court's interpretation of the statute was sweeping. The Court rejected any effort to read an element of reasonableness into the ESA's absolute requirement that the agency insure that no endangered species would be jeopardized by the agency action.³³² The Court stressed that the statutory language "admits of no exception,"³³³ and that it "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies."³³⁴

When Congress renewed the ESA³³⁵ shortly after the Court's decision in *TVA v. Hill*, it did not alter the Court's interpretation of the statute by weakening the requirement to insure against jeopardy.³³⁶ Instead, Congress added the section 7(g) and (h) exemption provisions and the section 7(d) prohibition against irre-

The court's contradictory statements suggest that the court has had a difficult time reconciling the compensation requirement with its conclusion that the lease sale did not violate the ESA, and that it may be attempting to give the plaintiffs a second chance to present their argument. Nevertheless, when the plaintiffs sought to petition for a rehearing on the matter, their motion to file the petition late was denied.

It is not clear at this time whether the court's Dec. 17 opinion, when officially published, will reflect the changes contained in the Court's Memorandum and Order of Feb. 22, 1980. The original opinion, however, has been unofficially published at 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049 (1st Cir. Dec. 17, 1979), and the Memorandum and Order at 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1229 (1st Cir. Feb. 22, 1980).

³²⁹ See *North Slope Borough v. Andrus*, 486 F. Supp. 332, 352 (D.D.C. Jan. 22, 1980).

³³⁰ 437 U.S. 153 (1978).

³³¹ The Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, were enacted on Nov. 10, 1978. *TVA v. Hill* was decided June 15, 1978.

³³² *TVA v. Hill*, 437 U.S. 153, 194 (1978).

³³³ *Id.* at 173.

³³⁴ *Id.* at 185. The court's interpretation of the ESA is not altered by the 1979 ESA amendments. See text and notes at notes 406-09, *infra*.

³³⁵ See note 331, *supra*.

³³⁶ See text at notes 281-82, *supra*.

trievable commitments during consultation. Section 7(d) was enacted in order to prevent the type of situation presented in *TVA v. Hill*, where a project would continue to consume substantial resources until a determination of jeopardy is finally made, by requiring the determination of jeopardy at the beginning of the project.³³⁷ Explaining the importance of section 7(d), Senator John Culver emphasized that “[i]t is also clear that the earlier in the progress of a project a conflict is recognized, the easier it is to design an alternative consistent with the requirements of the act, or to abandon the proposed action.”³³⁸ Thus section 7(d) is intended to stop projects at their inception until a lack of jeopardy is insured. This precautionary aspect of the statute can only be given full force by viewing the project as a whole³³⁹ and considering the lease sale as the appropriate point at which to halt Interior’s Georges Bank project pending a determination of whether jeopardy will occur.

One court has recently recognized that an OCS lease sale is conducted in order to encourage subsequent exploration and development activities,³⁴⁰ that a massive amount of resources must be invested to facilitate these activities,³⁴¹ and that such an investment before the safety of an endangered species is insured is exactly what Congress intended to prevent by enacting section 7(d).³⁴² Pre-exploration activities, such as sonar testing, bottom sampling, seismic testing, and the preparation of exploration plans based on that testing,³⁴³ that immediately follow the lease sale are extremely expensive, costing hundreds of millions of dollars.³⁴⁴ The court of appeals in *CLF v. Andrus* did not appear to

³³⁷ See 124 CONG. REC. S10,893-97 (daily ed. July 17, 1978), (remarks of Sen. Culver); H. R. CONF. REP. NO. 697, 96th Cong., 1st Sess. 13 [hereinafter cited as 1979 H.R. CONF. REP.], reprinted in [1979] U.S. CODE CONG. & AD. NEWS 4776, 4781 [hereinafter cited as 1979 CONG. & AD. NEWS].

³³⁸ 124 CONG. REC. S10,896 (daily ed. July 17, 1978) (remarks of Sen. Culver).

³³⁹ See *North Slope Borough v. Andrus*, 486 F. Supp. 332, 350 (D.D.C. Jan. 22, 1980) (the ESA gives agency action a very broad scope, and for OCS oil activities, agency action includes the lease sale and all resulting activities).

³⁴⁰ *Id.* at 352.

³⁴¹ *Id.* at 357.

³⁴² *Id.* at 356. The *North Slope* court reached the contradictory conclusion, however, that conducting the lease sale did not constitute the making of an irretrievable commitment of resources. See text at notes 347-64, *infra*.

³⁴³ See *North Slope Borough v. Andrus*, 486 F. Supp. 326, 330 (D.D.C. Dec. 7, 1979). See also 30 C.F.R. § 250.34-1 (1979) (lessee must prepare exploration plan before commencing exploration activities).

³⁴⁴ The estimated cost of pre-exploration activities for the Beaufort Sea lease sale is

be aware of that cost, and the parties did not raise the point in their arguments or briefs.³⁴⁵ Yet such a sizable investment would have to be considered "massive" according to any reasonable definition of the term, and is the type of investment that Congress intended to prevent. Thus, even prior to the Secretary's decision whether to approve exploration plans, which the court of appeals appeared to consider as the critical point after which an irretrievable commitment of resources would occur,³⁴⁶ the size of the investment that will have been made meets the "massive investment" test envisioned by Congress and should be sufficient to justify a finding of an irretrievable commitment of resources in violation of section 7(d).

In a very similar case, *North Slope Borough v. Andrus*,³⁴⁷ involving a challenge to Lease Sale No. 49 in the Beaufort Sea north of Alaska based on alleged jeopardy to the endangered bowhead whale,³⁴⁸ the Federal District Court for the District of Columbia acknowledged the significant cost of pre-exploration activities³⁴⁹ and yet refused to find that the lease sale violated section 7(d).³⁵⁰ The court reasoned that money invested in research could

\$157 million. *North Slope Borough v. Andrus*, 486 F. Supp. 332, 357 (D.D.C. Jan. 22, 1980).

³⁴⁵ Plaintiffs were unaware of the nature or cost of pre-exploration activities because they had not engaged in any pre-trial discovery. Conversation with Douglas I. Foy, Attorney for Plaintiffs CLF, *et al.* (Feb. 20, 1980). See text at notes 632-38, *infra*.

³⁴⁶ Once the Secretary of the Interior has conducted a lease sale and accepted the bids, the next step in the project over which he has control is his decision whether to approve exploration plans submitted by the lessees. See 1978 H.R. REP., *supra* note 25, at 64, 1978 CONG. & AD. NEWS at 1471; 43 U.S.C.A. § 1340(c)(1) (West Supp. 1979). If the plans are approved, exploratory drilling activities can begin. The court of appeals based its decision that the lease sale does not constitute an irretrievable commitment of resources in violation of section 7(d) of the ESA on the Secretary's ability to disapprove exploration plans if threatened with a section 7(d) violation. *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1050 (1st Cir. Dec. 17, 1979). The court's focus on this step of the project suggests that the court would consider approval of exploration plans to be an irretrievable commitment of resources.

³⁴⁷ 486 F. Supp. 332 (D.D.C. Jan. 22, 1980), *clarified*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1001 (D.D.C. Feb. 1, 1980).

³⁴⁸ The plaintiffs challenged the lease sale on several grounds, alleging that the EIS prepared for the sale violated NEPA requirements, that the safeguards established in the OCSLA had been violated, that the lease sale would jeopardize the endangered bowhead whale, and that the Secretary of the Interior had violated his trust responsibility to the Inupiat native Alaskans, who subsist on the bowhead, by jeopardizing the whales. The bowhead whales migrate spring and fall through the Beaufort Sea and the lease sale area. *North Slope Borough v. Andrus*, 486 F. Supp. 332, 340 (D.D.C. Jan. 22, 1980).

³⁴⁹ See note 344, *supra*.

³⁵⁰ *North Slope Borough v. Andrus*, 486 F. Supp. 332, 351 (D.D.C. Jan. 22, 1980). Al-

not be considered wasteful, since it is valuable in its own right,³⁵¹ and that the cost must be considered in light of the high risk generally present in the industry as a risk that the industry is willing to accept, knowing that a subsequent ESA violation might be found.³⁵² In reaching its conclusion, however, the district court relied on a notion of reasonableness to justify the expense,³⁵³ an approach explicitly rejected by the Supreme Court in *TVA v. Hill*.³⁵⁴

The *North Slope* court initially recognized that the purpose of section 7(d) is to prevent the agency from "steamrolling" an activity in order to secure completion of a project,³⁵⁵ since the agency may be tempted to commit significant resources to a project as a means of encouraging continuation of the project if jeopardy is subsequently found to exist.³⁵⁶ Yet allowing the lessees to make the pre-exploration investment prior to determining whether jeopardy will occur creates just such a steamrolling temptation, especially where the lessees would be unlikely to consider the pre-exploration research a reasonable investment in its own right if they knew beforehand that no exploration would be allowed. Thus the *North Slope* court's conclusion that the lease sale does not violate section 7(d)³⁵⁷ is inconsistent with its initial premise that section 7(d) was intended to prevent the type of massive investments involved in pre-exploration activities.³⁵⁸

The *North Slope* court's conclusion is also inconsistent with its second initial premise, that the ESA intends agency action to be given an expansive scope in determining compliance with the

though the court found no section 7(d) violation, it did find a violation of section 7(b) since no satisfactory biological opinion had been obtained. *Id.* at 354. The court also found that the Secretary has a trust responsibility to the Inupiat, and that he violated that responsibility by failing to comply with the ESA. *Id.* at 344. The court also found a NEPA violation based on the failure of the EIS prepared for the lease sale to discuss the alternative of management under marine sanctuary status. *Id.* at 349. Consequently, although the lease sale had been held, the court enjoined further activities subsequent to the lease sale until the EIS deficiency has been remedied, and until a satisfactory biological opinion has been obtained. *Id.* at 363-64.

³⁵¹ *Id.* at 357.

³⁵² *Id.*

³⁵³ *See id.*

³⁵⁴ 437 U.S. 153, 194 (1978).

³⁵⁵ *North Slope Borough v. Andrus*, 486 F. Supp. 332, 356 (D.D.C. Jan. 22, 1980).

³⁵⁶ *See* 1979 H.R. CONF. REP., *supra* note 337, at 13, 1979 CONG. & AD. NEWS at 4781.

³⁵⁷ *North Slope Borough v. Andrus*, 486 F. Supp. 332, 357 (D.D.C. Jan. 22, 1980).

³⁵⁸ *Id.* at 355.

statute.³⁵⁹ According to the court's premise, the precautionary nature of the ESA can be effectively implemented only by requiring the agency to look at all ramifications of the agency action.³⁶⁰ In order to do so, the agency should view the three phases of the exploration process (the lease sale, exploration, and production) as a series of related steps to be taken toward the ultimate objective of exploiting the OCS resources.³⁶¹ Accordingly, the court determined that agency action constitutes "the lease sale and all resulting activities."³⁶² In rejecting the claim that the lease sale violated section 7(d), however, the *North Slope* court considered only the pre-exploration activities³⁶³ rather than all resulting activities, such as exploration and development, and found the cost of those activities acceptable.³⁶⁴ The court's refusal to find a section 7(d) violation therefore ignored not only its premise that the intent of Congress was to prevent such massive investments, but also its premise that the reviewable agency action involved all steps of the project.

If the *North Slope* court's initial premises are accepted, and the *TVA v. Hill* mandate that the agency insure that endangered species are not jeopardized is enforced, the lease sale is the most appropriate point to grant an injunction in order to avoid massive investments and thus prevent an irretrievable commitment of resources during consultation. Support for this approach exists in the case of *Nebraska v. Rural Electrification Administration*.³⁶⁵ *Nebraska* involved a challenge to a proposed dam project that would possibly threaten the critical habitat of endangered whooping cranes.³⁶⁶ The Rural Electrification Administration (REA) had made loan guarantee commitments to the sponsors of the project, and the Army Corps of Engineers had issued a permit for dredging and filling operations.³⁶⁷ The court held that the actions

³⁵⁹ *Id.* at 350-51.

³⁶⁰ *Id.* at 351.

³⁶¹ *Id.* at 352.

³⁶² *Id.* at 351.

³⁶³ *Id.* at 357.

³⁶⁴ *Id.*

³⁶⁵ 12 *Envir. Rep. Cas.* 1156 (D. Neb. Oct. 2, 1978).

³⁶⁶ The project included the construction of an electric generating station and a dam and reservoir on the Laramie River in Wyoming. *Id.* at 1157. The Laramie is a tributary of the North Platte River, which contains a critical habitat of the endangered whooping cranes. The REA had refused to initiate consultation with the Fish and Wildlife Service to determine whether the cranes would be jeopardized by the project. *Id.* at 1170.

³⁶⁷ *Id.* at 1157.

of the REA and the Corps of Engineers constituted an irretrievable commitment in violation of agency regulations containing a consultation requirement virtually identical to the subsequently enacted section 7(d),³⁶⁸ even though construction had not begun, and therefore issued a preliminary injunction.³⁶⁹ The court reasoned that the two agencies had not met their burden of *insuring* that no jeopardy would exist³⁷⁰ and that their actions would create pressures to continue the project in the face of later information that the project might be detrimental.³⁷¹

Making a loan guarantee commitment or issuing a permit is analogous to conducting a lease sale. It is the essential first step in a project that quickly involves the commitment of massive amounts of resources. The court in *Nebraska* recognized that that first step would lead directly to the type of commitment that section 7(d) and its precursor were intended to prohibit³⁷² and, acknowledging the Supreme Court's strict interpretation of the ESA's absolute language,³⁷³ stopped the project at that point.³⁷⁴

In contrast to *Nebraska*, the court of appeals in *CLF v. Andrus* has not acknowledged the importance of the lease sale itself as the initial step of the Georges Bank project. This step is likely to generate pressure to continue the project at later stages, a pressure that Congress sought to avoid and which will lead directly to sizable investments prior to the Secretary's decision whether to approve exploration plans. The court has adopted a narrow view of the scope of agency action under the ESA, looking only at an individual segment of the project, rather than taking a broad view of the project as a whole, a view that is essential if the preventive purpose of the statute is to be achieved. If the project can be justified, Congress has provided a means for the Secretary to avoid the strictures of the ESA's provisions. For at the same time that

³⁶⁸ *Id.* at 1180. At the time *Nebraska v. REA* was decided, the ESA had not yet been amended to include the section 7(d) prohibition against irretrievable commitments of resources during consultation. The Fish and Wildlife Service, however, as the branch of Interior administering the ESA, had promulgated regulations containing a consultation requirement virtually identical to the language of section 7(d). 50 C.F.R. § 402.04(a)(3) (1978). See *Nebraska v. REA*, 12 *Envir. Rep. Cas.* 1156, 1172 (D. Neb. Oct. 2, 1978).

³⁶⁹ *Nebraska v. REA*, 12 *Envir. Rep. Cas.* 1156, 1180 (D. Neb. Oct. 2, 1978).

³⁷⁰ *Id.* at 1171, 1173.

³⁷¹ *Id.* at 1172.

³⁷² *Id.*

³⁷³ *Id.* at 1171.

³⁷⁴ *Id.* at 1181.

Congress added section 7(d)³⁷⁵ to prevent a premature investment of resources, it also provided for exemptions from the statute's provisions in situations where jeopardy cannot be insured against and where the project will provide important benefits.³⁷⁶ Therefore, if the Secretary is unable to insure a lack of jeopardy, the appropriate course of action is to apply for an exemption.³⁷⁷ The court of appeals should have encouraged the Secretary to use the exemption procedure rather than restricting the focus of section 7(d) so as to frustrate the intent of Congress.

C. *The Burden of Proof*

An additional consequence of the court's decision in *CLF v. Andrus* is that the court has effectively placed on the plaintiffs the burden of demonstrating whether the Secretary has complied with the ESA. The court of appeals did not specifically address the burden of proof issue, and the issue has not been resolved consistently by other courts. Yet the burden of proof is an important issue in any litigation based on alleged ESA violations, because the plaintiffs' chances of success in challenging agency action are much greater if the burden of demonstrating compliance falls on the agency.

