

## NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

An act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes (Act of January 1, 1970, Public Law 91-190, 83 Stat. 852)

[**Sec. 1. Short title.**]—This Act may be cited as the “National Environmental Policy Act of 1969”. (83 Stat. 852; 42 U.S.C. § 4321 note)

### PURPOSE

**Sec. 2.** The purposes of this Act are: To 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 biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. (83 Stat. 852; 42 U.S.C. § 4321)

### TITLE I

#### DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

**Sec. 101.** (a) The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment with-

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out degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. (83 Stat. 452; 42 U.S.C. § 4331)

NOTES OF OPINIONS

**1. Discretion to defer project construction**

**2. Substantive compliance**

**1. Discretion to defer project construction**

The Act of August 5, 1965 authorizing the Garrison Diversion Unit permitted the Secretary to exercise limited discretion over the timing of construction of the project to the extent authorized by the National Environmental Policy Act. The Secretary had authority to defer construction until additional environmental impact statements were prepared and perhaps also until Congress had a reasonable opportunity to reconsider the project authorization in light of newly available environmental information, but he was not authorized to promise unconditionally to defer construction until 60 days after Congress took action on the project authorization, regardless of how long Congressional action may be deferred. Thus, where the Secretary agreed in a court stipulation to halt project construction until additional environmental and other studies were prepared, legislation was submitted to Congress regarding reauthorization or modification of the project, and 60 days had elapsed after Congress acted on such legislation, the agreement was read to include the implied condition that if Congress failed to act after having had a reasonable op-

portunity to reconsider the 1965 authorization, the parties shall no longer be bound by the stipulation. Since the Secretary had prepared the additional studies and submitted them to Congress, the record showed clearly that the controversy over the project was brought to the attention of Congress, and Congress did not act after a reasonable opportunity to do so, the condition was met and the Secretary's obligations under the stipulation were discharged. *National Audubon Society, Inc. v. Watt*, 678 F.2d 299 (D.C. Cir. 1982).

**2. Substantive compliance**

Considering the low level of adverse impacts on South Dakota due to the Garrison Diversion Unit, which impacts were clearly considered in good faith in the formulation of the decision, the decades of Congressional support for the project, and the very obvious benefits that will be the result of the project in North Dakota, the decision to proceed with the 250,000-acre plan for development of the project described in a 1979 environmental impact statement was not arbitrary and capricious and did not give insufficient weight to environmental values. *James River Flood Control Association v. Watt*, 553 F. Supp. 1284 (D. S. Dak. 1982).

**Sec. 102. [Policies, regulations, laws to be interpreted in accordance with this Act—Agency duties—Systematic, interdisciplinary approach—Presently unquantified amenities and values—Environmental impact statement—Impact statement prepared by State agency—Unresolved conflicts concerning alternative uses of available resources—International cooperation—Availability of advice and information—Use of ecological information—Assist Council on Environmental Quality.]—The**

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Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by 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.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

- (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
- (ii) the responsible Federal official furnishes guidance and participates in such preparation,
- (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
- (iv) after January 1, 1976, the responsible Federal official provides

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early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act. (83 Stat. 853; Act of August 9, 1975, 89 Stat. 424; 42 U.S.C. § 4332)

EXPLANATORY NOTES

**Editor's Note, Annotations.** Annotations of opinions are included only for cases applying the National Environmental Policy Act to activities of the Bureau of Reclamation and the Alaska, Bonneville, Southeastern, Southwestern and Western Area Power Administrations. No comprehensive analysis of the Act is intended.

**1975 Amendment.** The Act of August 9, 1975 (Public Law 94-83, 89 Stat. 424) amended section 102(2) by adding a new subparagraph (D) and redesignating former subparagraphs (D) through (H) as (E) through (I), respectively. The 1975 Act does not appear herein.

**Reference in the Text.** Section 552 of title 5, United States Code, referred to in subsection (c) of the text, is the Public Information Section of the Administrative Procedure Act. The Section appears in Volume III, Appendix, at page 1930.

**Economic Impacts.** The report of the conferees on the Agricultural-Environmental and Consumer Protection Programs Appropriations Act, Fiscal Year 1972 (H.R. 9270), stated in part:

"The conferees believe it most important that the various agencies of Government and the Congress, in the review and appraisal of Federal Government programs, projects, and activities, have full information available not only as to the impact upon the environment but also the significant economic impact on the public and the affected areas and industries.

