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ENVIRONMENTAL LAW

OREGON NATURAL RESOURCES COUNCIL *v. MARSH*: THE NINTH CIRCUIT ESTABLISHES A POTENT STANDARD FOR ENVIRONMENTAL DISCLOSURE

I. INTRODUCTION

In *Oregon Natural Resources Council v. Marsh*,¹ the Ninth Circuit held that the U.S. Army Corps of Engineers' (Corps) Environmental Impact Statement (EIS) relating to construction of the proposed Elk Creek Dam failed to satisfy the requirements of the National Environmental Policy Act (NEPA).² In reversing the denial of injunctive relief, the court agreed with plaintiffs' contentions that the EIS was insufficient due to the Corps' failure to specify and analyze techniques mitigating the adverse environmental impacts of the project.³ Further, the court held that the Corps must (1) prepare a new supplemental EIS addressing new information obtained regarding the environmental impact of the project,⁴ (2) prepare a worst case analysis or conduct further research on the issue of waterflow from Elk Creek,⁵ and (3) address the cumulative impact of Elk Creek Dam in conjunction with two other nearby existing dams.⁶

1. 820 F.2d 1051 (9th Cir. 1987) (per Ferguson, J.; the other panel members were Norris, J., and Wallace, J., concurring in part, and dissenting in part).

2. 42 U.S.C. §§ 4321-4370 (1982).

3. *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051, 1055 (9th Cir. 1987). Plaintiffs are Oregon Natural Resources Council, Oregon Guides and Packers Assn., Inc., Rogue Flyfishers, Inc., and Rogue River Guides Assn., nonprofit groups claiming injury by the dam's construction. *Id.* at 1054 n.2.

4. *Id.* at 1058.

5. *Id.* at 1059.

6. *Id.* at 1060. The Ninth Circuit affirmed the district court's rulings regarding the placement of opposing views in the EIS, the Corps' discussion of conflicts between the proposed Elk Creek Dam and competing federal policies, and the adequacy of the cost-

II. FACTS

The Rogue River, into which Elk Creek flows, is located in southwestern Oregon. The Rogue is one of eight rivers designated as "wild and scenic" by the U.S. Congress,⁷ and its fishing and white water recreation are of national repute.⁸ In 1962, Congress authorized construction of Elk Creek Dam, Applegate River Dam, and Lost Creek Dam to control flooding in the Rogue River Basin.⁹ The Applegate River and Lost Creek dams have since been completed.¹⁰

In 1971, the Corps completed the final EIS on the Elk Creek project.¹¹ In 1975, the Corps drafted a supplemental EIS after studying the projected impact of the dam on turbidity¹² in the Rogue River.¹³ In 1980, after completing additional turbidity and temperature projections, the Corps filed a revised draft supplemental EIS.¹⁴ These analyses generated much criticism by state and federal agencies.¹⁵ The Corps placed these comments and its responses to them in a separate section of its final supplemental EIS.¹⁶

In August, 1985, although funding was not sought by the Corps,¹⁷ Congress appropriated funds and directed the Corps to

benefit analysis employed. *Id.* at 1060-61.

7. *Marsh*, 820 F.2d at 1053-54 (citing Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (1982)).

8. *Marsh*, 820 F.2d at 1054.

9. *Id.*

10. *Id.*

11. *Id.* The Elk Creek project, as proposed, includes a concrete dam 249 feet high and 2,580 feet long. *Id.* The reservoir created will cover approximately 1,290 acres of land. *Id.*

12. *Id.* "Turbidity" is defined by the Corps as "an expression of the optical property of water which causes light to be scattered and absorbed rather than transmitted through in straight lines . . . [which] is caused by suspended matter." *Id.* at 1054 n.1. "Simply stated, turbidity is murkiness due to stirred-up sediment." *Id.*

13. *Id.* at 1054. During this period, the Governor of Oregon withdrew state support for the project and requested that work be suspended until its effect on water quality in the Rogue could be evaluated. *Oregon Natural Resources Council v. Marsh*, 628 F. Supp. 1557, 1561 (D. Or. 1986), *rev'd*, 820 F.2d 1051 (9th Cir. 1987).

14. *Marsh*, 820 F.2d at 1054. Projections were based on observations at Lost Creek Dam in 1977 and simulated models. *Id.*

15. See *infra* text accompanying notes 97-102.

16. *Marsh*, 820 F.2d at 1054.

17. *Oregon Natural Resources Council v. Marsh*, 628 F. Supp. 1557, 1561 (D. Or. 1986), *rev'd*, 820 F.2d 1051 (9th Cir. 1987). Despite the Corps' issuance of a Record of

begin construction of Elk Creek Dam.¹⁸ Shortly thereafter, plaintiffs brought this action in federal district court to enjoin construction of the project.¹⁹ The district court held that the Corps' preparation of the EIS satisfied NEPA requirements and denied plaintiff's request for injunctive relief.²⁰

III. BACKGROUND

In introducing the National Environmental Policy Act, Congress broadly declared its intent to encourage harmony with, and prevent damage to the environment.²¹ NEPA directs all federal agencies to consider environmental issues "to the fullest extent possible," during the planning and implementation of proposed actions.²² NEPA also established the Council of Environmental Quality (CEQ),²³ which issues regulations implementing NEPA's procedural requirements.²⁴

Decision, water quality data, an Environmental Assessment, and Finding of No Significant Impact (all in support of proceeding with the project), the Corps did not seek Congressional funding. *Id.* Plaintiffs assert that the Corps' uncharacteristic failure to seek funding was caused by its prior opposition to the Elk Creek project. Oregon Natural Resources Council, White Paper 7-8 (August 23, 1987).

18. *Marsh*, 628 F. Supp. at 1561.

19. *Id.*

20. *Id.* at 1568-69. The court concluded that the Corps satisfied its obligations under NEPA since it took a "hard look" at the environmental consequences of the proposed dam. *Id.*

21. 42 U.S.C. § 4321 (1982). Congress further described its intent "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . . [and] to enrich the understanding of the ecological systems and natural resources important to the Nation" *Id.* Congress enumerated several intended goals such as the recognition of the populace as trustee of the environment for future generations, and the preservation of important historic, cultural and natural resources. 42 U.S.C. § 4331(b) (1982). For a discussion of the legislative history and intent of NEPA, see W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 7.1 (1977) [hereinafter W. RODGERS], and Murchison, *Does NEPA Matter? -An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557 (1984) [hereinafter MURCHISON].

22. 42 U.S.C. § 4332(2)(C) (1982). NEPA's requirements are subordinate to an agency's conflicting obligations arising under other statutes. 42 U.S.C. § 4334 (1982). See also MURCHISON, *supra* note 21, at 559.

