Chapter 13

DISCLOSURE STRATEGIES: NEPA'S STOP-AND-THINK LOGIC, AND THE POWER OF INFORMATION

A. NEPA, the National Environmental Policy Act
B. NEPA in Court; the first generation
C. NEPA in the courts since Kleppe
D. Federal Community Right-to-Know Statutes

This chapter focuses on the broadest, most coherent, and best known statutory model of an environmental disclosure statute — the National Environmental Policy Act (NEPA) — which tries to induce agencies to stop-and-think before launching projects that harm the environment, and enforces that objective with environmental impact statements (EISs) — information-disclosure procedures that have been repeatedly enforced by citizen litigation.

NEPA is by no means the only environmental statute to have an information-disclosure element, although it is more central in NEPA than in many others. Much of environmental law is concerned with obtaining information, organizing it, and directing it to where it can do the most legal and political good. Information is power in environmental policy-making, because if the media and the public have critical information on the negatives of a dubious proposal, the public inclinations toward environmental protection often will produce a corrective decision in court or in the political arena. Getting strategic information into open public debate is often more than half the battle, especially where the availability of direct citizen enforcement mechanisms can make information regarding environmental threats actionable by members of the public, without the intervention of governmental agencies.

Thus information disclosure components can be found in many environmental statutes, especially federal. The biological assessment mechanism of §7 of the Endangered Species Act pressures federal wildlife agencies to examine and publish the factual biological vulnerabilities of endangered species populations, forcing many potential conflicts into the open which otherwise would be lost in bureaucratic bogs. Pollution statutes often are linked to public information, requiring submission of data to governmental agencies with a strong presumption in favor of public availability.1 Product regulation and market access statutes typically

1. See, e.g., CWA §308(a), 33 U.S.C.A. §1316(a).
require the intensive development and production of information regarding product safety as a core regulatory element. Market-enlisting statutes can succeed or fail depending on the availability of good data on the physical conditions to be addressed as well as the economic and financial impacts of taxes and incentives. Effective enforcement and informal dispute resolution demand reliable data of all varieties. The public trust doctrine in part operates to discourage low-visibility decision-making by requiring public ventilation of information and consideration of it by responsible political or legal institutions. And international law often operates far more by information generation and production than by mandate.

Following the NEPA analysis, the chapter studies several "community right-to-know" statutes, including the federal Emergency Planning And Community Right-to-Know Act (EPCRA), and an influential state disclosure law, California's "Proposition 65."

A. NEPA, THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA, the National Environmental Policy Act, is a statute that provokes a wide diversity of reactions. To some it is a paper tiger, of awesome but toothless aspect. To others, it is a ringing statutory declaration of environmental protection and rational human governance, setting a precedent of international significance. To some it is an unproductive attempt to intrude on productive public-private enterprises. To others, it is a legislative accident [whether fortunate or unfortunate] that was created and continues to evolve by happenstance. As usual, there is probably some truth in each of these perspectives.

Ultimately, NEPA's successes may be impossible to measure, in part because its effectiveness includes the anonymous thousands of destructive federal projects that are withdrawn, or never proposed in the first place, in anticipation of NEPA scrutiny.

In taxonomic form, a distinct new model of statutory regulation can be discerned within NEPA's provisions: NEPA is a broad stop-and-think, disclose-to-the-public administrative law. It is general in its statutory commands — a broad, simple set of directives that apply across the board to all federal agencies. Its operative terms require agencies to contemplate the context and consequences of their actions before acting, in effect mandating a particularized process of program planning, intended to begin early in the genesis of agency decisions. Public disclosure is NEPA's complementary mandate: agencies must produce a publicly reviewable physical document reflecting the required internal project analysis. Preparation of this document is supposed to ensure that the agency has given "good faith consideration" to the environmental consequences of its proposed action and its reasonable alternatives, but, in practice, this assumption is frequently false.

The rationality of this requirement — requiring documented formal consideration of negatives and alternatives as well as benefits before acting — may be obvious, but NEPA was its pioneer. Its logic has subsequently been adopted in many

international and domestic systems. The potent nonenvironmental forces that NEPA attempts to control, however, have kept up a running resistance to its statutory mandates, with some successes over the years.
COMMENTARY AND QUESTIONS

1. NEPA as paper tiger. Note that NEPA, as finally passed, contains a great deal of poetic language and precious little that is mandatory. There are ringing hortatory declarations of policy, and wistful commitments to processes of scientific rationality, especially in §101, and in most of §102. Does all this amount to anything? Is there anything in §101, purportedly the primary section of NEPA, that has any legal effect? There is, of course, the small matter of §102(2)(C). Note that even that subsection is filled with vague verbiage; the instrumental words are limited to a couple of dozen out of two hundred. If you parse it carefully, however, §102(2)(C) levies a sole, narrow, statutory requirement: an EIS shall be prepared for all major federal actions significantly affecting the quality of the human environment. That deceptively simple requirement has produced virtually all NEPA caselaw. Nevertheless, even though there may be an enforceable EIS requirement, it seems merely procedural and does not purport to dictate substantive results. In other words, NEPA provides a right to information, not to particular programmatic actions. Observing the course of application of NEPA to the intricate internal mechanisms of federal agencies, and the market forces with which they are linked, many observers have said that this procedural restraint is relatively meaningless. As Professor Sax wrote about NEPA, "I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil...." A sustained process in some federal courts, and many federal agencies over the years, has held NEPA to procedural terms and minimal formal compliance.

Continuing through these NEPA materials, therefore, one should note that they may chronicle a statutory program that some consider a symbolic assurance sham, not worth the extensive time and energies invested in it.

B. NEPA IN COURT — THE FIRST GENERATION

Whenever a new statute is legislated, an elaborate series of further questions must be answered. Has it created a new cause of action? If so, who can file lawsuits? Against what defendants? What is the statute of limitations? What actions can be attacked? What are potential defendants required to do under the Act? What
do plaintiffs have to show in their complaint and at trial? What defenses are available? What remedies are provided for? The evolving answers to these questions create a common law of the statute. Depending upon how they are answered in court, a statute can flourish or wither on the vine.

NEPA litigation has, from the beginning, focused upon the one clear requirement of the Act — a major federal action significantly affecting the environment must have an EIS. Tracing some of the issues raised in the cases over the years not only clarifies the law of NEPA, but also illuminates the process by which courts shape the flight of the statutory “missile” after the legislature launches it. In the case of NEPA’s environmental impact statement requirement, the fact that Congress pretty clearly did not intend to create any new cause of action has had remarkably little effect on the growth of the statute in court cases over time.

Section 1. NEPA IN THE JUDICIAL PROCESS: THE CHICOD CREEK CONTROVERSY — A CHRONOLOGICAL ANALYSIS OF A CLASSIC NEPA CASE

No case can be a “typical” NEPA case, because of the remarkable diversity of NEPA lawsuits over the years. The legal and practical elements of the Chicod Creek decisions, however, offer a broadly instructive blueprint of NEPA litigation generally, as well as a fascinating example of how NEPA, which was not intended to be litigable, quickly became a highly functional cause of action when plaintiffs dragged it before federal judges.

Natural Resources Defense Council v. Grant (Chicod Creek)
U.S. District Court, Eastern District of North Carolina, 1972
341 F. Supp. 356

LARKINS, District Judge...Chicod Creek Watershed, located in mideastern North Carolina, covers an area of 35,100 acres of which 29,625 acres are in Pitt County and 5,475 acres in Beaufort County. Plans for solving flooding, water management, and other resources problems have been prepared with the concurrence of local sponsors and with federal assistance under the the provisions of P.L. 566. The sponsoring local organizations are the Pitt Soil and Water Conservation District, Beaufort Soil and Water Conservation District, Pitt County Board of Commissioners, and Pitt County Drainage District Number Nine. Under the Chicod Creek Watershed Work Plan and Supplements, the local organizations assume all local responsibilities for the installation, operation and maintenance of planned structural works.

The topography of the watershed is nearly level to gently sloping. The outer perimeter is flat and well drained and the flood plains are broad swamps. Land use in the watershed consists of 15,600 acres of cropland; 15,550 acres of woodland; 350 acres of grassland; and 3,600 acres of miscellaneous uses. Approximately 10,000 acres of crop and pasture land are subject to flooding.... A loss of at least 50 percent is sustained on the crops grown on land subject to flooding about once each five years. [Such flooding] causes interrupted traffic, blocked school bus and mail delivery routes, interrupted feeding schedules of farm animals, and additional maintenance and repair on the roads. Excessive rainfall and flooding create a health hazard. Septic tanks, nitrification lines, and approved pit-privies overflow to the surface of the soil after excessive rainfall. Poor drainage often results in low quality crops and high unit cost of production.
The population of the watershed is approximately 3,000 people. The entire population is classified as rural with 25 percent being non-farm. Agriculture is the principal enterprise in the watershed. The chief cash crops are tobacco, corn, soybeans, and cotton. Livestock production, consisting of beef cattle and swine, make up ten percent of the cash farm receipts. Value of farm products sold was under $10,000 for 77.6 percent of the 250 farms in the watershed. Fifty-five percent of the families make less than $3,000 income per year.

Chicod Creek originates about 6 miles south of Grimesland and flows generally (about 10 miles) north to its confluence with the Tar River. Cow Swamp and Juniper Branch are the two largest tributaries and they enter Chicod Creek from the west. Chicod Creek and the surrounding area has significant value for numerous waterfowl, fur bears and other wetland wildlife species. The streams have substantial resident fish population and support a significant spawning run of herring during the spring.

The project was developed for the purposes of flood prevention, drainage, and conservation, development, and improvement of agricultural tracts of land. These objects are to be achieved by land treatment measures and structural measures. The land treatment measures will include conservation cropping systems, cover crops, crop residue use, minimum tillage, grasses and legumes, and tile and open drains. Also, 300 acres of open land will be reforested, while 1,350 acres of land will be subject to thinning and removal of trees. Structural improvements will consist of approximately 66 miles (comprising the main stream and all the various tributaries) of channel enlargement or "stream channelization." Mitigation measures to reduce the adverse effects on fish and wildlife resources are [1] 73 acres of wildlife wetland preservation area, [2] a 12 acre warm-water impoundment area, [3] 11 channel pools, and [4] 30 swamp drainage control structures. These mitigation measures are designed to mitigate for the disruption to the fish caused by the construction of the channels and to offset the wildlife habitat destroyed by the channels and spoil areas. Certain groups feel that these mitigation measures do not sufficiently lessen the adverse effects of the project on the environment. A letter [from] the Fish and Wildlife Service, dated September 10, 1971, reflects such an opinion:

It is the opinion of the Service that the original mitigation measures plus the additional measures do not significantly lessen the adverse effects of the project on the ecosystem of the watershed.

The Watershed Work Plan and an agreement for the implementation thereof were executed on behalf of [the local] Soil and Water Conservation District... organizations, who are parties to the agreement and plan, and before execution by the Soil Conservation Service, the plan was reviewed by the Corps of Engineers of the United States Department of the Army and the United States Department of the Interior, and other federal agencies...and approved by the Committees on Agriculture [both House and Senate]....

Pursuant to the provisions of the National Environmental Policy Act and the Council on Environmental Quality [regulations], the Administrator of the Soil Conservation Service, through the issuance of Environment Memorandum 1 and Watersheds Memorandum 108, the Chicod Creek Watershed project was placed in Group 2, i.e., those projects having some adverse effect which can be eliminated by minor project modification.... After consideration of environmental concerns, including the unfavorable comments of the Fish and Wildlife Service, officials of
the Soil and Conservation Service determined that the project as modified was not a major federal action significantly affecting the quality of human environment and that the project should proceed.

The present action was instituted to enjoin the defendants from financing and participating in the construction of the Chicod Creek Watershed Project. The total installation cost of the project is estimated to be $1,503,831. Public Law 566 funds are to pay $706,684 and other funds will provide $797,147. There has been extensive preparation by the defendants and the intervenors for this project. The landowners have incurred approximately $13,000 of debts to create the drainage district. Easements and rights-of-way have been obtained on 282 tracts of land involving 230 landowners. The local sponsors have procured a Farmers Home Administration loan. The Soil Conservation Service has incurred substantial expenses on the project, having expended $50,000 for planning and $159,176 for engineering, design, and land treatment. The Soil Conservation Service will suffer expenses as a result of the delay caused by this action. The projected cost of delay amounts to $7,650 per month, representing salaries and increased construction costs. The cost of preparing impact statements is approximately $7,500 per project....

COMMENTARY AND QUESTIONS [ON CHICOD CREEK UP TO THIS POINT]

1. The factual setting. Can you figure out what is going on here? Physically, these Soil Conservation Service (SCS) channelization projects involve cutting a swath of trees (here about 10 percent of the area's woodland) along a watercourse, then, using power-scoopers called "draglines," cutting a wide open-banked canal in a straight line through the watershed. The natural meandering stream is thus replaced by a broad ditch. The judge does not seem particularly aware of what "adverse effects" might result. What kind of ecological evidence would you have brought to the hearing on a preliminary injunction to demonstrate the facts?

What were the purposes of the project? "Flood prevention" clearly does not mean protection of lives and property from rampaging floodwaters. Rather, the flood problem appears to be drainage, and the purpose of the project is largely to promote agriculture [although traffic and sanitation consequences are mentioned]. By channelizing the watershed and adding open ditches and tile drains, the project would not only have reduced seasonal drainage problems but also have created new arable land out of "useless marshes." About 17 percent of the benefited acreage was owned by the Weyerhaeuser Lumber Company.

Economically, it is Public Law 566, the Watershed Protection Act, 16 U.S.C.A. §§1001 et seq. (1970) that pushes the project along. The court notes that $706,684 out of the $1,503,831 total cost is to be contributed by federal taxpayers under P.L. 566. The "local" contribution is typically not wholly paid in dollars. By donating land rights [i.e., easements of access for the dragline, rights-of-way for ditches], landowners are credited with economic contributions toward the local share. The remainder is made up by assessments in the drainage district. As a result, local agriculture gets a construction project subsidy five to ten times its own dollar outlay [the federal contribution rate varies depending upon how much can be called "flood protection" (75 percent) rather than drainage (50 percent)]. Does the
Stream channelization involves bulldozing or draglining the natural contours and meanders of a stream into straight-line trapezoidal cross-section ditches. The trees and shrubs naturally clustered along the streambanks are stripped away and burned or left in spoil piles. Water flows change dramatically from natural flows in terms of temperature, volume, velocity, erosion, and water quality. The pre-existing populations of fish and other aquatic life typically decline severely. In this photograph, the dragline is re-dredging a silted-in channelization done approximately five years prior.

fact that the private market does not build these projects on its own show that they are not cost-effective without federal subsidies?
NRDC v. Grant, 341 F. Supp. 356, continued...

CONCLUSIONS OF LAW: JURISDICTION... This Court has jurisdiction of this matter pursuant to 28 U.S.C.A. §1331 (federal question) and 5 U.S.C.A. §702 (Administrative Procedure Act).

The National Environmental Policy Act of 1969, 42 U.S.C.A. §4321 et seq., requires all federal agencies, in performing their respective functions, to be responsive to possible environmental consequences of their actions. The Act makes it the "continuing" responsibility of the federal government to "use all practicable means and measures" to carry out the national policy of restoring and maintaining a quality environment....

RETROACTIVITY... [Judge Larkin, as most other judges in the early development of NEPA, held that NEPA was applicable to ongoing projects, like the Chicod Creek channelization, on which substantial actions remained to be taken.]

REQUIREMENTS OF §102(2)C OF NEPA... Section 102(2)(C) directs all agencies of the federal government to prepare an environmental impact statement for every major federal action significantly affecting the environment. The defendants contend that even though they have not filed an environmental impact statement, "a particular form," that in substance they have fulfilled all of the requirements of §102(2)(C). In support they assert that a detailed statement has been prepared and circulated; that the environmental impact has been considered by the Soil Conservation Service and agencies of both state and federal government; that adverse effects which cannot be avoided have been considered and weighed against the total benefit of going on with the project; that alternatives have been considered and some have been adopted; that there have been consultations with other federal agencies and with state and local agencies; and that the project has been open to and has received public comment. According to the record and the testimony received at the motion hearing on January 5, 1972, this cannot be disputed. But the fact remains that an environmental impact statement has not been prepared and filed for the Chicod Creek Watershed Project. Mr. Hollis Williams, Deputy Administrator of Watersheds, Soil Conservation Service at the motion hearing testified to the effect: "We had the belief and still do, that an environmental impact statement is not needed in the Chicod Creek Project." An environmental impact statement must be filed for every major federal action significantly affecting the quality of the human environment. The District of Columbia Circuit noted in Calvert Cliffs v. AEC, 449 F.2d 1109 (D.C. Cir. 1971) that "...the §102 duties are not inherently flexible. They must be complied with to the fullest

8. But see Oregon Natural Resources Council v. Bureau of Reclamation, 49 F.3d 1441 [9th Cir. 1994] [agency's lowering water levels and applying aquatic herbicides in a federal impoundment is not a "major federal action" because these activities were ongoing in 1970].
extent, unless there is a conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance...."

ADMINISTRATIVE DISCRETION... It is contended that the determination of whether a project is [1] "a major Federal action" and [2] "significantly affecting the quality of the human environment" is within the discretion of the Administrator of the Soil Conservation Service, and that an administrative determination should not be reversed by this Court in the absence of a strong showing that it was arbitrary, capricious, or clearly erroneous. In the case at bar the administrator, with the advice of scientists and specialists, made the determination that the project as modified could not significantly affect the quality of the human environment within the meaning and intent of NEPA, and as such "going forward with the project as modified" was in compliance with the requirements of NEPA. Certainly, an administrative agency like the Soil Conservation Service may make a decision that a particular project is not major, or that it does not significantly affect the quality of the human environment, and, that, therefore, the agency is not required to file an impact statement. However, when the failure to file an impact statement is challenged, it is the court that must construe the statutory standards of "major federal action" and "significantly affecting the quality of the human environment," and having construed them, then apply them to the particular project, and decide whether the agency's failure violates the Congressional command.

STATUTORY STANDARDS... A "major federal action" is federal action that requires substantial planning, time, resources, or expenditure. The Chicod Creek Watershed Project is a "major federal action." This project calls for sixty-six miles of channelization and the expenditure of $1,503,831, $706,684 of which is to be federally funded. The project has been in the planning and preparation stages for several years. Many persons and agencies have become involved and concerned with this project, and the construction of this project will require a substantial amount of time and labor. Certainly this can be considered to be a "major federal action."

The standard "significantly affecting the quality of the human environment" can be construed as having an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment. The cumulative impact with other projects must be considered. Any action that substantially affects, beneficially or detrimentally, the depth or course of streams, plant life, wildlife habitats, fish and wildlife, and the soil and air "significantly affects the quality of the human environment." This project will require sixty-six miles of stream channelization. As a result of such channelization there will be a substantial reduction (ninety percent) in the fish population. As a result of drainage and the clearing of right of ways, there will be significant lossage [sic] in wetland habitat which is vital to waterfowl and forest game. The Chicod Creek Watershed Project as presently proposed will have a cumulative effect upon the environment in the eastern plains of North Carolina. There are a total of forty Soil Conservation projects either authorized for construction, under construction, or completed, representing 1,562 miles of stream channelization, affecting over 100,000 acres of wetlands, and having very serious repercussions upon fish and wildlife in the Coastal Plains of North Carolina. The Chicod Creek Watershed Project "significantly affects the quality of the human environment."

It is interesting to note that one of the Soil Conservation Service's own biologists, prior to the implementation of any mitigation, concluded that this project
would have significant effects upon the environment. Also noteworthy is the fact that subsequent to Watersheds Memorandum 108, the Soil Conservation Service placed this project in Group 2, a category established by the Watersheds Memorandum indicating that projects placed in this group could have some adverse effect upon the environment. After certain mitigation measures were implemented, this project was placed in Group 1, signifying minor or no known adverse effect upon the environment. It is the opinion of this Court that an environmental impact statement should have been issued when this project was placed in Group 2.

STANDING... It is contended that the plaintiffs lack standing to pursue this action on the grounds that they have not suffered a legal wrong and have not been adversely affected by agency action.... The plaintiffs have standing to maintain this action as they have alleged injury to conservational interests and that such interests are within the zone of interests protected by NEPA.