The ESA is an unusual statute. Its purpose is prophylactic³⁷⁸ and its requirements are strict.³⁷⁹ Section 7(a) requires agencies to *insure* that their actions will not jeopardize *any* endangered

³⁷⁵ 16 U.S.C. § 1536(d) (Supp. II 1978).

³⁷⁶ *Id.* §§ 1536(e), (g), (h).

³⁷⁷ An exemption may be granted if 1) there are no reasonable alternatives to the agency action, 2) the benefits of the action clearly outweigh the benefits of alternatives that would conserve the species and the action is in the public interest, 3) the action is of regional or national significance, and 4) the adverse effects of the action on the species are minimized through reasonable mitigation measures. *Id.* § 1536(h)(1).

Following the enactment of the 1978 ESA amendments, exemptions were requested for two projects — the Tellico Dam and the Grayrocks Dam. The Grayrocks Dam project, which was the focus of the controversy in *Nebraska v. REA*, was granted an exemption. 9 ENVIR. REP. (BNA) 1776 (1979). The Tellico Dam, however, which was at issue in *TVA v. Hill*, was denied an exemption by a unanimous vote of the Endangered Species Committee, because a balancing of the costs and benefits demonstrated a negative net benefit, even after the project was 95 percent complete. *Id.* Congress subsequently amended an appropriations bill to exempt the Tellico Dam project from any law that might hinder its completion. Act of Sep. 25, 1979, Pub. L. No. 96-69, 93 Stat. 437, 449-50, reprinted in [1979] U.S. CODE CONG. & AD. NEWS.

³⁷⁸ See *TVA v. Hill*, 437 U.S. 153, 194 (1978).

³⁷⁹ See *id.* at 173.

species.³⁸⁰ In *TVA v. Hill* the Supreme Court found the meaning of the provision plain and its language absolute.³⁸¹ The Court rejected any attempt to add a judicial gloss of “reasonableness” to the ESA’s requirements,³⁸² reasoning that the intent of Congress was to reverse the trend toward the extinction of species, “whatever the cost,”³⁸³ and that any attempt to balance the interests of the species against the value or cost of a project was therefore inappropriate.³⁸⁴

The National Environmental Policy Act (NEPA)³⁸⁵ presents a useful contrast to the ESA. While the language of the ESA is strict, NEPA merely requires agencies to give “appropriate consideration” to environmental values in the decision-making process.³⁸⁶ The agencies are not required to give environmental values paramount importance.³⁸⁷ NEPA’s requirements are essentially procedural³⁸⁸—so long as the agency has considered all reasonable factors, courts are not to question the agency’s final decision.³⁸⁹ Furthermore, under NEPA the burden of demonstrating a lack of compliance with the statute’s requirements always remains on the plaintiffs.³⁹⁰ If they cannot demonstrate that the agency has violated the terms of NEPA, the agency is free to proceed with the project.

The burden of demonstrating an agency’s compliance with the ESA, however, must rest on the agency if the precautionary purposes³⁹¹ of the statute are to be effective. Placing the burden on the agency will insure that the agency fully accepts its statutory obligation to give endangered species top priority.³⁹² If the agency has insured that no jeopardy exists, then the agency should easily be able to demonstrate to a reviewing court that the required

³⁸⁰ 16 U.S.C. § 1536(a) (Supp. II 1978). While the language of section 7(a) has been modified slightly by the 1979 ESA amendments, its import remains unchanged. See text and notes at notes 406-09, *infra*.

³⁸¹ *TVA v. Hill*, 437 U.S. 153, 173 (1978).

³⁸² *Id.* at 194.

³⁸³ *Id.* at 184.

³⁸⁴ *Id.* at 187.

³⁸⁵ 42 U.S.C. §§ 4321-4361 (1976).

³⁸⁶ *Id.* § 4332(2)(B) (1976). See text at notes 123-70, *supra*.

³⁸⁷ *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 100 S.Ct 497, 500 (1980).

³⁸⁸ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

³⁸⁹ *Id.*

³⁹⁰ *Sierra Club v. Morton*, 510 F.2d 813, 818 (5th Cir. 1975).

³⁹¹ See text at notes 258-79, *supra*.

³⁹² See *TVA v. Hill*, 437 U.S. 153, 174 (1978).

measures have been taken.³⁹³ On the other hand, if the challenging party must bear the burden of demonstrating a lack of compliance, the agency will be free to proceed with a project until non-compliance can be positively shown. If a lack of compliance were not provable in court, the agency would be free to place endangered species in jeopardy. In difficult situations the agency might be tempted to compromise its duty under the ESA, hoping that the challenging party would not be able to present sufficient evidence to demonstrate a statutory violation. Such a result would be inconsistent with the prophylactic purposes of the ESA.

In *Nebraska v. REA*,³⁹⁴ where a dam project threatened the habitat of endangered whooping cranes, the court placed the burden of demonstrating compliance on the agency.³⁹⁵ Relying on the Supreme Court's uncompromising interpretation of the ESA in *TVA v. Hill*,³⁹⁶ the court reasoned that while the agency may have been justified in concluding that no adverse impact would occur, the question was whether the agency had met its burden of insuring that there would be no jeopardy, and that the agency had not complied with the statute until it had provided that insurance.³⁹⁷ In refusing to place the burden on the parties challenging the agencies,³⁹⁸ the *Nebraska* court adopted an approach that gave full effect to the precautionary purposes of the ESA.³⁹⁹

The nature of the consultation process established by section 7 lends itself to a requirement that the agency demonstrate its

³⁹³ The conference report on the 1979 ESA amendments states in reference to section 7 of the ESA that "[t]his 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 [the new version of section 7(a)]." 1979 H.R. CONF. REP., *supra* note 337, at 12, 1979 CONG. & AD. NEWS at 4780. If the action agency has the burden of demonstrating compliance to the consulting agency, then the action agency should carry the same burden before a reviewing court.

³⁹⁴ 12 Envir. Rep. Cas. 1156 (D. Neb. Oct. 2, 1978).

³⁹⁵ *Id.* at 1171.

³⁹⁶ 437 U.S. 153 (1978). See text at notes 272-79, *supra*.

³⁹⁷ *Nebraska v. REA*, 12 Envir. Rep. Cas. 1156, 1171 (D. Neb. Oct. 2, 1978).

³⁹⁸ *Id.*

³⁹⁹ Although the Court of Appeals for the Fifth Circuit reached the opposite conclusion in *National Wildlife Federation v. Coleman*, 529 F.2d 359, 372 (5th Cir. 1976), *cert. denied sub nom. Boteler v. National Wildlife Fed'n*, 429 U.S. 979 (1976), the case is questionable precedent. In that case, where the construction of an interstate highway threatened the habitat of the endangered sandhill crane, the court placed the burden of demonstrating agency non-compliance on the plaintiffs. *Id. Coleman*, however, was decided before the Supreme Court's strict interpretation of the ESA in *TVA v. Hill* and therefore before the absolute nature of the agency's obligation was judicially established.

compliance.⁴⁰⁰ Section 7(c) requires that, for any agency action, the agency must request a biological assessment from the appropriate consulting agency in order to identify any endangered species present in the area and likely to be affected by the action.⁴⁰¹ Therefore, if the agency has not requested such an assessment, the agency has not insured against jeopardy and is not in compliance with the statute. If an assessment has been obtained and no species is likely to be affected, the agency is free to proceed; but if any species is likely to be affected, section 7(b) requires the agency to obtain a biological opinion stating whether jeopardy will occur.⁴⁰² If the agency has not obtained a biological opinion, it has not insured that jeopardy is not likely, and the agency is therefore not in compliance with the statute. If a biological opinion has been issued based on information insufficient to determine whether jeopardy will occur, the agency likewise has not insured that jeopardy is unlikely, and the agency is not in compliance with the statute.⁴⁰³ If a biological opinion is issued and states that jeopardy is likely to occur, the agency demonstrably cannot insure that jeopardy is unlikely and can only comply with the statute by seeking an exemption under section 7(g).⁴⁰⁴ Only if the agency has obtained both a biological assessment and, if required, a biological opinion based on sufficient information to determine that jeopardy is unlikely has the agency complied with the statute.

Thus the structure of the section 7 consultation process provides agencies with a simple mechanism for demonstrating that they have insured that their actions are not likely to jeopardize any endangered species. If the agency has not completed the consultation process, then the challenging party should be entitled to an injunction against the agency action until the process has been completed and an opinion based on information sufficient to sup-

⁴⁰⁰ The following description of the consultation process reflects the changes in section 7 included in the 1979 ESA amendments, Pub. L. No. 96-159, § 4, 93 Stat. 1226 (1979). While the language of section 7(a) has been altered slightly, the change does not alter the essential requirements, and the consultation process remains intact. See text and notes at notes 406-09, *infra*.

⁴⁰¹ 16 U.S.C. § 1536(c) (Supp. II 1978).

⁴⁰² *Id.* § 1536(b).

⁴⁰³ *Contra*, *North Slope Borough v. Andrus*, 486 F. Supp. 332, 356-57 (D.D.C. Jan. 22, 1980). In *North Slope*, however, the district court's conclusion contradicted its initial premises. See text at notes 347-64, *supra*.

⁴⁰⁴ 16 U.S.C. § 1536(g) (Supp. II 1978).

port a conclusion that jeopardy is unlikely has been obtained. This mechanism places the burden on the agency, with the cooperation and the expertise of the consulting agency available to facilitate compliance with the statute, and furthers the intent of Congress to protect endangered species regardless of the cost.

D. What Level of Harm Constitutes Jeopardy?

A final issue raised in *CLF v. Andrus*, which the court of appeals did not need to address because of its ruling that the lease sale is not an irretrievable commitment of resources, is the question of the threshold for jeopardy.⁴⁰⁵ At what point does a threat to a species become so significant that it is deemed to jeopardize the species?

The 1979 ESA Amendments⁴⁰⁶ have made the question more complicated by altering slightly the critical language of section 7(a). Whereas section 7(a) previously required each federal agency to "insure that any action . . . does not jeopardize the continued existence of any endangered species,"⁴⁰⁷ section 7(a)(2) now requires each federal agency to "insure that any action . . . is not likely to jeopardize" endangered species.⁴⁰⁸ The legislative history of the 1979 amendments, however, suggests that, rather than watering down the strict requirements of the statute, Congress simply intended to clarify the language of section 7 by con-

⁴⁰⁵ No physical threat to endangered species would occur until exploration activities begin, because no chronic pollution or threat of an oil spill would exist beforehand. Therefore the lease sale would violate the ESA only if it constituted an irretrievable commitment of resources in violation of section 7(d). Since the court of appeals found no section 7(d) violation, and looked only at the lease sale itself, rather than all resulting activities, the court did not consider whether the exploration activities would jeopardize the whales.

⁴⁰⁶ Act of Dec. 28, 1979, Pub. L. No. 96-159, 93 Stat. 1225 (amending 16 U.S.C. §§ 1531-1543 (Supp. II 1978)).

⁴⁰⁷ 16 U.S.C. § 1536(a) (Supp. II 1978) (emphasis added).

⁴⁰⁸ Pub. L. No. 96-159, § 4, 93 Stat. 1226 (amending 16 U.S.C. § 1536(a) (Supp. II 1978)) (emphasis added). In its entirety, section 7(a)(2) reads:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') 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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Id.

forming it to existing interpretations.⁴⁰⁹ Therefore *TVA v. Hill*⁴¹⁰ still stands as the authoritative interpretation of section 7, and the strictness of that interpretation has not been diluted.

Nevertheless, the situation presented in *CLF v. Andrus* tests the limits of the ESA's requirements. In *TVA v. Hill* the jeopardy was clear—if the dam were completed, the snail darter would be eradicated. *CLF v. Andrus*, however, presents the opposite end of the spectrum. At the time of the court's decision in Round Two, the work on the Georges Bank project had not begun and no resources had been committed.⁴¹¹ Furthermore, oil drilling activity in the Georges Bank area conceivably may never harm even a single member of an endangered species. Yet the ESA should still apply, because its terms are strict, requiring agencies to insure that jeopardy is not likely and providing for no exceptions.⁴¹²

Since Congress did not define the terms "insure" and "jeopardize", their ordinary meaning applies.⁴¹³ To insure is "to make certain,"⁴¹⁴ and to jeopardize is to "expose to danger."⁴¹⁵ Therefore to insure that an agency action is not likely to jeopardize the continued existence of any endangered species is to make certain that members of an endangered species will not likely be exposed to danger of death or injury, so that the continued existence of

⁴⁰⁹ See 1979 H.R. CONF. REP., *supra* note 337, at 12, 1979 CONG. & AD. NEWS at 4780. Rather remarkably, the report does not specifically discuss the reasons for the change in the critical language of section 7(a), except to indicate that it brings the language into conformity with existing decisions. *Id.* Thus the legislative history indicates that the Supreme Court's interpretation of the statute in *TVA v. Hill* still controls. The report goes on to state that the statute "continues to give the benefit of the doubt to the species," and continues to place on the action agency the burden of demonstrating compliance with section 7(a)(2). *Id.* See text at notes 379-404, *supra*.

The practical effect of the 1979 amendments is to recognize that it is impossible to demonstrate conclusively that a project does not jeopardize any endangered species, and therefore it should be sufficient for the agency to demonstrate that it has insured that no endangered species are *likely* to be jeopardized. That recognition, however, should not be used to dilute the essential requirements of section 7. Congress has given its approval to the Supreme Court's strict interpretation of the statute, and continues to place primary emphasis on the preservation of endangered species.

⁴¹⁰ 437 U.S. 153 (1978).

⁴¹¹ Since the lease sale had not been conducted at the time of the court's decision on Dec. 17, 1979, the potential lessees had not acquired any rights to begin post-lease sale activities.

⁴¹² If the agency cannot comply with the requirements of section 7, the agency should request an exemption under section 7(g). See text and notes at notes 375-77, *supra*.

⁴¹³ See *Old Colony R.R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932).

⁴¹⁴ WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 439 (1967 ed.).

⁴¹⁵ *Id.* at 455.

the species is not threatened. In practical terms, then, the agency's obligation is to make certain that the species' chances for survival are not impaired. Any likely threat of harm to a critical portion of the species must be avoided.

Many endangered species can be found in the Georges Bank area,⁴¹⁶ but the most significant threat posed by drilling activities is to the right whale and the humpback whale. Both species are present on Georges Bank for a large part of the year,⁴¹⁷ both are surface feeders and therefore particularly susceptible to oil spills,⁴¹⁸ and the populations of each remain critically low, so that the loss, including the loss of reproductive potential, of even a few members could impair the species' chances of survival.⁴¹⁹ Because whales are by their nature virtually impossible to study thoroughly,⁴²⁰ the potential adverse effects of spilled petroleum and of the pollutants contained in chronic drilling discharges is not known.⁴²¹ Consequently it is impossible to say with certainty that drilling activities on Georges Bank will not impair the whales' chances of survival.

In claiming that the harm to the whales is speculative and remote,⁴²² the defendants in *CLF v. Andrus* have missed the point. The ESA is precautionary — the emphasis is not on the relative remoteness of the threatened harm, but rather on the agency's obligation to *insure* that jeopardy is not likely to occur, so long as the potential harm is to a critical portion of the species. To argue that the terms of the ESA should not apply because the threatened harm is remote is to adopt an element of reasonableness, an approach explicitly rejected by the Supreme Court in

⁴¹⁶ FES, *supra* note 6, at 389, 397.

⁴¹⁷ Sanctuary Issue Paper, *supra* note 39, at 23, FSES at 514; FSES at 657.

⁴¹⁸ FSES, *supra* note 6, at 657-59.

⁴¹⁹ *Id.* at 658.

⁴²⁰ Whales are among the largest of living creatures. They range over wide areas of the ocean, migrating thousands of miles each year. Many species of whales are endangered because their populations have been reduced severely as a result of widespread commercial hunting. These factors make it difficult to study whales carefully, and because oil pollution is so unpredictable, it is impossible to study its effects on whales with any degree of control. Therefore the effects of oil pollution on whales are likely to remain poorly understood. For more information on whales, see Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment* (pt. 1), 6 *ECOLOGY* L.Q. 323 (1977).