23. 42 U.S.C. §§ 4341-47 (1982).

24. 40 C.F.R. §§ 1500-08 (1986). See generally MURCHISON, *supra* note 20, at 589. The CEQ's initial advisory role was enhanced by President Carter's executive order authorizing CEQ's promulgation of environmental guidelines binding on federal agencies. *Id.* CEQ regulations are binding on federal agencies and entitled to substantial deference by the courts. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

The key provision enacted to attain Congress' environmental objectives requires federal agencies to include an EIS with every proposal for major federal actions significantly affecting the quality of the human environment.²⁵ The primary purposes of an EIS are to foster both informed decision-making and informed public participation in light of the environmental consequences of a proposed project.²⁶ An agency's obligations under NEPA are generally considered to be satisfied upon the preparation and circulation of an EIS which demonstrates that a project's environmental impact has been fully evaluated.²⁷

25. 42 U.S.C. § 4332(2)(C) (1982). See F. SKILLERN, ENVIRONMENTAL PROTECTION—THE LEGAL FRAMEWORK § 2.21 (1981 & Supp. 1987) [hereinafter F. SKILLERN] (the role of the EIS in the decisionmaking process is to assure the protection of the public interest); see also D. MANDELKER, NEPA LAW & LITIGATION, THE NATIONAL ENVIRONMENTAL POLICY ACT § 1:01 (1984 & Supp. 1987) [hereinafter D. MANDELKER].

An Environmental Impact Statement is defined as a detailed statement of the responsible official on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (1982).

26. *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985). *Better Henderson* upheld an EIS for construction of power transmission lines within city limits. *Id.* at 1057. See also 40 C.F.R. § 1502.1 (1986) (CEQ's view of the purpose of an EIS).

27. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), which severely limited the scope of judicial review of agency decisions under NEPA. Reversing a decision by the Court of Appeals for the District of Columbia, the Supreme Court held that the Nuclear Regulatory Commission's failure to address energy conservation as an alternative to the construction of a nuclear power plant did not invalidate its EIS. *Id.* at 552-53. "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is *essentially procedural*." *Id.* at 558 (emphasis added). See also *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (in reviewing agency action, the court's only role is to insure that the agency has taken a "hard look" at the environmental consequences). See *infra* notes 75-78 and accompanying text. See generally F. SKILLERN, *supra* note 25, at 21 (favorable view of NEPA's significance). But cf. MURCHISON, *supra* note 21, at 603 (articulating a skeptical view of NEPA's significance for environmental protection).

CEQ's view of NEPA's purpose states: "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b) (1986).

A. STANDARD OF REVIEW

In reviewing the sufficiency of an EIS under NEPA, the Ninth Circuit applies a “rule of reason,” the standard generally recognized in the federal courts.²⁸ For example, in *Enos v. Marsh*,²⁹ the court reviewed the sufficiency of the Corps of Engineers’ EIS discussion of the secondary environmental effects of its proposed deep draft harbor project.³⁰ Applying the “rule of reason,” the court described its task as to determine “whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences,”³¹ thereby fostering informed decision-making and public participation.³² The court held that the EIS adequately alerted deci-

28. See *Enos v. Marsh*, 769 F.2d 1363, 1372 (9th Cir. 1985), discussed *infra* notes 29-34 and accompanying text; *Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1460-61 (9th Cir. 1984) (“rule of reason” applied to determine adequacy of transportation department’s EIS), *cert. denied*, 471 U.S. 1108 (1985), discussed *infra* notes 47-52 and accompanying text; *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (“rule of reason” applied to determine adequacy of Forest Service EIS). See generally F. SKILLERN, *supra* note 25, at § 2.39.

The Second Circuit also employs a “rule of reason” in reviewing the sufficiency of the contents of an EIS. See, e.g., *Sierra Club v. United States Army Corps of Eng’rs*, 701 F.2d 1011, 1031 (2nd Cir. 1983). The court applied a “rule of reason” in evaluating the Corps’ EIS for a highway and urban renewal project. *Id.* By its inclusion of false statements regarding the aquatic impact of the project and omission of impact on fisheries, the court found that the EIS did not adequately compile relevant information on the project. *Id.* In *Druid Hills Civic Ass’n v. Federal Highway Admin.*, 772 F.2d 700 (11th Cir. 1985), the Eleventh Circuit applied a “rule of reason” to assess the contents of a Federal Highway Administration (FHWA) EIS supporting construction of the Presidential Parkway in Atlanta. *Id.* at 708-09. Upon review of the plaintiffs’ claims disputing the FHWA’s traffic and safety data, the court held that they failed to demonstrate the substantial procedural flaws necessary to invalidate the EIS. *Id.* at 712.

In *Township of Springfield v. Lewis*, 702 F.2d 426 (3rd Cir. 1983), the Third Circuit rejected plaintiffs’ challenges of the adequacy of a highway administration EIS for highway construction through a New Jersey park. *Id.* at 442. Rather than applying a “rule of reason,” the court applied the more deferential “arbitrary and capricious” standard by shifting the focus of the inquiry from adequacy of the EIS’s contents to the agency’s substantive decision to go forward with the project. *Id.* at 441. Based on the district court’s analysis and substantial volume of the EIS, the agency action was neither arbitrary nor capricious. *Id.* at 442.

29. 769 F.2d 1363 (9th Cir. 1985).

30. *Id.* at 1371.

31. *Id.* at 1372 (citing *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

32. *Enos*, 769 F.2d at 1372. Judicial authority to review agency decisions is pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(D) (1982), empowering courts to set aside agency actions taken without observance of procedures required by law. *Id.* This circuitous source of authority is necessary because Congress failed to provide any enforcement mechanism within NEPA. See MURCHISON, *supra* note 21, at 562.

While a “rule of reason” is employed in the review of agency decisions, district court

sion-makers and the public to potential secondary effects of the project, and that further analysis was not required.³³ The court reasoned that the EIS's brief references to the harbor project's impact on population growth, urbanization, and pollution, though potentially "far reaching," were sufficient, since such consequences were speculative and dependent on local development decisions.³⁴

B. ADEQUACY OF AN EIS' MITIGATION PLAN

CEQ regulations require that an EIS include a discussion of "[m]eans to mitigate adverse environmental impacts"³⁵ The Ninth Circuit requires that an EIS include an analysis and evaluation of measures to be employed to mitigate the adverse effects of the project.³⁶

In *Northwest Indian Cemetery Protective Association v. Peterson*,³⁷ the Ninth Circuit reviewed a Forest Service plan to permit timber harvesting and road construction in a portion of Six Rivers National Forest considered sacred by Indians in the area.³⁸ The court held that the EIS's discussion, which neither analyzed nor explained the effectiveness of mitigation measures planned, was insufficient to ensure the level of informed deci-

decisions are reviewed to determine whether they are grounded upon an erroneous legal standard or upon clearly erroneous findings of fact. *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460-61 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985). See *infra* notes 47-52 and accompanying text.