LACHES... The mere lapse of time does not constitute laches. Laches is determined in light of all the existing circumstances and requires all delay to be unreasonable and cause prejudice to the adversary. This project has been in the planning and preliminary stages for several years. However, NEPA became effective only on January 1, 1970. The plaintiffs instituted this action on November 30, 1971. At that date no construction contract had been let nor had any construction on the installation of the project taken place. Therefore, it appears to this Court that there was no unreasonable delay in the commencement of this action, and even assuming such, there does not appear to be any prejudice to the defendants or intervenors as construction of the project has yet to begin.

INJUNCTION... The plaintiffs seek a preliminary injunction to enjoin construction of the Chico Creek Watershed Project on the grounds that an environmental impact statement has not been issued as required by NEPA. The tests for granting such relief were recently restated by the Fourth Circuit:

In the exercise of its discretion [to issue a preliminary injunction] it is sufficient if a court is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued, and considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury to the defendant.... W. Virginia Highlands Conservancy v. Island Creek Coal, 441 F. 2d 232, 235 (4th Cir. 1971).

In summary, the movants are entitled to preliminary injunctive relief if they demonstrate [a] a substantial likelihood that they will prevail on the merits, and [b] that a balancing of the equities favors the granting of such relief. Here, the plaintiffs have shown more than a substantial likelihood that they will prevail on the merits upon final determination of their NEPA environmental impact statement claim as NEPA requires that an environmental impact statement be filed for “major federal actions significantly affecting the quality of the human environment.” The plaintiffs have shown that this project is a “major federal action significantly affecting the quality of the human environment,” and that an impact statement has not been filed.

The question as to the balancing of the equities gravely concerns this Court. Basically, there are three different interests represented in this action: the conservationists, the Soil Conservation Service, and the landowners. In considering the
various interests the public interest is a relevant consideration. This project was
designed to enable the landowners to control severe drainage problems and to
increase farm productivity. These farmers have spent much time, effort, and
money in preparation for this project with the expectation of federal aid. This has
been no easy task for farmers in an area in which fifty-five percent of the families
make less than $3,000 income per year. These farmers have given up much in
expectation of innumerable benefits resulting from the project.... It was only when
the preparations had been made and construction ready to begin that this action
was initiated to enjoin the project. The Soil Conservation Service's... primary concern in this action seems to be that if it has to issue an impact statement for this
project, it will have to do the same for many other ongoing projects. This will
cause delay and, in many cases, duplicity [sic]. The projected cost per project for
issuing an impact statement is approximately $7,500. This cost is minute indeed
in comparison to the equity of the farmers and the effect that this project will have
on the environment. The conservationists are organizations dedicated to the laudable
cause of conservation and preservation of our environment. They have shown
that this project will have a significant effect on the environment. It is to the
public's welfare that any project significantly affecting the environment comply
with the procedures established by NEPA so there can be assurance that the envi-
ronmental aspects have been fully considered. It would constitute irreparable
damage for this project to proceed without the environmental aspects being prop-
erly considered as required by NEPA. Therefore, the equitable considerations favor
the environment, the public, and the plaintiffs and require that the construction of
the Chicod Creek Watershed Project be enjoined until the requirements of NEPA
are satisfied.

The defendants shall have thirty days within which to prepare and file a "full
disclosure" environmental impact statement. The preliminary injunction shall
remain in effect thereafter until all of the procedures of NEPA have been complied
with. The plaintiffs shall file a bond for the payment of costs and damages as may
be suffered by any party who is found to have been wrongfully restrained herein.
The amount of bond shall be commensurate to the possible damages incurred by
the defendants and the intervenors as a result of the injunction. Over $200,000 has
already been expended on this project by the Soil Conservation Service and
$130,000 of debt has been incurred by the intervenors. The projected cost of delay
to the Soil Conservation Service resulting from the institution of this suit is
approximately $7,650 per month. Taking into consideration the amounts that have
been expended, the costs of delay, and that other amounts are obligated, this Court
sets the bond at $75,000.

NOW THEREFORE, in accordance with the foregoing, it is ORDERED, that the
defendants and their agents, employees, and persons in active concert and participa-
tion with them who receive actual notice hereof, be and the same are hereby
restrained and enjoined from taking any further steps to authorize, finance, or com-
mence construction or installation of the Chicod Creek Watershed Project until an
environmental impact statement is filed and circulated according to the require-
ments of the National Environmental Policy Act; and,

FURTHER ORDERED, that the defendants prepare and file a "full disclosure" envi-
ronmental impact statement within thirty (30) days from the filing of this Order; and,
FURTHER ORDERED, that plaintiffs file a bond for the payment of costs and damages as may be suffered by any party who is found to have been wrongfully or unlawfully restrained herein, in the amount of, or security equivalent to, $75,000.... Let this Order be entered forthwith.
The case then went back to Judge Larkins' court for review of the SCS's newly-prepared EIS. The citizen plaintiffs again sued for a preliminary injunction, alleging that even though there now was an EIS, it was inadequate under the terms of NEPA.

**NRDC v. Grant**
U.S. District Court, Eastern District of North Carolina, 1973
355 F. Supp. 280

LARKINS, District Judge:

"The River...is the living symbol of all the life it sustains or nourishes — fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent upon it or who enjoy it for its sight, its sound or its life." Justice William O. Douglas, dissenting in *Sierra Club v. Morton*, 405 U.S. 727 (1972)....

---

FINDINGS OF FACT AND CONCLUSIONS OF LAW... There is a substantial probability that the provisions of NEPA are not satisfied by the Chicod Creek Watershed environmental impact statement.

A. SCOPE OF JUDICIAL REVIEW OF THE ENVIRONMENTAL IMPACT STATEMENT
As the Court views this case, the ultimate decisions must not be made by the judiciary but by the executive and legislative branches of our government. This court does not intend to substitute its judgment as to what would be the best use of Chicod Creek and its environs for that of the Congress or those administrative departments of the executive branch which are charged by the Congress with the duty of carrying out its mandate. The Court's function is to determine whether the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed, and that conclusions are substantiated by supportive opinion and data.

B. REQUIREMENTS OF NEPA Section 102(2)(C) of NEPA requires, first, that federal agencies make full and accurate disclosure of the environmental effects of proposed action and alternatives to such action; and, second, that the agencies give full and meaningful consideration to these effects and alternatives in their decision-making. "At the very least, NEPA is an environmental full disclosure law...intended to make...decision-making more responsive and responsible. The 'detailed statement' required by 102(2)(C) should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public, and indeed, the Congress to all known possible consequences of proposed agency action."

But NEPA requires more than full disclosure of environmental consequences and project alternatives. NEPA requires full consideration of the same in agency decision making. Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). The environmental impact statement "must be written in language that is understandable to the nontechnical minds and yet contains enough scientific reasoning to alert specialists to particular problems within the field of their expertise."

C. THE FINAL STATEMENT OOMITS AND MISREPRESENTS A NUMBER OF IMPORTANT ENVIRONMENTAL EFFECTS OF THE PROJECT.

(1) The Statement Misrepresents the Adverse Environmental Effects of the Project upon Fish Habitat
The final Statement concedes that the Project will greatly increase the quantities of sediment carried downstream from the project area into the lower reaches of Chicod Creek and the Tar River. Immediately after construction, annual sediment deposit in the lower Chicod will be 11,670 tons. Sediment yield at the confluence of the Tar River is expected to be 730 tons annually. On the assumption that the banks will stabilize in two years, sedimentation will still be increased to 4,010 tons deposited annually in Chicod Creek and 250 tons in the Tar River.... While disclosing the fact of this increase in sediment load, the statement contains no discussion of its downstream effects. The statement merely concludes, without supportive scientific data and opinion that "No significant reduction in quality of the waters of the Tar River, Pamlico River, and Pamlico Sound is expected." Credible evidence suggests the opposite conclusion. Having conceded a massive increase in sedimentation, the Statement disposes of its environmental effects in
one conclusory statement unsupported by empirical or experimental data, scientific authorities or explanatory information of any kind....

[2] The Statement Misrepresents the Effect of the Project upon Fish Resources
The Statement is not at all clear on the effect of the Project on the fishery resources in Chicod Creek. It suggests that there will be effects upon the resident and anadromous fish in Chicod Creek, but the Statement does not define the effects. Yet the Statement without any supportive data declares "Most of the fishery resources within the watershed will not be affected by the project's works of improvement or will be mitigated." This falls far short of the standards of NEPA.

Eutrophication problems occur in waterways which accumulate an excess of nutrients such as nitrogen and phosphorous. Nutrients may be introduced in the waterways from several sources including agricultural runoff and swamp drainage. At the present time the nearby Chowan River is suffering from a very serious eutrophication problem.... Eutrophication is a problem that needs extensive study and research. Yet the Statement is silent on eutrophication. This is a violation of the "full disclosure" requirements of NEPA.

...Evidence indicated that local sponsors have failed to adequately perform their maintenance responsibilities in the past.... The Statement should disclose the history of success and failure of similar projects.

[5] The Statement Ignores the Serious Environmental Consequences of the Proposed Use of Kudzu
Although one may not know what it is called, a person does not have to be a scientist to recognize kudzu..... It can be seen growing on banks, stretching over shrubs and underbrush, engulfing trees, small and large, short and tall, slowly destroying and sniffing out the life of its unwilling host. Even manmade structures are susceptible to the vine — the tall slender green tree may be your telephone pole. However, if controlled, kudzu may have erosion preventing value. The defendants propose to plant one row of kudzu at the top edge of the channel slope in cultivated areas — along 23.5 miles of the new channels. As to the use of kudzu, the Statement merely discloses; "one row of kudzu will be planted at the very top edge of the channel slope through cultivated areas. The growth of kudzu will be controlled by mechanical methods." The Statement fails to disclose how the growth of kudzu can be controlled by mechanical or any other methods and in this respect fails to satisfy the requirements of NEPA.

[6] The Statement Misrepresents and Fails to Disclose Other Important Environmental Effects of the Project
The Statement fails to disclose that over 17 percent of the acreage to be benefited by the Project is held by the Weyerhaeuser Company, a large lumber company. The Statement does not contain an adequate discussion of the possible adverse effects of the Project upon downstream flooding.

D. THE STATEMENT DOES NOT DISCLOSE OR DISCUSS THE CUMULATIVE EFFECTS OF THE PROJECT. ...The [Regulations] of the Council of Environmental Quality focus attention upon the "overall cumulative impact of the action proposed [and further actions contemplated]," since the effect of decision about a project or a complex of projects "can be individually limited but cumulatively
considerable." Yet, the Defendants have failed to consider fully in the final Statement the cumulative impact of the Chicod Creek Watershed Project and other channelization projects on the environmental and economic resources of Eastern North Carolina.... The cumulative effect of sedimentation is ignored in the Statement. There is no discussion of the potential adverse effects of long-term accumulation of nutrients caused by this and other channelization projects in the Tar-Pamlico River Basin. There is no discussion of the cumulative impact of drainage projects upon hardwood timber or groundwater resources.... Such effects should be assessed and disclosed in the environmental impact statement.

E. THE STATEMENT DOES NOT FULLY DISCLOSE OR ADEQUATELY DISCUSS ALTERNATIVES TO THE PROJECT. The "full disclosure" impact statement required by NEPA must contain a full and objective discussion of (1) reasonable alternatives to the proposed project and (2) the environmental impacts of each alternative. The Statement falls far short of satisfying these important and essential standards. Several critical reasonable alternatives are not discussed at all in the Statement. The recommendation of the Bureau of Sport Fisheries and Wildlife that seven miles of channelization be deleted from the most productive portion of the Chicod ecosystem is not discussed as an alternative to the Project. The Statement fails to discuss the alternative of deferral of the Project. Deferral is particularly appropriate in view of differing opinions about the environmental effects of the Project and §102(2)(A) of NEPA which "makes the completion of an adequate research program a prerequisite to agency action." Many of the conclusions in the Statement as to the potential adverse effects of the Project are not supported by references to scientific or other sources. The Statement omits any discussion of the recommendation of the North Carolina Department of Natural and Economic Resources that vertical drainage and water level control structures be discussed in the alternatives section, specifically as they mitigate any adverse ground water effects of the proposed project.

Alternatives are discussed only superficially, and nowhere are the environmental impacts of the alternatives discussed. The Statement thus does not provide "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." Natural Resources Defense Council v. Morton, supra. It is not the "full disclosure" statement required by NEPA.

F. CONCLUSIONS. This Court finds as a fact that the final Chicod Creek Watershed Environmental Statement does not fully and adequately disclose the adverse environmental effects of the Chicod Creek Watershed Project; nor does the Statement adequately disclose or discuss reasonable alternatives to the Project; and, therefore, there is a substantial probability that the Plaintiffs will be able to demonstrate at trial on the merits that the final Statement is not the "full disclosure" statement required by this Court's Order of March 16, 1972, and NEPA. A preliminary injunction barring further action on the Project pending a full hearing on the merits is thus appropriate....

COMMENTARY AND QUESTIONS

1. Agencies and EISs — a shotgun marriage? What apparently was the nature and tone of the Chicod Creek EIS? Most agencies have an understandable inclination to build their projects as conveniently as possible, and EISs do not serve this end.
The central problem of the §102 EIS requirement is that it presents federal agencies (especially "construction" agencies and regulatory agencies with a high level of market involvement like the Nuclear Regulatory Commission, the Department of Agriculture, etc.) with conflicting mandates. On one hand, they have specific statutory missions, backed by the elaborate reward structure of supportive congressional committees, money, and the support of the related private industries and organizations with which they work. On the other hand, they have the vague, generalized values and directives of NEPA, for which there is no affirmative administrative reward system (beyond the satisfaction of a job well done in environmental terms). At the end of a year, agency officials tend to measure their accomplishments in terms of how many miles of river were dammed or channelized, or how many reactors licensed — it must be harder to measure institutional success in terms of how many wetlands have not been disrupted, or how many rivers left as they are. Yet EISs, by illuminating facts and concerns that previously had no legal place in the institutional decisionmaking process, now can show, in some cases, that the country would be better off without the agency's projects. A straightforward EIS may militate against building the project at all, or may indicate a less destructive way of constructing it, for the sake of newly-declared ecological values that do not square with the agency's own specific mandate.

Little wonder, then, that there is a marked tendency to write EISs in a manner that is consistent with agencies' program missions. Pick up any recent environmental impact statement, review its content and prose, and you will probably be confronted with the predictable agency reaction to contradictory statutory mandates.

So the temptation is great to make the EIS a "post hoc rationalization" which is supportive of the decision the agency has already effectively made. Sometimes, project benefits are stressed, negative effects are briefly noted and rated "manageable," "mitigation" is discussed, and alternatives are cursorily noted and dismissed. Other times, the agency's strategy is to prepare an excessively long, hypertechnical, and unreadable EIS that is calculated to prevent public scrutiny. The CEQ Regulations require that EISs be prepared using an interdisciplinary approach (§1502.6), that they not exceed approximate page limitations (§1502.7), and that they be written in "plain language" (§1502.8), but these commands are rarely followed and never enforced. The CEQ itself has admitted that

frequently NEPA takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials, particularly senior leadership, is inadequate. The EIS process is still frequently viewed as merely a compliance requirement rather than as a tool to effect better decision-making. Because of this, millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decision-making. CEQ Study, 7.

Courts rarely mention the reality of this administrative inclination to write self-justifying impact statements, but in the Chicod Creek case the court seems skeptical of the SCS's sincerity. In judicial review of agency decisions under NEPA and other environmental laws, can environmental lawyers ask judges to take account of political science and be less deferential, where applicable laws were designed to constrain the agencies' singlemindedness? Do they already do so implicitly?
2. Judicial psychology. Do you detect a change in Judge Larkins' tone? What happened? There is no mention now of the alleged project benefits to small farmers; rather the opinion is a catalog of the project's negative effects. Can you discern which pieces of evidence at trial got through to the judge most dramatically? How sophisticated would the various pieces of plaintiff's evidence have to be on eutrophication, sedimentation, fisheries, and kudzu? What about Weyerhaeuser's ownership? Problems of past maintenance? How do environmental plaintiffs get around a judge's natural inclination to defer to official expertise?

3. Epilogue to Chicod Creek. What did finally happen in our North Carolina case? As one state official put it, "Old John Larkins saw he was going to make some enemies either way he decided this thing, so he called in the attorneys for both sides and said 'Boys, we've gone through this stuff long enough now, why don't you go settle it between yourselves?' And because the handwriting was on the wall, the SCS agreed to a compromise." [Confidential interview, February 1981]. No channelizing, channel straightening, or major tree-cutting was allowed; silt removal was permitted in the upper stretches. The lower six to seven miles of the creek were cleaned of snags and silt, but no draglines were permitted. As a result, the stream and its tributaries were, to a great degree, returned to the quality of the days before intensive agriculture, with a meandering wooded course and restored swimming holes. The redesigned project was so successful that the North Carolina legislature passed a Stream Restoration Act in 1979, mandating consultation with the State Wildlife Resources Commission for all such projects. Is this a success story? What about the poor families that Judge Larkins wrote of in his first opinion? No new subsidized farmland was created. Is this another example of élite conservationism oppressing poor folks?
Kleppe v. Sierra Club
United States Supreme Court, 1976
427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576

POWELL, J.... Respondents, several organizations concerned with the environment, brought this suit in July 1973 in the United States District Court for the District of Columbia. The defendants in the suit, petitioners here, were the officials of the Department [of Interior] and other federal agencies responsible for issuing coal leases, approving mining plans, granting rights-of-way and taking...other actions necessary to enable private companies and public utilities to develop coal reserves on land owned or controlled by the Federal Government. Citing widespread interest in the reserves of a region identified as the "Northern Great Plains region," and an alleged threat from coal-related operations to their members' enjoyment of the region's environment, respondents claimed that the federal officials could not allow further development without preparing a "comprehensive environmental impact statement" under §102(2)(C) on the entire region.... [Plaintiffs lost in the District Court, but the Court of Appeals reversed and granted an injunction.]

The "Northern Great Plains region" identified in respondents' complaint encompasses portions of four States — northeastern Wyoming, eastern Montana, western North Dakota and western South Dakota. There is no dispute about its richness in coal, nor about the waxing interest in developing that coal, nor about the critical role the federal petitioners will play due to the significant percentage
of the coal to which they control access. The Department has initiated, in this
decade, three studies in areas either inclusive of or included within this region....

While the record does not reveal the degree of concern with environmental
matters in the first two studies, it is clear that the NGPRP [Northern Great Plains
Resources Program] was devoted entirely to the environment. It was carried out by
an interagency federal-state task force with public participation, and was designed
"to assess the potential, economic and environmental impacts" from resource
development in five States — Montana, Wyoming, South Dakota, North Dakota,
and Nebraska....

In addition, since 1973 the Department has engaged in a complete review of its
ccoal leasing program for the entire Nation.... The purpose of the program review
was to study the environmental impact of the Department's entire range of coal-
related activities and to develop a planning system to guide the national leasing
program. The impact statement, known as the "Coal Programmatic EIS," went
through several drafts before issuing in final form on September 19, 1975 — shortly
before the petition for certiorari was filed in this case....

The major issue remains the one with which the suit began: whether NEPA
requires petitioners to prepare an environmental impact statement on the entire
Northern Great Plains region. Petitioners, arguing the negative, rely squarely on
the facts of the case and the language of §102(2)(C) of NEPA. We find their reliance
well placed....

Respondents can prevail only if there has been a report or recommendation on
a proposal for major federal action with respect to the Northern Great Plains
region. Our statement of the relevant facts shows there has been none; instead, all
proposals are for actions of either local or national scope....

The Court of Appeals, in reversing the District Court, did not find that there
was a regional plan or program for development of the Northern Great Plains
region. It accepted all of the District Court's findings of fact, but concluded never-
theless that the petitioners "contemplated" a regional plan or program....

Even had the record justified a finding that a regional program was contem-
plated by the petitioners, the legal conclusion drawn by the Court of Appeals
cannot be squared with the Act. The Court recognized that the mere "contem-
plation" of certain action is not sufficient to require an impact statement. But it
believed the statute nevertheless empowers a court to require the preparation of an
impact statement to begin at some point prior to the formal recommendation or
report on a proposal. The Court of Appeals accordingly devised its own four-part
"balancing test" for determining when, during the contemplation of a plan or other
type of federal action, an agency must begin a statement. The factors to be consid-
ered were [based on SIPI:] the likelihood and imminence of the program's coming
to fruition, the extent to which information is available on the effects of imple-
menting the expected program and on alternatives thereto, the extent to which
irretrievable commitments are being made and options precluded "as refinement
of the proposal progresses," and the severity of the environmental effects should
the action be implemented....