"The conferees, therefore, direct that, in addition to the environmental effects of an action, all required reports from departments, agencies, or persons shall also include information, as prepared by the agency having responsibility for administration of the program, project, or activity

involved, on the effect on the economy, including employment, unemployment, and, other economic impacts.

"The conferees expect the agencies involved to spend such additional sums as may be necessary, out of general funds available, to cover any additional costs of preparing such statements.

"This requirement will apply primarily to the environmental impact statements required under section 102 of the Environmental Quality Act, and the reports required under the permit dumping programs based on the Refuse Act of 1899." H.R. Rept. No. 92-376, 95th Cong., 1st Sess. 7-8 (1971).

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### 1. Adequacy—Alternatives

Where the court concludes that the preparers of the environmental impact statement on the Miles City/New Underwood transmission line took a "hard look" at the environmental consequences of their action, the court will accept the EIS as sufficient even though it does not discuss the main alternative route proposed by the plaintiffs. *Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary*, 513 F. Supp. 257 (D. S. Dak. 1981), affirmed on the ground of laches, 683 F. 2d 1171 (8th Cir. 1982).

The consideration of possible alternatives

is the linchpin of the entire environmental impact statement and should involve a "rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions, particularly those that might . . . avoid some or all of the adverse environmental effects." The Bureau failed to comply with this criterion in preparing an environmental impact statement for the installation of a 23-megawatt powerplant at the Navajo Dam facility of the Colorado River Storage Project to power the sprinkler irrigation system of the Navajo Indian Irrigation Project. The EIS discussed only briefly the options of obtaining power from existing power sources or using gas-powered engines and entirely neglected to even mention other reasonable alternatives such as 1) building a smaller powerplant, 2) obtaining power from the uncommitted reserves stored in the Colorado River Storage Project system, and 3) delaying construction pending completion of environmental studies. *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977).

The environmental impact statement for the Strawberry Aqueduct and Collection System, Bonneville Unit, Central Utah Project, which devoted over 100 pages to alternatives to the entire Bonneville Unit plan, including possible alternatives to the Currant Creek Dam (the particular system feature whose construction had been challenged), provided a good faith, objective and reasonable discussion of alternatives. The environmental impact statement is not required to consider alternatives whose effects cannot reasonably be ascertained and whose implementation is deemed remote and speculative. Rather the statement need set forth only those alternatives "sufficient to permit a reasoned choice." *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

Sections 102(2)(C) and 102(2)(D) of the National Environmental Policy Act, which require that an environmental impact statement

present alternative courses of action, were designed to assume that such alternatives are explored in the initial decisionmaking process and to provide an opportunity to those removed from that process also to evaluate those alternatives. But the range of alternatives considered need not extend beyond those reasonably related to the purposes of the project. Consequently, where it has been established that the primary purposes of the first phase of the Teton Dam Project were to prevent flooding and provide irrigation water and the secondary purposes were to provide hydroelectric power and recreational benefits, the environmental impact statement satisfied the requirements of the Act by considering the alternatives of (1) no development whatever, (2) ground water pumping to obtain irrigation water, and (3) levees to control flooding in the Lower Teton Valley, as well as other less reasonably related alternatives, all of which were rejected. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

The environmental impact statement filed for the New Melones Dam satisfied the requirement of section 102(2)(C)(iii) of the National Environmental Policy Act that it contain a detailed statement of all reasonable structural and nonstructural alternatives to the proposed dam by considering such alternatives as: possible alternative reservoir sizes, including increasing the size of the downstream Tulloch Dam; alternative reservoir sizes at the New Melones site; alternatives to the planned operation such as releases downstream to enhance fisheries and water quality and to meet the demands of other nearby service areas; and alternatives to constructing the reservoir itself, such as channel and levee improvements, floodplain management and abandonment of the project. The Act requires only that all reasonable alternatives to the project be considered, even if some were only briefly alluded to or mentioned. *Environmental Defense Fund, Inc. v. Armstrong*, 352 F. Supp. 50 (N.D. Cal. 1972) and 356 F. Supp. 131 (N.D. Cal. 1973), *aff'd*, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