33. *Enos*, 769 F.2d at 1373.

34. *Id.*

35. 40 C.F.R. § 1502.16(h) (1986).

36. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *vacated in part on rehearing on other grounds*, 795 F.2d 688 (9th Cir. 1986), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 107 S. Ct. 1971 (1987). Complete compensation for adverse impacts is not required as long as significant mitigation measures are undertaken. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985). The Ninth Circuit upheld a U.S. Fish and Wildlife Service decision not to prepare an EIS despite the project's impact on an "endangered species." *Id.* at 988-89. One factor supporting the court's decision was the enhancement of survival of the Mission Blue Butterfly due to mitigation measures adopted. *Id.* at 987.

37. 764 F.2d 581, 588 (9th Cir. 1985), *vacated in part on rehearing on other grounds*, 795 F.2d 688 (9th Cir. 1986), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 107 S. Ct. 1971 (1987).

38. *Id.* at 583.

sion-making contemplated by NEPA.³⁹

In *Trout Unlimited v. Morton*,⁴⁰ the Ninth Circuit considered challenges to the Bureau of Reclamation's EIS for construction of the Teton Dam and reservoir.⁴¹ The court held that the Bureau's EIS discussion of mitigation measures, organized under eight headings, was adequate though conceding that it could have been more extensive.⁴² The court stated that the Bureau's issuance of an elaborate mitigation plan for wildlife *after* filing of the final EIS "suggested" that the EIS was adequate to inform decision-makers.⁴³

C. DUTY TO SUPPLEMENT EIS

CEQ regulations require that federal agencies supplement an EIS when significant new information is acquired or new circumstances develop, relevant to the environmental impact of a proposed action.⁴⁴ The Ninth Circuit expands on this theme by finding a continuing duty by federal agencies to gather and evaluate new information relevant to the environmental impact of its actions after the issuance of its EIS.⁴⁵ However, reasonable agency decisions not to supplement an EIS in light of new information will be upheld.⁴⁶

39. *Id.* at 588 (citing *Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982)). *See also* *Environmental Defense Fund v. Froehle*, 473 F.2d 346, 351-52 (8th Cir. 1972) (EIS for river channelization project which did not contain specific mitigation plan nor a discussion of alternative of acquiring land to mitigate loss of natural resources was held inadequate even though this alternative involved a separate project requiring separate Congressional authorization); *Prince George's County v. Holloway*, 404 F. Supp. 1181, 1186-87 (D.D.C. 1975) (EIS for relocation of naval oceanographic center which did not consider mitigation measures regarding the impact on housing and education in the affected community was held inadequate). *See generally* D. MANDELKER, *supra* note 25, § 10:17; and MURCHISON, *supra* note 21, at 608-09 (CEQ regulations such as mitigation provisions may provide important basis for environmental challenges, even though they may exceed scope of NEPA's statutory framework).

40. 509 F.2d 1276 (9th Cir. 1974).

41. *Id.* at 1281.

42. *Id.* at 1284.

43. *Id.*

44. 40 C.F.R. § 1502.9(c)(1)(ii) (1986).

45. *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1463 (9th Cir. 1984). "When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing requirements." *Id.* at 1463-64.

46. *Id.* at 1463. In *Township of Springfield v. Lewis*, 702 F.2d 426 (3rd Cir. 1983), discussed *supra* note 28, the Third Circuit held that new information dealing with the

In *Stop H-3 Association v. Dole*,⁴⁷ the Ninth Circuit identified four factors for determining the reasonableness of an agency's decision not to supplement its EIS.⁴⁸ Reasonableness depends on (1) the environmental significance of the new information, (2) the probable accuracy of the information, (3) the degree of care with which the agency considered and evaluated the information, and (4) the degree to which the agency supported its decision not to supplement the EIS.⁴⁹

In *Stop H-3*, the court reviewed a transportation department decision not to supplement its EIS for a proposed extension of interstate highway with allegedly new and significant population data.⁵⁰ The court concluded that information developed from 1978 Hawaii state population projections did not require supplementation since the changes were not significantly different from the population ranges discussed in the EIS.⁵¹ Furthermore, the court considered that data revealed by the 1980 census was not shown to be so environmentally significant as to require supplementation even though population growth in the area to be served by the project exceeded local planning objectives.⁵²

In *Warm Springs Dam Task Force v. Gribble*,⁵³ the Ninth Circuit considered claims that the Corps of Engineers improperly failed to supplement the EIS for the construction of Warm

traffic, noise, and air quality impacts of the project, included in the final EIS after circulation of the draft EIS did not violate NEPA. *Id.* at 439 (emphasis added). In *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984), the Seventh Circuit treated a Navy decision not to supplement the EIS with new information dealing with the biological effects of its submarine communications project as a decision not to issue an EIS at all. *Id.* at 417. By this approach, the court was able to apply the more deferential "arbitrary and capricious" standard to the Navy's action, facilitating its decision that NEPA was not violated. *Id.* at 424. The court held that a supplementary EIS was not required unless the new information presented "a seriously different picture of the environmental landscape such that another hard look is necessary." *Id.* at 418 (emphasis in original). See generally F. SKILLERN, *supra* note 25, § 2.48A; D. MANDELKER, *supra* note 25, §§ 10:43-10:45.

47. 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

48. *Id.* at 1464.

49. *Id.*

50. *Id.* at 1463-64.

51. *Id.* at 1464-65.

52. *Id.* at 1465. Furthermore, the court stated that the transportation agency's concurrence in the EIS was conditioned on recognition of an obligation to cooperate with local agencies' planning goals. *Id.*

53. 621 F.2d 1017 (9th Cir. 1980).