The Court's reasoning and action find no support in the language or legislative
history of NEPA. The statute clearly states when an impact statement is required,
and mentions nothing about a balancing of factors. Rather...the moment at which
an agency must have a final statement ready "is the time at which it makes a rec-
ommendation or report on a proposal for federal action." The procedural duty
imposed upon agencies by this section is quite precise and the role of the courts in
enforcing that duty is similarly precise. A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement should be prepared. Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decision making process of the agencies, and would invite litigation....

Respondents [further] insist that, even without a comprehensive federal plan for the development of the Northern Great Plains, a “regional” impact statement nevertheless is required on all coal-related projects in the region because they are intimately related....

We begin by stating our general agreement with respondents’ basis premise that §102(2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time.... Thus, when several proposals for coal-related actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together“....

Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare a comprehensive statement on this entire region, and we agree. The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighting of a number of factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving those issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately. Respondents have made no showing to the contrary.

MARSHALL, J., concurring in part and dissenting in part.

While I agree with much of the Court’s opinion, I must dissent from [that part] which holds that the federal courts may not remedy violations of [NEPA] — no matter how blatant — until too late for an adequate remedy to be formulated. As the Court today recognizes, NEPA contemplates agency consideration of environmental factors throughout the decisionmaking process. Since NEPA’s enactment, however, litigation has been brought primarily at the end of that process — challenging agency decisions to act made without adequate environmental impact statements or without any statements at all. In such situations, the courts have had to content themselves with the largely unsatisfactory remedy of enjoining the proposed federal action and ordering the preparation of an adequate impact statement. This remedy is insufficient because, except by deterrence, it does nothing to further early consideration of environmental factors. And, as with all after-the-fact remedies, a remand for the preparation of an impact statement after the basic decision to act has been made invites post hoc rationalizations, rather than the candid

14. At some points in their brief respondents appear to seek a comprehensive [“programmatic”] impact statement covering contemplated projects in the region as well as those that already have been proposed. The statute, however, speaks solely in terms of proposed actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions. Should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects.
and balanced environmental assessments envisioned by NEPA. Moreover, the remedy is wasteful of resources and time, causing fully developed plans for action to be laid aside while an impact statement is prepared.

Nevertheless, until this lawsuit, such belated remedies were all the federal courts had had the opportunity to impose under NEPA. In this case, confronted with a situation in which, according to respondents' allegations, federal agencies were violating NEPA prior to their basic decision to act, the Court of Appeals...seized the opportunity to devise a different and effective remedy....

The Court begins its rejection of the [Court of Appeals'] four-part test by announcing that the procedural duty imposed on the agencies by §102(2)(C) is "quite precise" and leaves a court "no authority to depart from the statutory language." Given the history and wording of NEPA's impact statement requirement, this statement is baffling. A statute that imposes a complicated procedural requirement on all "proposals" for "major federal actions significantly affecting the quality of the human environment" and then assiduously avoids giving any hint, either expressly or by way of legislative history, of what is meant by a proposal for a "major federal action" can hardly be termed precise. In fact, this vaguely worded statute seems designed to serve as no more than a catalyst for development of a "common law" of NEPA. To date, the courts have responded in just that manner and have created such a "common law." Indeed, that development is the source of NEPA's success. Of course, the Court is correct that the courts may not depart from NEPA's language. They must, however, give meaning to that language if there is to be anything in NEPA to enforce at all.

COMMENTARY AND QUESTIONS

1. **Tiering of EISs.** Plaintiffs-respondents wanted a full complement of impact statements on the federal coal-leasing program: a national (programmatic, or generic) EIS; a regional EIS; and impact documents for each local coal lease and right-of-way granted by the Department. This hierarchy of impact documents is called "tiering." See CEQ regulations, §1508.28. How informative could the national EIS and the local impact statements be without a regional EIS integrating them? Regional, or "ecosystem," planning is currently seen the most efficient and effective prelude to intelligent environmental management:

   An ecosystem, or place-based approach to strategic planning through NEPA can provide a framework for evaluating the environmental status quo and the combined cumulative impacts of individual projects. Analyzing similar but individual projects on a watershed basis, for example, can be very efficient, reducing the number of analyses and documents, and allowing agencies to focus on cumulative impacts within a geographic area. *CEQ Study*, 14.

   Was the Court suggesting that the NGPRP was the "functional equivalent" of a regional EIS?

2. **To plan or not to plan.** Is the Kleppe decision a disincentive to comprehensive planning? After all, from the standpoint of a federal agency, if you don't plan, you then don't have to go public with an EIS, thus avoiding public controversy until the action has become a self-fulfilling prophecy. If this is so, doesn't Kleppe contradict NEPA's emphasis on early planning in order to forestall irretrievable commitments of resources to environmentally damaging projects?
3. **When is there a proposal?** *Kleppe* stands for the rule that a proposal only comes into existence when the agency declares it, unless the agency has been arbitrary and capricious in not making a proposal. The CEQ regulations (§1508.23) state that a proposal may exist in fact even if it is not explicitly made. Should CEQ or the Court have the last word in interpreting NEPA? On one hand, courts should defer to an agency's interpretation of its own enabling act, but this presumption does not apply where the agency interpretation violates the plain language of the statute. Do you agree with Justice Powell or Justice Marshall about how strictly the language of NEPA should be interpreted?

In effect, the *Kleppe* Court holds that the agency itself must determine when a "proposal" is being made, and a court should only overrule this decision if it is arbitrary. Under the *Kleppe* ruling, environmental plaintiffs find it difficult to establish the existence of "de facto proposals." (cf. CEQ regulation §1508.23) Is the *Kleppe* interpretation consistent with NEPA's goal of factoring environmental analysis into federal agency planning at the earliest possible time? What could the NRC now do in a *SIP* situation if it wanted to begin a breeder reactor research program with minimal public scrutiny?

How successful do you think you would be in contending in court that an agency has been arbitrary and capricious because it hasn't done something that you claim it should have done?

See *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980) (NEPA compliance unnecessary where the Secretary of the Interior did not act to prevent the State of Alaska from killing wolves on federal lands).

4. **Cumulative impacts and NEPA.** Do you agree with the Court that the cumulative impacts of potential activities in the surrounding area cannot be considered in impact documents until the activities have actually been proposed? Doesn't this lead to fragmented, reactive planning? Even if you only consider the impacts of proposed projects, how helpful is it to consider them in each local, site-specific impact document? Once again, the CEQ regulations appear to conflict with the Supreme Court's interpretation of NEPA. (see §1508.28).

5. **Hard cases make bad law.** Should the Sierra Club have decided not to file this action under this set of facts? After all, it's not as if the Department hadn't done any planning for utilization of the Northern Great Plains coal reserves. The Sierra Club simply disagreed with Interior about what the relevant planning area should have been.

6. **NEPA as post-hoc rationalization.** Is Justice Marshall correct when he charges that a NEPA lawsuit usually comes too late in the agency decision-making process to be effective? Has the agency already invested too much money and political capital to change its plans? Or, on the other hand, does the spectre of a NEPA suit that would expose substantial waste and shoddy planning inspire agency officials to give prudent consideration to environmental problems early in the process? Is Justice Marshall's reservation about NEPA answered by the CEQ's "scoping" suggestions? (§1501.7.) Note that if the agency doesn't scope, its failure to do so can't be raised until after the final EIS has been released.
7. Applying NEPA to federal agencies’ international actions. In United States Trade Representative v. Public Citizen, et al., 5 F.3d 549 [D.C. Cir. 1993] NEPA was held inapplicable to the North American Free Trade Agreement (NAFTA) on the following grounds: 1) NAFTA was not a final agency action because it remained to be finalized by the President and Congress; 2) it was not a final agency action because it was to be submitted to Congress by the President, who is not an “agency”; and 3) it was not reviewable, under the APA, because it was not an action that “directly affected” the plaintiff. Isn’t NEPA’s mandate of EISs on “agency...proposals for legislation” quite nullified by this logic? Could any agency proposal for legislation ever be subject to judicial review, or are the terms of NEPA now left up to voluntary enforcement by the executive branch and Congress, which have not enforced NEPA in the past? The “direct effect” element of this decision sounds like a heightened standing inquiry — plaintiffs have to claim a direct injury deriving from the challenged action. If this USTR case means that an agency gets a good defense against NEPA suits by saying that other actors will have to act before the harm can occur, that would open up a large loophole indeed.

In Environmental Defense Fund v. Massey, 986 F.2d 528 [D.C. Cir. 1993], the court held that NEPA applied to the National Science Foundation’s plans to build an incinerator at NSF’s McMurdo Station research facility in Antarctica because: 1) the administrative action would occur primarily, if not exclusively, within the United States; 2) the alleged extraterritorial effect of NEPA would be felt in a place without a sovereign; and 3) it would be felt in an area over which the United States has a great measure of legislative control. If all three of these criteria are necessary in order to imply extraterritorial effect for a statute that does not clearly assert it, won’t the rule of this case be limited to federal actions that play themselves out on the high seas, or at the other Pole, or in outer space? If only the first of these criteria must be satisfied, a wide range of United States activities with international repercussions might be covered by NEPA. Especially where a statute is procedural, like NEPA, U.S. regulation of agency decisionmaking procedures is less likely to create a contradiction with the laws of a foreign nation. This is doubly true in cases where statutes are being applied to regulate federal agencies that are spending U.S. funds in a foreign country, instead of directly regulating conduct. It would seem less controversial to put strings on spending projects of, for example, U.S.A.I.D., the federal Agency for International Development.

8. Where is NEPA’s overview? Observing the scene that has followed the Kleppe decision, Professor Oliver Houck comments that

NEPA is missing the point. It is producing lots of little statements on highway segments, timber sales, and other foregone conclusions; it isn’t even present, much less effective, when the major decisions on a national energy policy and a national transportation policy are made. On the most pivotal development questions of our time, NEPA comes in late in the fourth quarter, in time to help tidy up."

15. Letter to Michael Deland, Chairman, CEQ, 19 Feb. 1991. Houck urges that CEQ not focus on making each EIS “a ‘succinct review for a single project’...[but] rather, to make NEPA work for legislative proposals and for programs that all but conclusively determine what the subsequent projects will be.”
The CEQ has recently repeated this critique: The NEPA process is often triggered too late to be fully effective. Generally, agency and private sector planning processes begin long before the NEPA process. By the time an environmental impact analysis is started, alternatives and strategic choices are foreclosed. Congress envisioned that federal agencies would use NEPA as a planning tool to integrate environmental, social, and economic concerns directly into projects and programs. However, during the 25 years of NEPA, application has focused on decisions related to site-specific construction, development, or resource extraction projects. NEPA is virtually ignored in formulating specific policies and often is skirted in developing programs, usually because agencies believe that NEPA cannot applied within the time available or without a detailed proposal. Instead, agencies tend to examine project-level environmental effects in microscopic detail. The reluctance to apply NEPA analysis to programs and policies reflects the fear that microscopic detail will be expected, even when such depth of analysis is not possible that early in the project development stage. CEQ Study, 12.

Do you think that federal agencies really do not employ NEPA as a long-range, programmatic planning tool because they are afraid of being compelled to divulge too much detail too early? Or do agencies find it difficult to resist making low-visibility decisions that may be more responsive to political influences?

C. NEPA IN THE COURTS SINCE KLEPPE

The Kleppe decision ushered in a period of relatively unfriendly handling of NEPA claims by the Rehnquist Supreme Court. Through Strycker's Bay (1980), Pane (1983), and two cases decided in 1989, Marsh v. Oregon Natural Resources Council, 490 U.S. 360, and Robertson v. Methow Valley Citizens' Council, 490 U.S. 332, the Court has consistently narrowed NEPA's coverage.

Marsh v. Oregon Natural Resources Council... Marsh involved construction, by the Corps of Engineers, of the third dam of a three-dam grouping in the Rogue River watershed in Oregon, a famous fishing area. The original EIS was completed in 1971. After acquiring 26,000 acres of land and relocating residents and utilities, the Corps acknowledged incomplete information about the water quality impacts of the dam, and began further studies centered on the dam's effects on stream turbidity. A Final Supplemental EIS ("FEISS") was completed in 1980. After reviewing the FEISS, the Corps decided to proceed with the project and, in 1985, Congress appropriated funds for the construction of the dam project, now one-third completed. Plaintiffs sued, claiming that the Corps had violated NEPA by, among other things, failing to prepare a second SEIS to review two documents developed after 1980 — one prepared by the Oregon Department of Fish and Wildlife, and the other by the United States Fish and Wildlife Service — indicating that the downstream water quality impacts of the dam would be greater than suggested in the FEISS. The Court of Appeals, reversing the District Court, held that the Corps should prepare another SEIS because the two documents brought to light important new information, which the Corps had not adequately considered. The Supreme Court reversed the Circuit Court and upheld the Corps' decision:

The parties are in essential agreement concerning the standard that governs an agency's decision to prepare a supplemental EIS... [The] cases make clear that
an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand, as the Government concedes, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. Application of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major federal action" to occur, and if the new information is sufficient to show that the remaining action will "affect the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared....

The parties disagree, however, on the standard that should be applied by a court that is asked to review the agency's decision.... Respondents contend that the determination of whether the new information suffices to establish a "significant" effect is either a question of law or, at a minimum, a question of ultimate fact and, as such "deserves no deference" on review.... We disagree.... The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise. Respondent's claim...rests on the contentions that the new information undermines conclusions contained in the FEIS, that the conclusions contained in the ODFW memorandum and the SCS survey are accurate, and that the Corps' expert review of the new information was incomplete, inconclusive, or inaccurate. The dispute does not turn on the meaning of the term "significant" or on an application of this legal standard to settled facts. Rather, resolution of this dispute involves primarily issues of fact.... Accordingly, as long as the Corps' decision not to supplement the FEIS was not "arbitrary or capricious," it should not be set aside. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 372–377.

The Court then held that the Corps' decision not to prepare another SEIS was not a clear error of judgment.

ROBERTSON v. METHOW VALLEY CITIZENS' COUNCIL.... In the Robertson case, plaintiffs contested the United States Forest Service's EIS on a proposed permit to construct a ski resort in the Okanogan National Forest in Washington. Plaintiffs claimed that the EIS was defective because it did not include a "worst case analysis" of the effects of the resort on the resident mule deer herd or a mitigation plan to reduce the project's impacts on the herd and local air quality. The Court of Appeals agreed with both of plaintiffs' arguments. The Supreme Court reversed, holding that (1) a worst case analysis was no longer necessary (see above discussion), and (2) a mitigation plan was not required by NEPA:

The sweeping policy goals announced in §101 of NEPA are...realized through a set of "action forcing" procedures that require that agencies take a "hard look" at environmental consequences, and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. In this
case, for example, it would not have violated NEPA if the Forest Service, after complying with the Act’s procedural prerequisites, had decided that the benefits to be derived from downhill skiing...justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd. Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed — rather than unwise — agency action.

To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.... Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse impacts. An adverse effect that can be remedied by, for example, an inconsequential public expenditure is certainly not as serious as a similar effect that can only be modestly ameliorated through the commitment of vast public and private resources.... There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. In this case, the off-site effects on air quality and on the mule deer herd cannot be mitigated unless nonfederal government agencies take appropriate action. Since it is those state and local governmental bodies that have jurisdiction over the area in which the adverse effects need to be addressed and since they have the authority to mitigate them, it would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary. Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms — as opposed to substantive, result-based standards — to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act. Robertson v. Methow Valley Citizens' Council, 490 U.S. 332, 350–352.

Do you agree with the Court that NEPA's procedural requirements "are almost certain to affect [an] agency's substantive decision"? If the Forest Service concludes that significant environmental impacts of the resort could be mitigated by state and local activities, should USES be permitted to issue the permit before it has received reasonable assurances that those steps will actually be taken?

Although the United States Supreme Court has, in recent years, been unreceptive to NEPA claims, the lower federal courts are continuing to enforce the statute. The following case illustrates NEPA's continuing deterrent impact on environmentally problematic federal actions:

Sierra Club v. Department of Energy
District Court for the District of Columbia
808 F.Supp. 852 [1991]

LAMBERTH, J. Five years ago, the Department of Energy attempted to import spent nuclear fuel rods from Taiwan through a West Coast port without filing the documentation required by NEPA. Once they were caught by an environmental group and enjoined by a prior lawsuit, the Department shifted its plans to an East Coast Port and filed an EA which did not consider real alternatives. The Department filed a second EA in 1988 that similarly did not consider real alternatives. The
Department was sued once again and the plaintiff specifically identified a variety of perceived flaws in the EA. In 1991, the Department again filed an EA, correcting some, but not all of the problems. For the reasons stated [below], this EA is almost adequate, but not quite. While none of the parties and especially not this court wish to waste government time and resources, the Department must make another attempt to comply with the law. It is not this court's order, but rather it is the Department's failure to follow the requirements of NEPA that has forced this duplication of effort.

While the risks are small in absolute terms, the relative risks reveal that there are significant differences in the risk of a port accident as population density varies.... These differences are particularly important in a situation involving nuclear material where the worst case scenario is catastrophic, if highly unlikely, and the subject of great public concern. Even the Department's least likely credible accident would result in the exposure of hundreds of thousands of people over a 379 sq. km area to excess radiation. Further casting doubt on the Department's decision making process is its change in policy that led the Department to bring the fuel rods in through Hampton Roads rather than through a West Coast port as was originally planned. After two years of unsuccessful litigation, the Department decided to try the East Coast which does indeed provide a safer route to the Savannah [Ga.] site. All of the Department's plans have involved transit of the nuclear fuel rods to the Savannah River processing site. The 1991 EA states that the Idaho processing site "does not handle uranium products." It has never been clear to the court whether this facility cannot process such uranium or whether some modification would be required or whether the government simply prefers the Savannah site based on economic or other considerations. The only evidence that has been presented indicates that the Idaho facility is actually more sophisticated than the Savannah site because it can extract krypton gas from spent fuel products.... The court does not [and cannot] say that the Department must use the Idaho site, but the Department has never clearly explained why this is not a feasible and sensible alternative.... Here the court does not believe that the Department took a "hard look" at a reasonable range of alternatives when it prepared its 1991 EA and selected the port of Hampton Roads....

Although the court holds that the Department need not file a programmatic EIS, the court nonetheless does not believe that the Department can ignore the fact that, by continuing to bring spent fuel through a single port, a narrow range of the population bears the entire risk.... In its new EA, the Department should calculate [the] cumulative dose, explaining the amount of radiation, the number of people it might involve, and its potential health effects.... The court does not impose this requirement16 to arouse public furor that Hampton Roads appears to be the port of choice for nuclear fuel shipments, but rather to insure that, as the court assumes the Department's calculations will reveal, those along the transportation route know that exposure to multiple incident-free doses has a very minimal health effect on them.... Admittedly these doses are below those permissible by law and cannot by themselves serve as a basis for an injunction; the Department has not, however, calculated the risk from repeated exposure to such doses to those along the transportation route. Further, permitting the importation of the nuclear fuel

---

16. The amount of time and resources spent defending this lawsuit dwarfs the effort that would have been expended had the Department simply analyzed all eleven ports suggested by the plaintiff and examined the full range of risks.
rods will unquestionably create a risk of greater environmental harm (through an accident), which cannot at this time be said to be insignificant. Requiring an adequate environmental assessment will ensure that the risk is sufficiently minimal that the Department would choose to proceed with its program through Hampton Roads or perhaps would reveal that another more safe port is a preferable port of entry. The court finds that the public interest will be served both by the simple enforcement of NEPA and by insuring that an appropriate risk analysis is completed before the shipment is completed.

**COMMENTARY AND QUESTIONS**

1. **NEPA is alive and well?** Another example of the fact that NEPA is alive and well in the lower federal courts is City of Carmel-by-the-Sea v. U.S. Department of Transportation, 95 F.3d 892 (9th Cir. 1996). In *Carmel* the City challenged the adequacy of the EIS/EIR for a proposed road project under applicable provisions of NEPA and the California Environmental Quality Act ("CEQA"). The court held that "the EIS/R failed to consider adequately the effects [of the proposed project] on wetlands, failed to analyze adequately the project's cumulative impacts, and failed to consider reasonable alternatives, in light of the statement of purpose and need articulated in the final EIS/R." The major problem that the court found with the EIS/R was that there had been a material change in the statement of purpose between the Draft and the Final EIS/R. However, this change in the statement of purpose was not accompanied by a consideration of additional alternatives that satisfied the requirements of the revised statement of purpose. The stated purpose of the Draft EIS/R was "to improve the capacity of Highway 1 and reduce crossing and turning conflicts." The Final EIS/R, on the other hand, changed the stated purpose to the requirement of "a specific traffic flow Level of Service."