## 2.—Cost/benefit analyses

The National Environmental Policy Act does not demand that every Federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. Rather, by giving the decisionmaker and other readers enough detail concerning all of

the costs and benefits to permit a reasoned evaluation and decision, the statement satisfies the Act's requirement that long-term environmental costs be weighed against immediate benefits. Thus, where the environmental impact statement for the first stage of the Palmetto Bend Project was found, in all other respects, sufficiently clear and comprehensive, there was no real reason for a mathematical decision as to a cost-benefit ratio. Moreover, a cost-benefit ratio was considered in the project's development in reports filed in 1962 and 1963 and in the feasibility report filed with Congress in February 1965. Finally, the responsibility for determining whether the United States can afford this project lies in the Congress which, based on the project's history, has already decided it is worth the money. *Sierra Club v. Morton*, 431 F. Supp. 11 (S.D. Tex. 1975).

The environmental impact statement for the Strawberry Aqueduct and Collection System, Bonneville Unit, Central Utah Project, was not required to contain a cost-benefit ratio. The National Environmental Policy Act requires only that "presently unquantified environmental amenities and values . . . be given appropriate consideration in decisionmaking along with economic and technical considerations." This does not require the fixing of a dollar figure for either environmental losses or benefits. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

The environmental impact statement for the first phase of the Teton Dam Project adequately evaluated the full range of alternatives reasonably related to project purposes without conducting a formal and mathematically expressed cost-benefit analysis. Because there is sufficient disagreement about how environmental amenities should be valued to permit any value so assigned to be challenged on the grounds of its subjectivity in most, if not all, projects, the ultimate decision to proceed with the project is not strictly a mathematical determination. Moreover, the first phase of the Teton Dam Project has already, independently, undergone a cost-benefit analysis because of its status as a reclamation project. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

## 3.—Differences of scientific opinion

The fact that there is a difference of scientific opinion among experts regarding the environmental impact of the first stage of the Palmetto Bend Project does not mean that the

impact has been inadequately discussed in the Project's final environmental impact statement, nor does such difference mean the statement's explanations must be disregarded. *Sierra Club v. Morton*, 431 F. Supp. 11 (S.D. Tex. 1975).

#### 4.—Discount rate

It is not inappropriate for the Government to employ a 3½% discount rate in the environmental impact statement for the New Melones Dam even though such rate was, arguably, economically unrealistic at the time the statement was filed, as this is the rate Congress has expressly authorized to be used in evaluating Government projects. *Environmental Defense Fund, Inc. v. Armstrong*, 352 F. Supp. 50 (N.D. Cal. 1972), aff'd, 487 F.2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).

#### 5.—Draft EIS

In determining whether the requirements of the National Environmental Policy Act were met with regard to the Garrison Diversion Unit, a draft environmental impact statement prepared in 1976 could be considered in addition to final environmental impact statements prepared in 1974 and 1979, particularly since the 1979 statement makes it clear that it was intended to act as a "supplement" to the 1976 draft statement and, presumably, anyone who so desired could have commented on any inadequacy in the 1976 statement while the 1979 statement was being processed. *James River Flood Control Association v. Watt*, 553 F. Supp. 1284 (D. S. Dak. 1982).

#### 6.—Economic effects

In preparing the "Final Environmental Statement" for the O'Neill Unit, Lower Niobrara Division of the Pick-Sloan Missouri Basin Project, the Bureau of Reclamation was not obligated to provide information regarding the economic benefits and costs of the proposed project. Neither the National Environmental Policy Act nor decisional law require this information unless, of course, it has environmental implications. If, however, the environmental impact statement does delineate economic issues they should be fully and objectively described. *Save the Niobrara River Association v. Andrus*, 483 F. Supp. 844 (D. Neb. 1979).

#### 7.—Generally

The environmental impact statement on the Lower Monumental-Ashe transmission line is not insufficient because it did not include an intricate, computerized system of

analysis or all of the working papers that form the basis of the information presented. *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 592-95 (9th Cir. 1981), affirming *Columbia Basin Land Protection Association v. Kleppe*, 417 F. Supp. 46 (E.D. Wash. 1976).