Springs Dam.⁵⁴ The plaintiffs argued that new information became available which suggested that the EIS underestimated the force of potential earthquake activity in the area.⁵⁵ The court concluded that this information was significant because it suggested that the dam, as designed, might not withstand such seismic activity.⁵⁶ The court, however, questioned the accuracy of the newly acquired information, which also failed to supply data indicating the strength of potential earthquakes.⁵⁷ The court determined that the Corps' decision not to supplement the EIS in light of this information was unreasonable at the time.⁵⁸ However, the Ninth Circuit concluded that the Corps' failure was cured by studies undertaken subsequent to trial which reaffirmed the seismic data presented in the EIS.⁵⁹ On the basis of this, most recent information, the Corps' decision not to supplement the EIS to address the information at issue in this case was deemed reasonable.⁶⁰

D. REQUIREMENT OF WORST CASE ANALYSIS

CEQ regulations in effect during the planning stages of the Elk Creek Dam required that when an agency was uncertain or lacked information as to the adverse environmental effects of its actions, it must make clear, in the EIS, that such uncertainty existed.⁶¹ If information is lacking that is essential to a reasoned choice and the cost of obtaining it is not exorbitant, the agency must obtain the information and include it in the statement or include a worst case analysis.⁶²

In *Sierra Club v. Sigler*,⁶³ the Fifth Circuit interpreted the CEQ's worst case requirement in a case where the Corps proposed the construction of oil pipelines and a tanker superport in

54. *Id.* at 1023.

55. *Id.*

56. *Id.* at 1025.

57. *Id.* The court considered the new information more significant for the questions it raised rather than the answers it provided. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1026.

61. 40 C.F.R. § 1502.22 (subsequently amended April 25, 1986).

62. *Id.*

63. 695 F.2d 957 (5th Cir. 1983).

Galveston Bay.⁶⁴ The plaintiffs contended that the EIS was inadequate since it did not include a worst case analysis of a catastrophic oil spill.⁶⁵ The Fifth Circuit reasoned that the purpose of the worst case requirement is to disclose to the decision-makers all known potential environmental consequences of an agency action.⁶⁶ The court held that the EIS must analyze the probability of such a spill, rejecting the Corps' arguments that such a scenario was unreasonably speculative.⁶⁷

In *Save Our Ecosystems v. Clark*,⁶⁸ the Ninth Circuit held that the Bureau of Land Management's (BLM) worst case analysis for its herbicide spraying program was inadequate.⁶⁹ The court noted that the CEQ's worst case requirement was not new, but rather a codification of prior case law which required analysis of the costs of proceeding with a project absent relevant information.⁷⁰ Furthermore, the court reaffirmed the principle that when a project's environmental consequences are uncertain, disclosure of such uncertainty is insufficient.⁷¹ The court held that an analysis of the spectrum of possible events, including the worst case situation that cancer could be spread by implementation of its spraying program, was required.⁷²

E. CUMULATIVE IMPACT REQUIREMENT

To further NEPA's objectives of promoting informed deci-

64. *Id.* at 968-75.

65. *Id.* at 968.

66. *Id.* at 973.

67. *Id.* at 974-75.

68. 747 F.2d 1240 (9th Cir. 1984).

69. *Id.* at 1245-46.

70. *Id.* at 1244 (citing *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1478 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984)). *See also* 40 C.F.R. § 1508.27(b)(5) (1986) (requiring a similar analysis when a project's environmental risks are uncertain).

71. *Save Our Ecosystems*, 747 F.2d at 1244.

72. *Id.* at 1244-45. The court rejected the BLM's argument that a worst case analysis was not required where the occurrence of such an event was not supported by scientific data. *Id.* *See also* *Southern Oregon Citizens*, 720 F.2d at 1479 (worst case analysis requirement applied to Bureau of Land Management's proposed insect spraying program despite bureau's contention that a worst case event was improbable). *But see* *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 495-96 (9th Cir. 1987) (agency's use of worst case analysis in EIS for gypsy moth eradication project upheld despite agency's failure to explicitly show cost of further study exorbitant). *See generally* F. SKILLERN, *supra* note 25, § 2.50A; D. MANDELKER, *supra* note 25, § 10:17.

sion-making and public awareness of proposed federal actions, CEQ regulations require EIS discussion of the cumulative impact of its proposed actions.⁷³ “‘Cumulative impact’ is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions”⁷⁴

In *Kleppe v. Sierra Club*,⁷⁵ the Supreme Court reviewed a District of Columbia Circuit decision ordering the federal government to prepare a comprehensive EIS analyzing coal development in the northern Great Plains region of the United States prior to approving specific development permits.⁷⁶ In reversing the circuit court, the Supreme Court held that analysis of the cumulative impact of regional development under consideration, was not required, unless such agency action was formally proposed.⁷⁷ However, the Court also noted that an agency could approve one project in an area where other projects are contemplated, and then take into consideration the environmental effects of the existing project when preparing a statement on the cumulative impact of the remaining proposals.⁷⁸

In *Thomas v. Peterson*,⁷⁹ the Ninth Circuit reviewed challenges to the United States Forest Service’s (Service) approval of timber harvesting and timber road construction in Idaho’s national forests.⁸⁰ The plaintiffs claimed that the Service violated NEPA by failing to issue an EIS addressing the cumulative environmental impact of the road construction together with the planned timber harvest.⁸¹ The court explained that since the

73. See 40 C.F.R. § 1502.16 (1986) (specifying certain topics to be addressed in an EIS, including a project’s direct and indirect environmental effects).

74. 40 C.F.R. § 1508.7 (1986).

75. 427 U.S. 390 (1976).

76. *Id.* at 408.

77. *Id.* at 414-15.

78. *Id.* at 414 n.26. See also *Fritiofson v. Alexander*, 772 F.2d 1225, 1247 (5th Cir. 1985) (Corps of Engineers’ assessment of cumulative impact of proposed housing development on fragile wetlands held inadequate since it failed to address numerous actions affecting the same area); and *Prince George’s County v. Holloway*, 404 F. Supp. 1181, 1186 (D.D.C. 1975), discussed *supra* note 39, (EIS prepared for transfer of naval oceanographic program was held inadequate for failure to address cumulative impact of planned transfer of army and NASA personnel to same location). See generally F. SKILLERN, *supra* note 25, § 2.35; D. MANDELKER, *supra* note 25, § 10:37.

79. 753 F.2d 754 (9th Cir. 1985).

80. *Id.* at 756.

81. *Id.* at 757.

timber sales could not take place without the road construction, and the roads would not be necessary but for the timber sales, the projects were "connected actions" for purposes of the CEQ regulations.⁸² The court found that these actions were being planned contemporaneously and that together, they would significantly impact Salmon River trout and salmon populations as well as the habitat of the endangered Rocky Mountain Gray Wolf.⁸³ Due to the interdependency of these actions, and the extent of their combined environmental effects, the Ninth Circuit held that the Service must prepare an EIS addressing these issues.⁸⁴

IV. THE COURT'S ANALYSIS

A. MAJORITY

Oregon Natural Resources Council v. Marsh involved alleged violations of NEPA and related CEQ regulations regarding the adequacy of the Corps' final EIS for the proposed Elk Creek Dam. The court began its analysis by declaring its duty to apply a standard of reasonableness to agency decisions.⁸⁵

1. *Adequacy of the Mitigation Plan*

The plaintiffs first argued that the mitigation plan for wildlife violated NEPA and CEQ guidelines because the EIS failed to specifically analyze or evaluate the measures submitted.⁸⁶ The court evaluated the Corps' mitigation plan in light of its function to enable informed judgments by decision-makers, and full disclosure of the environmental impact of a project.⁸⁷

The court emphasized that by January 1986, the mitigation plan for wildlife, published in 1980, had not yet been finalized.⁸⁸ The plan stated that measures to compensate for loss of wildlife

82. 40 C.F.R. § 1508.25(a)(1) (1986).