Defendants materially altered the statement of purpose and need between the Draft and Final EIS/R by adding a specific requirement of attaining Level of Service C. They did not, however, update the list of alternatives under consideration to reflect the more specific goals of the Final EIS/R's statement of purpose and need. All of the alternatives except the one chosen fail to even come close to satisfying the new goals.... The issues under NEPA and CEQA are whether, once the Level of Service C goal was added, a reasonable range of alternatives was considered. By materially changing the goal of the EIS/R without also considering an acceptable range of alternatives designed to meet the changed purpose, Defendants failed to consider a range of alternatives which were "dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice." Where, as here, a range of alternatives is developed in conjunction with one statement of purpose and need, and the statement of purpose and need is subsequently changed to eliminate all but one of the initial range of alternatives, there has been an abuse of discretion.... The Federal Highway Administration and CALTRANS should have either prepared appropriate new alternatives in light of the new statement of purpose and need, or else retained the original statement of purpose and need and provided a reasonable analysis of all relevant factors. *Carmel-by-the-Sea*, 95 F.3d, at 903, 908.

Another recent federal circuit court of appeals decision that falls into the "NEPA is alive and well" category is Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664 (7th Cir. 1997).
Like Sierra Club and Carmel-by-the-Sea, the Simmons case involved an artificial narrowing of alternatives by the lead federal agency, the Corps of Engineers. In Simmons, the Corps proposed to dam a scenic and recreationally important river in southern Illinois in order to provide water supply for neighboring towns. Throughout the gestation of the proposal, local conservationists and landowners had opposed the project, instead advocating either expansion of an existing pipeline from another lake or construction of several smaller dams on various rivers. The Corps first prepared an EA and FONSI, considering only the single-dam alternative. The EA and FONSI were invalidated by the district court as arbitrary and capricious because they did not consider other apparently viable alternatives. The Corps then prepared a full EIS, which also ignored alternatives other than the proposed single dam. The circuit court struck down the EIS for the same reason:

Eight years have elapsed since the City of Marion, Illinois, first proposed building a new water reservoir in the southernmost tip of Illinois. In those eight years a tale has unfolded that is all too familiar. Lawsuits have stopped the project short; and Marion is still no closer to a new water supply. As is routine in American administrative law, the litigation has little to do with what anybody really cares about. One side wants a dam built and a new lake created, and the other does not. Instead, the dispute, now in and out of federal court for five years, has centered on procedures — whether the [Corps] fulfilled its procedural obligations under federal environmental law. All this is true. But the case provides a textbook vindication of the wisdom of Congress in insisting that agencies follow those procedures in the first place....

When a federal agency prepares an [EIS], it must consider “all reasonable alternatives” in depth. No decision is more important than delimiting what those “reasonable alternatives” are. That choice, and the ensuing analysis, forms “the heart of the environmental impact statement.” 40 CFR §1502.14. To make that decision, the first thing an agency must define is the project’s purpose. The broader the purpose, the wider the range of alternatives; and vice versa. The “purpose” of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing “reasonable alternatives” out of consideration (and even out of existence). The federal courts cannot condone an agency’s frustration of congressional will. If the agency constrains the definition of the project’s purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. We are confronted here with an example of this defining-away of alternatives.... At no time has the Corps studied whether this single-source idea is the best one — or even a good one. Simmons v. Corps, 120 F.3d 664, at 665–667.

2. Has NEPA been worth the effort? In The [Unhappy] Truth about NEPA, 26 Okla. L. R. 239 (1973), where he concluded that NEPA’s procedural reform is “nine parts myth and one part coconut oil,” Joseph Sax argued that the Act was unlikely to change decisionmaking. Here are his five basic rules of the game:

1. Don’t expect hired experts to undermine their employers.
2. Don’t expect people to believe legislative declarations of policy. The practical working rule is legislatures’ true policy is what they choose to fund.
3. Don’t expect agencies to abandon their traditional friends.
4. Expect agencies to back up their subordinates and professional colleagues.
5. Expect agencies to go for the least risky options (even where risk means performing their missions).

Consider, however, the latent effect of NEPA that is likely to affect virtually all agency actions that faced citizen challenge after the Chicod Creek case. Ultimately, for instance, it was the potential disclosure process of NEPA that prevented construction of the environmentally threatening, excessively expensive nuclear fast breeder reactor. The CEQ quotes a former Secretary of Energy as having remarked, regarding his decision to defer selection of a tritium production technology, "Thank God for NEPA, because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country." CEQ Study, 13.

In fact, information has a power of its own, even in the absence of substantive review mechanisms. Human beings and their institutions are averse to being embarrassed by public exposure of their nonconformity with generally accepted behavioral norms. The fundamental currency of politics is not money, but "image."
United States District Court, D. Montana, Great Falls Division.
MONTANA WILDERNESS ASSOCIATION a non-profit corporation, and, Curley Youpee, an enrolled member of the Fort Peck Tribes, individually, Plaintiff;
v.
Tom FRY, Acting Director, U.S. Bureau of Land Management; Mat Millenbach, Director, Montana-Dakotas State Office, U.S. Bureau, of Land Management; Jamie Rappaport Clark, Director, U.S. Fish & Wildlife Service; U.S. Bureau of Land Management; U.S. Fish & Wildlife Service; and Macum Energy, Inc., a Montana corporation, Defendants.


Background: Wilderness association and Native American tribal member brought action against Bureau of Land Management (BLM), Fish and Wildlife Service (FWS) and energy corporation, challenging sale of oil and gas leases on National Monument land.

I. INTRODUCTION

This case arises from Defendant Bureau of Land Management’s sale of three oil and gas leases to Defendant Macum Energy, Inc. on September 28, 1999, and from BLM’s decision granting an unrelated pipeline right-of-way to Macum Energy on November 4, 1999. The leases and pipeline are in Blaine County, north central Montana, in an area of the Upper Missouri Breaks commonly known as the Bullwacker, named after a creek running through the area. The Bullwacker area is 30 miles south of Zortman, Montana, and 50 miles south of Chinook, Montana. It is comprised of 27,382 federal acres and 640 state acres. It is bounded by Cow Creek Road to the north, private land to the south, and Gist Branch Road to the east and south.

In designating this area part of a National Monument in 2001, President Clinton stated: The Bullwacker area of the monument contains some of the wildest country on all the Great Plains, as well as important wildlife habitat. During the stress-inducing winter months, mule deer and elk move up to the area from the river, and antelope and sage grouse move down to the area from the benchlands. The heads of the coulees and breaks also contain archaeological and historical sites, from tepee rings and remnants of historic trails to abandoned homesteads and lookout sites used by Meriwether Lewis.

Proclamation 7398, Establishment of the Upper Missouri River Breaks National Monument (Jan. 17, 2001),


All parties moved for summary judgment. Oral argument was held October 22, 2003. In my view, the plaintiffs are correct. The law was not followed as the Congress requires and the President intended.

II. STANDARD OF REVIEW

The substantive statutes under which the parties have moved for summary judgment do not provide an independent basis for review. The action is therefore governed by the Administrative Procedure Act (APA), which permits judicial review of final agency action. 5 U.S.C. § 706. Judicial review under the APA is limited to the question of whether the BLM acted arbitrarily, capriciously, or otherwise not in accordance with the law. 5 U.S.C. § 706.

In making its determination, the Court must consider whether the agency's decisions were based on a consideration of the relevant factors and determine whether the agency made "a clear error of judgment." Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). The Court's review is limited to the information that
was before the agency at the time it made its decision. *Friends of the Earth v. Hintz*, 800 F.2d 822, 828-29 (9th Cir.1986).

III. FACTUAL BACKGROUND

A. Lease Sales

On September 28, 1999, BLM sold three oil-and-gas leases to Macum Energy in a competitive sale at the Montana BLM office in Billings, Montana. The BLM identified the parcels earlier in the year, and determined through use of its Documentation of Land Use Plan Conformance and NEPA Adequacy (DNA) worksheets that leasing of each parcel complied with NEPA. Specifically, the BLM determined that leasing complied with the 1988 West HiLine Resource Management Plan Environmental Impact Statement (RMP/EIS).

Parts of the leases are located on land that was designated the Upper Missouri River Breaks National Monument ("National Monument") in January 2001. Then-Secretary of the Interior Bruce Babbitt announced plans to place restrictions on this area in May 1999 pending special designation of the legal status of the land. In July 1999, in response to local opposition, Secretary Babbitt announced he would not place new restrictions on the area pending special designation. The lease sales took place three months later.

Although the proclamation establishing the National Monument prohibits further oil and gas leasing, it protects valid existing oil and gas lease rights. ("The Secretary of the Interior shall manage development on existing oil and gas leases within the monument, subject to valid existing rights, so as not to create any new impacts that would interfere with the proper care and management of the objects protected by this proclamation.").

The Upper Missouri National Wild and Scenic River Corridor is closed to mineral leasing, as are Wilderness Study Areas including Cow Creek, Ervin Ridge, Woodhawk, Stafford and Dog Creek. Neither the leases nor the pipeline are within any of these areas.

BLM placed notices of the lease sales at various of its Montana offices and on its website. However, because BLM determined that its obligations under NEPA regarding the lease sales were met through the West HiLine RMP/EIS, it did not prepare an EA or issue a Finding of No Significant Impact (FONSI). Nor did it mail notices to interested parties, or publish notice in any publications or newsletters.

B. Pipeline Right-of-Way

On September 9, 1999, Macum applied for a pipeline right-of-way in the Bullwacker to serve production from existing wells. This right-of-way is unrelated to the leases granted on September 28, 1999.

In response, the agency prepared an EA, and issued a Finding of No Significant Impact (FONSI) and Record of Decision (ROD) on October 27, 1999. It did not circulate the EA or the FONSI, nor did it publish notices of the EA, FONSI, or the right-of-way grant.

BLM also contracted with a consultant who prepared a Cultural Resources Inventory of the right-of-way area. The consultant inspected the area on November 1, 1999. He sent his report to the BLM on November 5, 1999. The consultant reported a stone ring, which he posited is a former Native American tipi site from an indeterminate age, 54 feet from the right-of-way. The consultant determined that the site would not be affected by the pipeline.

An addendum to the report was prepared on December 8, 1999. It addressed 17 additional acres, and reported no archaeological sites.

The BLM granted the right-of-way to Macum on November 4, 1999—one day before it received the report from its archaeological consultant. Pipeline construction took place that winter; the pipeline is currently used to transport natural gas.

C. NEPA/ESA Documents

As evidence of its compliance with NEPA and ESA in its decisions to sell the three leases, BLM relies upon the 1981 Lewistown District Oil and Gas Leasing Environmental Assessment (EA) and the West HiLine Resource Management Plan Environmental Impact Statement (RMP/EIS). As evidence of its compliance with NEPA and the NHPA for the pipeline right-of-way, it relies upon the EA it prepared in the fall of 1999, and the cultural resource survey prepared on its behalf.

1. West Hi Line RMP/EIS

The BLM states that the challenged leases were issued in compliance with the Final West HiLine RMP/EIS, which was released in 1988. Plaintiffs contend the RMP/EIS did not address oil and gas leasing, and cannot be used to fulfill BLM's obligations under NEPA or the ESA.

The West HiLine RMP/EIS is a programmatic document, designed to "provide a master plan for managing and allocating public land resources within the planning area over the next 10 to 15 years." The document's self description says it is "preced[ing] the activity planning level. The activity plan is a site-specific, detailed plan that may precede actual site development."

The RMP/EIS planning area includes 626,098 surface acres and 1,328,014 subsurface acres administered by the BLM. The RMP/EIS identified and resolved five primary land-use issues in the planning area: 1) it identified lands for retention, disposal, and acquisition; 2) it amended existing designations for open, limited or closed to off-road-vehicle use areas; 3) it identified areas not suitable for transmission and communication site right-of-way location; 4) it identified areas where management emphasis may be required (Kevin Rim, Sweet Grass Hills, and Cow Creek); and 5) it determined recreation management direction for the Upper Missouri National Wild and Scenic River Corridor.

As implied by this list, the West HiLine RMP/EIS did not evaluate the environmental impacts of oil and gas leasing in the planning area. Oil and gas management is addressed in the Management Common to All Alternatives section of the RMP/EIS. The management alternatives discussed in that section are not analyzed in the EIS. Rather, they reflect decisions made in previous planning documents.

The guidance given in the Management Common to All Alternatives section has been carried forward from existing laws, regulations and previous planning efforts. It is current, valid guidance which will be followed no matter which alternative is selected and is a substantial portion of the RMP.

The 1981 Lewistown District Oil and Gas EA is referenced as being one of the valid decisions "brought forward" into the RMP/EIS.

Appendix 1.3 to the RMP/EIS, Reasonably Foreseeable Development of Oil & Gas Resources, discussed oil & gas production levels prior to 1988, and predicted the reasonably foreseeable future of oil & gas development in the planning area. Additionally, it discussed possible impacts on a variety of resources. It did not do this in the context of a range of alternatives, however; it simply outlined broad impacts expected to occur from the projected level of oil and gas development.

Moreover, Appendix 1.3 was added to the Final RMP/EIS after the DEIS stage. Because it was not part of the Draft RMP/EIS, it was not available for public comment or review.

The BLM published a Notice of Intent to announce the RMP/EIS planning process in December 1983. It held several meetings and elicited public comment on the Draft RMP/EIS from June 1987 through September 1987. With one exception, none of the public comments address impacts from oil and gas leasing. The one exception to this are the numerous comments directed toward mining in the Sweet Grass Hills, which was identified as an Area of Environmental Concern in the RMP/EIS, and an Area of Critical Environmental Concern in the modified Record of Decision (ROD).

Plaintiffs' contention that the West HiLine RMP/EIS was not an oil and gas EIS is supported by the plain language of the RMP/EIS. The RMP/EIS unequivocally states that it is addressing management issues other than oil and gas management. Although oil and gas management was identified as an issue during the scoping process, it was considered to have been addressed earlier in the Lewistown Oil and Gas EA. Additionally, in response to a question posed at a public meeting, "How does the draft [EIS] propose managing the mineral resources, especially hard rock minerals?", the BLM replied:

Hardrock minerals will be managed under the 43 CFR 3809 regulations which are applicable where BLM is the surface managing agency. For additional information and text revisions please refer to the Mineral Resource Management section of the Management Common to All Alternatives description in Chapter 2.

That section, as noted earlier, incorporates earlier decisions and does not analyze any alternatives.

Thus, the West HiLine RMP/EIS did not analyze potential environmental impacts of various oil and gas management alternatives. To the extent the RMP/EIS is an oil and gas NEPA document, therefore, it must come from its incorporation of the 1981 Lewistown Oil and Gas EA.
two years prior to the EA. No other FONSI appears in the record.

3. Pipeline Right-of-Way EA

In response to Macum Energy’s application for a pipeline right-of-way in September 1999, BLM prepared an EA. Exh. H, Tab 3. Although it does not explicitly say so, the EA appears to “tier” to the West HiLine RMP/EIS. The EA refers the reader to the RMP/EIS for discussion of soil, water, air, minerals, wilderness, roads and trails, cultural resources, and hazardous or solid wastes. It states in the Rationale for Decision that it is “in conformance” with the West HiLine RMP/EIS. On October 27, 1999, the BLM issued a Finding of No Significant Impact (FONSI) and a Record of Decision (ROD).

The pipeline EA examined the proposed action, which was issuing Macum the right-of-way grant, and a no-action alternative. The evaluation of alternatives focused primarily on possible effects to soil, concluding that long-term impacts could be mitigated through right-of-way stipulations.

IV. ANALYSIS OF CLAIMS

A. Jurisdictional Defenses

B. NEPA Violations

1. Standard of Review

The Administrative Procedure Act governs judicial review of agency decisions under NEPA. NEPA aims to promote environmentally sensitive governmental decision-making, without prescribing substantive standards. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989); Tillamook County v. U.S. Army Corps of Eng’rs, 288 F.3d 1140, 1143 (9th Cir.2002).

Toward that end, the Congress by statute requires, with some exceptions, that all federal agencies consider the environmental impact of their actions. Anderson v. Evans, 350 F.3d 815, 829 (9th Cir.2003).

The adequacy of an Environmental Impact Statement (EIS) is judged by whether it constituted a “detailed statement” that took a “hard look” at all of the potentially significant environmental consequences of the proposed action and reasonable alternatives.
thereto, considering all relevant matters of environmental concern. 42 U.S.C. §§ 4332(2)(a); Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); 40 C.F.R. § 1502.1. The critical question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action as well as a range of alternatives to that action. California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). The "hard look" mandated by Congress must be timely, and must be taken objectively and in good faith—"not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000).

In reviewing the adequacy of an EIS, "[i]t is this circuit's practice to employ a 'rule of reason' that asks whether an EIS contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" Idaho Cons. League v. Munn, 956 F.2d 1508, 1519 (9th Cir. 1992). The "rule of reason analysis and the review for an abuse of discretion are essentially the same." Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998). An "environmental impact statement is more than a disclosure document." 40 C.F.R. § 1502.1. It is not enough to simply outline the foreseeable effects of a decision already made. NEPA requires consideration of a range of alternatives, and frank public discussion of those alternatives.

Similar rules apply to Environmental Assessments (EA). An EA is to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact," and "shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(e), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(a)(1), (b); Save the Yaak Comm. v. Block, 840 F.2d 714, 717-18 (9th Cir. 1988). Although the discussions may be "brief," the Court must still determine whether an EA took a " 'hard look' at the environmental consequences" of the proposed action. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (citing Oregon Natural Res. Council v. Love, 109 F.3d 521, 526 (9th Cir. 1997)). The court must defer to an agency conclusion that is "fully informed and well-considered," but need not rubber stamp a "clear error of judgment." Blue Mountains, 161 F.3d at 1211 (quoting Save the Yaak Comm., 840 F.2d at 717 and Marsh v. U.S. Dep't of Agric., 499 U.S. 360, 378, 109 S.Ct. 1851).

An EA as well as an EIS must analyze "connected actions." Save the Yaak, 840 F.2d at 720. An EA must discuss reasonably foreseeable future actions that may result in cumulative impacts. Id. It must also be circulated to the public for some level of comment and participation. Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961, 970-971 (9th Cir. 2003). As the Ninth Circuit recently noted:

Although we have not established a minimum level of public comment and participation required by the regulations governing the EA and FONSI process, we clearly have held that the regulations at issue must mean something. ... It is evident, therefore, that a complete failure to involve or even inform the public about an agency's preparation of an EA and a FONSI, as was the case here, violates these regulations.


If the EA establishes that the agency's action "may have a significant effect upon the ... environment, an EIS must be prepared." Foundation for Nat. Wild Sheep v. United States Dep't of Agric., 581 F.2d 1172, 1178 (9th Cir. 1978) (emphasis added); see also Blue Mountains, 161 F.3d at 1212. If not, the agency must issue a Finding of No Significant Impact (FONSI), see Blue Mountains, 161 F.3d at 1212; 40 C.F.R. §§ 1501.4, 1508.9, accompanied by a "convincing statement of reasons why the project's impacts are insignificant." Blue Mountains, 161 F.3d at 1212 (quoting Save the Yaak Comm., 840 F.2d at 717); National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001).

Whether there may be a significant effect on the environment requires consideration of "context and intensity." 40 C.F.R. §§ 1508.27; 42 U.S.C. §§ 4332(2)(a); see also Sierra Club v. U.S. Forest Serv., 843 F.2d 1190, 1193 (9th Cir. 1988). Context refers to the scope of the agency's action, including the interests affected. Intensity relates to the degree to which the agency action affects the locale and interests identified in the context part of the inquiry. National Parks & Conservation Ass'n, 241 F.3d at
In challenges to an agency's issuance of a FONSI, the reviewing court must ensure that, in preparing the EA, the agency took a "hard look" at all the relevant foreseeable consequences of a proposed action, in light of their context and intensity, and determined that no "significant impact" to the environment would result. Metcalf, 214 F.3d at 1141 (citing Robertson, 490 U.S. at 348, 109 S.Ct. 1835). An agency's issuance of a FONSI is entitled to "substantial deference." Oregon Natural Res. Council, 490 U.S. at 372, 109 S.Ct. 1851. The agency's determination is considered in light of the degree of uncertainty manifested, and the degree of controversy generated. "Either of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." National Parks & Conservation Ass'n, 241 F.3d at 731 (quoting Sierra Club v. U.S. Forest Serv., 843 F.2d 1190, 1193, 1194 (9th Cir.1988); Blue Mountains, 161 F.3d at 1212-14).