⁴²¹ FSES, *supra* note 6, at 655.

⁴²² Federal Defendants' Third Memorandum in Support of Summary Judgment and in Opposition to Plaintiffs' Motions for Preliminary Injunction at 13-14, *Massachusetts v. Andrus*, 481 F. Supp. 685 (D. Mass. Nov. 5, 1979) [hereinafter cited as Fed. Memo III].

TVA v. Hill.⁴²³ While the Supreme Court was confronted with a situation where the threatened harm was certain and immediate, the Court did not limit its interpretation of the statute.⁴²⁴ According to the Court, the intent of Congress was to reverse the trend toward the extinction of species, regardless of the cost.⁴²⁵ Congress has not rejected that interpretation. In subsequent amendments to the ESA,⁴²⁶ the requirement continues to be exacting. Instead, Congress has added the consultation requirement of section 7(d)⁴²⁷ in order to avoid the *TVA v. Hill* type of situation,⁴²⁸ where the jeopardy is not discovered until after the project is well under way, and added the exemption provisions of sections 7(g)⁴²⁹ and (h)⁴³⁰ in order to overcome the prohibitions of section 7(a)(2)⁴³¹ for any project that can justify such an exemption.⁴³² Therefore the Supreme Court's sweeping interpretation of the ESA's requirements stands and its rigid quality remains unbending.

While the precise nature of the threat to the whales from drilling activities is not known, the existence of the threat is not disputed.⁴³³ There is no question that drilling activity will generate significant amounts of pollution, both from chronic discharges⁴³⁴ and from oil spills.⁴³⁵ The question is the extent of that pollution's impact on the endangered whales. The Georges Bank environmental impact statement (EIS) says that the "existence and extent of this danger [of whale mortality caused by oil spills] remains unanswered."⁴³⁶ Nevertheless the EIS states that oil spills may force the whales to shift their migration patterns, forcing them to feed in less desirable habitats that "probably cannot sup-

⁴²³ 437 U.S. 153, 194 (1978).

⁴²⁴ *Id.* at 173.

⁴²⁵ *Id.* at 184.

⁴²⁶ Act of Nov. 10, 1978, Pub. L. No. 95-632, 92 Stat. 3751; Act of Dec. 28, 1979, Pub. L. No. 96-159, 93 Stat. 1225.

⁴²⁷ 16 U.S.C. § 1536(d) (Supp. II 1978) (amended 1979).

⁴²⁸ See 124 CONG. REC. S10,896 (daily ed. July 17, 1978) (remarks of Sen. Culver); 1979 H.R. CONF. REP., *supra* note 337, at 13, 1979 CONG. & AD. NEWS at 4781.

⁴²⁹ 16 U.S.C. § 1536(g) (Supp. II 1978) (amended 1979).

⁴³⁰ *Id.* § 1536(h).

⁴³¹ Pub. L. No. 96-159, § 4, 93 Stat. 1226 (1979) (amending 16 U.S.C. § 1536(a) (Supp. II 1978)).

⁴³² See note 377, *supra*, for exemption requirements.

⁴³³ FES, *supra* note 6, at 917-22.

⁴³⁴ *Id.* at 1255-56.

⁴³⁵ *Id.* at 1256-57.

⁴³⁶ *Id.* at 917.

port their foraging,"⁴³⁷ which in turn "will add additional stress to populations and can be particularly harmful to calves and juveniles."⁴³⁸ Furthermore, there is "some circumstantial evidence of the detrimental effects of increasing pollution levels."⁴³⁹ Finally, the EIS states that "the potential for impact [to the humpback] is present in all phases" of development activity,⁴⁴⁰ and that if the population of the right whale is as low as is estimated, "the loss of any individuals as a direct or indirect effect of oil and gas development can be considered a significant loss."⁴⁴¹ The defendants' own documents therefore indicate that a critical portion of these species is threatened. The defendants simply cannot insure that these species are not likely to be jeopardized, since information is not available to establish that the whales will not likely be harmed, and since what information is available suggests just the opposite.⁴⁴²

Because the threat of harm is to a critical portion of the two species, the threshold of jeopardy has been crossed. Since the defendants cannot insure that no endangered species is likely to be jeopardized, they may not make any irretrievable commitment of resources until they demonstrate that jeopardy is unlikely or obtain an exemption under section 7(h). The information necessary to determine whether the whales will be harmed may take years to accumulate. Yet the resulting delay in exploiting oil and gas resources is a factor that a reviewing court must not consider. The Supreme Court has concluded that courts are not empowered to balance the cost of such a delay, no matter how significant, against the threat to the endangered species,⁴⁴³ because Congress has already balanced the conflicting interests and has tipped the scales decisively in favor of the species.⁴⁴⁴ Georges Bank presents

⁴³⁷ *Id.* at 918.

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 920.

⁴⁴⁰ *Id.* at 921.

⁴⁴¹ *Id.* at 922.

⁴⁴² In *North Slope Borough v. Andrus*, 486 F. Supp. 332 (D.D.C. Jan. 22, 1980), the court interpreted section 7(a)(2) to create a presumption in favor of continuing the project unless a negative biological opinion (indicating that jeopardy will likely occur) is issued. *Id.* at 356. The court's interpretation, however, contradicts the intent of Congress to "give the benefit of the doubt to the species." 1979 H.R. CONF. REP., *supra* note 337, at 12, 1979 CONG. & AD. NEWS at 4780. See note 409, *supra*; see text at notes 347-64, *supra*.

⁴⁴³ See *TVA v. Hill*, 437 U.S. 153, 187 (1978).

⁴⁴⁴ *Id.* at 194. The legislative history of the 1979 ESA amendments reaffirms the Supreme Court's interpretation. See note 409, *supra*.

precisely the type of situation in which the ESA has its most far-reaching effect. Congress has provided a method for exempting a sufficiently important project from the statute's coverage. Because Congress has explicitly provided one method of exemption, other methods are implicitly excluded.⁴⁴⁵ Neither the agency nor the courts should attempt to circumvent the established statutory framework in order to impose their notions of reasonableness on the provisions of the ESA. Reliance on an element of reasonableness is precisely what the Supreme Court and Congress have emphatically rejected.⁴⁴⁶ Until there is a clear indication that the strict requirements of the ESA have been tempered, they should remain in full force.⁴⁴⁷

The court of appeals' handling of the ESA issues in *CLF v. Andrus* may represent the beginning of a process of erosion for the ESA's strict requirements, similar to the gradual decline of NEPA's effectiveness.⁴⁴⁸ The court refused to regard the lease sale as an irretrievable commitment of resources in violation of section 7(d), even though the compensation requirements of the OCSLA and the expense of pre-exploration activities provided ample grounds for doing so. At the same time, the court has effectively placed the burden of demonstrating the agency's lack of compliance on the challenging party, a result that may frustrate the purposes of the statute by encouraging agencies to proceed with projects until forced to take notice of demonstrable violations. The court's approach also suggests that the threat to the whales on Georges Bank may be considered too remote to constitute "jeopardy" under the terms of the ESA.

The effect of the court's decision is already apparent. The

⁴⁴⁵ According to the maxim *expressio unius est exclusio alterius*, that which is expressed in a statute implies the exclusion of that which is not expressed. Under this maxim, the fact that Congress has provided one means of avoiding the strict requirements of section 7(a) implies that Congress did not intend reviewing courts to construe other means of skirting those requirements. See *TVA v. Hill*, 437 U.S. 153, 188 (1978).

⁴⁴⁶ *Id.* at 194, See H.R. REP. No. 1625, 95th Cong., 2d Sess. 3, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9453, 9453 (the purpose of the 1978 amendments is to introduce some flexibility into the act by establishing an exemption process); 1979 H.R. CONF. REP., *supra* note 337, at 12, 1979 CONG. & AD. NEWS at 4780 (1979 amendments are intended to bring the language of the Act into conformity with existing interpretations).

⁴⁴⁷ Congress has indicated its satisfaction with the existing interpretations of the ESA. See 1979 H.R. CONF. REP., *supra* note 337, at 12, 1979 CONG. & AD. NEWS at 4780. Reviewing courts should not interpret the altered language of section 7(a)(2) as moderating the statutory requirements until Congress gives some positive indication of a change of heart.

⁴⁴⁸ See text at notes 208-12, *supra*.

North Slope court relied on the *CLF v. Andrus* decision while interpreting the ESA.⁴⁴⁹ The lease sale situation presents a litmus test for the statute—if a lease sale is not considered an irretrievable commitment and the threatened harm to the whales is not sufficient to constitute jeopardy, then the ESA will not be applied in the situations such as Georges Bank where its effect would be the most significant—where the danger to a species is not fully appreciated until the harm has occurred. In *TVA v. Hill* the Supreme Court strictly construed the ESA, and that construction suggests that lease sales should fall within the coverage of the statute. The ESA requires a precautionary approach, because if the courts “were to err on the side of permissiveness . . . the most eloquent argument would be of little consequence to an extinct species.”⁴⁵⁰

V. THE SECRETARY'S DUTY TO PROTECT THE FISHERIES

While the court of appeals had an opportunity under the Endangered Species Act to consider previously uninterpreted aspects of a relatively new statute, in reviewing the Outer Continental Shelf Lands Act (OCSLA)⁴⁵¹ the court relied on a single phrase in an old statute intended to regulate the development of mineral resources to give the statute a potentially expansive environmental scope. In Round One of *CLF v. Andrus*, the court of appeals held that the OCSLA imposed upon the Secretary of the Interior a duty to protect the Georges Bank fisheries while performing his other obligations under the statute.⁴⁵² At the same time, however, the court defined the Secretary's duty in conflicting terms, so that in Round Two the parties could plausibly argue contradictory interpretations of the Secretary's duty. Unfortunately, the court did little in Round Two to dispel the confusion it had generated. Consequently, although the court has clearly delineated the sources of the Secretary's duty and given a general description of the nature of the duty, the extent of the judicially

⁴⁴⁹ *North Slope Borough v. Andrus*, 486 F. Supp. 332, 353 & n. 69 (D.D.C. Jan. 22, 1980). The court cited *CLF v. Andrus* to support its conclusion that the section 7(d) consultation requirement applies independently to each discrete step of the project, and that therefore the first step of the project may proceed even if the agency has not insured that jeopardy is unlikely at later stages of the project. *Id.*

⁴⁵⁰ *Hill v. TVA*, 549 F.2d 1064, 1072 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

⁴⁵¹ 43 U.S.C.A. §§ 1331-1356, 1801-1866 (West Supp. 1979).

⁴⁵² *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

reviewable substantive obligations which that duty imposes upon the Secretary remains unclear. If the Secretary's duty is broad and the question of his compliance with the duty is fully reviewable, the court of appeals may have recognized a potentially powerful new weapon for environmental litigation.

A. *The Nature and Sources of the Secretary's Duty*

In Round One of the litigation, the court of appeals examined the grounds for the preliminary injunction issued by the district court and held that those grounds were no longer sufficient to justify continuing the injunction.⁴⁵³ The court, however, also went beyond the immediate issue of whether to continue the injunction in order to recognize that the Secretary has a duty to protect the Georges Bank fisheries while overseeing the development of OCS oil and gas resources,⁴⁵⁴ and that his duty attaches at the time of the lease sale.⁴⁵⁵ In considering the nature and sources of the Secretary's duty, the court found that the duty arises not only from the terms of the OCSLA, but also from the provisions of NEPA⁴⁵⁶ and the Fishery Conservation and Management Act,⁴⁵⁷ as well as the common law public trust doctrine.⁴⁵⁸ The court's definition of the nature of that duty, however, supports conflicting interpretations of the extent of the Secretary's duty.

The court of appeals found the primary source of the Secretary's duty to protect the fisheries to be in the terms of the OCSLA,⁴⁵⁹ even prior to its amendment in 1978.⁴⁶⁰ Section 5(a)(1) of the statute, as originally written, provided in relevant part that "[t]he Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf . . ."⁴⁶¹ The court of appeals interpreted that language as requiring the Secre-

⁴⁵³ *Id.* at 887. See text at notes 64-88, *supra*.

⁴⁵⁴ *Id.* at 889.

⁴⁵⁵ *Id.*

⁴⁵⁶ 42 U.S.C. §§ 4321-4361 (1976).

⁴⁵⁷ 16 U.S.C. §§ 1801-1882 (1976 & Supp. II 1978).

⁴⁵⁸ *Massachusetts v. Andrus*, 594 F.2d 872, 890-92 (1st Cir. 1979).

⁴⁵⁹ 43 U.S.C.A. §§ 1331-1356, 1801-1866 (West Supp. 1979).

⁴⁶⁰ Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (amending 42 U.S.C. §§ 1331-1343).

⁴⁶¹ 43 U.S.C. § 1334(a)(1) (1976). The wording quoted here was not changed by the 1978 amendments.

tary to regulate oil and gas activities so as to harmonize the competing interests in the various resources of the OCS.⁴⁶² The court rejected the defendants' argument that the permissive language of section 5(a)(1) merely empowered, rather than commanded, the Secretary to consider the interests of the fisheries,⁴⁶³ reasoning that the word "may" in a statute can be treated as imposing a duty where the statute confers a power to be exercised for the benefit of the public.⁴⁶⁴ The court considered such an interpretation especially appropriate here, since the Secretary's power to enter leases was also phrased in discretionary terms⁴⁶⁵ and therefore did not mandate "the singleminded exploitation of oil and gas resources."⁴⁶⁶

The court of appeals found additional support for its interpretation of the Secretary's duty from other sources. First, the court invoked the seldom-used "public trust" doctrine, which is based on the common law notion that the Secretary of the Interior is the guardian of the people and therefore is bound to see that none of the public domain is wasted.⁴⁶⁷ The court reasoned that the duty to protect the fisheries would be in keeping with that doctrine.⁴⁶⁸ Second, the court of appeals viewed its interpretation of the Secretary's duty as consistent with the policies of NEPA,⁴⁶⁹ which require a careful weighing of the benefits to be gained from the exploitation of one resource against the harm that may occur to others.⁴⁷⁰ Finally, the court considered the Secretary's duty to

⁴⁶² *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

⁴⁶³ *Id.* at 889-90.

⁴⁶⁴ *Id.* at 890. See *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359 (1895).

⁴⁶⁵ Section 8(a)(1) of the OCSLA states in part that "[t]he Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf . . ." 43 U.S.C.A. § 1337(a)(1) (West Supp. 1979) (emphasis added). Other subsections of section 8 refer repeatedly to the discretionary nature of the various aspects of the Secretary's authority to grant leases.

⁴⁶⁶ *Massachusetts v. Andrus*, 594 F.2d 872, 890 (1st Cir. 1979).

⁴⁶⁷ *Id.* See *Knight v. United States Land Ass'n*, 142 U.S. 161, 181 (1891). When the government holds a resource that is available for the free use of the general public, the courts will frown upon any attempt to reallocate the resource to more restricted uses or to subject public uses to the self-interest of private parties. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970).

⁴⁶⁸ *Massachusetts v. Andrus*, 594 F.2d 872, 890 (1st cir. 1979).

⁴⁶⁹ 42 U.S.C. § 4331 (1976). This section declares a congressional policy to "use all practical means" to preserve man's environment.

⁴⁷⁰ *Massachusetts v. Andrus*, 594 F.2d 872, 891 (1st Cir. 1979). Although many courts have recognized that NEPA may establish some substantive requirements, in recent years

be reinforced by the enactment in 1976 of the Fishery Conservation and Management Act⁴⁷¹ (Fishery Act), since a major purpose of Congress in passing the statute was to protect the fisheries on Georges Bank.⁴⁷² Although the responsibility for implementing the Fishery Act lies with the Department of Commerce rather than with Interior,⁴⁷³ the court reasoned that the statute nevertheless reflects a federal interest in protecting the OCS fishery resources equal to that in developing the mineral resources under the OCSLA.⁴⁷⁴ Therefore, the Secretary must give effect to both policies by construing them so as to minimize conflict between them.⁴⁷⁵ These conflicting policies, the court continued, could best be reconciled not by giving mineral development absolute priority over the fisheries, but rather by balancing the interests in the two resources in such a way that the fisheries would not be seriously harmed by oil and gas activities.⁴⁷⁶

The court of appeals regarded the 1978 OCSLA amendments as spelling out the nature of the Secretary's duty to the fisheries.⁴⁷⁷ Congress had included in the amendments several provisions setting up environmental safeguards, such as an oil spill liability fund,⁴⁷⁸ a fishermen's gear compensation fund,⁴⁷⁹ and authorization to cancel leases where a severe and long-lasting threat to the

the emphasis has increasingly been placed on NEPA's procedural requirements. See text at notes 123-70, *supra*. Therefore the court of appeals could only find support of a supplemental nature in NEPA, and its decision would have been open to challenge if it had based its interpretation of the Secretary's duty primarily on NEPA.

