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ENVIRONMENTAL LAW

During the survey period the major cases dealing with environmental law arose under one or both of two environmental statutes. This Article will first discuss the cases which arose under the National Environmental Policy Act of 1969.[1] The second section of the Article will survey the cases decided under the Federal Water Pollution Control Act Amendments of 1972.[2]

I. NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of the National Environmental Policy Act of 1969 (NEPA)[3] was to declare a national environmental policy and to establish the Council on Environmental Quality.[4] This Act requires federal agencies to consider and respect environmental issues and prescribes the procedures that must be followed by the agencies in order to assure full environmental consideration.[5] The most significant requirement contained in the Act is that federal agencies prepare environmental impact statements (EIS) whenever major federal actions significantly affecting the quality of the human environment are proposed.[6]

The role of a court in reviewing the EIS is strictly limited. Once an agency has made a decision subject to NEPA's procedural requirements, the court is only to ensure that the agency has con-

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1. 42 U.S.C. §§ 4321-4361 (1976).
2. 33 U.S.C. §§ 1251-1376 (1976).
3. 42 U.S.C. §§ 4321-4361 (1976).
4. *Id.* § 4321.
5. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).
6. 42 U.S.C. § 4332 (1976). The contents of the EIS are to include a discussion of the following:

> (i) [T]he 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.

Id. § 4332(2)(C)(i)-(v).

sidered the environmental consequences.[7] The court must determine whether the environmental group has established by a preponderance of the evidence that the EIS was inadequate.[8] In 1978 the Fifth Circuit set forth three criteria for determining the adequacy of an EIS: (1) Whether the agency in good faith has objectively taken a hard look at the environmental consequences of a proposed action and alternatives to that action; (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and (3) whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action.[9] In reaching its decisions, the court applied these criteria liberally and upheld every EIS that it considered.

A. *Adequacy of the EIS*

The first case of the survey period dealing with the adequacy of an EIS was *South Louisiana Environmental Council, Inc. v. Sand.*[10] An environmental group sought injunctive relief against the United States Army Corps of Engineers (Corps) to halt construction on a navigation project in Louisiana. The Corps had prepared an EIS and a supplement to the EIS, but the plaintiffs alleged that the Corps had given a distorted assessment of economic benefits and environmental costs. The economic benefits were allegedly overstated because of the inclusion of invalid hurricane refuge and flood control benefits and the miscalculation of other navigation benefits. The costs of the project were underestimated, according to plaintiffs, because of the Corps' failure to consider increased costs in view of a levee-extension-flood-control proposal. Plaintiffs claimed further that the Corps had underestimated costs by "fail[ing] to consider adequately the project's water quality im-

7. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam).

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

9. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573, 575 (5th Cir. 1978).

10. 629 F.2d 1005 (5th Cir. Oct. 1980). The plaintiffs also contended that the Corps of Engineers' approval of the project was invalid under a provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1976). This issue is discussed in part II of this Survey, notes 76-78 *infra*, and accompanying text.

pacts, impacts of economic and population growth in the project area, impacts on land loss, and alternatives to the project."[11]

In order to determine whether the Corps had taken a "hard look" at these environmental impacts, the court also had to decide whether the economic factors against which the environmental considerations were weighed were so distorted that fair judgment was impaired. After reviewing each of the challenged economic benefits, the Fifth Circuit concluded that the Corps had indeed taken the required "hard look" at the environmental consequences of the project.[12] The court refused to inspect the Corps' economic-benefit analysis as closely as the plaintiffs had requested, because such projects have very long gestation periods and economic realities change.[13] The court stated that once the decision has been made to proceed with a project, the court will not substitute its judgment for that of Congress and the Corps unless the decision was arbitrary and capricious.[14]

In *Citizens for Mass Transit, Inc. v. Adams*,[15] the court upheld another environmental impact statement attacked by citizens' groups. In this case the project was a proposed bridge across the Mississippi River near New Orleans, and the agency involved was the United States Coast Guard. The citizens' groups contended that the EIS analysis was insufficiently detailed and that the combination of alleged misstatements and inadequacies in the EIS presented a pattern of bad faith on the part of the Coast Guard.[16] Not only did the court consider the analysis to have been made in good faith, but it also found the report careful and detailed.[17] The Fifth Circuit thus affirmed the district court's summary judgment for the defendant Coast Guard.