### 2. Oil and Gas Lease Sales

The sale of oil and gas leases is an irretrievable commitment of resources for which an EIS must be prepared. Conner v. Burford, 848 F.2d 1441 (9th Cir.1988); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir.1988). The government notes that the Tenth Circuit has held that an EIS is not required at the lease sale stage. Park County Res. Council, Inc. v. U.S. Dept of Agric., 817 F.2d 609 (10th Cir.1987). However, that is not the rule in this Circuit, nor has it been the rule for the past 15 years. As long as the leases are non-NSO (non-no-surface-occupancy) leases, these are, their sale constitutes an irretrievable commitment of resources. Conner, 848 F.2d at 1451 ("the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases").

While it is true that some or all of the environmental consequences of oil and gas development may be mitigated through lease stipulations, it is equally true that the purpose of NEPA is to examine the foreseeable environmental consequences of a range of alternatives prior to taking an action that cannot be undone. Conner, 848 F.2d at 1446 ("The purpose of an EIS is to apprise decision makers of the disruptive environmental effects that may flow from their decisions at a time when they retain a maximum range of options"); 40 C.F.R. § 1501.2.

Thus, I need not determine whether an EIS was required prior to the sale of the three leases; Conner establishes that it was. Instead, the question is whether the West HiLine RMP/EIS fulfilled the BLM's obligations under NEPA; that is, whether it took a "hard look" at the foreseeable environmental consequences of oil and gas development on these leaseholds.

Although the government contends that "[t]o say that [the West HiLine RMP/EIS] is not an oil and gas EIS is to ignore the substance of the document," Govt. Brief at 18, the text of the RMP/EIS belies that statement. The government made clear in the RMP/EIS that oil and gas management was not being analyzed in that document.

The explanation of the no-action alternative in the RMP/EIS Record of Decision (ROD) verifies that oil and gas development was never analyzed in the RMP/EIS: "This [no-action] alternative plus the guidance given in the Management Common to All Alternatives would have formed the RMP." ROD. In other words, oil and gas management would have been the same even if the no-action alternative had been chosen. Given that the oil and gas outcome was established from the beginning, BLM cannot reasonably contend that it was subject to any level of NEPA analysis in this document. This was essentially a "no look" not a "hard look" process.

Appendix 1.3 does not transform the RMP/EIS into an oil and gas EIS. As noted, NEPA requires more than disclosure of the consequences of a decision already made. Appendix 1.3 discusses in some detail the potential impacts of oil and gas leasing on a variety of resources. But keeping in mind the "dual purpose" of NEPA, Appendix 1.3 cannot satisfy BLM's NEPA obligations with respect to oil and gas development. It was added to the EIS after the public comment period closed. It contains no discussion of alternatives; instead, it is based on the assumption that oil and gas leasing will take place. Finally, it is included in a document that states up front that oil and gas management is not being analyzed.

The only way the West HiLine RMP/EIS could support the lease sales herein is by "tiering" to the 1981 Lewistown Oil and Gas EA, which in turn would have to be sufficient to fulfill BLM's NEPA obligations. Apart from the fact that tiering proceeds from the programmatic stage to the site-specific stage and not vice versa, 40 C.F.R. § 1502.20, as previously noted, an EIS must be prepared prior to the sale of oil and gas leases. Conner addressed just
this situation: the agency prepared an EA, and the Ninth Circuit held that was insufficient. The rule from Conner cannot be fulfilled by an EIS that merely refers the reader to an earlier prepared EA.

It is also unclear from the record whether the 1981 EA was subject to public comment or discussion. The document contains no mention of public meetings, nor any comments from the public with responses by the agency, as is required of an EIS. While the public notice requirements for an EA are not as stringent as those for an EIS, it would certainly thwart one of the cornerstones of NEPA to allow an EIS to “tier” to an EA that was never circulated for public comment.

Finally, the BLM never issued a Finding of No Significant Impact (FONSI) for the 1981 Oil and Gas EA. The document to which the parties have referred as a FONSI is a finding of no major federal action, issued two years before the EA was completed. This is not a FONSI. Thus, the BLM did not fulfill its duties under 40 C.F.R. § 1508.9.

Therefore, neither the West HiLine RMP/EIS nor the 1981 EA can support the BLM's sale of the oil and gas leases herein. Because BLM did not fulfill its obligations under NEPA, Plaintiffs' motion for summary judgment under NEPA is granted with respect to the three leases.

**3. Pipeline Right-of-Way**

BLM prepared an EA for the pipeline right-of-way, and as a result, issued a FONSI and ROD. The EA refers to the West HiLine RMP/EIS for discussions of existing resources, but contains its own discussion regarding foreseeable effects of the proposed action.

An EA must discuss those alternatives “necessary to permit a reasoned choice”; the discussion can be brief. *Natural Res. Defense Council, Inc. v. National Marine Fisheries Svc., 280 F.Supp.2d 1007, 1012* (N.D.Cal.2003). Nonetheless, the permitted brevity does not obviate the requirement that the EA “include brief discussions ... of the environmental impacts of the proposed action and alternatives.” 40 C.F.R. § 1508.9(b). The right-of-way EA fails that test.

For example, the impact analysis in the EA contains a section on “Hazardous or Solid Wastes,” which states in its entirety:

The R/W stipulations provide for detection and safe disposal of hazardous materials and wastes. In addition, the R/W grant would include a stipulation which would indemnify the United States against any liability arising from the release of any hazardous substance or hazardous waste on the R/W.

This section implies that some hazardous or solid wastes may be released in conjunction with this project; however, no information is provided about what those wastes might be or how they might affect the environment. The fact that the right-of-way contains stipulations regarding detection and disposal of wastes does not fulfill the NEPA mandate to provide sufficient information so as to make an informed decision.

More importantly, the right-of-way EA was never circulated for public comment, nor publicized in any way. The government contends that “the CEQ regulations give the authorized officer great flexibility in determining the level of public participation and notification,” citing 40 C.F.R. § 1501.4(a)(2) and 40 C.F.R. § 1506.5. What the regulations actually say is that agencies shall “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). Further, the regulations say the agency shall provide public notice of NEPA-related hearings, public meetings and the availability of environmental documents. 40 C.F.R. § 1506.6(b). The regulations even prescribe in detail the types of notice contemplated for actions “with effects of primarily local concern.” 40 C.F.R. § 1506.6(b)(3)(I)-(ix). The list includes notice to the state, notice to tribes, publication in local newspapers, notice through other media, publication in newsletters, direct mailing, and posting of a notice in the area where the action will take place.

The government has provided no evidence that it complied in any way with this regulation. In fact, its brief simply states, “In this case, no posting occurred, although an Environmental Documentation Log was kept and is made available upon public request.” Govt. Brief at 25. Admitting this is a clear violation of the law, the government continues, “However, because the pipeline challenge is moot, no purpose would be served by remanding the matter to the BLM for correction of this technical violation.” *Id.* This suggests that the government views the public participation goals of NEPA as merely “technical” in nature. The Ninth Circuit takes a different view, however. In a recent case in which the Forest Service prepared an EA for a new forestwide rule and failed to publish notice of that action or solicit any public comment, the court rejected the agency's characterization of the public-notice requirements as
"hortatory." *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 970 (9th Cir.2003). Acknowledging that an EA need not conform to all the requirements of an EIS, the court said this "does not mean that 40 C.F.R. §§ 1501.4(b) and 1506.6 are without substance." *Id.* In fact, it went on, "We have previously interpreted these regulations to mean that the public must be given an opportunity to comment on draft EAs and EISs." *Id.* (emphasis added).

The BLM's failure to provide any notice to the public of its intention to evaluate the environmental impacts of the pipeline right-of-way, or to solicit comments from the public regarding the potential impacts of that action, violates NEPA. Combined with the conclusory discussion of potential impacts from hazardous or solid wastes, I find that the pipeline right-of-way EA failed to accomplish that which NEPA envisioned and is insufficient to support the action taken by the BLM. It is hard to imagine a more blatant example of an agency's failure to meet the congressional mandate to include citizens in the decision making process.

I am therefore granting Plaintiffs' motion for summary judgment on their NEPA claims for the pipeline right-of-way.

### C. Endangered Species Act

The Endangered Species Act (ESA) contains substantive and procedural provisions requiring federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species. *See 16 U.S.C. §§ 1536(a)(2).* The ESA prescribes a three-step process to facilitate compliance with its substantive provisions: 1) An agency proposing an action must inquire of the U.S. Fish and Wildlife Service whether any threatened or endangered species "may be present" in the area of the proposed project. *See 16 U.S.C. § 1536(a)(1); 2) if the answer is affirmative, the agency must prepare a "biological assessment" to determine whether such species is "likely to be affected by the action." The biological assessment may be part of the environmental assessment for the project; 3) if it is determined that the project is likely to affect listed species, formal consultation with the U.S. Fish and Wildlife Service is required. *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir.1985).

The purpose of the biological assessment is to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action." *50 C.F.R. § 402.12(f); 16 U.S.C. § 1536(a)(1).* If the BA determines that there will be no effect on threatened and endangered species, and FWS concurs, formal consultation is not required. *50 C.F.R. 402.12(k)(1).*

The contents of a BA are discretionary, depending upon the nature of the federal action being assessed. *50 C.F.R. § 402.12(f); *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 126 n. 4 (D.D.C.2001). The regulations suggest that a BA may include results of an on-site inspection, views of recognized experts on the species, review of the relevant literature, analysis of the effects of the action on the species and habitat and an analysis of alternative actions. *50 C.F.R. § 402.12(f).* At least one court has held that a DEIS and FEIS taken together could be construed as a BA, even if not denominated as such. *Bays' Legal Fund v. Browner*, 828 F.Supp. 102, 110–111 n. 19–21 (D.Mass.1992).

My inquiry under the APA is whether the BLM acted arbitrarily, capriciously, or otherwise not in accordance with the law. *5 U.S.C. § 706.* "To determine whether an agency violated the arbitrary and capricious standard, this court must determine whether the agency articulated a rational connection between the facts found and the choice made." *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir.2001) (citing *Friends of Endangered Species, Inc. v. Janssen*, 760 F.2d 976, 982 (9th Cir.1985)). If "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," its action may properly be held to be arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). "This inquiry must be 'searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).

Here, the BLM prepared a BA as part of the West HiLine RMP/EIS. Thus, BLM was aware of endangered or threatened species that are present in the planning area. BLM concluded in its BA that the
activities envisioned by the RMP/EIS were not likely to affect any threatened or endangered species. The U.S. Fish & Wildlife Service (FWS) reviewed the BA and concurred in BLM's no-effect determination. Specifically, FWS stated:

We concur with your determination that the preferred alternative will not affect the bald eagle ... peregrine falcon ... black-footed ferret ... or the piping plover.

The BLM relies on its BA, and FWS's concurrence, as evidence of its compliance with the ESA for the leasing and pipeline decisions. The issue is whether the West HiLine RMP/EIS sufficiently considered oil and gas development to contemplate possible effects on threatened or endangered species from the sale of the leases herein. The BA and FWS's concurrence contemplated a particular proposed action, which was determined not to have an effect on threatened or endangered species. The question is: what was the nature of the proposed action?

As already discussed, the RMP/EIS was not an oil and gas document. However, Appendix 1.3 predicts in some detail possible impacts of oil and gas development on a variety of resources. A BA based upon that proposed action might suffice under the ESA. Unfortunately, the BA and FWS's concurrence were premised on the Draft EIS, which did not include Appendix 1.3.

Moreover, the BA addresses possible impacts from the Management Common to All Alternatives (which included oil and gas development) by listing six guidelines “to manage other actions taken on BLM administered lands such as ... oil and gas development.” These guidelines are no more than a sentence or two each: 1) BLM will maintain and enhance species for all species of wildlife; 2) no action will be taken that will jeopardize and federally listed species; 3) BLM will work with FWS on species reintroduction; 4) BLM will consult with FWS when any action may affect a threatened or endangered species; 5) BLM may require 1/4- to 3-mile zone around surface uses to protect essential habitat of threatened or endangered species; and 6) BLM will adhere to peregrine falcon recovery plan and guidance from Montana Peregrine Falcon Working Group.

BLM is merely reciting duties already required of it in these guidelines. These are not facts, they are conclusions; they are not descriptive, they are speculative. They reveal nothing about whether or how specific species or their habitat may be affected by oil and gas development. Instead, they simply postpone that determination to some point in the future.

While it is true that the court in Conner addressed a Biological Opinion rather than a Biological Assessment, the fundamental teaching of that case is true in either situation: the relevant agency action for purposes of the ESA “entails not only leasing but leasing and all post-lease activities through production and abandonment.” 848 F.2d at 1453. Prior to selling oil and gas leases, the ESA requires the agency to assess the potential effects of the action on threatened or endangered species. 50 C.F.R. § 402.12(a). According to the Ninth Circuit, when the action is the sale of oil and gas leases, the scope of the action includes activities from leasing through post-production and abandonment. Conner, 848 F.2d at 1453. Thus, the issue is whether BLM has fulfilled that obligation.

It has not. The West HiLine RMP/EIS BA contains no analysis of the effects of oil and gas production on any species. In regards to oil and gas management, it simply states that BLM will follow the law. Even if the BA is sufficient for the five management issues analyzed in the RMP/EIS, it is insufficient as an assessment of impacts from oil and gas development on threatened or endangered species.

Thus, BLM may not rely on that BA to fulfill its pre-leasing obligations under the ESA. Plaintiffs' motion for summary judgment on this issue is granted.

D. National Historic Preservation Act

The National Historic Preservation Act (NHPA) has been characterized as a “stop, look and listen” provision. Apache Survival I, 21 F.3d at 906; Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir.1999). NHPA requires, prior to any federal undertaking, that the relevant federal agency “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register” and “afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking.” 16 U.S.C. § 470f.

NHPA requires a federal agency to make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of an “undertaking” on any
eligible historic properties found, 36 C.F.R. § 800.4, 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. § 800.5, 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. § 800.8(e), 800.9.

Additional NHPA provisions apply to Indian tribes: In carrying out its responsibilities under Section 106, a Federal Agency shall consult with any Indian Tribe ... that attaches religious and cultural significance to properties described in Subparagraph (A).


1. Standing

Defendants claim Plaintiff Curly Youpee does not have standing to bring this claim. To satisfy Article III, which is the irreducible constitutional minimum of standing, a plaintiff must demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 616 (2000). A plaintiff bringing suit under the APA for a violation of a particular statute must also show that his injury falls within the “zone of interests” the statute was designed to protect. Douglas County v. Babbitt, 48 F.3d 1495, 1499 (9th Cir.1995); Contrell v. City of Long Beach, 241 F.3d 674, 679 (9th Cir.2001).

To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that “the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n. 8, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); Contrell, 241 F.3d at 679. Additionally, where plaintiffs validly assert a procedural injury, they need not meet “the normal standards for redressability and immediacy.” Lujan, 504 U.S. at 572 n. 7, 112 S.Ct. 2130.

The zone of interests test consists of a two part inquiry: first, determining which interests the statute protects and second, determining whether the agency action affects those interests. TAP Pharm. v. U.S. Dept. of Health and Human Servs., 163 F.3d 199, 203 (4th Cir.1998). The purpose of the NHPA is to remedy the dilemma that “historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency.” 16 U.S.C. § 470(b)(3). The Act prescribes the section 470f process, which requires federal agencies with the authority to license an undertaking “to take into account the effect of the undertaking on any ... site ... that is ... eligible for inclusion in the National Register” prior to issuing the license. 16 U.S.C. § 470f.

Here, Plaintiff claims BLM failed to make a reasonable effort to identify historic sites that may be affected by the oil and gas lease sales and failed to consult with Rocky Boys and Fort Belknap Indian Reservations before issuing the leases and the right-of-way. Defendant first argues Youpee is a member of the Fort Peck Tribe, not the Rocky Boys or Fort Belknap tribes. In response, Youpee filed an affidavit stating that “The Missouri Breaks is well-documented and officially recognized as a traditional migratory route of my people.” Youpee Affidavit, Plaintiffs’ Reply Brief, Tab G, ¶ 4. Moreover, Youpee avers:

I have personally visited sites of traditional cultural significance to me people in the Upper Missouri River breaks, and the area encompassed by the lawsuit, as a traditional cultural undertaking. I will do so again each year in the future.

Youpee further testifies that BLM’s failure to follow the procedures established by NEPA and NHPA have deprived him of his “voice and input.” He is right.

NHPA’s regulations require federal agencies to provide interested members of the public reasonable opportunity to participate in the section 470f process. 36 C.F.R. § 800.1(a), 800.2(a),(4), (d)(1). Thus, any member of the public who can demonstrate sufficient interest in the preservation of the historical lands at issue falls within the zone of interests protected by the NHPA.

Youpee has sufficiently alleged facts supporting his standing under Article III as well as the zone of interests protected by the NHPA.

2. Merits

In defense of its failure to initiate any section 470f process prior to selling the leases herein, BLM contends that the lease sales were not “undertakings,” and therefore did not trigger any obligation on its part to conduct site inventories or consult with any tribes. It does acknowledge that the pipeline right-of-way grant was an “undertaking,” but contends that it met its NHPA obligations by conducting a cultural resource inventory, which showed the project would have no effect on historic sites. Each of these
arguments is examined in turn.

**a. Lease Sales**

BLM states, without citation, that a lease sale is not an “undertaking.” It explains that conclusion by stating, “A lease sale is not the point at which the agency decision has the potential to affect historic properties.” Govt. Brief at 31. That is not the point at which the statute requires identification or consultation, however. The relevant regulations define undertaking as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 36 C.F.R. § 800.16(y). The sale of oil and gas leases is a “project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency,” and may also be construed as an activity “requiring a Federal permit, license or approval.”

Initiation of the section 407f (also referred to as section 106) process involves two steps. According to the regulations, “The agency official shall determine whether the proposed Federal action is an undertaking as defined in § § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.” 36 C.F.R. § 800.3(a). An undertaking has an “effect” when the undertaking “may alter characteristics of the property that may qualify the property for inclusion in the National Register ... [including] alteration to features of a property's location, setting, or use....” 36 C.F.R. § 800.5(a)(1). An “effect” is “adverse” when it may “diminish the integrity of the property's location, ... setting ..., feeling, or association.” Id. Examples of “adverse effects” include physical destruction, the introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting, and “[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.” Id. (emphasis added).

This regulatory definition of “adverse effects” suggests that the sale of oil and gas leases is considered an undertaking. The BLM recognizes this by arguing that it uses lease stipulations to avoid those effects. But it cannot skip the first step and go directly to the second. If the lease sales are an undertaking, BLM is required to initiate the NHPA process in accordance with the regulations.

BLM’s contention that the sale of oil and gas leases is not an undertaking is not supported by the statute or the regulations. In fact, BLM’s argument on this point mirrors NEPA argument: By placing stipulations on leases, the agency can avoid affecting historic properties. But like NEPA, NHPA is a procedural statute. The process of identifying properties and consulting with affected tribes as well as members of the public is the goal sought by the statute. Lease stipulations do not accomplish the same goal, and cannot replace the BLM’s duties under NHPA. Moreover, it is conceivable that different lease stipulations would evolve from a larger discussion of possible effects on historic tribal lands from oil and gas leasing. It seems to me that agency efforts to comply with the law are more productive than efforts that appear to be directed at circumventing the law.

The plain language of NHPA requires consultation once an agency embarks on an undertaking. The sale of oil and gas leases is an undertaking. I am therefore granting Plaintiffs’ motion for summary judgment that BLM violated NHPA by failing to follow the prescribed NHPA process prior to selling the leases herein.

**b. Pipeline Right-of-Way**

BLM acknowledges that the right-of-way grant was an “undertaking.” It performed a cultural resource inventory in order to identify historic sites that could be affected by the pipeline. It does not explain the fact that the report was not sent to it until November 5, 1999, a day after the right-of-way grant was issued.

The cultural resources survey reported one archaeological site “very near the project area.” The site, a stone tipi ring used by Native Americans, was outside the proposed right-of-way-a fact relied upon by BLM in justifying its failure to take any other action under NHPA. But the site is only 54 feet away from the pipeline route. BLM is obligated to consider the “affected area,” not just the narrow area where the pipeline is laid. See, e.g., *Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425, 1438 (D.Cal.1985). Moreover, tribes known to have used the area should have been consulted to determine whether they had a different view of potential
adverse effects.