⁴⁷¹ Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801-1882 (1976 & Supp. II 1978)).

⁴⁷² *Massachusetts v. Andrus*, 594 F.2d 872, 891 (1st Cir. 1979). Because Georges Bank is such a productive fishing ground, it has been overfished by international fishing fleets for a number of years. The severe depletion of fish stocks was a major factor in Congress' decision to enact the Fishery Conservation and Management Act in order to regulate fishing activities and thereby allow the fisheries to return to normal levels of productivity. See *Maine v. Kreps*, 563 F.2d 1043 (1st Cir. 1977).

⁴⁷³ See 16 U.S.C. § 1802(20) (1976).

⁴⁷⁴ *Massachusetts v. Andrus*, 594 F.2d 872, 891 (1st Cir. 1979).

⁴⁷⁵ *Id.* The court cited *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970), for the proposition that, where conflicting federal policies exist, the statutes must be construed so as to give effect to both policies as far as possible. *Massachusetts v. Andrus*, 594 F.2d 872, 890-91 (1st Cir. 1979).

⁴⁷⁶ *Massachusetts v. Andrus*, 594 F.2d 872, 891 (1st Cir. 1979).

⁴⁷⁷ *Id.*

⁴⁷⁸ Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 302, 92 Stat. 672 (1978) (to be codified at 43 U.S.C. § 1812).

⁴⁷⁹ *Id.*, § 402, 92 Stat. 686 (1978) (to be codified at 43 U.S.C. § 1842).

environment was found to exist.⁴⁶⁰ According to the court, those provisions indicated that the Secretary must consider and protect other resources while exploiting the mineral resources.⁴⁶¹ The court regarded the provisions as establishing specific methods of minimizing or eliminating conflicts with other resources.⁴⁶² The amendments thus indicated that, although Congress sought to expedite exploitation, it also intended to avoid serious damage to renewable resources.⁴⁶³

The court made it clear that the Secretary's duty to protect the fisheries arises at the time of the lease sale. The court stated that the Secretary's duty "includes the obligation not to go forward with a lease sale in a particular area if it would create unreasonable risks in spite of all feasible safeguards,"⁴⁶⁴ but that if the damage to fishing would not be significant "the Secretary may determine that leasing should proceed even if some harm may result."⁴⁶⁵ Consequently, while the Secretary need not prevent harm that is "of no major consequence,"⁴⁶⁶ he must avoid an unreasonable risk of harm to the fisheries, and he must do so beginning at the time of the lease sale.

A major difficulty, however, arose from the court of appeals' efforts to delineate the extent of the Secretary's duty and the power of the courts to review the Secretary's efforts to comply with that duty. The court described the Secretary's duty in strong terms that indicated a significant substantive obligation "to exercise due diligence that the resources be in fact protected."⁴⁶⁷ At the same time, though, the court suggested that a reviewing court's role in determining whether the Secretary had complied with his obligation to the fisheries would be a narrow one,⁴⁶⁸ sug-

⁴⁶⁰ *Id.*, § 204, 92 Stat. 637 (1978) (to be codified at 43 U.S.C. § 1334(a)(2)).

⁴⁶¹ *Massachusetts v. Andrus*, 594 F.2d 872, 891-92 (1st Cir. 1979).

⁴⁶² *Id.* at 891.

⁴⁶³ In its decision in Round One enjoining the lease sale, the district court also found support for the Secretary's duty in the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1464 (1976). *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138, 1140 (D. Mass. Jan. 28, 1978). The CZMA establishes a national policy to preserve, protect, develop and restore the resources of the country's coastal zone. 16 U.S.C. § 1452(a) (1976). Subsequent arguments concerning the Secretary's duty, however, were not based on the CZMA and the court of appeals did not mention the statute in discussing the Secretary's duty.

⁴⁶⁴ *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st cir. 1979).

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 890.

⁴⁶⁸ *Id.* at 892.

gesting that the Secretary, rather than the court, had the task of balancing the competing interests,⁴⁸⁹ and that "the Secretary must determine which interest must give way, and to what degree."⁴⁹⁰ Consequently, in Round Two the plaintiffs were able to argue that the court of appeals had set a very high standard of care for the Secretary, a standard which the Secretary had not met and which implied a strict standard of judicial review.⁴⁹¹ At the same time, the defendants could argue that it was the Secretary's responsibility to make the ultimate decision whether to proceed with the lease sale after considering the competing interests,⁴⁹² and that the court could not interfere with that decision unless it was irrational or in violation of the law.⁴⁹³ Nevertheless, even though the court of appeals was squarely confronted with conflicting interpretations of the Secretary's duty, it failed to address the issue directly.

B. *The Extent of the Secretary's Duty*

Although in Round One the court of appeals recognized that the Secretary of the Interior had a duty to avoid unreasonable risks to the Georges Bank fisheries, in Round Two the court addressed only one aspect of that duty, even though the plaintiffs had raised extensive arguments concerning other specific aspects of the duty.⁴⁹⁴ In Round Two the court held that the Secretary was not obligated, prior to conducting the lease sale, to promulgate new regulations necessary to define best available and safest technology (BAST),⁴⁹⁵ which the 1978 OCSLA amendments require lessees to use on all new OCS drilling operations, prior to conducting the lease sale.⁴⁹⁶ The court did not address questions

⁴⁸⁹ *Id.* at 889.

⁴⁹⁰ *Id.*

⁴⁹¹ CLF Brief II, *supra* note 101, at 43-57; Mass. Brief II, *supra* note 104, at 19-26.

⁴⁹² Brief for the Federal Appellees at 35-37, CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049 (1st Cir. Dec. 17, 1979) [hereinafter cited as Fed. Brief I].

⁴⁹³ Brief in Support of Federal Defendants' Motion for Summary Judgment at 10-12, Massachusetts v. Andrus, 481 F. Supp. 685 (D. Mass. Nov. 5, 1979) [hereinafter cited as Fed. Brief II].

⁴⁹⁴ See CLF Brief II, *supra* note 101, at 43-62; Mass. Brief II, *supra* note 104, at 26-29.

⁴⁹⁵ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

⁴⁹⁶ Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 208, 92 Stat. 655 (1978) (to be codified at 43 U.S.C. § 1347(b)); cf. Clean Water Act, 33 U.S.C.A. § 1311(b)(1)(A), 1311(b)(2)(A) (West 1978) (requiring the use of the best practicable control technology currently available and the best available technology economi-

concerning other aspects of the Secretary's duty, such as whether the safeguards which the Secretary claimed to have taken actually provided any additional protection for the fisheries, and whether despite those safeguards the risk to the fisheries remained unreasonable. The court also did not attempt to clarify whether the reviewing court should adopt a strict or a deferential standard of review in determining whether the Secretary has complied with his duty.⁴⁹⁷ Each of these aspects of the Secretary's duty raises questions about the extent to which the Secretary must consider the effects of OCS drilling operations on the Georges Bank fisheries, and the extent to which those requirements can be enforced.

1. The Standard of Review

A threshold issue affecting the consideration of all other aspects of the Secretary's duty to protect the fisheries is the standard of review to be applied by the courts. Since the standard of review determines the level of scrutiny the court will use in reviewing the agency action or decision, a limited standard of review would make it more difficult for parties to challenge the Secretary's actions for a failure to comply with his duty, while a broad standard of review would subject the Secretary's actions to a more searching examination. In defining the Secretary's duty in Round One, the court of appeals appeared to establish a high standard of care for the Secretary, stating that his duty includes an obligation not to conduct a particular lease sale "if it would create unreasonable risks in spite of all feasible safeguards,"⁴⁹⁸ and to refuse to permit drilling activities that pose too great a threat to a fishery.⁴⁹⁹ At the same time, however, the court of appeals suggested that a limited standard of review would be

cally achievable).

⁴⁹⁷ The standard of review adopted by the court was not clear. The court was considering an appeal of the district court's decision denying a preliminary injunction and stated that the proper standard was whether the district court's decision was "clearly erroneous or clearly the result of an error of law." *CLF v. Andrus*, 14 *ENVIR. REP. (Envir. Rep. Cas. (BNA))* 1049, 1050 (1st Cir. Dec. 17, 1979). At the same time, however, the court indicated that it was deciding two issues on the merits, ruling that the lease sale would not violate the ESA and that the Secretary was not required to promulgate BAST regulations prior to conducting the lease sale. *Id.* at 1055 n.7. Presumably a more searching standard of review was invoked to decide those two issues, but the court gave no indication of that.

⁴⁹⁸ *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

⁴⁹⁹ *Id.* at 889.

adopted, stating that the task of balancing the competing interests "is committed to the Secretary, and so long as he carries it out rationally and in conformity to the law, the courts may not intervene."⁵⁰⁰

A limited standard of review, however, is inadequate if the Secretary's duty is to have any practical significance. The reviewing court must be able to examine the merits of the Secretary's decisions in order to determine whether any risk to the fisheries that remains after all feasible safeguards have been taken is unreasonable. It is not sufficient for the court simply to determine whether the Secretary made a decision in a reasonable manner⁵⁰¹ or whether the decision was supported by substantial evidence in the record,⁵⁰² because such a limited determination does not consider whether the Secretary's decision is correct, but rather focuses on the procedural aspects of the decision. The Secretary may have acted in a reasonable manner in reaching his decision, and yet the risk involved may remain unreasonable because the threatened harm is too great or too immediate. Conversely, if the risk is in fact reasonable but the Secretary refuses to conduct the lease sale, then the Secretary's decision is unreasonable, even though he may have followed correct procedures and created an adequate record. In either case, the court cannot determine whether the Secretary's decision is correct without first evaluating the nature of the risk to ascertain whether it remains unreasonable. Only after the court has determined whether the risk is reasonable can it determine whether the decision itself was reasonably made. A narrow standard of review prevents the court from making such a determination because a narrow standard does not allow the court to examine the nature of the risk or the propriety of the decision itself.

In Round Two the court of appeals did not discuss the appropriate standard of review for determining the Secretary's compli-

⁵⁰⁰ *Id.* at 892.

⁵⁰¹ If the applicable statute does not establish a higher standard of review, then under the traditional standard for the review of agency action a reviewing court is to determine only whether an agency's decision was reasonable, and not whether it was right. B. SCHWARTZ, *ADMINISTRATIVE LAW* 609 (1976).

⁵⁰² In reviewing agency findings of fact, a court is to determine whether those findings are supported by substantial evidence in the record. The standard is a deferential one — the court is to determine the reasonableness, not the rightness, of the agency's findings. *Id.* at 592-95. In *CLF v. Andrus*, however, the court was not reviewing findings of fact, but rather whether the Secretary had complied with his substantive statutory duties.

ance with his duty. The district court interpreted the Round One court of appeals decision as indicating that the appropriate test is whether the Secretary's decision was arbitrary or capricious.⁵⁰³ The "arbitrary and capricious" standard, however, is too limited, because it does not lend itself easily to a searching review of agency action.⁵⁰⁴ While in theory the standard is flexible and permits a review of substantive as well as procedural compliance,⁵⁰⁵ in practice the standard is a deferential one, under which the reviewing court engages in a presumption of regularity toward the agency's decision⁵⁰⁶ and does not substitute its judgment for that of the agency.⁵⁰⁷

Undue deference to the agency, however, is inappropriate when the agency's obligation is substantive. Here, the Secretary is obligated to see that the fishery resources are *in fact* protected.⁵⁰⁸ The Secretary's duty requires more than adherence to proper procedures. Instead the Secretary must avoid a threat of serious harm to the fisheries.⁵⁰⁹ The courts can insure that the Secretary has complied with his duty only by conducting a searching and careful inquiry into the record⁵¹⁰ and by drawing an independent conclusion as to whether the risk remains unreasonable and therefore whether the Secretary's decision was proper. The deference usually shown to agencies under the "arbitrary and capricious" standard precludes such a thorough examination of the Secretary's actions; consequently this standard is not adequate to

⁵⁰³ *Massachusetts v. Andrus*, 481 F. Supp. 685, 692 (D. Mass. Nov. 5, 1979). The "arbitrary and capricious" standard has been codified in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

⁵⁰⁴ *See, e.g. Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 & n.74 (D.C. Cir. 1976).

⁵⁰⁵ *See NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

⁵⁰⁶ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

⁵⁰⁷ *Id.* at 416. Courts often prefer to adopt a deferential standard in reviewing agency action because agencies, and not the courts, are presumed to have expertise, and thus a special competence, in their areas of responsibility. *See FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972). Courts presume that the agency's expertise will usually lead to a correct decision, whereas the courts, with their lack of expertise, would be less likely to reach a correct decision on their own. *See NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). *But see Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (although the standard for reviewing agency findings of fact is a deferential one, the reviewing court must still use close scrutiny for even the most complex technical matters in order to understand the case and properly perform its reviewing function).

⁵⁰⁸ *Massachusetts v. Andrus*, 594 F.2d 872, 890 (1st Cir. 1979).

⁵⁰⁹ *Id.* at 891.

⁵¹⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

determine the Secretary's compliance with his duty, and a stricter standard of review is necessary.

2. All Feasible Safeguards

While the court of appeals has not resolved the issue of the standard of review, it did specify in Round One the two essential factors that the reviewing court must examine in determining whether the Secretary has met his duty to protect the fisheries: whether he has taken all feasible safeguards and, if so, whether the remaining risk to the fisheries is unreasonable.⁵¹¹ The court of appeals clearly indicated that these factors are to be considered at the time of the lease sale and that, if the risk remains unreasonable, the Secretary's duty requires him not to conduct the sale.⁵¹² The court's view of the lease sale in Round One as the point at which the Secretary's duty under the OCSLA attaches stands in sharp contrast to the court's view in Round Two that the lease sale is not a proper time to invoke the provisions of the Endangered Species Act.⁵¹³ Since the obligation to insure against jeopardizing endangered species and the duty to protect the fisheries entail similar responsibilities, the court's effort to enforce the two obligations at different times creates a fundamental inconsistency. Although the court's analysis in Round Two implies that the court may no longer consider the time of the lease sale significant for the Secretary's duty,⁵¹⁴ nevertheless the court has not directly rejected its Round One view that the lease sale is the appropriate time to examine the Secretary's actions.

Although the court of appeals in Round One suggested that the Secretary must implement all feasible safeguards,⁵¹⁵ in Round Two the court held that the Secretary was not required to adopt

⁵¹¹ *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

⁵¹² *Id.*

⁵¹³ See *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1050-51 (1st Cir. Dec. 17, 1979).

⁵¹⁴ The court refused to consider the lease sale as an irretrievable commitment of resources in violation of section 7(d) of the ESA, see text at notes 302-10, *supra*, and, without acknowledging its definition of the Secretary's duty in Round One, declared that "[w]e know of no authority which would support enjoining the lease sale until BAST regulations are promulgated." *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1051 (1st Cir. Dec. 17, 1979). Thus, when confronted with its first opportunity to apply the Secretary's duty at the time of the lease sale, the court of appeals did not do so, suggesting that its view of the lease sale might have changed.