The environmentalists lost again in *Sierra Club v. Hassell*,[18] a case in which the federal agencies prepared no EIS at all. The agencies involved, the Federal Highway Administration (FHWA) and the Coast Guard, determined that an EIS was not required because the project was not a major action having a significant im-

11. 629 F.2d at 1010.
12. *Id.* at 1012.
13. *Id.* at 1014-15.
14. *Id.* at 1011.
15. 630 F.2d 309 (5th Cir. Nov. 1980).
16. *Id.* at 312-13.
17. *Id.* at 317.
18. 636 F.2d 1095 (5th Cir. Feb. 1981).

pact on the environment.[19] The project was the construction of a bridge between Dauphin Island and the Alabama mainland to replace a bridge destroyed in 1979 by Hurricane Frederic. The FHWA argued that the status quo of the environment was the bridge in place, prior to its destruction; thus, the project to rebuild the bridge would have no significant impact on the environment.[20] The plaintiff environmental groups contended that the status quo was the island after the hurricane, without a bridge.[21] The Fifth Circuit, however, found that the FHWA's conclusions were reasonable and upheld the decision not to prepare an EIS, because rebuilding the bridge would merely restore an environmental situation that had existed for twenty-four years, and the new design of the bridge might even provide some environmental and safety benefits.[22] Thus, the circuit court affirmed the district court's denial of an injunction against the project.[23]

The environmentalists finally avoided a unanimously adverse decision in *Piedmont Heights Civic Club, Inc. v. Moreland*,[24] but the Fifth Circuit still upheld the challenged EIS. The court affirmed the decision of the district court not to grant a preliminary injunction against the construction of several projects to widen interstate highways in and around Atlanta, Georgia.[25] The majority held that the district court did not abuse its discretion in finding that the plaintiffs had not proved likelihood of success on the merits and, thus, were not entitled to injunctive relief.[26]

The environmentalists attacked the EIS on these projects on two primary grounds. First, the plaintiffs argued that the federal agencies involved had failed to comply with the NEPA because the EIS did not consider the Metropolitan Atlanta Rapid Transit Authority (MARTA) rail system as an alternative to the highway ex-

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19. *Id.* at 1097.
20. *Id.* at 1099.
21. *Id.*
22. *Id.*
23. *Id.* at 1101.
24. 637 F.2d 430 (5th Cir. Feb. 1981).
25. *Id.* at 433.
26. *Id.* The four requirements for granting a preliminary injunction are the following: (1) A substantial likelihood exists that plaintiff will prevail on the merits; (2) a substantial threat exists that plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to plaintiff outweighs the threatened harm the injunction may do to the defendant; and (4) granting the preliminary injunction will not disserve the public interest. *Id.* at 435 (citing Canal Auth. v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974)).

pansion projects as required by NEPA.[27] The district judge found that the MARTA alternative had been adequately covered when the EIS discussed the "no action" alternative.[28] The Fifth Circuit held that this finding was not an abuse of discretion, although an explicit discussion of MARTA might have been instructive.[29] It was apparent to the court that the plans for MARTA had been considered from the beginning of the decision-making process.[30] Judge Thomas A. Clark, in dissent, disagreed that consideration of the rapid transit alternative could be inferred from a discussion of the "no-build" alternative.[31]

The other principal ground for the plaintiffs' attack on the EIS was the alleged improper segmentation of the highway projects.[32] As a general rule segmentation of highway projects is improper for purposes of preparing an EIS.[33] There are exceptions to the rule, however, and the court has considered several factors, including the independent utility of the project and the interdependence of several projects.[34] The Fifth Circuit upheld the trial court's finding that each segment of the project could serve its own transportation purpose whether or not the other projects were built.[35] Thus, it was not an abuse of discretion to hold that the plaintiffs had not proved the likelihood of success on the merits of the segmentation issue.[36]

The standard of review for the adequacy of an EIS was demonstrated clearly in *Isle of Hope Historical Association v. United States Army Corps of Engineers.*[37] The Fifth Circuit adopted the trial court's memorandum as its opinion and judged compliance with NEPA by a "rule of reason," but was careful not to place extreme or unrealistic burdens on the agency compiling

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27. 637 F.2d at 435. The applicable section of the NEPA is 42 U.S.C. § 4332(2)(C)(iii) (1976).