According to the regulations, once an historic property has been identified, the agency shall “[s]eek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking’s potential effects on historic properties.” 36 C.F.R. § 800.4(a)(3). Consulting parties are defined as including Indian tribes, 36 C.F.R. § 800.2(c)(2), as well as the public. 36 C.F.R. § 880.2(d) (“The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties....”). In other words, the regulations provide direct guidance to an agency engaged in an undertaking to consult with tribes and with the public.

The record does not reflect any such consultation. In fact, the only consultation referred to by BLM in its brief is consultation on the West HI.line RMP/EIS. Given the nature of that document, which did not analyze site-specific impacts, and the nature of the undertaking at issue, which did have potential impacts on a specific site, that consultation is insufficient to fulfill BLM’s obligations under NHPA.

Because BLM failed to consult after identifying an historic site in the area of the pipeline right-of-way, it violated NHPA. Plaintiffs’ motion for summary judgment on this issue is granted.

V. REMEDY

Having found the BLM in violation of NEPA, the ESA, and the NHPA in its sale of the three leases to Macum and its grant of the pipeline right-of-way to Macum, it is necessary to determine the appropriate remedy.

A. Scope of Injunctive Relief


The court’s equitable powers are broad, and it is wholly within the court’s authority to fashion a remedy that fits the particular facts of the case before it. Moreover, the court has the power to fashion a remedy that ensures full compliance with the law. For instance, in *Metcalf v. Daley*, in which the federal defendants approved whale hunting by the Makah tribe without fully complying with NEPA, the Ninth Circuit recognized the peril of remanding to the agency for compliance with NEPA when the government was already on the record in support of the proposed action. 214 F.3d at 1146. It considered ordering the government to proceed directly to the preparation of an EIS, since it had already once prepared a defective EA. Given that time was not of the essence in that instance, it instead ordered the agency to prepare an EA, and placed the burden of proving it was sufficient on the defendants should the issue return to the courts. *Id.*

1. Oil and Gas Leases

This case is close to being on all fours with *Conner v. Burford*, 848 F.2d 1441 (9th Cir.1988) and *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir.1988). In both cases, the Ninth Circuit approved an injunction against all surface-disturbing activity on existing leases until preparation of an EIS and BO. *Conner*, 848 F.2d at 1461; *Bob Marshall Alliance*, 852 F.2d at 1227-28. It reasoned that it was converting non-NSO leases into NSO leases during the pendency of the injunction, and noted, “We enjoin only the actions of the government; the lessees remain free to assert whatever claims they may have against the government.” 848 F.2d at 1461. It also remanded to the district court for clarification of the scope of its injunctions.

When faced with a similar violation of NEPA involving coal leasing in the Powder River Basin, Judge Battin initially denied all the leases. *Northern
Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1154 (9th Cir. 1988). Upon timely motion of the government to amend, however, the Court suspended rather than voided two of the three leases pending preparation of an SEIS, and allowed one mining company to continue mining until and unless the BLM found that mining was causing “significant socioeconomic impacts.” Id. at 1154-55. Once the SEIS was completed, the BLM was ordered to decide whether to rescind the leases or impose additional measures of mitigation. Id. at 1155.

Northern Cheyenne provides some guidance on the scope of an injunction in the face of producing leases. Three coal companies purchased leases with full knowledge of the plaintiffs' lawsuit, but did not intervene until after the Court ruled against the BLM. In response to the Tribe's contention that the district court should have automatically enjoined all leases without first balancing the equities, the Ninth Circuit recognized that the equitable considerations involved in deciding the scope of an injunction are different when mining is going forward on the basis of fundamentally flawed EIS. It therefore remanded with directions to the district court to hold an evidentiary hearing and balance the equities on the record. “If the district court should determine that the threatened harm to the environment, including the cultural, social and economic cost to the Tribe, would be irreparable and that the balance of equities favors the Tribe, all mining should be stayed until the Secretary completes his review.” Id. at 1158. The Circuit remanded with directions to correct two additional defects in the injunction: first, to order the Secretary of the Interior to comply with his own regulations, and second, to expressly prohibit the Secretary from considering the lessees' financial interests in completing the EIS. Id. at 1155 (citing Cady v. Morton, 527 F.2d 786, 798 (9th Cir. 1975)).

Thus, Conner and Bob Marshall Alliance suggest the court can enjoin all surface-disturbing activity pending the BLM's compliance with NEPA and ESA, while Northern Cheyenne teaches that the court should hold an evidentiary hearing prior to enjoining ongoing mining, and must make explicit findings about the public interest. If the injunction can be fashioned so as to allow mining while minimizing adverse environmental impacts pending completion of the EIS, a more recent case suggests no evidentiary hearing is required. Idaho Watershed, 307 F.3d 815.

In Idaho Watershed, the district court imposed interim measures proposed by the BLM, which were not as drastic as those suggested by the plaintiffs (who wanted rescission of all grazing permits) or the ranchers (who wanted the status quo to be maintained while an EIS was being prepared). The court imposed the injunction without holding an evidentiary hearing—an issue that was appealed by the ranchers. The Ninth Circuit held it was proper for the court to issue interim injunctive relief without holding an evidentiary hearing on these facts:

Because these are interim measures designed to allow for a process to take place which will determine permanent measures, and all parties will have adequate opportunity to participate in the determination of permanent measures (and if need be challenge the outcome in court), we hold that an evidentiary hearing was not required on the facts of this case.

Id. at 831 (emphasis added).

Here, unlike in Conner, the lessee is a party to the case. The Court therefore has the power to void the leases as well as the right-of-way. See Kettle Range Conservation Group v. U.S. Bureau of Land Management, 150 F.3d 1083 (9th Cir. 1998). A third party’s potential financial damages from an injunction generally do not outweigh potential harm to the environment. National Parks & Cons. Ass'n, 241 F.3d at 738.

Because there is very little evidence in the record regarding Macum's leases, and because I am required to balance the equities on the record, I am going to preliminarily enjoin all surface-disturbing activity on the three leases pending an evidentiary hearing regarding the scope of injunctive relief pending completion of the appropriate environmental reviews. I am considering rescission of the three leases, which would put the Plaintiffs back in the position they were before BLM acted illegally.

2. Pipeline Right-of-Way

The pipeline has been laid and is in use. Removing it pending compliance with NEPA, ESA, and NHPA has the potential to cause additional harm, especially if the BLM decides to issue the right-of-way after fulfilling its statutory obligations. At the same time, allowing the status quo to continue appears to reward illegal behavior and makes it even more unlikely that a new EA will make any different finding. Courts have held that the purpose of NEPA is to make informed choices, and fashioning a remedy that restores that choice as much as possible is acceptable.
For example, the Ninth Circuit affirmed the rescission of water contracts in a case wherein the Bureau of Reclamation issued the 40-year contracts without first complying with its obligations under the ESA. *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998). It did so even though a “no-jeopardy” Biological Opinion had been issued during the pendency of the litigation. “The process, which was not observed here, itself offers valuable protections against the risk of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress.” *Id.* at 1128-29. In affirming the remedy of contract rescission, the Court stated, “Where contracts have already been entered into, the opportunity to ‘choose’ has been eliminated—all that remains is the limited ability to make the path chosen as palatable as possible. Therefore, an injunction would not serve any purpose if the contracts are not invalidated.” *Id.* at 1129.

In the case of the pipeline right-of-way, a middle ground can be found pending the outcome of an evidentiary hearing. I am ordering that the pipeline be shut down without removing it from the ground. This will go a long way toward restoring “choice,” will not allow Macum to reap any reward from BLM’s illegal behavior, and will make it easier to restore use should the BLM make a future decision granting the right-of-way after considering potential impacts under NEPA, ESA and NHPA.

As with the leases, however, I am going to hold an evidentiary hearing to determine the scope of injunctive relief. Specifically, it would be helpful to know how Macum pays for the right-of-way, what maintenance would be required while it was shut down, and who would have to pay for that.

**VI. CONCLUSION**

IT IS HEREBY ORDERED that Plaintiffs’ Motion for Summary Judgment (Dkt.# 76) is GRANTED, Defendant Macum Energy’s Motion for Summary Judgment (Dkt.# 31) is DENIED, Defendant BLM’s Motion for Summary Judgment (Dkt.# 94) is DENIED, and Plaintiffs’ Motion for leave to submit subsequent authority (Dkt.# 124) is GRANTED.

IT IS FURTHER ORDERED:
(1) The BLM shall prepare an EIS for the oil and gas leasing program in conjunction with the EIS process;
(2) The BLM shall consult with all required entities, including nearby tribes, as required by NHPA;
(3) Macum Energy, Inc. shall not engage in any surface-disturbing activity on the three leases pending my decision on permanent injunctive relief;
(4) Macum Energy, Inc. shall shut down the pipeline pending my decision on permanent injunctive relief.
discussed in more detail in Chapter 11, allows states to veto or impose conditions on federally-permitted activities involving discharges to the waters of the United States that are inconsistent with state water quality standards. According to EPA, “Some States rely on Section 401 certification as their primary mechanism to protect wetlands in the State.” U.S. Environmental Protection Agency, Section 401 Certification and Wetlands (revised May 25, 1999) [http://www.epa.gov/OWOW/wetlands/facts/fact24.html].

Many states do have some form of state or local regulatory wetland protection, overlapping to various degrees with section 404. Virtually all coastal states, for example, regulate the dredging and filling of coastal wetlands. A number of states also regulate activities in some or all freshwater wetlands. However, according to one analysis, only fourteen states protect isolated freshwater wetlands to any significant extent. See Jon Kusler, The SWANCC Decision and State Regulation of Wetlands 9 (2001). Many states are considering adopting or strengthening protection in the wake of the Solid Waste Agency decision. In states requiring wetland permits, obtaining federal authorization under section 404 does not obviate the requirement of a separate state permit. See 33 U.S.C. § 1344(t) (“Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State.”).
SECTION 3. COASTAL ZONE MANAGEMENT

A. SENSITIVE ENVIRONMENTAL ISSUES

Jan G. Laitos, Natural Resources Law

(1) The Federal Coastal Zone Management Act of 1972

The most significant coastal zone management programs have been in response to the incentives found in the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C.A. § 1451. This federal act does not regulate coastal areas directly. Rather, it seeks to accomplish its goal of rational use of coastal land and water resources by providing monetary assistance to states that develop management plans consistent with the Act’s standards. The Secretary of Commerce approves state programs that comply with CZMA standards. These federal standards require that a state plan (1) designate the geographical zone to be regulated, (2) describe permissible uses of land and water within this zone, and (3) provide sufficient authority for the plan’s implementation. Local governments may be used as a primary means of program implementation. The CZMA also requires that
the state coastal zone management program address energy facility siting in the designated coastal zone.

Although states are not required to adopt coastal zone legislation pursuant to the CZMA, the Act contains several incentives for state participation. These incentives have been so attractive that all states touching on the ocean coast or the Great Lakes have taken some action toward the preparation of coastal zone plans. First, after approval of a state plan the state receives federal grants that pay up to 80% of the cost of administering the program. Second, approval triggers a "federal consistency" provision in the CZMA which requires federal agencies, permittees, and lessees to demonstrate that their proposed developments in the coastal zones will comply with state management program requirements. Federal agencies may not approve proposed projects that are inconsistent with a coastal state's management program, except upon a finding by the Secretary of Commerce that the project is consistent with the purposes of the Act or necessary in the interest of national security. 16 U.S.C.A. § 1456.

This federal consistency provision of the CZMA has been particularly relevant with respect to federally authorized oil and gas developments on the Outer Continental Shelf Section 307(c)(l) of the Act provides that "[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is * * * consistent with approved state management programs." With approval of a state's coastal management plan a state thus gains: some control over federal actions "directly affecting the coastal zone." Is the Department of Interior's sale of oil and gas leases on the outer continental shelf an activity "directly affecting" a state's coastal zone? See Secretary of Interior v. California, 464 U.S. 312, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984)(no, because a lease sale does not involve exploration or development of the lease tracts).

(2) *State Regulation of Coastal Zones, Shorelines, and Beaches*

States which have enacted coastal zone plans (usually with the goal of gaining federal approval under the CZMA) may be roughly divided into two groups. The first consists of those states that, through legislation, have identified a set of development activities which require a permit if carried on in a coastal zone. Permit review occurs at the state agency level and is somewhat analogous to site planning. Such a program costs less to initiate because there is no comprehensive planning to undertake. It also provides the state with more flexibility than a comprehensive plan. But the major drawbacks are a lack of specificity and statewide uniformity. States along the eastern seaboard generally use the permit system. The second group of states are those that have enacted comprehensive coastal plans which provide land development controls for coastal areas.

NOTES AND QUESTIONS
1. The Supreme Court's opinion in Secretary of the Interior v. California was addressed by Congress in the 1990 amendments to the CZMA as follows:
(c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

(B) After any final judgment, decree, or order of any Federal court that is appealable under section 1291 or 1292 of title 28, United States Code, or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) is not likely to result in such compliance, the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.

(C) Each Federal Agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 1455(d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.


What is the effect of these amendments? A House of Representatives Conference Report states that inconsistency determinations, consideration should be given to effects that the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term “affecting” is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.


2. The Coastal Barrier Resources Act (COBRA) 16 U.S.C. §§ 3501–10, attempts to limit federal expenditures and financial assistance within designated coastal barrier beaches, thereby ensuring that these areas are not developed with inadvertent federal assistance. COBRA was upheld in Bostic v. United States, 753 F.2d 1292 (4th Cir.1985).
[Almost all the states that border on an ocean or the Great Lakes have implemented a coastal zone management program. (Georgia and Indiana are notable exceptions.) The programs vary in details, but are substantially similar because all seek to comply with federal guidelines and regulations. The following excerpt summarizes South Carolina’s program, which is of interest both in itself and because it provides the context for the important “takings” case, Lucas v. South Carolina Coastal Council.]

Angela L. Beckner, Coastal Zone Management on the Atlantic Seaboard

SOUTH CAROLINA

A. History and Development of State Regulation

In 1977, South Carolina enacted the South Carolina Coastal Zone Management Act (SCCZMA) in response to the escalating demands placed on South Carolina’s coastal zone by population growth and economic development. The General Assembly announced a State policy of “protect[ing] the quality of the coastal environment and * * * [of] promot[ing] the economic and social improvement of the coastal zone * * *.” Specifically, the Act was to be implemented by comprehensive tideland and beach erosion programs. Its purpose was to protect and, if possible, restore and enhance South Carolina’s coastal zone for this and successive generations. At the same time, South Carolina would encourage the development of coastal resources so as to promote the economic and social development of the state’s citizens.

To develop management programs under the SCCZMA and regulate coastal zone activities, the General Assembly created the South Carolina Coastal Council (SCCC), consisting of eighteen members: eight members representing each coastal zone county, six members representing each of the State’s congressional districts, two state Senators, and two members of the state House of Representatives. Under the 1977 Act, the SCCC is empowered to restrict coastal development only in the coastal zone’s “critical area.” That area, as defined in 1977, included coastal waters, tidelands, beaches and primary ocean dunes. “Coastal waters” is further defined as the navigable saline waters of the United States subject to the ebb and flow of the tide, shoreward to the mean high water mark. “Tidelands” was designated to include all areas at or below the mean high tide, and all areas contiguous or adjacent to coastal waters which are periodically inundated by saline waters (i.e., coastal wetlands). The remaining two areas were defined, respectively, as the lands subject to periodic inundation by tidal and wave action so that no non-littoral vegetation is established, and those dunes which form the front row of dunes adjacent to the Atlantic Ocean.
B. Features of the South Carolina Coastal Zone Management Act

1. Permit Requirements

The SCCZMA requires any person who wishes to “fill, remove, dredge, drain or erect any structure on or in any way alter the critical area” to obtain a permit from the SCC before commencing such activity.85 Activities exempted from the permit requirements include state-approved projects commenced prior to July 1, 1977 (the date the SCCZMA took effect), activities such as emergency orders by public officials, otherwise lawful hunting and fishing, walkway construction over dunes, emergency repairs to existing structures, and drainage and sewer facility and walkway maintenance.

Pursuant to section 14(B) of the SCCZMA, an applicant seeking a permit to develop land in a critical area must include in his or her application a drawing of the proposed development, a plat of the area on which the proposed development will take place, a copy of his or her deed or lease of the area, and a list of the adjoining landowners. Within thirty days of receiving an application, the SCC is required to notify all interested parties of the proposed activity. Persons required to receive notice include interested agencies, all adjoining landowners, and the local government in the area, who each then have thirty days to file written comments in response to the application. In addition, public notice of the proposed development is required to be given (at least once) by publishing a notice in a newspaper “of general circulation” in the area. The SCC is required to hold a public hearing on a permit application upon the request of twenty or more residents of the affected county.

The SCC must approve or deny a permit application within ninety days of its receipt. Although each application is individually evaluated, the SCC decision as to whether to issue a permit is guided by the policies underlying the SCCZMA and certain enumerated factors listed in section 15(A). These factors include the extent to which the proposed activity: (1) requires a water-front location or is economically enhanced by its proximity to water, (2) would harmfully obstruct the natural flow of navigable water, (3) would affect marine life, wildlife, and other natural resources, (4) could cause erosion, channel shoaling, or stagnant water creation, (5) could affect public access to coastal resources, (6) could affect rare and endangered specie habitats or irreplaceable historic and archeological sites, and (7) could affect adjoining property value. In addition, the proposed development’s economic benefits are compared to the benefits from the preservation of the area in its unaltered state. The issuance of a permit may also be conditioned upon the applicant taking the necessary steps “to protect the public interest.” “Public interest” is the project’s beneficial and adverse impacts and effects on the members of the general public (especially South Carolina residents), who are not the project’s developers or owners.

C. Amendments to the SCCZMA

1. 1988 Amendments: Beach Management Act

In July, 1988, South Carolina amended its coastal zone management program by enacting the Beach Management Act (Act). The 1988 Amendments established a forty-year setback program for the South Carolina shoreline, which curtailed the construction and reconstruction of habitable structures in the setback area. The setback program expanded the SCCC's jurisdiction and regulatory authority by creating a new critical area. The Act changed the fourth part of the SCCZMA's "critical area" definition from "primary ocean dune" to "beach/dune system," which is defined as the area "from the mean high-water mark to the setback line as determined in § 48-39-280." This new critical area in which the SCCC is authorized to regulate coastal development encompasses two categories of coastal zones: standard erosion zones and inlet erosion zones. The SCCC determined these areas by forecasting the eventual location of the beach and dunes, rather than by their current location. A standard erosion zone is a section of shoreline which is subject to the same "coastal processes," and is not directly influenced by tidal inlets or their associated shoals. An inlet erosion zone, by contrast, is defined as a segment of shoreline which borders tidal inlets and is directly influenced by the inlet and its associated shoals. In each zone, a "baseline" is established from which the setback line is measured. The baseline for a standard erosion zone is the "location of the crest of the primary oceanfront sand dune in that zone," however, in those zones which have been altered by erosion control devices or other manmade structures, the baseline is where the crest of a primary oceanfront dune would be located if the area had not been altered. The baseline for an inlet erosion zone, that has not been stabilized by jetties or other structures, is the most landward erosion point at any time in the previous forty years. In an inlet erosion zone that has been stabilized by jetties or other structures, the baseline is determined in the same manner as those in a standard erosion zone.

The SCCC determines the setback lines for each zone by using its established baselines. In both standard and inlet erosion zones, the setback line is the line landward of the baseline at a distance of forty times the annual erosion rate, which the SCCC determines by using historical and other scientific means. However, in both zones there is a minimum mandatory twenty foot setback line (twenty feet landward of the baseline) even in places where the shoreline has accreted or remained stable in the past forty years.

The most restrictive and controversial provisions of the Beach Management Act are contained in sections 48-39-290 and 48-39-300. These provisions govern the construction, reconstruction and repair of habitable structures seaward of the setback and baselines. A "habitable structure" is defined as any structure suitable for habitation or commercial use.


111. Id. § 48-39-10.
Under sections 48–39–290 and 48–39–300, the construction and reconstruc-
tion of (most) habitable structures seaward of the setback line is
prohibited. In addition, these sections established a total ban on new
construction and reconstruction of habitable structures damaged beyond
repair, seaward of the minimum twenty-foot setback line. Furthermore, no
new habitable structure construction is permitted seaward of the baseline.
Habitable structures built seaward of the setback line in existence at the
effective date of the Act are permitted to be repaired if damaged. However,
the repaired structure may not exceed the original structure’s total square
and linear footage, and must not be any further seaward than the original
structure. An existing habitable structure which is “destroyed beyond
repair” may be rebuilt following the same guidelines set forth in section
290(A)(1). In addition, any reconstruction of a habitable structure may not
be seaward of the baseline and the replaced structure must be built as far
landward as feasible (if possible, behind the setback line). The owner also
must annually renourish the beach in front of his property with at least
one and one-half (1½) times the volume of sand lost annually. The Act also
permits new habitable structure construction seaward of the setback line,
provided that the new structure’s total square footage does not exceed five
thousand square feet, and the structure is built as landward as possible.