⁵¹⁵ *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

the safeguard of promulgating regulations to define the best available and safest technology (BAST)⁵¹⁶ to be used on all OCS drilling operations.⁵¹⁷ The court agreed with the defendants' argument⁵¹⁸ that because of changing technology the Secretary's duty to develop the BAST regulations is an on-going process and that, since subsequently promulgated regulations would apply to pre-existing leases, the lease sale need not be enjoined.⁵¹⁹ In rejecting the plaintiffs' argument that the failure to provide BAST regulations before the lease sale violated the OCSLA, the court ignored the relevance of the Secretary's duty to the fisheries as defined in Round One,⁵²⁰ and concluded its opinion by remarking that the plaintiffs would be free to argue on the merits that the Secretary had violated his duty to the fisheries.⁵²¹

Yet the promulgation of BAST regulations would appear to be a perfect example of the type of safeguard that should be implemented prior to the lease sale in order for the Secretary to fulfill his duty to the fisheries. That BAST regulations would provide additional protection is undisputed.⁵²² Furthermore, Interior had already had sufficient time to promulgate the BAST regulations, since more than a year had elapsed following the enactment of the OCSLA provision requiring the regulations.⁵²³ Therefore the Secretary's argument that the regulations were in the process of being formulated and that they would be in place before exploration begins⁵²⁴ offers slim justification for refusing to delay the lease sale, when the court's definition of the Secretary's duty appears to encompass the promulgation of such regulations as a feasible safeguard prior to conducting the lease sale.⁵²⁵

⁵¹⁶ See 43 U.S.C.A. § 1347(b) (West Supp. 1979).

⁵¹⁷ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

⁵¹⁸ Intervenor Brief I, *supra* note 6, at 32-34.

⁵¹⁹ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

⁵²⁰ See note 514, *supra*.

⁵²¹ CLF v. Andrus, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1055 (1st Cir. Dec. 17, 1979).

⁵²² See Fed. Brief I, *supra* note 492, at 38-43.

⁵²³ The OCSLA Amendments of 1978 were enacted Sep. 18, 1978.

⁵²⁴ Fed. Memo III, *supra* note 422, at 6.

⁵²⁵ Defendants also argued that the Secretary had provided other extraordinary safeguards that indicated the Secretary's effort to comply with his duty. Fed. Brief II, *supra* note 493, at 16-28. Prior to the lease sale the Secretary deleted twelve additional environmentally sensitive tracts from the sale, established an advisory Biological Task Force to monitor the dangers of oil activity on Georges Bank, Boston Globe, Sep. 22, 1979, at 15,

3. Unreasonable Risks

Even if the Secretary has taken all feasible safeguards, a decision to hold the lease sale is a violation of his duty if the risk to the fisheries remains unreasonable.⁵²⁶ In order to determine whether the risk is unreasonable, the court must examine the information on which the Secretary based his decision. The court of appeals gave no indication in Round Two that it had conducted such an examination. Yet the record suggests that information sufficient to establish the reasonableness of the risk did not exist.⁵²⁷ Consequently, the court should have enjoined the lease sale until the Secretary had performed an assessment of the risk sufficient to determine its reasonableness.

The court of appeals should have found the risk to the fisheries unreasonable on two grounds. First, insufficient information was available to determine the extent of the damage that will result from the chronic pollution associated with drilling operations.⁵²⁸ That information could be obtained by conducting further studies. Second, the Campeche blowout challenges previous assumptions that the risk of a major spill during exploratory operations is minimal.⁵²⁹ Because a spill like Campeche on Georges Bank would likely be catastrophic,⁵³⁰ the court should have required

col. 5, and adopted revised lease stipulations to authorize stricter operating standards. 44 Fed. Reg. 66,150, 66,165-67 (1979). See text at notes 95-96, *supra*. The plaintiffs argued, however, that the Secretary's efforts were not as significant as they might seem — the deletion of individual tracts from the lease sale would not eliminate the possibility of pollution from other nearby tracts, the lease sale stipulations (which are additional requirements contained in individual leases) were not new, having been applied to the Beaufort Sea lease sale, and in any case the stipulations did not provide any assurance of additional protection, since they merely empowered, rather than required, the Secretary to enforce additional protective measures. CLF Brief II, *supra* note 101, at 38-42. Regardless of the effectiveness of these measures, the issue is not whether the Secretary took certain steps. The issue is whether he established *all* feasible safeguards, and if so, whether the risk remains unreasonable. *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979). Since promulgation of the BAST regulations is a feasible safeguard that has not been implemented, the fact that the Secretary provided other safeguards does not resolve the issue of the Secretary's compliance with his duty.

⁵²⁶ *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

⁵²⁷ See Sanctuary Issue Paper, *supra* note 39, at 35-65, FSES at 526-56. See text at notes 532-39, *infra*.

⁵²⁸ Sanctuary Issue Paper, *supra* note 39, at 35-65, FSES at 526-56.

⁵²⁹ See FES, *supra* note 6, at 6.

⁵³⁰ Even a spill of only 37,500 barrels of oil, the maximum spill estimated for Georges Bank and barely equal to the amount of oil spilled in a single day in the Campeche incident, is estimated to threaten hundreds of millions of dollars in damage to the fishing industry. *Id.* at 871.

the Secretary at least to attempt to determine the causes of the blowout, so that he could consider its relevance to prior calculations of the probability of a major spill on Georges Bank.⁵³¹

Oil exploration poses many dangers to Georges Bank that are still not fully understood or quantified.⁵³² These dangers include the likely damage to the Georges Bank marine life resulting from chronic discharges produced by drilling operations⁵³³ and subsequent contamination of seabed sediments.⁵³⁴ The possibility of harm is increased by the area's circular currents, which might prevent those discharges from dispersing.⁵³⁵ In addition, Interior considers major oil spills to be probable during the development phase of oil activity,⁵³⁶ threatening the destruction of entire year classes of fish⁵³⁷ and therefore the long-term commercial value of the fisheries.⁵³⁸ Furthermore, the contaminants contained in drilling muds and injection fluids potentially have a long-lasting toxic effect, although no long-term studies to measure their impact have been completed.⁵³⁹ The plaintiffs argued that, because of insufficient information on the adverse effects of drilling on Georges Bank, the safeguards provided by the Secretary could not insure that the fisheries were *in fact* protected, that as a result the risk

⁵³¹ *Id.* at 674.

⁵³² See Sanctuary Issue Paper, *supra* note 39, at 36-44, FSES at 527-35; FES, *supra* note 6, at 864-85.

⁵³³ Sanctuary Issue Paper, *supra* note 39, at 40, FSES at 531. Over the estimated twenty-year life of the oil activities on Georges Bank, a total of 360,000 to 1,494,000 barrels of oil are expected to be discharged into the waters of Georges Bank in the form of chronic low-level operational discharges from tankers and drilling platforms. NOAA Comments, *supra* note 229, at 46, FSES at 328.

⁵³⁴ NOAA Comments, *supra* note 229, at 45, FSES at 328; FES, *supra* note 6, at 873.

⁵³⁵ Sanctuary Issue Paper, *supra* note 39, at 34, FSES at 525.

⁵³⁶ FES, *supra* note 6, at 674-77.

⁵³⁷ Sanctuary Issue Paper, *supra* note 39, at 39, FSES at 530.

⁵³⁸ FES, *supra* note 6, at 871, 872.

⁵³⁹ See Sanctuary Issue Paper, *supra* note 39, at 54-62, FSES at 545-53; FES, *supra* note 6, at 857. The chronic discharges generated by drilling activity have several components: formation water, drill muds and cuttings. Formation water is water contained in oil and gas reservoirs. Formation water contains petroleum, dissolved mineral salts, and traces of heavy metals, and is produced at a rate of between 20 percent and 150 percent of oil production. FSES, *supra* note 6, at 154-55. Cuttings are composed of shattered and pulverized sediments and underlying rock. *Id.* at 545. Drilling muds are complex commercial mixtures of chemicals used to cool and lubricate the drill bit, carry cuttings to the surface, and control downhole pressures. *Id.* Drilling muds contain such ingredients as "corrosion inhibitors, defoamers, emulsifiers, filtrate reducers, flocculants, foaming agents, lost circulation materials, lubricants, . . . dispersants, viscosifiers, and weighting agents." *Id.* at 545-46. The environmental effects of drilling muds are inconclusive and controversial. *Id.* at 546.

to the fisheries remained unreasonable, and that therefore the lease sale should not be permitted without further protection.⁵⁴⁰

The Secretary's duty under the OCSLA to protect the fisheries and the requirement of the Endangered Species Act that an agency insure against jeopardy to endangered species⁵⁴¹ are similar in that both are prophylactic in nature. Both are intended to insure that the agency anticipate and avoid risks, rather than react to harm after it happens.⁵⁴² Although the duty to the fisheries contains an element of reasonableness not found in the ESA,⁵⁴³ the precautionary nature of the duty can only be given full effect if the courts interpret it to require that a lease sale be delayed when insufficient information is available to establish the reasonableness of the risk. Interior has admitted in its EIS that it lacks sufficient information to establish the extent of the threat to the Georges Bank environment.⁵⁴⁴ For example, the EIS states that "[s]ubtle affects [*sic*], carcinogenicity, and synergistic affects [*sic*] of oil are three areas that need further research to accurately predict their affects [*sic*]."⁵⁴⁵ In fact, further research is needed in order to make any reasonable predictions at all, much less accurate ones.

The EIS contains estimates that the potential damage to the fishing industry could be in the hundreds of millions of dollars,⁵⁴⁶ suggesting that the risk to the fish themselves is also substantial. When the possible harm is so great, and the probability of its occurring cannot be predicted, the only decision that would be consistent with the Secretary's duty is to postpone the lease sale until more is known about the nature and extent of the risk. Even the National Oceanic and Atmospheric Administration, the agency with technical expertise in marine fisheries, has criticized the Secretary for deciding to proceed with the lease sale when the

⁵⁴⁰ CLF Memo I, *supra* note 100, at 63-70.

⁵⁴¹ 16 U.S.C. § 1536(a) (Supp. II 1978) (amended 1979). See text at notes 260-71, 406-09, *supra*.

⁵⁴² Under the OCSLA the Secretary is to *avoid* creating an unreasonable risk to the fisheries, and under the ESA he is to *insure* that endangered species are not likely to be jeopardized. Under both statutes the intent is to anticipate and thereby prevent harm, rather than to provide a remedy once harm has occurred.

⁵⁴³ Under the OCSLA, the Secretary may proceed if insignificant damage is likely to occur, but the ESA does not sanction any harm that is likely to threaten the survival of a species.

⁵⁴⁴ FES, *supra* note 6, at 1255-58.

⁵⁴⁵ *Id.* at 1258.

⁵⁴⁶ FSES, *supra* note 6, at 150-51.

risk to the fisheries remains so potentially great.⁵⁴⁷ The delay required in order to obtain the necessary information may be substantial. Nevertheless the potential difficulty in obtaining that information should not be used to characterize the delay as unreasonable and thereby justify proceeding with the lease sale, because the only issue in determining the Secretary's compliance with his duty under the OCSLA is the reasonableness of the threat to the fisheries,⁵⁴⁸ not the reasonableness of any delay. Without adequate information, the risk to the fisheries is unreasonable, and delay is not only reasonable, it is required.

The Secretary's failure to study the Campeche blowout before holding the lease sale should also be considered a violation of his duty, even though the court did not find the lack of such a study to violate NEPA requirements.⁵⁴⁹ The Secretary's duty to protect the fisheries is a substantive one, whereas NEPA is a statute whose requirements are essentially procedural.⁵⁵⁰ Therefore even if a failure to analyze the blowout is not a procedural violation of NEPA, that failure can still violate the Secretary's duty to protect the fisheries. As long as the causes of the Campeche blowout are unknown, the defendants' claim that there is little risk of a major exploratory phase oil spill⁵⁵¹ is tarnished, and if the risk of an exploratory spill is not known, the risk to the fisheries cannot be determined. If the risk to the fisheries cannot be determined, the reasonableness of the risk certainly cannot be evaluated. Therefore proceeding with the lease sale before attempting to determine the causes of the blowout violates the Secretary's duty to avoid unreasonable risk to the fisheries.

In Round Two the court of appeals failed to face squarely the question of whether the Secretary had complied with his duty at the time of the lease sale. The failure to study the Campeche blowout and the uncertainty of what harm will result from the pollution associated with oil drilling operations are each sufficient to render the risk to the fisheries unreasonable. In spite of the risk, the Secretary did not provide the one obvious safeguard of

⁵⁴⁷ See Letter from Richard A. Frank, Administrator of NOAA, to James A. Joseph, Under Secretary of the Interior, Sep. 21, 1979, reprinted in CLF Memo II, *supra* note 196, at app.

⁵⁴⁸ See *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

⁵⁴⁹ *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979). See text at notes 230-48, *supra*.

⁵⁵⁰ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

⁵⁵¹ FES, *supra* note 6, at 6, 674.

promulgating BAST regulations before the lease sale. Thus the Secretary did not provide all feasible safeguards, and he conducted the lease sale even though the risk to the fisheries remained unreasonable, in violation of his duty as defined by the court of appeals in Round One. The court's failure to require that the Secretary comply with his duty cannot be justified in view of the court's clear indication in Round One that the lease sale is the point at which the Secretary's duty attaches.

VI. THE ROLE OF THE PRELIMINARY INJUNCTION IN *Conservation Law Foundation of New England, Inc. v. Andrus*

In addition to raising issues concerning the Secretary's compliance with the requirements of NEPA,⁵⁵² the OCSLA,⁵⁵³ and the Endangered Species Act,⁵⁵⁴ *CLF v. Andrus* presents issues associated with using the preliminary injunction as a vehicle for litigating environmental issues. Rounds One and Two of the litigation have proceeded entirely on the basis of motions for preliminary injunctions, suggesting the significance of the preliminary injunction as a weapon in environmental cases. As *CLF v. Andrus* illustrates, environmental litigation often seeks to prevent the happening of an event that is perceived to threaten environmental harm and that will occur before a decision on the merits of the case can be reached.⁵⁵⁵ Injunctive relief provides a method of protecting the threatened environmental resource pending a final decision by the courts on the issues. In Round Two the court of appeals refused to enjoin the lease sale,⁵⁵⁶ reasoning that the plaintiffs had not shown a likelihood of success on the merits of their claims,⁵⁵⁷ that the lease sale itself had not been shown to cause irreparable harm,⁵⁵⁸ and that the public interest and the equities of the case did not favor the plaintiffs.⁵⁵⁹ The court's reasoning, however, raises questions concerning the nature of irrepa-

⁵⁵² 42 U.S.C. §§ 4321-4361 (1976).

⁵⁵³ 43 U.S.C.A. §§ 1331-1356, 1801-1866 (West Supp. 1979).

⁵⁵⁴ 16 U.S.C. §§ 1531-1543 (1976 & Supp. II 1978), as amended by Act of Dec. 28, 1979, Pub. L. No. 96-159, 93 Stat. 1225.

⁵⁵⁵ See Leshy, *Interlocutory Injunctive Relief in Environmental Cases: A Primer for the Practitioner*, 6 *ECOLOGY L.Q.* 639, 641 (1977) [hereinafter cited as Leshy].

⁵⁵⁶ *CLF v. Andrus*, 14 *ENVIR. REP.* (Envir. Rep. Cas.) (BNA) 1049, 1055 (1st Cir. Dec. 17, 1979).

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.* at 1054.

⁵⁵⁹ *CLF v. Andrus*, 617 F.2d 296, 298 (1st Cir. Nov. 6, 1979).

rable harm and balancing the equities when the development of oil and gas resources threatens the environment. In addition, the court's decision precluded the need to discuss the related issue of the extent of threatened harm that must be shown in order to justify injunctive relief.

A. *The Standards for Granting a Preliminary Injunction*

The two basic standards developed by the courts for considering requests for preliminary injunctions are based on the nature of injunctions as equitable remedies.⁵⁶⁰ The Supreme Court has said that the distinguishing feature of equity jurisdiction is flexibility.⁵⁶¹ As a flexible remedy the injunction is to be molded to the requirements of the particular case,⁵⁶² and the decision whether to grant injunctive relief is subject to the broad discretion of the court.⁵⁶³

The purpose of a preliminary injunction is generally to maintain the existing relationship between the contending parties, that is, to preserve the *status quo*.⁵⁶⁴ A court grants a permanent injunction when the moving party has proven its case on the merits of its claim,⁵⁶⁵ and the court's decision is therefore final. In contrast, a court uses the preliminary injunction to provide temporary relief. The need for a preliminary injunction arises when the court has insufficient time to hear fully the issues in a case before the alleged harm will occur.⁵⁶⁶ Therefore the court will grant a preliminary injunction in order to maintain the *status quo* until a decision on the merits can be reached, thus preserving the court's ability to grant meaningful relief.⁵⁶⁷

In deciding whether to grant a preliminary injunction, the courts are usually guided by one of two standards. The traditional standard developed by the courts requires a consideration of four elements: 1) whether the moving party is likely to succeed on the merits of its claim; 2) whether the moving party will suffer irreparable harm if relief is not granted; 3) whether the harm to the

⁵⁶⁰ See *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953).