28. 637 F.2d at 437.

29. *Id.*

30. *Id.*

31. *Id.* at 444 (dissenting opinion).

32. *Id.* at 439. Segmentation is the preparation of impact statements on several sections of a project rather than preparing only one impact statement for the entire project.

33. *Id.* (citing Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974)).

34. 637 F.2d at 439 (citing Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978)).

35. 637 F.2d at 440-41.

36. *Id.* at 439.

37. 646 F.2d 215 (5th Cir. May 1981).

the EIS.[38] Thus, the environmentalists lost another one.

It is apparent from these cases that the Fifth Circuit is not an environmentalist court. The court upheld every EIS that was attacked by citizens' groups during the survey period, and the court once upheld a decision by a federal agency not to prepare an EIS at all. Obviously, environmentalist groups face a very heavy burden if they are to succeed in stopping a federal project that threatens the environment.

B. *Private Right of Action*

There is no implied right of action under NEPA, according to the Fifth Circuit in *Noe v. Metropolitan Atlanta Rapid Transit Authority*.[39] Mrs. Noe lived and operated a bookstore in an apartment building near a Transit Authority (MARTA) construction site. Because of the physical presence of the construction site and the high noise levels, Mrs. Noe sought injunctive and declaratory relief and money damages.[40] She filed suit in federal court under NEPA, alleging that the defendants were exceeding the noise levels predicted by the EIS.[41]

The issue of an implied private right of action under NEPA was a question of first impression for the Fifth Circuit,[42] but two other circuit courts had considered the issue,[43] and the general question of implied rights of action had been extensively treated by the Supreme Court and the Fifth Circuit.[44] The Fifth Circuit applied the four factors set out by the Supreme Court in *Cort v. Ash*[45] and found that plaintiff had failed to satisfy any of them.

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38. *Id.* at 220 (citing Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975)).

39. 644 F.2d 434 (5th Cir. May 1981).

40. *Id.* at 435.

41. *Id.*

42. *Id.* at 436.

43. *Id.* (citing Mountain Brook Homeowners Ass'n, Inc. v. Adams, 620 F.2d 294 (4th Cir. 1980) (mem.); Blue Ash v. McLucas, 596 F.2d 709 (6th Cir. 1979)).

44. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Cort v. Ash, 422 U.S. 66 (1975); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

45. 422 U.S. 66 (1975). Four questions must be answered: (1) Is the plaintiff a member of the class for whose special benefit the statute was created? (2) Is there any indication of legislative intent either to create or to deny the remedy sought? (3) Is it consistent with the underlying statutory purposes to imply a remedy such as that sought? and (4) Is the cause of action one that is traditionally relegated to state law, so that it would be inappropriate to

Thus, if the plaintiff could not prove her right to prevail under the *Cort* analysis, she certainly could not succeed under the stricter standards of the more recent Supreme Court cases, which focus on legislative intent.[46] The Fifth Circuit found that the congressional intent behind the NEPA did not include the protection of private individuals.[47] The "NEPA does not even require the protection of the environment," according to the court.[48] The NEPA requires only that an EIS be prepared prior to beginning construction of a project likely to affect the environment, in order that the individuals responsible for making the decision to proceed can do so on a well-informed basis.[49] Therefore, the court affirmed the district court's dismissal of Mrs. Noe's suit for want of jurisdiction.

Considering the lack of success that environmentalist groups have had against federal projects, it hardly matters that there is no implied private right of action. Nevertheless, the holding in *Noe* stands as an additional hurdle for the private party seeking to protect the environment.

II. FEDERAL WATER POLLUTION CONTROL ACT

During the survey period, the Fifth Circuit decided a number of cases involving the Federal Water Pollution Control Act Amendments of 1972 (FWPCA).[50] "The objective of [the FWPCA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[51] The Act seeks to regulate the maximum concentration of pollutants in a body of water and the effluents discharged from any particular source. The cases arising under the FWPCA during the survey involved several diverse

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infer a cause of action based solely on federal law? *Id.* at 78.