2. 1990 Amendments

In 1990, the South Carolina General Assembly amended its coastal
zone management program again by altering its 1988 Beach Management
Act.132 The 1990 amendments, lifted the total ban on construction in the
twenty-foot minimum setback zone and abolished the renourishment re-
quirement for rebuilding seaward of the baseline, but retained the restric-
tions on development and rebuilding in the area between the baseline and
setback lines and the severe restrictions on habitable structure construc-
tion and reconstruction seaward of the baseline. The 1990 amendments
also revised the term “destroyed beyond repair” to mean “more than sixty-
six and two-thirds percent of the replacement value of the habitable
structure * * * has been destroyed.” Finally, the 1990 amendments gave
the SCCC the authority to issue special permits for the habitable structure
construction or reconstruction of seaward of the baseline if the structure is
not constructed or reconstructed on a primary oceanfront dune, or the
permittee agrees to remove the structure, at the order of the SCCC, if the
beach erodes to the point that the structure is on the beach.

NOTE ON THE COASTAL ZONE MANAGEMENT ACT

The Coastal Zone Management Act is the most innovative environmen-
tal land use law. It is operated largely at the state level; it has explicit
environmental purposes; and it integrates the developmental and regula-
atory efforts of local, state, and federal governments through requiring consis-
tency with the coastal plan.

The 1990 Amendments to the CZMA created the Coastal Zone Enhancement Program, which provides grants to the participating states for the purposes of (1) protection of coastal wetlands, (2) minimization or elimination of development in coastal natural hazards (erosion prone) areas, (3) increased public access coastal areas having recreational, historic, aesthetic, ecologic, or cultural value, (4) reduction of marine debris, (5) control of cumulative and secondary impacts of coastal development, (6) preparation and implementation of special area management plans, (7) planned use of ocean resources, and (8) the adoption of procedures for the siting of coastal energy and governmental facilities of more than local significance. 16 U.S.C. § 1456(b). CZMA states also are required to implement a coastal land use management plan to control non-point source pollution. Id. § 1455(b).
Notes

1. The last section set out above, § 1456, reflects 1990 amendments made by Congress that redefined the seaward boundary of the coastal zone, changed the definition of water use, and made clear that all federal activities are subject to "consistency" review, including the offering of oil and gas leases for sale, thereby rendering irrelevant the U.S. Supreme Court’s decision to the contrary in Secretary of the Interior v. California, 464 U.S. 312, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984). This last point is particularly important as consistency review is the only control which coastal states have over actions on federal lands which affect the coastal zone.

2. As the foregoing statutory material demonstrates, it is to the states and their local governments that the federal government looks for the development and enforcement of coastal zone management programs. These programs have two critical components: (1) the delineation of the coastal zone, and (2) the permit
process for allowable coastal development. In the Topliss case below, the court wrestles with both.

**TOPLISS v. PLANNING COMMISSION**


842 P.2d 648.

* * *

Heen, Judge.

On April 30, 1990, Petitioner—Appellant Larry T. Topliss, dba Pacific Land Company (Petitioner), filed a petition (Permit Petition) with Appellee Planning Commission of the County of Hawaii (Commission) for a Special Management Area (SMA) permit (SMAP) pursuant to the Coastal Zone Management Act (CZMA), Hawaii Revised Statutes (HRS) chapter 205A (1985 and Supp. 1991), to develop two multi-story office buildings on his property (property) in Kailua–Kona.

The property lies on the northern corner of the intersection of Kuakini Highway and Seaview Circle. Kuakini Highway has an 80-foot right-of-way with a 24-foot pavement, while Seaview Circle has a 60-foot right-of-way with a 20-foot pavement. The Permit Petition acknowledges that the property “lies on a vital intersection and is adjacent to a high-traffic highway.” The Permit Petition also describes the intersection as “a high-traffic intersection.”

The property consists of two adjacent lots within the 143-lot Kona Sea View Lots Subdivision, most of which are in single family residential use.3

* * * [Eds. Note: The court summarized the applicable land use regulations and plans and concluded the property was appropriately classified for the proposed development.]

The property has an area of approximately one-half acre and is nearly 400 feet above sea level and about 3600 feet from the shoreline. The property is rather severely sloped away from Kuakini Highway with a grade of approximately 20%. The difference in elevation between the property’s mauka and makai boundaries is approximately 40 feet. The roof line of the proposed building abutting Kuakini Highway would extend approximately six feet above the elevation of the property’s boundary. Between the property and the coastline lies most of the Kona Sea View Lots Subdivision, a “non-transgressable thicket,” hotels and apartments along Alii Drive, and Alii Drive itself, which is the paved county roadway closest to and paralleling the coastline. Two circuitous vehicular routes measuring 2.7 miles in the southerly direction and 1.5 miles in the northerly direction are the only accesses to the coastline.

The property came within the purview of the CZMA in 1980 when the Commission designated all of the area makai of Kuakini Highway from Kailua southward to Keahou as an SMA. At that time, the Commission cited “anticipated development pressures,” the steep topography, soil composition, the Hawaii County General Plan designation of “the entire Kuakini right-of-way . . . as an important scenic resource,” and the need to “better coordinate the overall development of the area” as the grounds for its action.

3. The two lots have areas of 15,001 and 7,502 square feet.
The Commission denied the Permit Petition and Petitioner appealed to the third circuit court. By stipulation of the parties, the matter was remanded to the Commission for the entry of findings of fact (FOF) and conclusions of law (COL). Meanwhile, on September 4, 1990, Petitioner filed a petition with the Commission to amend the boundaries (Boundary Petition) of the SMA to exclude his property.

The Boundary Petition was heard by the Commission on January 31, 1991. At the same hearing, the Commission denied Petitioner’s request to reconsider the denial of the Permit Petition. On February 21, 1991, the Commission entered separate FOF, COL, and Orders denying both Petitions.

Petitioner appealed both orders to the third circuit court and on September 5, 1991, that court entered an order affirming the Commission. The matter is here on Petitioner’s appeal from the circuit court’s order.

***

I.

Although Petitioner does not challenge the validity of the CZMA, the thrust of his attack is that when the Commission denied his Petitions it violated the CZMA’s clear objectives and purposes. We disagree with respect to the Boundary Petition, but agree with respect to the Permit Petition.

The dispositive question is construction of the CZMA. Our duty in construing statutes is to ascertain and give effect to the legislature’s intention and to implement that intention to the fullest degree. State v. Briones, 71 Haw. 86, 784 P.2d 860 (1989). Petitioner argues that the CZMA is simply a zoning statute which must, as a general rule, be strictly construed against further derogation of common-law property rights. The rule cited by Petitioner is inapplicable here, however, since the language of the CZMA is clear and unambiguous and the legislature’s intent is beyond peradventure. See Maui County v. Puamana Management Corp., 2 Haw.App. 352, 631 P.2d 1215 (1981).

The CZMA is “a comprehensive State regulatory scheme to protect the environment and resources of our shoreline areas.” Mahuiki v. Planning Comm’n, 65 Haw. 506, 517, 654 P.2d 874, 881 (1982).

The CZMA imposes special controls on the development of real property along the shoreline areas in order “to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii.” HRS § 205A-21.


When it enacted the CZMA, the Hawaii legislature specifically found that “special controls on developments within an area along the shoreline are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other means, to public owned or used beaches, recreation areas, and natural reserves is provided.” HRS § 205A-21 (1985). The legislature therefore declared it to be “the state policy to preserve, protect, and where possible, to

3. We reject Petitioner’s arguments that the Commission’s refusal to remove the property from the CZMA was “spot zoning” and amounted to a “taking.”
restore the natural resources of the coastal zone of Hawaii.” Id. In order to carry out the CZMA’s policies and objectives, the legislature authorized the counties to establish SMAs. HRS § 205A–23 (1985). Development within an SMA is controlled by a permit system administered by the counties pursuant to HRS § 205A–28 (1985).

II.

THE BOUNDARY PETITION

A.

Petitioner argues that the Commission exceeded its lawful authority when it established Kuakini Highway as the mauka [towards the mountains, inland, away from the beach] boundary of the SMA. He contends that the CZMA authorizes the Commission to include within the SMA lands that have a “direct and significant impact” on the coastal waters protected by the CZMA. He asserts that in this case the property has “no potential for direct or substantial impact upon either the coastal water or the coastal resources to be protected”, and should not be included within the SMA. The argument is without merit.

Among the CZMA’s stated objectives and policies are the protection, preservation, restoration and improvement of the “quality of coastal scenic and open space resources[,]” HRS § 205A–2(b)(3) and (c)(3)(C) (1985), and the “designing and locating” of new “developments to minimize the alteration of ... existing public views to and along the shoreline[,]” HRS § 205A–2(c)(3)(B) (1985).

In order to protect and preserve the coastal zone’s scenic and open space resources, the CZMA requires the Commission to “minimize, where reasonable ... any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast[.]” HRS § 205A–26(3)(D) (1985).

The intent of the CZMA is clearly to authorize inclusion in the SMA of lands that have a significant impact on the scenic resources in the area and whose development would alter the public views to and along the shoreline. Protection of the coastal areas and waters from adverse environmental or

4. Petitioner claims that the following findings of fact do not support the Commission’s conclusion that the property should not be removed from the SMA: 63. Upon mandatory review and update of the SMA maps, the [Planning] Department recommended that the SMA in the North Kona district should include the area along Alii Drive, bounded by Kailua, Keahou and Kuakini Highway. The rationale for this expansion focused on the rapid growth experienced in the area and a need to ensure that development evaluates the physical constraints as well as the scenic viewplanes from Kuakini Highway, which has been identified as an important scenic resource in the General Plan, 68. It is important that the boundary line be retained at Kuakini Highway since viewplanes have been identified as an area of critical concern. 71. If the development of Property is found to have no significant adverse impacts on viewplanes or open space, this does not mean that the Property can be removed from the SMA.

5. Any contration of an SMA boundary is subject to review by State authorities for compliance with the objectives and policies of the CZMA. HRS § 205A–23 (1985).

6. In a report of the United States Senate Commerce Committee on the Coastal Zone Management Act of 1972, S.Rep. No. 92–753, 92 Cong., 2d Sess. 3, reprinted in U.S.Code Cong. & Admin.News 4776 (1972), the committee suggested that a State coastal zone management program should include “both visual and physical” access “to the coastline and coastal areas[,]” Id. at 4776. Hawaii’s coastal management program arises from the federal enactment, and the above sections of the CZMA clearly are meant to be in accord with the Commerce Committee’s suggestion.
ecological impact is only one of the CZMA’s objectives. Another clear objective is protection against interference with or alteration of coastal scenic resources. Where a property or development has the potential for such interference, then it may be included within an SMA even though it is not in close proximity to the coastline.

Petitioner’s arguments that (1) the Commission’s “rapid growth” finding is “factually incorrect” because the area surrounding the property “had already become substantially developed as early as 1977[,]” and (2) the property “is one of the very last parcels in the neighborhood which is yet to be developed[,]” is without merit.

First, the finding is merely a reiteration of the original finding made in 1980 when the SMA boundary was established at Kuakini Highway. There is nothing in the record to support Petitioner’s argument that the area was already substantially developed at the time the finding was made. Moreover, whether the growth in the area was rapid or slow is really of no import. The aim of the CZMA is to control growth of whatever rapidity. See Sandy Beach Defense Fund.

Second, the fact that the property is among the last to be developed in the neighborhood does not vitiate the finding. The objective of controlling growth relates to the entire SMA not just the neighborhood in which the property is located.

Since control of growth in the SMA is an objective of the CZMA, id., it cannot be said, as Petitioner argues, that control of rapid growth is the Commission’s attempt to use general planning and zoning objectives to justify imposition of the special controls of the CZMA.

B.

Petitioner acknowledges that the CZMA expresses the legislature’s concern for “views along the shoreline.” However, he contends that the “scenic viewplanes” cited by the Commission in FOF No. 63 is purely a creation of the Commission and is not among the “state interests” advanced by the CZMA. Consequently, the continued inclusion of the property in the SMA unconstitutionally deprived him of his property. The argument is without merit.

First, Petitioner misstates the language of the CZMA. HRS § 205A–2(c)(3)(B) clearly establishes the protection of views to and along the shoreline as among the legislature’s policies regarding scenic and open space resources.

* * *

Second, as stated above, HRS § 205A–26(3)(D) requires the Commission to minimize a development’s interference with the line of sight from Kuakini Highway toward the sea.

In our view, the term scenic viewplanes employed in FOF No. 63 relating to the Boundary Petition is merely a paraphrase of the statutory terms “views to and along the shoreline” or “line of sight toward the sea,” and clearly comports with the intent of the statute.

7. See note 4, supra.
8. See note 4, supra.
9. HRS § 205A–2(c)(3)(B) (1985) reads as follows: Coastal zone management program; objectives and policies.
C.

Petitioner also argues that since the shoreline itself, as defined in the CZMA, cannot be seen from the property, the continued inclusion of the property in the SMA goes beyond the legislature's authorization to protect "views to and along the shoreline" and "shoreline open space and scenic resources." We disagree.

HRS § 205A-26(3)(D) clearly mandates the Commission to protect and preserve more than just the view of the shoreline. As noted above, the statute, by its very language, is intended to protect the view toward the sea, even though the "shoreline" cannot be seen either because of intervening development or natural growth.

Petitioner also contends that even if "protecting panoramic coastal views" is within the legislative mandate, it is not a reasonable basis for imposing SMA regulations, since Hawaii County may impose height and setback limitations under its zoning powers. However, the fact that the County can impose the same restrictions through the exercise of one power does not make the proper exercise of another specifically authorized power unreasonable.

D.

Petitioner asserts that since there is no significant view of either the ocean or the shoreline from the portion of Kuakini Highway that abuts the property, the inclusion of the property in the SMA did not advance the State's interest in preserving the viewplane from the highway. We disagree.

Admittedly, Petitioner's evidence indicates that the view from the portion of Kuakini Highway abutting the property is limited. However, that does not affect the Commission's finding as to the significance of the total viewplane from the highway. If, in fact, Petitioner's development would not have a significant adverse impact on the total viewplane, the Commission could consider that as favoring the development or could impose conditions on the development to minimize the impact. However, that would not necessarily support removal of the property from the SMA.

E.

Petitioner argues that "[t]he original enactment of Hawaii's CZMA in 1975 ... defined the SMA to exclude 'portions of [lands in] which there are numerous residential commercial or other structures of a substantial nature in existence as of the effective date of [CZMA],' " and there is no indication that that exclusion should not be continued. The argument misstates the statute.

The original enactment excluded from SMAs only such built up areas that may be located on lands "which abut any inland waterway or body of water wholly or partially improved with walls[.]" Act 176, 1975 Haw.Sess.Laws § 1 (emphasis added). That is not the situation here and there is nothing to indicate the legislature intended to continue that exclusion or to expand it.

10. HRS § 205A-1 (Supp.1991) defines shoreline as: the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.
III.
THE PERMIT PETITION

In denying the Permit Petition, the Commission made the following FOF: 62. Rule 9-10(H)(5) says that one factor which should be considered in constituting a "significant adverse effect" is when the proposed use, activity or operation "involves substantial secondary impacts . . . such as effect on public facilities." 69. Based upon the evidence adduced, including that submitted with the Petition, the testimony of the public and the Petitioner, and the information contained in the [Planning] Department's Background Report, the Commission concluded that the Petitioner's proposed development would have cumulative and significant adverse effects and impact on the public roadway facilities and system in the area of said development, to wit: (A) Increased traffic congestion; (B) Decreased pedestrian safety, especially with a school bus stop in the vicinity; (C) Potential increase in vehicular accidents at the intersection of Kuakini Highway and Sea View Circle.

Petitioner challenges the quoted FOF as not being based on substantial evidence. We disagree. The record contains substantial evidence showing that the development will impact on the roads in the vicinity of the Kuakini Highway-Sea View Circle intersection. Nevertheless, after a thorough review of the record, we have a definite and firm conviction that a mistake has been made.

Pursuant to HRS § 205A–26(2) (1955), development cannot be approved within an SMA unless findings are made that the development (A) will not have any substantial adverse environmental or ecological effect except, however, where the substantial adverse effect is practicably minimized and "clearly outweighed by public health, safety, or compelling public interests"; (B) is consistent with the objectives, policies, and SMA guidelines of the CZMA; and (C) is consistent with the county general plan and zoning. In our view, where a proposed development meets those statutory requisites, the Commission's denial of an SMAP would be in excess of its authority.

The purpose of the CZMA is to control development within an SMA through the device of the SMAP, not to totally prevent or prohibit such activity. It follows that, where an administrative record indicates that a proposed development within an SMA would not contravene the statute's policies, objectives, and purposes, the Commission would exceed its authority by denying an SMAP that may have been requested for that project. The question, here, is whether the Commission's findings satisfied its duty and authority under the statute.

Here, the Commission in other FOF found that the development would have no significant impact on archaeological or historical sites, "floral" and "faunal" resources of the coastal area, or on the coastal waters.12 The

12. The Commission made the following pertinent findings of fact: 46. The project site has been previously altered and is unlikely to contain any surface archaeological sites of significance. 47. The Department of Land and Natural Resources commented "It is our understanding that the lots in this subdivision were graded some time ago, making it unlikely that significant historic sites are present. The project should have 'no effect' on such sites," 49. Because the land has been altered, it is not likely to be a habitat for any rare or endangered species of flora or fauna. 50. The project site is located approximately 3,600 feet from the shoreline. 51. The impact to coastal waters should be negligible.
Commission made no finding regarding any impact on the viewplanes and open space.

The only reason given by the Commission for denying the permit, as noted in POF 62 and 69, is that the development would have cumulative and significant adverse effects on the roadway system at the intersection in question. However, at oral argument in this court, the Commission's counsel conceded that the traffic generated by the development in this case would have very little, if any, impact on the coastal zone's environment or ecology.

Under the circumstances of this case, absent a finding that the impact on the public facilities would result in a substantial adverse environmental or ecological effect, or render the development inconsistent with the objectives, policies, and guidelines of the CZMA, the Commission's finding that the development would have significant adverse effects and impact on the existing highway system in the area of the development does not provide a sufficient basis for denying the Permit Petition. In other words, if traffic from a development within an SMA is not shown to have a substantial adverse effect on the coastal environment, such impact as the traffic may otherwise have on the existing roadway system in the area of the development cannot be the basis for denying an SMAP application.

Additionally, even if the development in this case is shown to have a substantial adverse effect in accordance with the statute, the Commission was required under HRS § 205A–26(2)(A) to determine whether that effect could be practically minimized and, when minimized, whether the effect is clearly outweighed by public health, safety, or compelling public interests. See Mahuiki, 65 Haw. at 516–17 n. 10, 654 P.2d at 881 n. 10. That was not done in this case. Here, Petitioner represented to the Commission that he would be willing to design the development so as to minimize the traffic impact as much as possible. It does not appear from the record that the Commission considered Petitioner's offer as we think it was required to do under the statute.

On remand, the Commission should reconsider the Permit Petition and determine whether the traffic generated by the development will or will not have a substantial adverse environmental or ecological effect on the coastal zone. If the Commission finds that the traffic will not have such a substantial adverse effect, then the Commission should approve the Permit Petition without conditions relating to the traffic.

If the Commission finds that the traffic will have such a substantial effect, but that the effect can be practically minimized and, as minimized, the effect is clearly outweighed by public health, safety, or compelling public interests, the Commission should approve the Permit Petition. In order to achieve the minimization, the Commission may impose reasonable conditions on the development. If, of course, the development cannot be made to conform to HRS § 205A–26(2)(A), then the Commission should deny the Permit Petition.

This opinion is not meant to prevent the Commission from imposing other reasonable conditions affecting matters within the purview of the CZMA, such as the viewplanes to the ocean, where such may be deemed necessary to comply with the intent of the CZMA.
CONCLUSION

We affirm the Commission's denial of the Boundary Petition. We vacate the denial of the Permit Petition and remand the matter to the Commission for further proceedings consistent with this opinion.