⁵⁶⁵ *Minnesota Pub. Interest Research Group v. Butz*, 358 F. Supp. 584, 625 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974).

⁵⁶⁶ *Leshy*, *supra* note 555, at 641.

⁵⁶⁷ *Id.*

opposing party if relief is granted compels denial; and 4) whether the public interest lies with the granting of relief.⁵⁶⁸ In applying this standard, courts have usually adopted a balancing test, weighing the equities to see which party has the stronger claim to the court's protection.⁵⁶⁹

Courts sometimes use an alternative standard, especially where the circumstances of the case make a showing of likely success on the merits difficult.⁵⁷⁰ According to this standard, the court may issue a preliminary injunction even if the moving party cannot show probable success on the merits so long as the balance of hardships tips sharply in its favor.⁵⁷¹ Some courts have adopted a sliding scale, according to which the greater the differential between the relative harms threatened to the parties, the lesser the showing of likelihood of success on the merits required of the moving party.⁵⁷²

There are potentially two levels of judicial review of a trial court's decision to grant or deny a motion for a preliminary injunction. Because of the immediacy of the circumstances surrounding a request for injunctive relief, the trial court's decision will usually result in some hardship to the disfavored party, and because an appeal of the trial court's decision can take many months,⁵⁷³ the disfavored party will often request an injunction

⁵⁶⁸ *Minnesota Pub. Interest Research Group v. Butz*, 358 F. Supp. 584, 625 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974).

⁵⁶⁹ *See Charlie's Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973).

⁵⁷⁰ *See West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 235 (4th Cir. 1971).

⁵⁷¹ *See Charlie's Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973).

⁵⁷² *See Exxon Corp. v. City of New York*, 480 F.2d 460, 464 (2d Cir. 1973); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The First Circuit, however, has been willing to use the alternative standard only in very limited circumstances. For example, in *Providence Journal Co. v. FBI*, 595 F.2d 889 (1st Cir. 1979), the court enjoined a newspaper's attempt to publish transcripts of FBI wiretaps without requiring a showing of probable success on the merits because the status quo would be utterly destroyed and the FBI irreparably harmed since no meaningful review would be possible absent a preliminary injunction. *Id.* at 890. In *CLF v. Andrus*, 617 F.2d 296 (1st Cir. Nov. 6, 1979), however, the court refused to adopt the alternative standard in reviewing plaintiffs' request for a preliminary injunction pending appeal, because the plaintiffs had not shown that conducting the lease sale would "constitute the kind of massive, irretrievable alteration of the status quo contemplated by *Providence Journal*." *Id.* at 297. Thus the First Circuit has not been willing to apply the alternative standard as freely as some other circuits.

⁵⁷³ In Round One of *CLF v. Andrus*, the court of appeals dissolved the injunction issued by the district court after a delay of almost thirteen months.

pending the outcome of the appeal,⁵⁷⁴ if the moving party is appealing, or a stay of the trial court's injunction,⁵⁷⁵ if the challenged party is appealing.

The standard of review is not necessarily the same for each level of review. When reviewing the appeal itself, the appellate court is guided by a narrow standard of review. The trial court's decision will be overturned only if the trial court has abused its discretion or committed a clear error of law.⁵⁷⁶ By comparison, when considering a motion for a preliminary injunction (or a stay) pending appeal, some courts will apply the same standard used by the trial court,⁵⁷⁷ while others will apply the narrower standard invoked when considering the appeal itself, granting the motion only if the lower court abused its discretion or committed a clear error of law.⁵⁷⁸ Under the latter standard, a preliminary injunction is usually easier to obtain from the trial court than from the appellate court.⁵⁷⁹

In *CLF v. Andrus* the district court applied the traditional four-pronged standard in both rounds, granting a preliminary injunction in Round One,⁵⁸⁰ but denying injunctive relief in Round Two.⁵⁸¹ In both rounds the court of appeals applied the narrower standard of review to determine whether the district court had abused its discretion or committed a clear error of law, both on the motions for a preliminary injunction or a stay pending appeal,⁵⁸² and on the appeals themselves.⁵⁸³ In Round One, however,

⁵⁷⁴ See, e.g., *CLF v. Andrus*, 617 F.2d 296 (1st Cir. Nov. 6, 1979).

⁵⁷⁵ See, e.g., *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1147 (1st Cir. Jan. 30, 1978).

⁵⁷⁶ See *CLF v. Andrus*, 14 *Envir. Rep. (Envir. Rep. Cas.)* (BNA) 1049, 1050 (1st Cir. Dec. 17, 1979). For example, in one case challenging the adequacy of the environmental impact statement prepared for a lease sale, the appellate court vacated a preliminary injunction granted by the district court on the grounds that the alleged deficiencies in the statement did not violate the requirements of NEPA, and that therefore the trial court had committed a clear error of law. *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1386-87 (2d Cir. 1977).

⁵⁷⁷ See, e.g., *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁵⁷⁸ See *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1147 (1st Cir. Jan. 30, 1978); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 235 (4th Cir. 1971).

⁵⁷⁹ Leshy, *supra* note 555, at 669.

⁵⁸⁰ *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138, 1139 (D. Mass. Jan. 28, 1978).

⁵⁸¹ *Massachusetts v. Andrus*, 481 F. Supp. 685, 689 (D. Mass. Nov. 5, 1979).

⁵⁸² *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1147 (1st Cir. Jan. 30, 1978); *CLF v. Andrus*, 617 F.2d 296, 298 (1st Cir. Nov. 6, 1979).

⁵⁸³ *Massachusetts v. Andrus*, 594 F.2d 872, 882 (1st Cir. 1979); *CLF v. Andrus*, 14 *Envir. Rep. (Envir. Rep. Cas.)* (BNA) 1049, 1050 (1st Cir. Dec. 17, 1979).

the court of appeals applied that standard rather loosely, because of the change in circumstances caused by the enactment of the 1978 OCSLA amendments.⁵⁸⁴ In Round Two the court of appeals applied the same standard strictly to most issues,⁵⁸⁵ yet also resolved two issues on the merits,⁵⁸⁶ suggesting a more searching review of those issues. This dual standard of review applied by the court in Round Two makes it difficult to determine the weight that should be attributed to its decision.⁵⁸⁷ Nevertheless, the court's decision raises questions about its consideration of irreparable harm, the equities of the case, and the nature of the public interest.

B. *The Appropriateness of Enjoining the Lease Sale*

In Round Two of *CLF v. Andrus* the court of appeals upheld the district court's denial of a preliminary injunction, finding that the district court had not abused its discretion in concluding that the plaintiffs had not shown a likelihood of prevailing on the merits.⁵⁸⁸ In addition, the court of appeals questioned whether the lease sale itself would cause irreparable harm to the plaintiffs,⁵⁸⁹ reasoning that the filing of the suit acted as a *lis pendens* on the lease sale.⁵⁹⁰ According to the doctrine of *lis pendens*, which is usually invoked when title to property is in question, any party acquiring an interest in the property during the pendency of the litigation takes that interest subject to the court's final decision in the suit and is bound by it.⁵⁹¹ In this case, the court of appeals regarded the suit as putting the potential lessees on notice that

⁵⁸⁴ See text at notes 477-83, *supra*. The amendments were enacted after the court of appeals had heard arguments on the appeal but before the court announced its decision. See text at notes 76-88, *supra*.

⁵⁸⁵ *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1051, 1054 (1st Cir. Dec. 17, 1979).

⁵⁸⁶ *Id.* at 1055 n.7.

⁵⁸⁷ For example, while the court of appeals indicated that its conclusion that the lease sale did not constitute an irretrievable commitment of resources in violation of section 7(d) of the ESA was a decision on the merits, the *North Slope Borough v. Andrus* court found that decision inapplicable because it was reached in the context of a request for a preliminary injunction. 486 F. Supp. 332, 354 & n.71 (D.D.C. Jan. 22, 1980).

⁵⁸⁸ *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1055 (1st Cir. Dec. 17, 1979).

⁵⁸⁹ *Id.* at 1054.

⁵⁹⁰ *Id.*

⁵⁹¹ "The purpose of a *lis pendens* is to notify prospective purchasers and encumbrancers that any interest acquired by them in the property in litigation is subject to the decree of the court." *Beefy King Int'l v. Veigle*, 464 F.2d 1102, 1104 (5th Cir. 1972).

the court might declare the lease sale invalid.⁵⁹² Therefore the lessees would not later be able to claim a right to compensation for the loss of their leases, and consequently the court was unpersuaded that irreparable harm would occur as a result of the lease sale.⁵⁹³

The court's use of the *lis pendens* doctrine, however, does not insure that the lease sale will not cause irreparable harm, and creates additional problems. At first glance, the doctrine appears to offer a practical solution to the problem of how to handle challenges to projects in their early stages when irreparable harm does not appear to be imminent.⁵⁹⁴ Yet the court's use of the doctrine is unsatisfactory for several reasons. First, it places plaintiffs seeking to challenge future lease sales in the "Catch-22" situation of having to file a suit challenging the lease sale in order to invoke the doctrine and avoid irreparable harm even though the court has held that the plaintiffs cannot win such a challenge on the major arguments they have raised. Second, it imposes additional burdens on the plaintiffs' resources. Third, it will force a trial on the merits in cases that may not otherwise proceed beyond the attempt to obtain a preliminary injunction. Finally, it overlooks other aspects of the lease sale that would justify an injunction if the doctrine were not invoked.

The court of appeals' use of the *lis pendens* doctrine creates logical inconsistencies, not only for *CLF v. Andrus*, but even more so for future lease sale challenges. The court adopted the *lis pendens* concept in order to avoid finding that the lease sale would cause irreparable harm.⁵⁹⁵ Yet the doctrine is applicable only to the extent that the challenge to the lease sale remains undecided and the lessees' rights remain suspect. In this case, however, the court has given every indication that the lease sale does not impose on the Secretary the statutory obligations alleged by the plaintiffs, deciding two central issues against the plaintiffs on the merits.⁵⁹⁶ To the extent that the court has settled the question of the validity of the lease sale, justification for invoking

⁵⁹² *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

⁵⁹³ *Id.* The court subsequently modified the language of the opinion, deleting all references to the issue of compensation. See note 328, *supra*.

⁵⁹⁴ See Leshy, *supra* note 555, at 647-49. See text at notes 632-38, *infra*.

⁵⁹⁵ *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

⁵⁹⁶ *Id.* at 1055 n.7.

the *lis pendens* doctrine ceases to exist.⁵⁹⁷

More importantly, the court's use of *lis pendens* renders its applicability to future cases questionable. Plaintiffs seeking to challenge OCS drilling activities in other areas as a violation of the Endangered Species Act⁵⁹⁸ will have difficulty challenging the lease sale as violating the ESA because of the court's ruling in this case.⁵⁹⁹ Therefore they will have to challenge some later stage of the project, such as the Secretary's approval of exploration plans. Yet if the plaintiffs want to avoid irreparable harm as a result of the lease sale by invoking the *lis pendens* doctrine, they must file a suit challenging the lease sale and the Secretary's forthcoming decision *prior to* the lease sale in order to give the lessees notice that the validity of the leases is suspect, even though they cannot win a challenge to the lease sale, and even though the Secretary has not yet decided whether to approve the exploration plans. Consequently the plaintiffs would be faced with the possible dismissal of their suit for a lack of ripeness. According to the ripeness doctrine, judicial resources should be reserved for controversies that are real and imminent, and therefore courts will not consider a case involving uncertain and contingent future events that may not occur as anticipated.⁶⁰⁰ If the alleged violation is the Secretary's approval of exploration plans in violation of the ESA, but the suit is filed before the lease sale, when the Secretary cannot have approved the exploration plans,⁶⁰¹ the conduct being challenged is not imminent and therefore the issue is not ripe. Consequently the suit might well be dismissed,⁶⁰² and

⁵⁹⁷ The court of appeals was struggling to find support for its decision that the lease sale would not cause irreparable harm. *Lis pendens* is applicable only as long as the validity of the lease sale is in dispute. Yet the court decided on the merits that the lease sale did not violate the ESA and that the Secretary did not have to promulgate BAST regulations before conducting the lease sale, and its lengthy discussion of the NEPA claim suggests that no NEPA violation will be found. Since the major challenges to the lease sale appear all but settled, the validity of the lease sale has essentially been resolved, and the court has adopted a distorted view of the state of the proceedings in order to invoke *lis pendens* and find a lack of irreparable harm.

⁵⁹⁸ 16 U.S.C. §§ 1531-1543 (1976 & Supp. II 1978), as amended by Act of Dec. 28, 1979, Pub. L. No. 96-159, 93 Stat. 1225.

⁵⁹⁹ See also *North Slope Borough v. Andrus*, 486 F. Supp. 332, 354-57 (D.D.C. Jan. 22, 1980).

⁶⁰⁰ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

⁶⁰¹ Only after obtaining drilling rights by purchasing a lease does the lessee submit exploration plans for the Secretary's approval.

⁶⁰² A lack of ripeness does not necessarily preclude judicial review, because the court will also consider the hardship to the parties that would be caused by withholding review.

the protection of the *lis pendens* doctrine would be lost, since the suit would have to be refiled after the lease sale had occurred, and no suit would have been pending at the time of the lease sale to give notice to the lessees. As a result, the court of appeals in *CLF v. Andrus* has based its decision on the availability of a doctrine that may not be applicable in future cases and was not appropriate in this case.⁶⁰³

A second difficulty with the court's use of the *lis pendens* doctrine to avoid finding irreparable harm from the lease sale is the burden placed on the plaintiffs' legal resources. Parties seeking to protect environmental values are frequently citizens' groups suffering from a lack of adequate legal resources,⁶⁰⁴ and courts have been willing to recognize the financial burdens of environmental litigants.⁶⁰⁵ For example, although a party seeking an injunction is normally required to post a security bond to cover damages and costs incurred by a party later found to have been wrongfully enjoined,⁶⁰⁶ the bond is typically nominal in environmental cases brought by non-profit environmental organizations,⁶⁰⁷ and was waived in *CLF v. Andrus*.⁶⁰⁸

For the court to drain the plaintiffs' resources further by imposing additional legal obstacles is to threaten plaintiffs with the denial of a remedy to which they otherwise might be entitled simply because their resources might not be sufficient to survive the process. Under NEPA,⁶⁰⁹ plaintiffs must seek an injunction before the lease sale in order to insure that the EIS prepared for the lease sale fulfills NEPA's purpose of fostering informed decision-making,⁶¹⁰ because if the adequacy of the EIS is insured only after the lease sale the decision may have been based on inadequate information, and may therefore have been incorrect.⁶¹¹ Yet, be-

See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).

⁶⁰³ The *lis pendens* doctrine is even less appropriate since the First Circuit modified its opinion. See note 328, *supra*.

⁶⁰⁴ The case names in environmental litigation often include such citizens' groups as the Sierra Club, Friends of the Earth, the Natural Resources Defense Council, and the Environmental Defense Fund. CLF is another of these organizations.

⁶⁰⁵ See *Leshy*, *supra* note 555, at 671-75.

⁶⁰⁶ FED. R. CIV. P. 65(c).

⁶⁰⁷ *Leshy*, *supra* note 555, at 672.

⁶⁰⁸ *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138, 1146 (D. Mass. Jan. 28, 1978).

⁶⁰⁹ 42 U.S.C. §§ 4321-4361 (1976).

⁶¹⁰ *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); see *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974).