46. In Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), the Supreme Court found the first two *Cort* factors unsatisfied and, thus, refused to consider the others. Since the latter two factors are generally easier for plaintiff to establish, this holding results in a stricter standard. Later, in Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), the Court based its decision entirely on the second *Cort* factor, legislative intent. The trend has been to restrict those situations in which private rights of action will be implied.

47. 644 F.2d at 438.

48. *Id.*

49. *Id.*

50. 33 U.S.C. §§ 1251-1376 (1976). The Act was significantly amended in 1977, and its popular name was changed to the "Clean Water Act." Clean Water Act of 1977, Pub. L. No. 95-217, §§ 1, 518, 91 Stat. 1566, 1566 (1977) (amending scattered sections of 33 U.S.C.).

51. 33 U.S.C. § 1251(a) (1976).

issues.

A. *"Third Party"*

The FWPCA imposes liability for cleanup costs upon the owner or operator of any vessel from which oil or a hazardous substance is illegally discharged.[52] The owner-operator is provided a defense if he can prove that the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States Government, an act or omission of a third party, or any combination of these causes.[53] Decisions in two of the cases turned upon the court's definition of the term "third party." In *United States v. LeBeouf Brothers Towing Co.*[54] and in *United States v. Hollywood Marine, Inc.*,[55] the Government sought to hold the owner of tanker barges liable for oil spills caused by the tugboats, which were towing the barges. In both cases the trial court held for the defendants on the grounds that the tugboats constituted a "third party" under the FWPCA and, thus, insulated the barge owner from liability.[56] In *LeBeouf* the Fifth Circuit followed the reasoning of the First Circuit, in *Burgess v. M/V Tamano*,[57] and interpreted the term narrowly because "[t]he statute's comprehensive scheme for preventing and cleaning up oil spills would be undermined if barge owners . . . could escape strict liability merely by hiring out their operations to tugs and independent contractors."[58] Consequently, the court held that the tugboat hired by a barge owner is not a "third party" under the FWPCA.[59] In *Hollywood Marine* the court followed *LeBeouf* in summarily reversing the trial court's judgment and remanding the case.[60] These cases should cause barge owners to select their tugs carefully and insure against potential losses.[61]

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52. *Id.* § 1321(f)(1).
53. *Id.*
54. 621 F.2d 787 (5th Cir. July 1980), *cert. denied*, 101 S. Ct. 3031 (1981).
55. 625 F.2d 524 (5th Cir. Aug. 1980) (per curiam), *cert. denied*, 101 S. Ct. 2336 (1981).
56. *Id.* at 524; 621 F.2d at 788.
57. 564 F.2d 964 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978).
58. 621 F.2d at 789.
59. *Id.*
60. 625 F.2d at 524.
61. 621 F.2d at 790.

B. *Exclusive Remedy*

In *United States v. Dixie Carriers, Inc.*,[62] the Fifth Circuit held that the section of the FWPCA which provides a remedy for the government to recover oil spill cleanup costs[63] is an exclusive remedy, and thus, the government is precluded from recovering these costs under other legal theories.[64] The Government sought to recover under the FWPCA, the Refuse Act,[65] and common-law theories of public nuisance and maritime tort for negligence.[66] The trial court and the Fifth Circuit found that since the FWPCA allows the government to recover only a limited amount under strict liability, and to recover an unlimited amount only upon proof of willful discharge, the statutory scheme would be destroyed if the government could recover an unlimited amount under the Refuse Act or common law.[67]

C. *Water Quality Standards*

In *Mississippi Commission on Natural Resources v. Costle*,[68] the issue involved the authority of the Environmental Protection Agency (EPA) to promulgate a water quality standard on dissolved oxygen for the state of Mississippi.[69] Under the FWPCA, water quality standards are first promulgated by the states and then submitted to the EPA for approval.[70] If a state does not set standards consistent with the FWPCA or if the EPA determines that another standard is necessary to meet the requirements of the FWPCA, then the EPA can promulgate new standards.[71] In this case the EPA disapproved Mississippi's standard for dissolved oxygen and adopted a new standard. The Mississippi Commission on Natural Resources filed suit in federal district court seeking injunctive and declaratory relief. The Commission attacked both the disapproval