Notes

1. Defining the landward part of the coastal zone for purposes of CZMA can be difficult, especially for regulatory purposes, since the federal government looks to the states—to which it gives the money for program development and implementation—for enforcement. What if the statutory definition would result in CZM regulations covering the entire developable area of the state? This is what happened in Hawaii, which then developed two coastal zones: the all-inclusive one for "administrative" purposes, and a second only usually a few hundred yards wide (defined county-by-county) for regulatory purposes. See Callies, Regulating Paradise: Land Use Controls in Hawaii, Ch. 7 (1984).

2. The Coastal Zone Management Act appears to be directed at preserving critical coastal natural resources and values. Assuming it is possible to obtain a permit from an appropriate local agency under an approved coastal zone management program, what would you expect restrictions on development to look like? What kind of bulk and height standards would you expect to be imposed? Consider these questions in light of the materials in this Chapter on flood hazard protection and the dilemma of the landowner subject both to coastal zone protection and flood hazard prevention regulations enforced at the local level. See Davidson, Coastal Zone Management and Planning in California: Strategies for Balancing Conservation and Development; Winters, Environmentally Sensitive Land Use Regulation in California, 10 San Diego L.Rev. 693 (1973).


Los Angeles Times
Copyright 2003 The Los Angeles Times

Thursday, July 17, 2003

Main News; National Desk

The Nation; Prized Dunes Gone With the Wind; On Galveston Island and elsewhere along Texas' coast, hurricane's legacy may be loss of beaches.

Scott Gold
Times Staff Writer

GALVESTON, Texas An apt symbol for the fortunes of this island is the sea grass planted to strengthen the sand dunes that offer thousands of homes their only defense from storms rolling in from the Gulf of Mexico. There are two types: morning glory and bitter panic.

It is time, once again, for the latter.

As Texas began digging out Wednesday from Hurricane Claudette, it became clear that the storm's legacy would not be the splintered buildings or sunken boats, the trucks that floated 10 blocks or the snakes and jellyfish that littered streets like some sort of beachfront apocalypse. Claudette's most enduring legacy may be that many of Texas' prized beaches -- a good chunk of them anyway -- are gone.

In tiny Surfside Beach, concrete slabs that once held stilted houses in place vanished when the sand underneath them was sucked out to sea, leaving some damaged beyond repair, officials said. In Indianola, state officials feared that a $2.5-million beach replenishment project had been swept away in a single morning.

And on Galveston, a 33-mile-long barrier island of aging Victorian homes, new vacation condos and bustling surf shops, many dune lines were removed by powerful waves that sent streams of seawater 40 feet into the air during the height of Tuesday's storm. Although assessment teams are still making their way to badly damaged neighborhoods, some beaches here are believed to have shrunk by 50 feet, authorities say, not an insignificant figure considering the island is only 1 1/2 miles wide at some points. Several streets and driveways, no longer resting atop stable sand, collapsed.

On the island's western end, Lance Giese could be found walking through the backyard of his family's vacation home, shirtless and carrying a splinter of a door, still attached to a doorknob but no longer attached to a home. Giese, 32, a teacher and athletic director at a high school in College Station whose family has vacationed here since he was 7, wasn't sure which neighbor the door used to belong to.

He tossed it into a growing pile of debris left behind by Claudette -- seaweed, porch chairs, a mattress, a blue cooler, a pink child's shoe, a bottle of tanning lotion. Behind him, a front-end loader, beeping incessantly as it rumbled down the street in reverse, carted off someone's washing machine.

Giese's family bought the home, in an enclave called Acapulco Village, two weeks ago. The home, which survived with minimal damage, is fourth in line behind the beach. Sadly, Giese said, it was probably a better investment than he realized. "We'll be front-row soon -- beachfront," he said. "It's amazing to see this happen."

Residents of Galveston, lashed only by the northernmost reaches of Claudette, had pooh-poohed it as it approached.
After all, the modern version of the island -- once home to bootleggers and pirates, later a getaway for the wealthy -- was literally built on the remnants of the biggest storm of them all. A hurricane in 1900 destroyed two-thirds of the structures on Galveston Island and killed so many people that searchers had to be plied with whiskey to dull the horror and mask the scent. It remains the deadliest natural disaster in the nation's history. Two people were killed in Tuesday's storm, both when tree limbs fell on them; more than 6,000 people are estimated to have died in the 1900 hurricane.

After that storm, in a public works project with remarkable scope for the time, authorities picked up most of the remaining houses and raised the island by 16 feet. They then built a 10-mile-long seawall, to protect the island from future storms.

But the seawall protects only the eastern portion of the island, leaving the western section, where pricey homes are being built at a rapid pace, exposed to storms and erosion. Jetties built to protect a shipping channel off the northern tip of the island have only increased the rate of erosion farther south and west.

Some spots lose 10 feet of beach per year even without a storm, and the average erosion on the island is more than five feet per year, according to a recent study by the H. John Heinz III Center for Science, Economics and Environment, a Washington nonprofit group. An endless stream of beach "renourishment" projects has helped, but Claudette wiped away much of the recent progress.

"Any time Mother Nature destroys her own, you hate to see it," said Lois Harris, who lives north of Galveston but came to the island with her husband to view the damage to their local beach. "Every part of the country has its own natural disaster. Like it or not, this is ours."

Lindsey Jasso, 20, of Carthage, Texas, has been vacationing on Galveston for six years; as many as 7 million tourists come here annually. Each year, Jasso has watched the beach shrink.

"We had dunes two days ago," she said. "Now, we've got nothing. If we have enough storms like this one, it'll be gone for good."

Texas has 367 miles of coastline, a strip of sand that generates, mostly through tourism, $12 billion annually and employs more than 200,000 people. All of it is public land -- and almost half is eroding badly.

The Heinz study found that erosion rates in Galveston County and neighboring Brazoria County might be the worst in the nation; analysts believe that Galveston Island will eventually be cut in half if nothing is done.

Still, in the 95 years that the U.S. government has been giving states money to fight erosion, Texas has received just 1% of the pot. Florida, by comparison, has received 32%, according to the Texas General Land Office -- a seeming disparity that has spurred a renewed effort here to secure more funds and launch more projects, some controversial, to strengthen the coast.

For example, a 1.7-mile-long "geotube" -- a giant sock filled with sand -- erected along a stretch of western Galveston Island appears to have protected the houses behind it during Claudette. Supporters, who funded the project with private money, say more should be put in place; some argue that the government should begin paying for part of that effort.

Others are pushing for breakwaters offshore, part of a project that could cost more than $100 million. Some analysts said Wednesday that damage from Claudette could be several
times that, although officials have not yet totaled up the damage.

"The beach is the principal asset of the Texas coast. That is particularly true in Galveston," said Sidney S. McClendon III, owner of a home on Galveston's bay side. "The island is eroding away. One way or another, we've got to save that beach."

Others argue that structures such as breakwaters change the coast's dynamics and steal migrating sand from other beaches.

Like many coastal states, Texas bans construction of "hard" protective structures, but backers of the sand tubes got around that ban by declaring them "soft."

"Slam your face into it, buddy, and tell me if it's hard," said Ellis Pickett, head of the Texas chapter of the Surfrider Foundation, an environmental organization. "They only benefit people who own $200,000, front-row beachfront homes -- not the 20 million Texans who don't. You can't spend public money to protect someone's big, expensive house."

Researcher Lianne Hart contributed to this report.

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

GRAPHIC: Map: Texas, Island erosion; CREDIT: Perry Perez Los Angeles Times; PHOTO: HURRICANE DAMAGE: Residents survey damage to a house at Bermuda Beach on Galveston Island. Claudette damaged many of Texas' prized beaches. "We had dunes two days ago," one longtime Galveston Island vacationer said. "Now, we've got nothing."; PHOTOGRAPHER: Joshua Trujillo Houston Chronicle

---- INDEX REFERENCES ----

NEWS SUBJECT:  (Disasters/Accidents (GDIS); Environmental News (GENV); Weather (GWEA); Routine General News (NRGN); Political/General News (GCAT); Content Types (NCAT))

REGION:  (United States - Texas (USTX); North American Countries (NAMZ); United States (USA); Southern U.S. (US5))

EDITION:  HOME EDITION

OTHER INDEXING:  Infographic; TEXAS; HURRICANES; STORMS; WEATHER; BEACHES

Word Count: 1339

7/17/03 LATIMES A19

END OF DOCUMENT
Fran rearranges not only coastline but also development debate Hard decisions on who can rebuild

STUART LEAVENWORTH AND TODD RICHISSIN
STAFF WRITERS

NORTH TOPSAIL BEACH - Not 30 feet from the waves that lap the edge of this crumpled beach town is a house that resembles a bombed-out war bunker. The house has no roof, three of its brick exterior walls have been reduced to rubble, and the driveway is either buried under mounds of sand or lost at sea.

Viewed from the air, the house looks much like hundreds of beachfront homes blown apart by Hurricane Fran, the most damaging storm to hit North Carolina's barrier islands this century. What sets this house apart is a hand-painted note on its surviving wall. "We will be back," the sign says, in bold red letters.

For more than 200 years, island dwellers have kept that promise after every storm. But now that Hurricane Fran has rearranged the coast's topography - erasing not only private property but millions of dollars of government-supported infrastructure - the hurricane also is transforming the debate over development of barrier islands.

For the past two decades, North Carolina has taken a two-headed approach toward its barrier islands. While restricting development through coastal management laws, it also has facilitated growth through a network of highways, bridges and beach renourishment projects. The result is a booming coastal population and billions of dollars of homes and public investments that have been placed in the path of the Atlantic's fiercest storms.

Supporters of beach development say the state is now obligated to rebuild roads and sewers on barrier islands, just as it is repairing infrastructure elsewhere. "A barrier island is a barrier island," said Marty Bostic, mayor of North Topsail Beach. "But we weren't the only ones who took a hit. Look what happened in Raleigh."

Opponents say it's unfair to spend millions rebuilding dunes and highways to benefit a relatively small number of property owners, some of whom have considerable wealth. "This is my tax money they are talking about," said Stan Riggs, a geologist at East Carolina University. "And before they rebuild, I want to be sure they are rebuilding safely."

In the wake of Hurricane Fran, appointees of Gov. Jim Hunt have sided more with proponents of rebuilding than with those who recommend a go-slow approach. First, state coastal management officials announced new setback requirements on barrier islands that will allow some island property owners to rebuild quickly.
Then, on Friday, the Hunt administration announced it will endorse an 18-foot sea wall that owners of the Shell Island Resort want to build on the north end of Wrightsville Beach. Although the Coastal Resources Commission has a long-standing policy against sea walls, state officials say they now support a revised version of the Shell Island proposal, partly because Hurricane Fran increased erosion near the high-rise condominium.

Environmentalists say that both decisions are major concessions to developers, and will inevitably lead to more and more requests for private sea walls on public beaches. But so far, their arguments have had little impact on state regulators, who are being besieged with calls from island homeowners asking for relief.

Roger Schecter, head of the N.C. Division of Coastal Management, says he was awed by the scope of Fran's destruction, which he saw during a plane flight over the coast.

"We are dealing with thousands of folks, many of whom lost their primary home," Schecter told lawmakers last week. "The response has to be different this time. It has to be compassionate, but it has to recognize that we can't be putting some of these structures back in harm's way and using taxpayers' money to do that."

Starting Thursday, the Coastal Resources Commission will begin debating Schecter's proposals in a meeting that could set the tone for state's coastal policies in the post-Fran era.

"There have been a lot of difficult decisions put off because we didn't have to deal with them," said Dr. Courtney Hackney, a CRC member who teaches at the University of North Carolina-Wilmington. "Now we've reached a point in the development of the North Carolina coast where we have to make real decisions that have a real effect on real people."

###

The beaches have moved:

Every year in North Carolina, real people watch their houses fall into the water as the ocean eats away at their sandy front yards. It's a natural process that scientists have long documented along North Carolina's 300-mile coast, but rarely has it been so dramatic as with Hurricane Fran.

When the hurricane barreled into the state's southern coast, a 12-foot storm surge obliterated houses and marinas for 120 miles and dumped thousands of tons of sand on the back side of islands. Topsail Island, Figure Eight Island and Kure Beach took the hardest hits. There, the storm tore houses off their stilts, demolished mobile homes and ripped apart asphalt roads as if they were made of coffee grounds.

Homeowners who returned to North Topsail Beach last week were stunned by the damage. Propane tanks were buried in the beach. Vehicles lay on their sides or upside down, wheels to the sky. All
across the island, the ocean has dug wide gullies, and water continues to pass through some of these inlets with each change of the tide. Some people are still searching for the remains of their homes; only their mailboxes remain, like grave markers. Other people can't find their boats.

"I can't imagine them allowing us to rebuild with no dunes left," said Ruthann Horan, standing outside her beach home. Heavily damaged in July by Hurricane Bertha, the house was finished off when Fran sent it tumbling to the ground. "That storm just destroyed this island, and now there's another river running through it."

Public investments on barrier islands took a big hit from Fran. At North Topsail, the state Department of Transportation estimates it will cost $500,000 to repair a road that has been repeatedly damaged by storms. Since the 1980s, the state has spent more than $4.2 million on the road, which the DOT relocated at the request of developers.

Meanwhile, federal officials are just starting to estimate the amount of government-subsidized sand that was swept out to sea by Bertha and Fran. Since 1980, the Army Corps of Engineers has spent more than $10 million replenishing Wrightsville Beach with sand dredged from nearby harbors, according to a survey conducted by the Duke Program for the Study of Developed Shorelines.

The storm's destruction came as little shock to longtime critics of coastal development, such as geologists Orrin Pilkey, the director of Duke's shoreline program, and Riggs of East Carolina University.

In their 1980 book, "From Currituck to Calabash," Riggs and Pilkey warned that North Topsail Beach "is probably the most dangerous part of Topsail Island" because of its low topography and narrow dimensions. They also criticized the dense clusters of trailers near Surf City, noting that during hurricanes, "one loose trailer can wreak havoc as a wind-borne missile."

Although those predictions were largely borne out by Fran, Pilkey said he was surprised by the damage on other sections of Topsail. In previous books, Pilkey has reported that areas around Surf City "appear to be safe" because of elevated dunes. Instead, they were pummeled with waves that caused damage comparable to that on the island's northern tip.

"I was taken aback by the extent of overwash at Surf City," said Pilkey, referring to the large waves that flooded the area. "It seems the first hurricane set things up for the second hurricane. They had the bad luck of back-to-back storms."

Not all beachfront structures were heavily damaged by Fran's winds and waves. According to building inspectors and insurance officials, hundreds of structures built under new building codes - tightened by the state in 1987 and again in 1994 - are still habitable. Most of these new structures are elevated 14 feet above the ground and are buttressed with deep pilings in the sand.
Spencer Rogers, a construction and beach erosion specialist with the N.C. Sea Grant College Program, says he was impressed with how the newer houses fared.

"If we want to build pyramids, it's ridiculous to think about putting them on barrier islands," Spencer said. "But clearly, many of the islands are wide enough so that single-family homes can be constructed to last about an average lifetime."

Such words give hope to property owners like Tom Dale, 72, the owner of four lots on North Topsail Beach. Last week, he hitched a ride on a Marine Humvee to inspect his houses and see how quickly he could repair them.

"This could happen anywhere," said Dale. "What did they do in San Francisco? They had an earthquake and they rebuilt. How many times have they rebuilt on Hatteras?"

Dale, however, could end up being disappointed. Under state coastal management rules, homes that are damaged more than 50 percent can be rebuilt in the same location only if they meet health codes for sewage disposal. They also must be far enough inland to withstand 30 years of beach erosion.

On many islands, particularly Topsail, Figure Eight and Kure Beach, the storm swept away 40 feet of beach and left homes on the water's edge.

"What that means," says Schecter, "is there will be individuals who won't have lots."

###

Open to interpretation:

How will the state determine who builds and who doesn't? Much will depend on how the 15-member Coastal Resources Commission interprets its own rules, which were passed in the 1970s to protect public beaches.

Under the commission's rules, new houses on barrier islands must be set back a certain distance from an island's "first line of stable vegetation." Typically the setback distance is 30 to 120 feet, depending on average erosion rates for that location. In the past two weeks, however, state regulators haven't been able to determine the vegetation line on islands where entire dunes were washed away. Geologists expect those dunes eventually to reform and reseed themselves, but the process could take years.

ECU geologist Riggs, who visited Topsail and other islands last week, says the CRC should go slow in determining areas that will be safe to rebuild. "I don't think they can make a decision yet," he said. "It would be foolhardy to rush into it. If they do, there could be massive repercussions."

State officials, however, say they don't want to leave property
owners waiting months or years before learning whether they can rebuild. As a result, Schecter wants the commission to base the setback designations on aerial photography of the islands before Hurricane Fran.

For example, if the normal setback on an island were 60 feet from the vegetation line, and the town lost 40 feet of beach during the storm, the commission's proposed setback would be 100 feet back from the previous vegetation line.

## Shell Island:

At Topsail and other islands, state regulators are forced to juggle several different concerns in deciding who builds and who doesn't. Private property is one consideration; protection of public beaches is another. Meanwhile, the line that separates public land from private - the high-tide line - continues to move inland.

At Shell Island, a $22 million condominium and hotel on the north end of Wrightsville Beach, the moving line has brought the Coastal Resources Commission to a key moment in its 25-year-old history. As the ocean has crept closer to the nine-story building, Shell Island has sought state approval to build a sea wall, a type of structure long prohibited under coastal management rules.

Proponents say that some type of barrier is essential to prevent the condominium from being swallowed by a storm. Opponents say the wall would erode nearby beaches and note that Shell Island owners were originally aware of the hazards of building where they did.

When state officials issued a permit for the development in the 1980s, Shell Island officials signed a clause that read:

"In signing this permit, the permittee acknowledges the risks of erosion associated with developing on this site and recognizes that current state regulations do not allow shore-line erosion control structures such as sea walls to be erected for developments initiated after June 1, 1979."

Environmentalists thought the issue had been put to rest when the Coastal Resources Commission rejected a request by New Hanover County and Shell Island to build the wall earlier this year. In rejecting the request, the CRC noted that sea walls have been found to deflect waves onto other sections of beach, often transferring the erosion problem from one property to another.

Even so, Shell Island and New Hanover County pursued the matter, modifying the size of the wall and offering to make it out of tubes of sand - a material that sometimes is allowed under state rules for emergency situations.

Ken Shanklin, the attorney for the Shell Island owners, says coastal rules need to be flexible in this case. "Rules don't think," he said. "And if you just apply rules literally, sometimes you don't"
get the best result."

Riggs and other coastal geologists say that even a sandbag wall eventually will cause erosion on other parts of Wrightsville Beach, although it is difficult to predict when and where.

"A barrier island is a pile of moving sand," said Riggs. "It's built by wave energy; it absorbs wave energy. And every structure put on there stops that from happening and reflects the energy somewhere else."

Last week, the coastal management division - whose director is appointed by Hunt - announced its support for Shell Island's proposal, under certain conditions. These conditions require the resort to remove the wall if erosion is documented on the beach. New Hanover County and Wrightsville Beach also would have to post a performance bond to ensure the sandbag wall is removed in five years.

Schechter, the coastal management director, said that Hurricane Fran caused him to rethink the state's position since the storm caused "dramatic erosion" at Mason Inlet, the waterway next to Shell Island. "Shell Island needs to buy some time, so they can work on moving Mason Inlet as a long-term solution," Schechter said in a statement.

Todd Miller, director of the N.C. Coastal Federation, said Schechter's decision is the second time in two years the state has made a major concession to a well-connected, private developer. Last year, the CRC - on the urging of Hunt and Walter Davis, one of Hunt's allies - allowed Bald Head Island to plant a series of experimental sand tubes on its beach to protect beachfront homeowners. Davis is one of those homeowners.

Although the CRC usually follows the recommendations of its staff, at least one coastal commissioner says the panel needs to be wary of setting a precedent.

"If you let one person do something, you're obligated to treat all people the same regardless of who they are and what their economic status is," said Hackney, the commissioner from Wilmington. "We're going to have a hard time explaining to someone with a two-bedroom house falling into the ocean down the beach why they can't build their own wall."

###

(The Coastal Resources Commission will meet Thursday and Friday at 8:30 a.m. at Sea Trail Plantation, 200 Clubhouse Road, Sunset Beach.)

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

5 c photos; c graphic; Islands in the storm's eye; Staff; Caption: Gene Lockamy uses a bulldozer to push back the dunes at the Jolly Roger pier at Topsail Beach. How long they will stay there is another question. A Marine Corps Humvee patrols the beach at North Topsail Beach after Hurricane Fran destroyed the road that goes to the northern part of