83. *Id.* at 759-60.

84. *Id.* at 761.

85. *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051, 1054 (9th Cir. 1987). See *supra* notes 28-34 and accompanying text.

86. *Id.* at 1055.

87. *Id.* See *supra* notes 35-43 and accompanying text.

88. *Id.*

habitat would be developed, and would consist of management of selected lands to improve the quality of wildlife habitat.⁸⁹ The court declared that this failure to complete the mitigation plan rendered its analysis or evaluation by decision-makers impossible.⁹⁰ Furthermore, the court considered that the plan's use of general phrases such as "habitat manipulative techniques," and "habitat development measures," was inadequate without specification of the techniques contemplated.⁹¹ In addition, the EIS failed to analyze and evaluate the effectiveness of the measures presented.⁹² Based on these deficiencies, the court agreed with plaintiffs' contentions and held that the mitigation plan violated NEPA's requirements.⁹³

2. *Duty to Supplement the EIS*

The next issue concerned whether the Corps' failure to supplement its EIS after obtaining new information regarding the project's environmental effects, violated NEPA.⁹⁴ The Ninth Circuit reiterated the applicable standard, to uphold such agency decisions if reasonable,⁹⁵ and proceeded to apply the *Stop H-3 Association v. Dole* four-factor analysis.⁹⁶

Two studies completed subsequent to the Corps' 1980 supplemental EIS presented new information relevant to the environmental impact of the proposed Elk Creek Dam.⁹⁷ The Oregon Department of Fish and Wildlife (Department), in its study completed August 1985, found "that the project could result in decreased survivability of chinook salmon,⁹⁸ higher turbidity,⁹⁹

89. *Id.* Mitigation measures were to be developed subsequent to studies undertaken at nearby Applegate River Dam. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* The court also concluded that the Corps' mitigation plan failed to satisfy CEQ guidelines. *Id.*

94. *Marsh*, 820 F.2d at 1056.

95. *Id.* See *supra* notes 44-60 and accompanying text.

96. *Id.* (citing *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1463-64 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985)). Applying the *Stop H-3* test, the court recognized that these factors were neither mandatory nor exclusive. *Id.* at 1056 n.3, (citing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980)).

97. *Marsh*, 820 F.2d at 1056. These studies criticized the Corps' conclusions in several respects. *Id.* at 1056-57. See *infra* notes 98-102 and accompanying text.

98. *Id.* at 1056. Based on observations of the impact of nearby Lost Creek Dam,

increased disease potential in fish,¹⁰⁰ and decreased prospects for lure- and fly-fishing.”¹⁰¹ The United States Soil Conservation Service study disclosed significant new turbidity information corroborating the Department study.¹⁰²

Conceding that these findings were not conclusive,¹⁰³ the court was convinced that these studies presented legitimate environmental concerns regarding decreased fish survivability and increased downstream turbidity not previously available; and was therefore environmentally significant under *Stop H-3*.¹⁰⁴

Continuing with the *Stop H-3* approach, the court applied the second factor regarding the probable accuracy of the information obtained, and concluded that, at a minimum, some of this recently acquired information was “probably accurate.”¹⁰⁵ The court pointed out that although independent experts were critical of many of the Department’s conclusions, there was agreement on significant portions.¹⁰⁶

In addition, the Corps did not respond to significant concerns presented by the studies such as increased turbidity caused by project related roadbuilding in the Elk Creek watershed.¹⁰⁷ Accordingly, the court concluded that the Corps failed to exercise the proper level of care required under the third *Stop*

Department scientists believed that similar circumstances could result from construction and operation of Elk Creek Dam. *Id.* at 1056-57. Increased water temperatures caused by the release of warmer water could cause decreased survival of chinook salmon. *Id.*

99. *Id.* at 1056. Department scientists believed that logging and road building associated with the project would result in higher turbidity. *Id.* at 1056-57.

100. *Id.* at 1056. Although chinook salmon mortality rates have decreased to near zero, Department scientists believe there may be a connection between water flow controls and increased fish disease. *Id.*

101. *Id.* at 1056. Higher water flows in the Rogue could decrease fishing prospects. *Id.* at 1057. Furthermore, reduction of the Department’s budget by the Corps made additional study impossible. *Id.* at 1057.

102. *Id.* Soil content in the Elk Creek watershed was found to be different than that stated in the EIS, having a substantially greater turbidity potential. *Id.*

103. *Id.* Department scientists recommended further study of fish survivability and turbidity before the dam is built. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* Based on a review of the experts’ testimony and data, the court believed that at least some of this information was “probably accurate.” *Id.*

107. *Id.* at 1057-58. Further, the Corps failed to respond to study conclusions regarding fish mortality due to disease, and to increased erosion potential. *Id.*

*H-3 factor.*¹⁰⁸

Under the fourth *Stop H-3* factor, the court determined that the Corps neglected to support its decision not to supplement its EIS.¹⁰⁹ In the court's view, since this new information raised legitimate environmental concerns, the Corps should have considered the information and at least presented additional support as to why supplementation was not required.¹¹⁰ For these reasons, the majority held that the Corps must prepare a supplemental EIS to address the environmental impact of this new information.¹¹¹

3. *Worst Case Requirement*

The Ninth Circuit considered plaintiffs' contention that the Corps failed to satisfy the CEQ's "worst case" regulation.¹¹² They argued that the EIS revealed uncertainty regarding the amount of water flow Elk Creek contributed to the Rogue, directly affecting turbidity levels.¹¹³ Therefore, plaintiffs claimed that NEPA required further study on this issue or a worst case analysis to indicate the extent that turbidity resulting from Elk Creek dam would affect the Rogue.¹¹⁴

The court noted that the Corps, in its supplemental EIS, acknowledged its uncertainty regarding Elk Creek's contribution to total water flow in the Rogue.¹¹⁵ However, the Ninth Circuit rejected the district court's finding that disclosure of uncertainty in the EIS satisfied the worst case requirement.¹¹⁶ The court held that the Corps must do further research on the question of

108. *Id.*

109. *Id.*

110. *Id.* When the Corps learned that the soil in the Elk Creek watershed contained sedimentation levels in excess of that reported in the EIS, it chose not to respond. *Id.* at 1058.