In preparing an environmental impact statement as required by section 102 of the National Environmental Policy Act the discussion of environmental effects need not be exhaustive, but need only provide sufficient information for a reasoned choice of alternatives. The Act does not require that "each problem be documented from every angle to explore its every potential for good or ill." Rather, in determining whether an agency has complied with section 102 the rule of reason should govern. Nevertheless, both the "Final Environmental Statement" and the subsequent Final Environmental Statement Supplement for the O'Neill Unit, Lower Niobrara Division of the Pick-Sloan Missouri Basin Project were held to inadequately comply with the requirements of the Act with regard to several aspects of the Unit's effect on the environment. *Save the Niobrara River Association v. Andrus*, 483 F. Supp. 844 (D. Neb. 1979).

The final environmental impact statement (FES) for the Initial Stage of the Oahe Unit is not inadequate because it does not discuss the complete project or because studies are continuing on problems which the FES identifies. *United Family Farmers, Inc., v. Kleppe*, 418 F. Supp. 591 (D. S.D. 1976), affirmed on other grounds, 552 F.2d 823 (8th Cir. 1977).

The "Final Environmental Impact Statement" for the San Felipe Division of the Central Valley Project, which consisted of 475 pages and had been preceded by a "Draft Environmental Impact Statement" of 175 pages, satisfied the requirements of section 102 of the National Environmental Policy Act in that it adequately enabled decisionmakers to consider the project with full awareness of the environmental consequences and provided the public with information and encouraged public participation in developing that information. *Environmental Defense Fund, Inc. v. Stamm*, 430 F. Supp. 664 (N.D. Cal. 1977).

The environmental impact statement required for the first stage of the Palmetto Bend Project need not discuss remote and highly speculative consequences but should be sufficient to enable those who did not participate in compiling the statement to understand the

factors involved and fully consider the significance of such factors. *Sierra Club v. Morton*, 431 F. Supp. 11 (S.D. Tex. 1975).

The environmental impact statement for the first phase of the Teton Dam Project was not inadequate because it lacked a discussion of the environmental impact of the development of docks, second homes and corresponding structures and facilities as well as an analysis of the land use pattern changes that could result from the project. Second home development and its consequences in connection with this project are only remote possibilities. An environmental impact statement is required only to include a reasonably thorough discussion of the significant aspects of the probable environmental consequences and need not consider remote and highly speculative consequences. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

It is not necessary that the supporting studies on which an environmental impact statement is based be physically attached to the statement. They only need be available and accessible. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

#### 8.—Incorporation by reference

Because it is the essence of the National Environmental Policy Act that the requisite detailed statement gather in one place a discussion of the relative environmental impacts of alternatives, in reviewing the adequacy of the environmental impact statement for the O'Neill Unit, Lower Niobrara Division of the Pick-Sloan Missouri Basin Program, only the document actually entitled "Final Environmental Statement" will be examined. No consideration should be given to the Unit's feasibility report of December 7, 1965, its nine appendices, or the Reevaluation Statement of April, 1971, none of which are attached to or cited in the Final Environmental Statement. Where, however, a conclusion is stated in a Final Environmental Statement and the reader is then directed to another document for data supporting the conclusion, the document, to that extent, should be considered a part of the Statement, if it is accessible to the public. *Save the Niobrara River Association v. Andrus*, 483 F. Supp. 844 (D. Neb. 1979).

#### 9.—Injunctive relief

Nothing in the National Environmental Policy Act, its legislative history or decisional law requires that once an environmental impact statement is found deficient in some re-

spect, however slight, work on the project must be enjoined forthwith. *Environmental Defense Fund, Inc., v. Armstrong*, 352 F. Supp. 50 (N.D. Cal. 1972) and 356 F. Supp. 131 (N.D. Cal. 1973), aff'd., 487 F.2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).

#### 10.—Level of detail

Where questions concerned the degree of detail rather than the lack of it and nothing was presented to cast doubt upon the conclusion that the average annual change in water quantity in the James River in South Dakota due to the Garrison Diversion Unit would be so small as to be virtually unmeasurable, a draft environmental impact statement prepared in 1976 and final environmental impact statements prepared in 1974 and 1979, taken together, adequately put the decisionmakers on notice of the hazards to South Dakota if the project is completed and were sufficient under the requirements of NEPA even though additional facts may have been useful and it would have been desirable for there to have been more explicit recognition of the project's South Dakota impacts. *James River Flood Control Association v. Watt*, 553 F. Supp. 1284 (D. S.Dak. 1982).