⁶¹¹ See *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512

cause the court of appeals was not persuaded that the lease sale would cause irreparable harm,⁶¹² the plaintiffs are forced to seek injunctive relief at some later stage of the project, such as the Secretary's approval of exploration plans, in order to protect Georges Bank from harm. If the plaintiffs cannot afford the additional time and expense of returning to court, then they have been deprived of a judicial forum for their challenge. Because the court invoked the *lis pendens* doctrine even though its applicability was questionable and irreparable harm might otherwise have been found, the resulting burden to the plaintiffs renders the court's use of the doctrine inappropriate.

The court's use of *lis pendens* also creates a tactical roadblock for the plaintiffs because it presumes a continuation of the suit to a trial on the merits. Many environmental plaintiffs, however, do not intend to proceed to the merits, because a preliminary injunction is often sufficient to force the challenged agency to provide adequate protection for environmental resources,⁶¹³ and a trial on the merits is therefore unnecessary. Yet if those plaintiffs are denied a preliminary injunction, they must continue with subsequent, more expensive⁶¹⁴ stages of the litigation in order to insure that the resources are protected, thus incurring additional burdens.

The court of appeals adopted the *lis pendens* analysis from another court in a similar case. In *North Slope Borough v. Andrus*,⁶¹⁵ the court refused to enjoin the Beaufort Sea lease sale⁶¹⁶ even though the plaintiffs had demonstrated a likelihood of success on the merits of their allegations that the Secretary had violated several statutes, including NEPA, the ESA, and the OC-SLA.⁶¹⁷ The *North Slope* court reasoned that no irreparable harm would result from the lease sale because the suit acted as a *lis*

(D.C. Cir. 1974).

⁶¹² *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

⁶¹³ For example, after the plaintiffs obtained a preliminary injunction halting construction of the Cross-Florida Barge Canal, President Nixon decided to scrap the project. See *Canal Auth. v. Callaway*, 489 F.2d 567, 570-71 & n.2 (5th Cir. 1974).

⁶¹⁴ Particularly in NEPA cases, where the EIS provides a basis for preliminary review, it is often unnecessary to engage in the expensive discovery process in order to obtain injunctive relief.

⁶¹⁵ 486 F. Supp. 326 (D.D.C. Dec. 7, 1979).

⁶¹⁶ *Id.* at 332.

⁶¹⁷ *Id.* at 329-30.

pendens on the sale.⁶¹⁸ The situation in *North Slope* differed from *CLF v. Andrus*, however, in that both parties were prepared to proceed immediately to the merits of the case.⁶¹⁹ Consequently the delay in obtaining final relief was minimal, the parties were not confronted with the necessity of seeking additional injunctive relief, and the parties were not forced to proceed with a trial that otherwise might not be necessary. In contrast, the parties in *CLF v. Andrus* were not prepared to proceed with a trial on the merits.⁶²⁰ The plaintiffs had not begun the expensive discovery process, preferring to await an opportunity for preliminary relief that might eliminate the need for a trial. Consequently the plaintiffs were confronted with the additional burdens of delay and expense not present in *North Slope*, and the court's assumption that a decision on the merits would be quickly forthcoming may have been as misplaced in Round Two as it was in Round One.

Part of the court's justification for dissolving the original Round One injunction was its view that the district court could "proceed expeditiously to the merits,"⁶²¹ a view that proved to be unfounded.⁶²² The court reiterated its optimistic view in Round Two,⁶²³ even though the preliminary status of the case suggested otherwise. Since the parties were not prepared to proceed expeditiously to trial, and the plaintiffs were therefore faced with prolonged delay and significant additional expense following the denial of a preliminary injunction, the court's use of *lis pendens* to deny injunctive relief serves to frustrate the plaintiffs' efforts to utilize effectively both their resources and the judicial process.⁶²⁴

⁶¹⁸ *North Slope Borough v. Andrus*, 486 F. Supp. 326, 331 (D.D.C. Dec. 7, 1979).

⁶¹⁹ *Id.* In fact, the court granted the plaintiffs' motion for summary judgment only six weeks later. 486 F. Supp. 332 (D.D.C. Jan. 22, 1980), *clarified*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1001 (D.D.C. Feb. 1, 1980).

⁶²⁰ Conversation with Douglas I. Foy, Attorney for CLF (Feb. 20, 1980).

⁶²¹ *Massachusetts v. Andrus*, 594 F.2d 872, 887 (1st Cir. 1979).

⁶²² More than a year after the court's decision in Round One, there is still no prospect for a trial on the merits in the near future, if at all. The plaintiffs have not yet decided whether to proceed to trial, or even whether to engage in preliminary discovery efforts. Conversation with Douglas I. Foy, Attorney for CLF (Feb. 20, 1980).

⁶²³ *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

⁶²⁴ The court's approach cannot be justified by an argument that the plaintiffs should always be prepared to proceed to trial on the merits if necessary. Environmental plaintiffs can frequently obtain the desired relief by seeking a preliminary injunction, and courts have encouraged that approach by exercising their equitable discretion and granting requests for such relief frequently. It would be foolish for plaintiffs to conduct expensive discovery efforts to prepare for trial if adequate relief could be obtained without doing so.

If the court of appeals had not invoked the *lis pendens* doctrine, it would have had ample grounds for finding that the lease sale would cause irreparable harm, even though the lease sale was not an irretrievable commitment of resources in violation of the Endangered Species Act.⁶²⁵ The court of appeals could have found irreparable harm by viewing the lease sale as a possible violation of the Secretary's duty to protect the fisheries. In Round One the court had defined the Secretary's duty as including an obligation not to conduct the lease sale if unreasonable risk to the fisheries existed in spite of all feasible safeguards.⁶²⁶ If the risk from OCS oil and gas activities is unreasonable, as the lack of sufficient information to judge the risk suggests, holding the lease sale violates the Secretary's duty. Because the Secretary's duty is precautionary in nature, intended to prevent not only harm but also the risk of harm, a violation of his duty should be considered irreparable harm sufficient to support a preliminary injunction.⁶²⁷

A finding of irreparable harm at the time of the lease sale could also be justified because of the precautionary purposes of the ESA. The ESA requires the agency to insure that no endangered species is likely to be jeopardized,⁶²⁸ and prohibits an irretrievable commitment of resources until the agency has demonstrated that jeopardy is unlikely.⁶²⁹ The Secretary cannot presently demonstrate that jeopardy is unlikely because sufficient information is not available.⁶³⁰ The compensation provisions of the OCSLA, indicating that the lessees should be entitled to compensation if exploration plans are disapproved based on a threatened ESA violation, support a conclusion that the lease sale constitutes irreparable harm because of the expense that will be incurred if

Depending on the basis for denying an injunction, the plaintiffs can proceed with trial preparations if the court finds a likelihood of success on the merits, as in *North Slope Borough v. Andrus*, 486 F. Supp. 326 (D.D.C. Dec. 7, 1979), or drop the suit to conserve their scarce legal resources if preliminary relief is adequate or the court finds success on the merits unlikely. Judicial resources are valuable as well, and should not be wasted.

⁶²⁵ See text at notes 302-10, *supra*.

⁶²⁶ *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

⁶²⁷ The violation of a statute can constitute irreparable harm *per se*, sufficient to justify injunctive relief. See *Environmental Defense Fund, Inc. v. Froehke*, 477 F.2d 1033, 1037 (8th Cir. 1973).

⁶²⁸ Act of Dec. 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226 (to be codified at 16 U.S.C. § 1536(a)(2)).

⁶²⁹ 16 U.S.C. § 1536(d) (Supp. II 1978).

⁶³⁰ FSES, *supra* note 6, at 652.

compensation is required.⁶³¹ Furthermore, the sizable investment required for pre-exploration activities following the lease sale also supports a finding that the lease sale is an irretrievable commitment in violation of the ESA, and therefore causes irreparable harm.

Finally, because massive projects such as OCS drilling activities have a tendency to gain momentum once begun,⁶³² the lease sale itself should be considered irreparable harm. Injunctive relief is a flexible remedy, to be used in a manner that best effectuates the purposes of the remedy.⁶³³ Courts have recognized that it is easier to stop large projects in their early stages.⁶³⁴ Following the lease sale and the initial investments by the lessees, the Secretary will acquire a natural interest in keeping the project going. The Secretary may be less likely to halt post-lease sale activities because of the burden that would impose on the lessees. Because of the massive investments required in drilling activities, any unanticipated delays are very expensive.⁶³⁵ The cost of taking preventive action in the middle of such a project may dissuade both the Secretary and the courts from intervening. The Tellico Dam project in *TVA v. Hill*⁶³⁶ provides the classic example. In that case the district court refused to halt the construction of the dam,⁶³⁷ even though the snail darter would be wiped out, because, in the eyes of the court, the cost of stopping the project outweighed the benefit of saving the species.⁶³⁸ The possibility of a similar reluctance to halt drilling activities offers ample justification for finding irreparable harm sufficient to support an injunction.

Because sound reasons existed for the court of appeals to find irreparable harm at the time of the lease sale, because a trial on

⁶³¹ See text at notes 311-28, *supra*.

⁶³² See *North Slope Borough v. Andrus*, 486 F. Supp. 332, 356 (D.D.C. Jan. 22, 1980); 1979 H.R. CONF. REP., *supra* note 337, at 13, 1979 CONG. & AD. NEWS at 4781.

⁶³³ *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

⁶³⁴ See, e.g., *Steubing v. Brinegar*, 511 F.2d 489, 497 (2d Cir. 1975).

⁶³⁵ In the litigation challenging Lease Sale No. 40 in the Baltimore Canyon area off the New Jersey coast, the lessees paid over a billion dollars for their leases, money on which they could earn no interest until the case was decided, resulting in the loss of "staggering [sic] sums." Supplemental Brief of Intervenors-Appellants Atlantic Richfield Company *et al.* at 18, *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979). In addition, once drilling activities have begun, the drilling equipment will be in place and cannot be used anywhere else on a temporary basis if activity is ordered halted.

⁶³⁶ 437 U.S. 153 (1978).

⁶³⁷ *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976).

⁶³⁸ *Id.* at 760-63.

the merits was not imminent, because the plaintiffs will be forced to bear additional and perhaps fatal financial burdens, because the lease sale is an appropriate time to grant an injunction, and because the plaintiffs in similar suits will be confronted with problems of ripeness, the court's use of the *lis pendens* doctrine was unwise. In addition, the court's refusal to find irreparable harm⁶³⁹ precluded the necessity of determining whether the degree of harm to Georges Bank posed by the drilling activity would be sufficient to support the grant of a preliminary injunction.⁶⁴⁰ The issue will likely arise, however, if an injunction is sought at a later stage of the project, and may arise in challenges to other lease sales.

C. *What Degree of Threatened Harm Qualifies as Irreparable?*

Some courts may have difficulty finding irreparable harm in cases like *CLF v. Andrus*, where it is difficult to prove the nature and extent of the harm that will occur absent injunctive relief. Even though the harm is difficult to quantify, however, there is substantial justification for terming it irreparable, because of its threatened magnitude and the preventive nature of the applicable statutes.

The defendants in *CLF v. Andrus* argued that any harm threatened to the Georges Bank environment was purely speculative,⁶⁴¹ but that argument is misleading. The speculative element is not the possibility of harm, but rather the extent of the harm. Defendants have admitted that the harm to Georges Bank is likely to be substantial.⁶⁴² The environmental impact statement

⁶³⁹ *CLF v. Andrus*, 14 ENVIR. REP. (Envir. Rep. Cas.) (BNA) 1049, 1054 (1st Cir. Dec. 17, 1979).

⁶⁴⁰ The party requesting a preliminary injunction must demonstrate that without injunctive relief he will be irreparably harmed.

The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis in original).

⁶⁴¹ Fed. Memo III, *supra* note 422, at 36.

⁶⁴² See, e.g., FES, *supra* note 6, at 871-72; FSES, *supra* note 6, at 150-51.

prepared for the lease sale describes several unavoidable impacts of the project: the reduction of feeding efficiencies, photosynthetic activity, and primary production as a result of increased turbidity in the areas of operations;⁶⁴³ a substantial reduction in the area on Georges Bank available for fishing because of drilling platform and pipeline obstructions;⁶⁴⁴ chronic pollution from the discharge of toxic by-products during drilling;⁶⁴⁵ and the potential destruction of substantial percentages of several commercial species of fish as a result of large oil spills that are considered likely to occur.⁶⁴⁶ The EIS estimates that the commercial losses could be in the tens of millions of dollars per year.⁶⁴⁷ In addition the EIS admits that the long-term effects of oil spills and chronic low-level pollution, and especially the synergistic effects of the pollutants, are not well understood.⁶⁴⁸ Thus there is no question that the pollution will occur and that the harm will be significant. The only remaining question concerns the extent of the harm and the probability that it will be catastrophic.

The situation in *CLF v. Andrus* is similar in some respects to that encountered in *Reserve Mining Co. v. United States*,⁶⁴⁹ where a taconite processing plant was dumping allegedly carcinogenic tailings into Lake Superior. In that case the Court of Appeals for the Eighth Circuit stayed the injunction granted by the district court⁶⁵⁰ because the plaintiffs had not proved that the asbestos-like fibers in the tailings posed a "demonstrable hazard to the public health."⁶⁵¹ *CLF v. Andrus*, however, presents a stronger case for finding irreparable harm. In *Reserve Mining* the fibers in the tailings were structurally similar to asbestos and therefore suspect as a carcinogen, but their carcinogenic qualities

⁶⁴³ FES, *supra* note 6, at 1255. Because chronic drilling discharges may substantially increase the turbidity of the waters on Georges Bank, the rate of photosynthesis will decrease. As a result the feeding efficiencies (the rate at which nutrients can be ingested) of plankton are reduced, and therefore primary production, or the rate at which the plankton can reproduce to provide food for higher levels of the food chain, will also be reduced.

⁶⁴⁴ FSES, *supra* note 6, at 146-48.

⁶⁴⁵ FES, *supra* note 6, at 638-40, 654, 880-82. See Sanctuary Issue Paper, *supra* note 39, at 54-62, FSES at 545-53.

⁶⁴⁶ FSES, *supra* note 6, at 150-51.

⁶⁴⁷ *Id.*

⁶⁴⁸ FES, *supra* note 6, at 1258.

⁶⁴⁹ 498 F.2d 1073 (8th Cir. 1974).

⁶⁵⁰ *United States v. Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974).

⁶⁵¹ *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1084 (8th Cir. 1974).

remained undemonstrated,⁶⁵² a factor militating against an injunction, while in *CLF v. Andrus* pollution is certain to occur and the adverse effects are already demonstrated to a significant degree—it is only the extent of their impact that cannot be shown.

Any doubts about the actual extent of the harm likely to occur on Georges Bank should be resolved in favor of the environment, for several reasons. The fisheries are a major source of food, not only for the New England region but for several other countries as well.⁶⁵³ The pollution resulting from drilling activities on Georges Bank will contaminate the fish in the area,⁶⁵⁴ which in turn will be harvested by commercial fishing fleets. Therefore the pollution of Georges Bank poses a threat to public health, satisfying the requirement established in *Reserve Mining*.⁶⁵⁵ Courts have recognized that uncertainties should be resolved in favor of the public health. For example, in *Ethyl Corp. v. EPA* the Court of Appeals for the District of Columbia upheld an EPA order requiring annual reductions in the lead content of leaded gasoline.⁶⁵⁶ The court reasoned that a provision in the Clean Air Act,⁶⁵⁷ authorizing the EPA to regulate gasoline additives posing a “danger” to the public health,⁶⁵⁸ permitted the EPA to assess the risk of harm and to prevent the harm from happening.⁶⁵⁹ The court recognized that environmental questions are especially prone to uncertainty, and that the courts have a special interest in favor of protecting the public health, even in areas where cer-

⁶⁵² *Id.* at 1083.

⁶⁵³ Sanctuary Issue Paper, *supra* note 39, at 24, FSES at 515. Among those countries fishing on Georges Bank are East and West Germany, Poland, and the Soviet Union. See *Maine v. Kreps*, 563 F.2d 1043, 1046 n.3 (1st Cir. 1977).