111. *Id.* U.S. Fish and Wildlife Service officials believed that a new supplemental EIS should be prepared, based on possible decreased water storage needs. *Id.* at 1058 n.7.

112. *Id.* at 1058.

113. *Id.* at 1057-58. Water flow levels also affect fishing prospects. *Id.* at 1057, 1060.

114. *Id.* at 1058-59. *See supra* notes 61-72 and accompanying text.

115. *Id.* The Corps asserted that Elk Creek Dam would have little effect on temperature and turbidity on the Rogue. *Id.* However, in response to Oregon Department of Fish and Wildlife criticism, the Corps conceded that Elk Creek could contribute up to 25% of waterflow. *Id.*

116. *Id.* at 1059.

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water flow contribution from Elk Creek or prepare a worst case analysis.¹¹⁷ The majority¹¹⁸ added that the Corps' worst case responsibility also applied to the subsequently acquired information which it must now address.¹¹⁹

4. *Cumulative Impact Requirement*

The Ninth Circuit considered plaintiffs' contention that the Corps unreasonably limited the scope of the EIS by failing to consider the cumulative effects of the three dam projects comprising the Rogue River Basin Project.¹²⁰ Section 1508.7 of the CEQ guidelines requires the Corps to evaluate the incremental impact of its project in light of other past, present, and reasonably foreseeable actions.¹²¹

While the court rejected plaintiffs' contention that a separate EIS was required for the entire project,¹²² the court was persuaded that the Corps did not take a "hard look" at the cumulative impact of the three dam project.¹²³ In its final supplemental EIS, the Corps admitted that turbidity in the Rogue would increase as a result of the entire basin project.¹²⁴ However, in concluding that fish production would not be significantly affected by this increased turbidity, the Corps considered only the turbidity created by the Elk Creek Dam project.¹²⁵ Furthermore, in response to a United States Environmental Protection Agency comment, the Corps declared that the Elk Creek EIS was not the proper place to discuss the effects on downstream water quality of Lost Creek Dam.¹²⁶ The court disagreed

117. *Id.* (citing *Oregon Envtl Council v. Kunzman*, 817 F.2d 484, 495 (9th Cir. 1987)).

118. Judge Wallace dissented from this portion of the worst case decision. *Marsh*, 820 F.2d at 1062 (Wallace, J., concurring in part, dissenting in part).

119. *Id.* at 1059.

120. *Id.* See *supra* notes 7-10 and accompanying text.

121. 40 C.F.R. § 1508.7 (1986). See *supra* notes 73-84 and accompanying text.

122. *Marsh*, 820 F.2d at 1059. The plaintiffs argued that 40 C.F.R. § 1508.25(a)(2) requires the three dam project be evaluated in a single EIS because they are part of a connected plan. *Id.* The court, however, found that the requirement of a single EIS applied only to "proposed actions." *Id.* Here, the other two dams were already in place. See *supra* text accompanying notes 9-10.

123. *Marsh*, 820 F.2d at 1059-60.

124. *Id.* at 1060.

125. *Id.*

126. *Id.*

with this stance to the extent that a discussion of the effects of Lost Creek Dam were necessary to indicate the cumulative impact resulting from the Elk Creek project.¹²⁷ Accordingly, the Ninth Circuit held that the Corps failed to adequately consider the cumulative impact of the Elk Creek project in conjunction with the two already completed dams; and that this inquiry should take place before proceeding with construction of the last dam.¹²⁸

B. DISSENT

Judge Wallace dissented from the portion of the majority opinion requiring the Corps to issue a new supplementary EIS.¹²⁹ The dissent applied the *Stop H-3* four-factor analysis to evaluate the reasonableness of the Corps' decision not to supplement the EIS.¹³⁰

Judge Wallace first analyzed the Oregon Department of Fish and Wildlife's (Department) conclusions regarding the environmental impact of the project.¹³¹ Two independent experts, selected by the Corps, reviewed the Department's study, as well as Corps experts.¹³² These authorities conceded that while some Department conclusions were valid, many were unreliable due to flawed methodology, statistical inaccuracy or "undue biological speculation."¹³³ Relying on these comments and statements by the Department's program leader conceding some possible inaccuracies, Judge Wallace argued that the Department's study was of dubious accuracy and therefore not significant under the first *Stop H-3* factor.¹³⁴

Applying the third and fourth *Stop H-3* factors, Judge Wallace argued that the Corps exercised a high degree of care in

127. *Id.* "[T]he Corps [must] consider cumulative impacts of the proposed actions which supplement or aggravate the impacts of past, present, and reasonably foreseeable actions." *Id.* at 1059.

128. *Id.* at 1060.

129. *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051, 1062 (9th Cir. 1987) (Wallace, J., concurring in part, dissenting in part).

130. *Id.* See *supra* notes 47-49 and accompanying text.

131. *Id.* at 1062-64. See *supra* notes 98-101 and accompanying text.

132. *Id.* at 1062-63.

133. *Id.*

134. *Id.*

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evaluating this information and had sufficiently supported its decision not to supplement the EIS by communicating a formal response to the Department.¹³⁵ For these reasons Judge Wallace concluded that the Corps' decision not to supplement the EIS was reasonable.¹³⁶

Judge Wallace scrutinized the United States Soil Conservation Service's (Service) report suggesting increased turbidity in the Rogue resulting from construction of the dam.¹³⁷ The Service found sedimentation levels in the Elk Creek area in excess of those reported in the EIS.¹³⁸ Though Judge Wallace considered this information accurate, he concluded it was not sufficiently significant to require supplementation of the EIS.¹³⁹

Since the Corps could reasonably conclude that the Service's concerns were not significant, minimal additional analysis would satisfy the Corps' obligation under the third *Stop H-3* factor.¹⁴⁰ Judge Wallace noted that the Corps never specifically supported its decision not to supplement the EIS to address the Service's data, the fourth *Stop H-3* factor.¹⁴¹ However, in consideration of all the factors, the Judge concluded that the majority's decision requiring the issuance of a new supplemental EIS addressing the Service's study was unreasonable.¹⁴² The court's function is not to determine the scientific validity of the Corps' assessments of this new information, but to determine whether the Corps responded reasonably to the concerns raised.¹⁴³

135. *Id.* at 1064. The dissent considered that the Corps' review of the Department study by its own and independent specialists satisfied the third *Stop H-3* factor regarding the level of care exercised by an agency in response to newly acquired information. *Id.* Furthermore, the dissent considered the Corps' formal response directed to one of the Department's three main concerns as sufficient to satisfy its obligation to support its decision under the fourth *Stop H-3* factor. *Id.*

136. *Marsh*, 820 F.2d at 1064 (Wallace, J., concurring in part, dissenting in part).