Where one of the specific objectives of the Colorado River Storage Project Act, which authorized the Navajo Dam, is to mitigate losses of and improve conditions for the propagation of fish and wildlife, an environmental impact statement prepared in connection with the installation of a powerplant at the Dam was inadequate where it admitted that there would be some adverse impact on fish and wildlife, due to fluctuations in San Juan River flow rates, but failed to supply the detail necessary for informed decision-making. The Bureau cannot evade assessing the environmental consequences of a project under construction by simply deferring to the results of future studies, as once a facility has been completely constructed the economic cost of any alteration may be very great, and one of the purposes of the National Environmental Policy Act was to break the cycle of such incremental decisionmaking. *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977).

#### 11.—Water use priorities

The supplementary environmental impact statement which addressed the possible uses for the conservation yield of the New Melones Dam is not deficient because it failed to assign priorities of need for water among service



areas that may potentially use New Melones water because (1) as a practical matter it is impossible to assign such priorities at present, since no diversion of water will occur for at least eight years, (2) the authorizing statute (the Flood Control Act of 1962) itself establishes definite priorities, and (3) the District Court has explicitly retained jurisdiction over the case to insure that data dealing with the operation of the dam is forthcoming in a future or supplemental environmental impact statement, well before the New Melones Dam actually becomes operational. *Environmental Defense Fund, Inc. v. Armstrong*, 356 F. Supp. 131 (N.D. Cal. 1973), aff'd, 487 F.2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).

#### 26. Continuing appropriations

Congress has full authority to fund a Bonneville Power Administration transmission project before an environmental impact statement has been completed. *County of Missoula v. Johnson*, U.S.D.C., D. Mont., CV-81-35-BU, January 28, 1982. [Editor's note: This decision was affirmed on appeal on August 8, 1983, No. 82-3088, 9th Cir. (unpublished opinion)]

The fact that, in the Public Works for Water and Power Development and Research Act, 1978, Congress appropriated funds for the construction of the Garrison Diversion Unit, Missouri River Basin Project, while a suit challenging the sufficiency of the environmental impact statement for the Unit was pending does not preclude judicial review by evidencing a congressional determination that the statement complies with the National Environmental Policy Act because 1) Congress cannot legislate through the appropriations process, 2) there is no indication in the legislative history of the 1978 Act that Congress ever reviewed or debated the impact statement at issue, and 3) even if Congress makes the ultimate decision to proceed with the project it remains the role of the courts, exclusively, to determine the adequacy of the environmental impact statement. *National Audubon Society v. Andrus*, 442 F. Supp. 42 (D. D.C. 1977).

#### 27. Construction during preparation

The Act of August 5, 1965 authorizing the Garrison Diversion Unit permitted the Secretary to exercise limited discretion over the timing of construction of the project to the extent authorized by the National Environmental Policy Act. The Secretary had authority to defer construction until additional

environmental impact statements were prepared and perhaps also until Congress had a reasonable opportunity to reconsider the project authorization in light of newly available environmental information, but he was not authorized to promise unconditionally to defer construction until 60 days after Congress took action on the project authorization, regardless of how long congressional action may be deferred. Thus, where the Secretary agreed in a court stipulation to halt project construction until he prepared additional environmental and other studies, submitted legislation to Congress regarding reauthorization or modification of the project and 60 days had elapsed after Congress acted on such legislation, the agreement was read to include the implied condition that if Congress failed to act after having had a reasonable opportunity to reconsider the 1965 authorization, the parties shall no longer be bound by the stipulation. Inasmuch as the Secretary had prepared the additional studies and submitted them to Congress, the record showed clearly that the controversy over the project was brought to the attention of Congress, and Congress did not act after a reasonable opportunity to do so, the condition was met and the Secretary's obligations under the stipulation were discharged. *National Audubon Society, Inc., v. Watt*, 678 F.2d 299 (D.C. Cir. 1982).

Where the 28-page environmental impact statement for the first stage of the Palmetto Bend Project was being challenged in a lawsuit, the Bureau of Reclamation was not obligated to halt project construction while it prepared a revised 142-page statement. Such requirement might compromise the National Environmental Policy Act's goal of full disclosure in a situation where it was unclear whether a proposed change would first require a supplement to the environmental impact statement, in which case work could continue on the project, or a new environmental impact statement, which would provide more complete disclosure at the cost of a break in the project timetable. *Sierra Club v. Morton*, 431 F. Supp. 11 (S.D. Tex. 1975).