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62. 627 F.2d 736 (5th Cir. Oct. 1980).
63. 33 U.S.C. § 1321(f)(1) (1976).
64. 627 F.2d at 737.
65. 33 U.S.C. § 407 (1976).
66. 627 F.2d at 737.
67. *Id.* at 741.
68. 625 F.2d 1269 (5th Cir. Sept. 1980). For a more extensive discussion of the rulemaking authority issue in *Costle*, see the survey article on Administrative Law and Procedure, notes 85-96, and accompanying text.
69. *Id.* at 1271.
70. *Id.* at 1272.
71. *Id.* (citing 33 U.S.C. § 1313 (1976)).

of the state standard and the promulgation of the EPA standard, but the trial court refused the injunction.[72] The Fifth Circuit affirmed, upholding the EPA's authority to disapprove state water quality standards that are not consistent with the requirements of the FWPCA.[73] The court further held that the EPA was not arbitrary or capricious in promulgating the new standard, because the standard was reasonable and was set only after consideration of the local situation.[74] Although the EPA failed to promulgate its new criteria within the statutory time limit, no prejudice was shown because the FWPCA imposes no sanction for missing the deadline.[75]

D. *Balancing Test*

South Louisiana Environmental Council, Inc. v. Sand,[76] discussed in the section of this Survey concerning the National Environmental Policy Act, also contained an issue under the FWPCA. The environmentalists contended that the Corps of Engineers' approval of the project was invalid under section 404 of the FWPCA.[77] That section requires that the benefits of the project outweigh the damages to the wetland source. The court held that the Corps of Engineers had made a good-faith effort to satisfy the requirements of section 404 and, thus, had not violated the statute.[78]

E. *Constitutionality*

The FWPCA imposes a civil penalty of up to $5000 for each discharge of oil or hazardous substances in harmful quantities into the navigable waters of the United States.[79] Since it provides no defense, such as those provided against liability for cleanup costs,[80] the statute imposes an absolute-liability standard which obviates the need for a finding of fault. In *United States v. Coastal States*

72. 625 F.2d at 1271.
73. *Id.*
74. *Id.* at 1278.
75. *Id.*
76. 629 F.2d 1005 (5th Cir. Oct. 1980).
77. *Id.* at 1017 (citing 33 U.S.C. § 1344 (1976)).
78. 629 F.2d at 1018.
79. 33 U.S.C. § 1321(b)(6) (Supp. III 1979).
80. *See id.* § 1321(f).

Crude Gathering Co.,[81] the defendant attacked the constitutionality of assessing a civil fine without fault as being violative of the due process clause of the fifth amendment.[82] The Fifth Circuit agreed with the Seventh Circuit's opinion in *United States v. Marathon Pipe Line Co.*[83] and upheld the fine's constitutionality, concluding that the legislative means bore a reasonable relation to a proper legislative purpose and was neither arbitrary nor discriminatory.[84] The purpose of the fine is to place a major part of the financial burden for achieving and maintaining clean water upon those who would profit by the use of the navigable waters and who pollute those waters.[85] The court found "this shifting of the burden from the public to the offending users . . . to be a valid exercise of congressional powers" and affirmed the judgment assessing the fine.[86]

F. *Conclusion*

The Fifth Circuit confronted several diverse issues concerning the FWPCA during the survey period. The term "third party" was narrowly defined so as to exclude tug boats towing oil barges. The court also decided that the section providing a remedy for the government to recover oil spill cleanup costs is the government's exclusive remedy. The court upheld the authority of the EPA to promulgate water quality standards for the states if the states fail to meet FWPCA requirements. Finally, the court decided that the civil penalty for discharge of oil or hazardous substances in harmful quantities did not violate the due process clause of the United States Constitution.

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81. 643 F.2d 1125 (5th Cir. Apr. 1981), *cert. denied*, 102 S. Ct. 136 (1981).

82. *Id.* at 1127. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

83. 589 F.2d 1305, 1309 (7th Cir. 1978).

84. 643 F.2d at 1127-28. These are the criteria established by the Supreme Court in Nebbia v. New York, 291 U.S. 502 (1934).

85. 643 F.2d at 1128.

86. *Id.*