137. *Id.*

138. *Id.*

139. *Id.* at 1064-65. Judge Wallace pointed to considerable evidence indicating the lack of a direct relationship between soil type and turbidity. *Id.* at 1064. *See supra* note 102 and accompanying text.

140. *Id.* at 1064-65. Though the Corps undertook no further studies in response to the Service's report, the dissent argued that the Corps had good reason to conclude that the Service's conclusions were unfounded. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1065.

V. CRITIQUE

In *Oregon Natural Resources Council v. Marsh*, the Ninth Circuit appropriately concluded that the Corps' Elk Creek Dam EIS violated the National Environmental Policy Act.¹⁴⁴ With each issue, the court analyzed the sufficiency of the Corps' presentation mindful of the EIS's purpose: to promote informed decision-making and informed public participation.¹⁴⁵ By remanding this case to the district court for appropriate injunctive relief, the Ninth Circuit took a firm step towards assuring that the full extent of Elk Creek Dam's environmental impact will be assessed before construction can resume.¹⁴⁶

The Ninth Circuit had little difficulty concluding that the mitigation measures submitted violated NEPA.¹⁴⁷ The EIS's summary statement of nondescript mitigation measures simply failed to fulfill the Corps' obligation to provide a coherent and effective mitigation plan.¹⁴⁸

Marsh, in harmony with cases reviewing comparable deficiencies, recognized that the Corps' mitigation plan failed to fulfill its purpose.¹⁴⁹ For example, in *Northwest Indian Cemetery Protective Association v. Peterson*,¹⁵⁰ the Ninth Circuit rejected a Forest Service mitigation plan which merely listed mitigation measures without an evaluation of their effectiveness.¹⁵¹ Similarly, in *Prince George's County, Md. v. Holloway*,¹⁵² the court rejected an EIS which failed to address measures to mitigate the impact of an influx of military personnel into the community.¹⁵³

In *Marsh*, because the mitigation measures offered were so

144. *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051, 1061-62 (9th Cir. 1987).

145. *Marsh*, 820 F.2d at 1054. See *supra* text accompanying notes 26-27.

146. *Id.* at 1062.

147. *Id.* at 1055. See *supra* notes 86-93 and accompanying text.

148. *Marsh*, 820 F.2d at 1055. See *supra* notes 35-36 and accompanying text.

149. *Id.* A mitigation plan presented without evaluation of its effectiveness does not promote informed decision-making. *Id.*

150. 764 F.2d 581 (9th Cir. 1985), *vacated in part on rehearing on other grounds*, 795 F.2d 688 (9th Cir. 1986), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 107 S. Ct. 1971 (1987); see *supra* notes 37-39 and accompanying text.

151. *Id.* at 588.

152. 404 F. Supp. 1181 (D.D.C. 1975), discussed *supra* note 39.

153. *Id.* at 1186-87.

vague and undeveloped, evaluation of their effectiveness was impossible; and therefore, a violation of NEPA's procedural requirements.¹⁵⁴ By rejecting the Corps' minimal effort, *Marsh*, like *Northwest Indian* and *Prince George's County*, reaffirmed the principle that a complete mitigation plan is a critical factor in judging the environmental impact of an agency's actions.¹⁵⁵

Furthermore, little fault can be found with the court's conclusion that the EIS inadequately treated areas of uncertain environmental impact.¹⁵⁶ Here, the Corps' own data indicated uncertainty regarding Elk Creek's water flow contribution to the Rogue, a key factor affecting turbidity levels.¹⁵⁷ The requirement of a worst case analysis is necessary where, as in the present case, the extent of damage to the ecosystem is undetermined due to gaps in relevant data.¹⁵⁸ In *Sierra Club v. Sigler*,¹⁵⁹ the Fifth Circuit required analysis of the effects of a hypothetical massive oil spill in order to fully disclose the possible environmental costs of a planned oil superport.¹⁶⁰ As in *Sigler*, if decision-makers and the public are to be fully informed of a project's impact, the full range of its environmental costs must be addressed.¹⁶¹

In addition, the court properly held that the Corps violated NEPA's cumulative impact requirement.¹⁶² In *Thomas v. Peterson*,¹⁶³ the Ninth Circuit struck down the Forest Service's approval of a timber harvesting project and related road construction, where the Service did not evaluate the combined environmental impact of the projects.¹⁶⁴ In *Marsh*, the EIS stated that fish production from increased turbidity would not be adversely affected.¹⁶⁵ However, this conclusion was reached by consideration of the turbidity resulting from the Elk Creek

154. *Marsh*, 820 F.2d at 1055.

155. *Id.*

156. *Id.* at 1059.

157. *Id.* See *supra* notes 115-19 and accompanying text.

158. *Marsh*, 820 F.2d at 1059.

159. 695 F.2d 957 (5th Cir. 1983), discussed *supra* notes 63-67.

160. *Id.* at 974-75.

161. See *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244-45 (9th Cir. 1984), discussed *supra* note 68-72, where the BLM was required to analyze, in the EIS, the possibility that its herbicide spraying program might cause the spread of cancer.

162. *Marsh*, 820 F.2d at 1060.

163. 753 F.2d 754 (9th Cir. 1985), discussed *supra* notes 79-84.

164. *Id.* at 761.

165. *Marsh*, 820 F.2d at 1060.

project alone, disregarding the impact of the two other dams in the Rogue Basin Project.¹⁶⁶ An EIS like the one in *Marsh* or in *Thomas*, which overlooks a project's actual environmental effects by considering it apart from existing conditions is incomplete, and serves to mislead rather than inform those who rely on it.¹⁶⁷

While these aspects of the present decision are important, *Marsh's* true significance is revealed in the court's analysis of the Corps' duty to supplement the EIS. In rejecting the Corps' decision not to supplement the EIS, the Ninth Circuit closely scrutinized the Corps' conduct under a reasonableness standard.¹⁶⁸

The Ninth Circuit concluded that the information acquired by the Oregon Department of Fish and Wildlife and the United States Soil Conservation Service was environmentally significant, despite strong disagreement by Corps experts.¹⁶⁹ Second, despite similar opposition, the majority determined that "some" of this information was probably accurate.¹⁷⁰ Third, even though Corps experts reviewed much of this information, the court held that the Corps failed to adequately respond to it.¹⁷¹ Finally, the court concluded that the Corps did not offer any explanation or additional data to support its decision not to supplement its EIS, despite the Corps' position that this information did not merit formal response.¹⁷²

Faced with this dispute among experts regarding the significance and accuracy of this new information, many courts would have upheld the Corps' decision as reasonable.¹⁷³ For example, in *Township of Springfield v. Lewis*,¹⁷⁴ the Third Circuit upheld an agency decision to include new environmental information in

166. *Id.*

167. *Id.*

168. *Marsh*, 820 F.2d at 1056-58. The court applied a four-factor analysis citing *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1464 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

169. *Marsh*, 820 F.2d at 1057. *See supra* notes 97-106 & 132-33.