⁶⁵⁴ Not only will many fish be killed by an oil spill, but others will become tainted with an oily taste, reducing their “marketability,” FSES, *supra* note 6, at 151. Furthermore, because of the potential carcinogenicity of chronic pollution, the threat to the fish is a threat to the public health as well. Sanctuary Issue Paper, *supra* note 39, at 62, FSES at 553.

⁶⁵⁵ Two recent incidents demonstrate a more direct threat to the public health than that presented by the contamination of commercially harvested fish. On March 24, 1980, a drilling rig in the Gulf of Mexico exploded, killing two people and injuring nine, with five others missing and presumed dead. *Boston Globe*, Mar. 25, 1980, at 3, col. 5. Three days later, a “hotel” platform in the North Sea collapsed during a severe storm, killing more than a hundred crew members. *Id.*, Mar. 28, 1980, at 1, col. 2.

⁶⁵⁶ 541 F.2d 1, 7 (D.C. Cir. 1976).

⁶⁵⁷ 42 U.S.C. §§ 1857-1858a (1976) (current version at 42 U.S.C.A. §§ 7401-7642 (West Pamph. 1978)).

⁶⁵⁸ *Id.* § 1857f-6c(c)(1)(A) (current version at 42 U.S.C.A. § 7545(c)(1)(A) (West Pamph. 1978)).

⁶⁵⁹ *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976).

tainty does not exist.⁶⁶⁰ The court interpreted "danger" to consist of "reciprocal elements of risk and harm, or probability and severity,"⁶⁶¹ so that health could be endangered either by a lesser risk of greater harm, or by a greater risk of lesser harm.⁶⁶² In *CLF v. Andrus*, the lesser harm is not a risk, it is a foregone conclusion, and the greater harm is clearly a risk—it is only the magnitude of that risk that is not known. Thus the harm that is threatened by drilling activities on Georges Bank qualifies under either definition of danger, and therefore should be sufficient to constitute irreparable harm.

The argument for finding irreparable harm in *CLF v. Andrus* is even more compelling when the nature of the Secretary's statutory obligations is considered. The Endangered Species Act is a preventive statute, setting the highest standards for the protection of endangered species.⁶⁶³ The Secretary's duty under the OCSLA to protect the fisheries also demands a high standard of protection.⁶⁶⁴ As the court declared in *Ethyl Corp. v. EPA*, reasonable concerns about threats to the environment long precede certainty,⁶⁶⁵ and "[a]waiting certainty will often allow for only reactive, not preventive, regulation,"⁶⁶⁶ a result that would be inconsistent with statutes that "demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable."⁶⁶⁷ Allowing the Secretary to proceed with the development of Georges Bank oil and gas resources when that development will admittedly pose substantial risk of severe harm would frustrate the requirements of the ESA and the Secretary's duty to protect the fisheries. The Secretary's statutory obligations thus provide reinforcement for considering the harm to Georges Bank irreparable.

Because of the substantial threat of extensive harm posed by drilling operations to the Georges Bank environment and the preventive nature of the applicable statutes, the court of appeals has ample justification for terming the harm irreparable and therefore sufficient to support a preliminary injunction. Even if the harm is

⁶⁶⁰ *Id.* at 24.

⁶⁶¹ *Id.* at 18.

⁶⁶² *Id.*

⁶⁶³ See text at notes 259-79, *supra*.

⁶⁶⁴ See text at notes 453-86, *supra*.

⁶⁶⁵ *Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C. Cir. 1976).

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

deemed irreparable, however, the court must still weigh that harm against the harm to the other party, and consider where the public interest lies.

D. Balancing the Equities and Considering the Public Interest

To an extent that is unusual in environmental litigation, the public interest in *CLF v. Andrus* lies with both parties to the suit.⁶⁶⁸ In addition, the relative injuries that are threatened to each side are also shared by the general public. As a result the case presents the court with an unusually difficult task in balancing the harms and determining on which side the public interest predominates.⁶⁶⁹ Not surprisingly, the court of appeals struggled with the task in Round Two. The result was unsatisfactory because the court did not distinguish between the differences in the quality of the loss threatened to each side and between the differences in the elements of the public interest.

Both sides in the Georges Bank dispute appear to be threatened with significant harm.⁶⁷⁰ On closer examination, however, important differences between the harms can be distinguished. The threat to the plaintiffs is the substantial impairment or destruction of an irreplaceable but otherwise indefinitely renewable food supply that supports an established commercial fishing industry.⁶⁷¹ On the other hand, the loss threatened to the defendants is the continued lack of a presently available, reliable oil supply for the United States due to the delay in OCS exploration efforts.⁶⁷²

The court of appeals appeared to consider these harms equally significant.⁶⁷³ The court's view, however, lacks perspective in two ways. First the court did not distinguish the national concerns for

⁶⁶⁸ See Leshy, *supra* note 555, at 657-58.

⁶⁶⁹ For a general discussion of balancing the equities and the public interest, see Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENV'T L. 477, 484-510 (1979).

⁶⁷⁰ Although the threatened injury to the plaintiffs provided the basis for the original injunction in Round One, the delay caused by the protracted litigation became a significant factor in the denial of an injunction in Round Two, where the court of appeals found the threat of further delay a harm to the defendants that it could not ignore. *CLF v. Andrus*, 617 F.2d 296, 298 (1st Cir. Nov. 6, 1979).

⁶⁷¹ *Massachusetts v. Andrus*, 11 Envir. Rep. Cas. 1138, 1145 (D. Mass. Jan. 28, 1978).

⁶⁷² *CLF v. Andrus*, 617 F.2d 296, 298 (1st Cir. Nov. 6, 1979).

⁶⁷³ *Id.*

protection of the environment and development of oil supplies from the local concerns of a large Georges Bank fishing industry and a small Georges Bank oil field. Even if oil and the environment have similar significance on a national level, that does not mean that they should be given equal weight in each local situation where they conflict. If the threat in a particular case is to an environmental resource of special importance to a region and the competing energy resource is relatively small, as is the case on Georges Bank,⁶⁷⁴ then in that case the environmental concerns should predominate.⁶⁷⁵ Second, the court did not consider the long-term perspective in weighing the relative harms. The court considered the short-term energy needs of the country important, but did not appear to weigh the long-term value of the fisheries.⁶⁷⁶ By comparison, in deciding to grant an injunction in Round One, the district court considered the long-term value of the fisheries and found that it far outweighed the importance of a small oil field that could be depleted in twenty years⁶⁷⁷ because the fisheries, if protected, could last for centuries and provide an essentially inexhaustible food supply.⁶⁷⁸

Furthermore, as the district court noted, the issue is not whether oil production will be prohibited entirely on Georges Bank.⁶⁷⁹ Rather, the question is whether a delay of relatively short duration, whether a few months or a few years, in the development of the petroleum resources of Georges Bank is reasonable compared to the possible destruction of an irreplaceable and abundantly productive existing resource.⁶⁸⁰ Since it takes five to six years following a lease sale for an area to begin producing

⁶⁷⁴ The amount of oil that may lie beneath Georges Bank can only be estimated, but there is only one chance in twenty that a large find will be made. *Boston Globe*, Dec. 16, 1979, at 29, col. 2. The most probable find is predicted to be 123 million barrels, or enough to satisfy national needs for eight days. *Id.*, Nov. 15, 1979, at 24, col. 1.

⁶⁷⁵ On the other hand, since man's activities in general, and OCS drilling activities in particular, often threaten the environment to some degree, environmental considerations in a particular location might not prevail if the threat to the environmental resource were not unusual and the countervailing developmental interest were strong, such as where an especially large oil field had been found.

⁶⁷⁶ *Compare* CLF v. Andrus, 617 F.2d 296, 298 (1st Cir. Nov. 6, 1979), with *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138, 1145 (D. Mass. Jan. 28, 1978).

⁶⁷⁷ *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138, 1145 (D. Mass. Jan. 28, 1978).

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.*

⁶⁸⁰ *Id.*

oil,⁶⁸¹ Georges Bank will not help solve the short-term oil supply problem. The actual harm to the nation is questionable in any case, since the rising price of oil will make the Georges Bank reserves even more valuable in the future.⁶⁸²

In addition, the court of appeals' concern⁶⁸³ for the two-year delay of the lease sale⁶⁸⁴ caused by the litigation in *CLF v. Andrus* is not totally justified. Courts have acknowledged that delay is an expected element in any agency's consideration of environmental factors,⁶⁸⁵ and that "the spectre of a national power crisis . . . must not be used to create a blackout of environmental consideration" by agencies.⁶⁸⁶ Furthermore, the initial delay of the lease sale in Round One of the litigation is directly attributable to Interior's failure to fulfill the requirements of NEPA.⁶⁸⁷ It is hardly equitable to deny injunctive relief because of the delay that has already occurred, when the agency that benefits from such a denial bears a significant portion of the responsibility for that delay. In any case, delay in the development of a minor oil reserve can hardly be equated with the possible destruction of a valuable food source in balancing the relative harms, and thus the harm that would occur to the defendants if an injunction were granted does not balance the harm that could occur to the plaintiffs following the denial of an injunction.

The court of appeals similarly failed to recognize the distinctions between opposing aspects of the public interest. In order to

⁶⁸¹ *Id.*

⁶⁸² Testimony of Robert Howarth, Ph.D., Marine Biologist at Woods Hole Oceanographic Institute, before the Bureau of Land Management, concerning Lease Sale No. 42 (June 20, 1979), reprinted in FSES, *supra* note 6, at 387-88. Because petroleum is becoming increasingly scarce, its social as well as economic value will increase over time. Furthermore, future higher prices for petroleum would benefit not only the oil companies, but also the country, since the petroleum would have a greater effect in the future on the country's balance of payments.

⁶⁸³ *CLF v. Andrus*, 617 F.2d 296, 298 (1st Cir. Nov. 6, 1979).

⁶⁸⁴ The lease sale was originally scheduled for Jan. 31, 1978, and was finally held Dec. 18, 1979.

⁶⁸⁵ See *Steubing v. Brinegar*, 511 F.2d 489, 497 (2d Cir. 1975) ("compliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that these costs must be discounted").

⁶⁸⁶ *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1122 (D.C. Cir. 1971).

⁶⁸⁷ Interior initially prepared an inadequate EIS. *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138, 1141 (D. Mass. Jan. 28, 1978). Therefore the delay that occurred because of Interior's preparation of a supplemental EIS is attributable to the defendants. Plaintiffs can hardly be considered responsible for any delay that results from their efforts to seek the Secretary's compliance with his statutory duty.

determine where the public interest lies, courts will often look to existing statutes as congressional expressions of the public interest.⁶⁸⁸ In *CLF v. Andrus* the court of appeals found the concern for protecting the environment expressed in various environmental statutes⁶⁸⁹ to be balanced by the interest in expediting OCS oil exploration suggested in the OCSLA.⁶⁹⁰ The public interest rested on both sides of the case, and the court balanced the country's goal of preserving the environment with its need for reliable energy sources.⁶⁹¹ In doing so, the court failed to recognize that the special importance of a resource such as the Georges Bank fisheries could outweigh the interest in developing an oil resource that will not likely make a significant contribution to the country's energy needs. Since Georges Bank is a renewable resource with the potential to remain productive indefinitely,⁶⁹² but is threatened with destruction by the development of a relatively minor energy source that will be depleted in about twenty years, the court has sacrificed the substantial public interest in protecting a unique and invaluable natural resource to the development of an oil and gas resource that offers little hope of enhancing the public interest in establishing reliable energy sources.

The court's refusal to enjoin the Georges Bank lease sale suggests that injunctive relief may be difficult to obtain in future challenges to lease sales on non-NEPA grounds. The court's questionable use of the *lis pendens* doctrine to avoid attributing irreparable harm to the lease sale places a heavy burden on environmental plaintiffs that may discourage efforts to provide adequate environmental safeguards in other OCS drilling projects. In addition, the court's failure to acknowledge that the threat to the Georges Bank fisheries outweighs any potential contribution from Lease Sale No. 42 to the nation's energy supply suggests that the court's perception of the equities and the public interest in environmental cases may be changing, so that environmental values

⁶⁸⁸ See, e.g., *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 236 (4th Cir. 1971); *Leshy*, *supra* note 555, at 657.

⁶⁸⁹ See note 247, *supra*.

⁶⁹⁰ 617 F.2d 296, 298 (1st Cir. Nov. 6, 1979). See also *Massachusetts v. Andrus*, 481 F. Supp. 685, 689 (D. Mass. Nov. 5, 1979). OCSLA § 3(3) declares it to be the policy of the United States that "the outer Continental Shelf . . . should be made available for expeditious and orderly development, subject to environmental safeguards . . ." 43 U.S.C.A. § 1332(3) (West Supp. 1979).

⁶⁹¹ *CLF v. Andrus*, 617 F.2d 296, 298 (1st Cir. Nov. 5, 1979).

⁶⁹² *Massachusetts v. Andrus*, 11 *Envir. Rep. Cas.* 1138, 1145 (D. Mass. Jan. 28, 1978).

may increasingly be sacrificed in a time of growing demand for dwindling non-renewable resources.

VII. CONCLUSION

In *Conservation Law Foundation of New England, Inc. v. Andrus*, the Court of Appeals for the First Circuit heard a challenge to the sale of Outer Continental Shelf (OCS) oil drilling rights on Georges Bank, an area noted for its uniquely productive fishing grounds. The court faced two rounds of litigation, both on requests for preliminary injunctive relief. In the first, because the 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA) promised significant additional environmental safeguards, the court dissolved a district court injunction that had blocked the planned sale of leases to several oil companies by the Department of the Interior. In the second, the court found that Interior could conduct the lease sale lawfully and therefore refused to overturn the district court's denial of an injunction, thus allowing the sale to proceed. In the process, the court first proffered, and then withdrew, an opportunity for the strict enforcement of environmental laws in lease sale challenges.

In Round One, the court of appeals carefully evaluated Interior's efforts to comply with the requirements of the National Environmental Policy Act (NEPA) and, in addition, recognized for the first time that the Secretary of the Interior has a duty under the OCSLA and other statutes to protect the nation's fisheries while sponsoring OCS oil and gas exploration and development. In Round Two, however, the court conducted a superficial examination of Interior's supplemental environmental impact statement (EIS) before refusing to find a NEPA violation. In addition, the court held that the lease sale did not constitute an irretrievable commitment of resources in violation of the Endangered Species Act (ESA) and that, in spite of the Secretary's duty to provide all feasible safeguards for the Georges Bank fisheries, he was not required to promulgate best available and safest technology (BAST) regulations prior to the lease sale. Furthermore, the court refused to find that the lease sale would cause the plaintiffs irreparable harm, so that injunctive relief was not appropriate at the time of the lease sale.

The court's decision in Round Two portends several environmentally inauspicious trends. First, the court's failure to scrutinize the substance of the supplemental EIS suggests a continuing

erosion of NEPA's significance in contributing to the protection of the environment. Second, the court's refusal to find the lease sale an irretrievable commitment of resources, even though the compensation provisions of the OCSLA indicated otherwise, signifies a continued judicial temptation to enforce the terms of the ESA less strictly than the Supreme Court's decision in *TVA v. Hill* would suggest, and thus the recent amending of the critical language in section 7(a)(2) of the ESA may well lead to the evisceration of the ESA. Third, the court's failure to enforce the Secretary's duty to protect the fisheries by requiring BAST regulations prior to the lease sale indicates that the duty will be difficult to enforce and therefore will provide little, if any, additional protection for the environment. Fourth, the court's adoption of the *lis pendens* doctrine in a strained effort to avoid finding irreparable harm, and its use of an implied contractual condition of legality to support its conclusion of no irretrievable commitment hints that even the threat of serious damage to a remarkably productive environmental resource will not be sufficient to dissipate the pressure for rapid development of additional non-renewable energy sources.

While the effect of the court's decision on future environmental litigation cannot be accurately predicted because of the preliminary nature of the proceedings, nevertheless the court appears to have shifted from the high standard of environmental protection suggested in Round One to substantial deference to agency decisions in Round Two in spite of the significant substantive requirements of the applicable statutes, indicating that efforts to protect the environment may face increasingly difficult obstacles. Even environmental resources with substantial and demonstrable long-term value may continue to give way to the short-range exploitation of competing non-renewable energy resources.