170. *Id.*

171. *Id.* at 1057-58.

172. *Id.*

173. *See, e.g., Marsh*, 820 F.2d at 1062 (Wallace, J., concurring in part, dissenting in part), *supra* notes 129-143 and accompanying text.

174. 702 F.2d 426 (3rd Cir. 1983), discussed *supra* notes 28 & 46.

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its EIS *after* it had been circulated.¹⁷⁵ The Third Circuit's validation of an agency's supplementation of significant information to an EIS *after* circulation directly contradicts the purpose of the EIS: to promote informed decision-making.¹⁷⁶ In *Wisconsin v. Weinberger*,¹⁷⁷ the Seventh Circuit extended itself in upholding an agency's decision by treating a Navy decision not to supplement its EIS, as a decision not to issue an EIS.¹⁷⁸ This technique allowed the court to apply a much less rigorous review of the Navy's actions, so that reversal would be virtually impossible.

Marsh's significance lies in the majority's willingness to undertake a probing and in-depth review of the circumstances surrounding the Corps' decisions, rather than to defer to the agency's expertise.¹⁷⁹ Disagreement among experts frequently occurs. Where, as here, legitimate concerns are raised regarding a project's environmental consequences, the Ninth Circuit properly concluded that this information should have been addressed in the EIS.¹⁸⁰ This result is further justified by the substantial environmental damage that the Elk Creek Project would cause: the irretrievable destruction of prime wilderness areas in the upper Rogue Valley, as well as irretrievable losses to fish and wildlife habitat.¹⁸¹

The immediate impact of the Ninth Circuit's decision is to suspend construction of the project.¹⁸² Compliance with the court's decision forces the Corps to evaluate new information relevant to Elk Creek's environmental impact, and to compare it with its own conclusions.¹⁸³ This will increase project costs. In addition to the possibility that this process might reveal errors

175. *Id.* at 439.

176. *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985), discussed *supra* note 26.

177. 745 F.2d 412 (7th Cir. 1984), *see supra* note 46.

178. *Id.* at 417.

179. Despite the United States Supreme Court's advocacy of "substantial inquiry" of an agency's decisions by a reviewing court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), many courts are satisfied if the agency demonstrates that it took a "hard look" at the project's environmental consequences. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); discussed *supra* note 27.

180. *Marsh*, 820 F.2d at 1057.

181. *Id.* at 1059, *see supra* note 11.

182. *Id.* at 1060.

183. *Id.* at 1061-62.

or inconsistencies in the Corps' position, project opponents gain time to gather political strength, information and influence.¹⁸⁴ Furthermore, as time passes and costs increase, assumptions relating to the project's benefits may no longer remain valid. These factors could conceivably result in cancellation of a controversial project such as Elk Creek Dam.

In cases such as *Marsh*, abandonment of the project is appropriate since its environmental costs far outweigh the benefits to be gained by the addition of a third dam in the Rogue watershed.¹⁸⁵ Substantial evidence indicates that the key factor propelling the Elk Creek project was a Congressional intent to channel federal largesse back to the constituency, rather than to realize any significant benefit to flood control.¹⁸⁶

Regarding the prospective impact of the present case, *Marsh* serves as a signal to government agencies that the Ninth Circuit will not tolerate half-hearted efforts in the evaluation of the environmental effects of agency actions. *Marsh* indicates that the courts will take a "hard look" at agency decisions to assure that NEPA's objectives of fostering informed decision-making and public access to relevant information are satisfied.

Agency generation of voluminous data will not guarantee acceptance of its decisions if responsible opposing opinions are ignored or required analyses are glossed over. *Marsh* stands for the proposition that the courts will accept a significant role, under NEPA, in ensuring that all the potential environmental costs of agency actions be disclosed prior to proceeding.

Unfortunately, as indicated by many of the cases surveyed above, courts frequently defer to agency decisions in challenges

184. See MURCHISON, *supra* note 21, at 611-13 (the information and time gained as a result of NEPA procedural requirements may aid in influencing an agency to abandon its proposal).

185. See Oregon Natural Resources Council, White Paper (August 23, 1987) (presenting evidence of severe environmental effects of the project, and General Accounting Office (GAO) challenges to claimed benefits of the project). *Id.* at 5-6. Furthermore, the U.S. Fish and Wildlife Service questioned whether prior forecasts of water storage needs supporting the project were still accurate. *Marsh*, 820 F.2d at 1058 n.7; see *supra* note 111.

186. *Id.* at 7-8. The White Paper surveys the political history of the Elk Creek Project and points out the Corps' prior opposition. *Id.*

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to the sufficiency of an EIS.¹⁸⁷ CEQ guidelines however, as utilized in *Marsh*, provide important support for the requirement of full environmental disclosure. Nevertheless, the essential solution to the environmental issues presented in *Marsh* require further legislation at the federal level to prevent the needless destruction of our natural resources. Congress must recognize that retention of rapidly disappearing wilderness areas and wildlife habitat require preference in the evaluation of whether to proceed with planned development. However, as long as projects like Elk Creek provide a popular device to channel federal funds back to one's constituency, those interested in protecting the environment can not hope for significant Congressional action in the near future.

VI. CONCLUSION

Marsh is a victory for those who seek to limit the development and destruction of our natural resources. However, since this victory may only result in the *temporary* postponement of the Elk Creek project, it should not cause euphoria. While *Marsh* demonstrates that the courts will support the policies underlying the National Environmental Policy Act, only by further legislation insuring preference to environmental concerns can our natural resources be adequately protected from unnecessary development.

James J. Wesser*

187. See e.g., *Enos v. Marsh*, 769 F.2d 1363 (9th Cir. 1985), *supra* notes 29-34 and accompanying text; *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985), *supra* notes 47-52 and accompanying text; *Druid Hills Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700 (11th Cir. 1985), *supra* note 28; *Township of Springfield v. Lewis*, 702 F.2d 426 (3rd Cir. 1983), *supra* note 28; *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984), *supra* note 46.

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