#### 28. Exemptions from filing

The Bureau of Reclamation's drawdown of carryover storage at Clair Engle Lake and resultant decrease in releases into the Trinity River is a management activity expected to have an effect in mitigating drought-related losses and damages to the Central Valley Proj-

ect. As such, the Bureau is specifically exempted from filing an environmental impact statement by section 5 of the Emergency Drought Act (Public Law 95-18, 91 Stat. 36), at least until the authority under that Act expires on September 30, 1977. *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977).

### 29. "Local agency"

A port district is not a "local agency" within the meaning of section 102(2)(C) of NEPA whose comments and views have to be obtained because it is not required to develop and enforce environmental standards. *Port of Astoria v. Hodel*, 595 F.2d 467, 475-76 (9th Cir. 1979), affirming *Port of Astoria v. Hodel*, Civil No. 75-349, U.S.D.C. Oregon (August 26, 1975).

### 30. Purposes

An environmental impact statement serves four purposes: 1) to ensure that agency officials will be acquainted with the trade-offs which will have to be made if any particular line of action is chosen; 2) to explicate fully the agency's course of inquiry, analysis, and reasoning, thus opening up the agency's decisionmaking process to critical evaluation by those outside the agency, including the public; 3) to supply a convenient record for courts to use in reviewing agency decisions on the merits; and 4) to provide full disclosure to the public of environmental issues. *Save the Niobrara River Association v. Andrus*, 483 F. Supp. 844 (D. Neb. 1979).

There are two purposes to be served by an environmental impact statement. First, it should provide decisionmakers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences. Second, the statement should provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development of that information. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

### 31. Relationship with other laws

Suits challenging the execution by the Administrator of the Bonneville Power Administration of long-term power contracts required by section 5(g) of the Pacific Northwest Electric Power Planning and Conservation Act on the grounds that the failure to issue environmental impact statements violated the National Environmental Policy Act should be filed with the 9th Circuit Court of

Appeals and not the District Court. *National Wildlife Federation v. Johnson*, 548 F. Supp. 708 (D. Ore. 1982) [Editor's note: This holding was affirmed in *Forelaws on Board v. Johnson*, 709 F. 2d 1310 (9th Cir. 1983).]

Even a good faith attempt to comply with the environmental impact statement requirements of section 102 of the National Environmental Policy Act may be insufficient to satisfy the reporting requirements of the Fish and Wildlife Coordination Act. The latter Act directs that Congress be directly informed of environmental effects of stream modification, a policy which may not be duplicated by the National Environmental Policy Act. Thus, a report under the Coordination Act remains mandatory for the installation of a powerplant at the Navajo Dam, Colorado River Storage Project, which would unquestionably affect wildlife resources by altering the flow rates of the San Juan River. *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D. D.C. 1977).

### 32. Scope

Segmentation of an environmental impact statement on Bonneville Power Administration's Colstrip transmission lines is proper where the segment has independent utility, the length selected assures adequate opportunity for consideration of alternatives, and the segment fulfills important state and local needs. *County of Missoula v. Johnson*, U.S.D.C., D. Mont., CV-81-35-BU, January 28, 1982, at 19. [Editor's note: This decision was affirmed on appeal on August 8, 1983, No. 82-3088, 9th Cir. (unpublished opinion).]

The agency's decision to fulfill the requirements of the National Environmental Policy Act for proposed Federal water projects in the Colorado River Basin through project or site-specific environmental impact statements which will discuss and evaluate any cumulative and synergistic environmental impacts, as opposed to a comprehensive environmental impact statement for the entire basin, is subject to judicial review under the arbitrary and capricious standard. *Environmental Defense Fund, Inc. v. Higginson*, 655 F.2d 1244 (D.C. Cir. 1981).

It is reasonable for the Bureau of Reclamation to issue a comprehensive environmental impact statement for the continuing operation of the entire Colorado River Basin Project and not to prepare a site-specific environmental impact statement for the Glen Canyon Dam and Reservoir component of the

project, whose impounded waters form Lake Powell. The Colorado River Basin Project Act itself recognizes the comprehensive nature of the project by 1) providing in section 102(a) that the purpose of the Act is the further comprehensive development of the water resources of the Colorado River Basin and 2) requiring, in section 602(a), that the Secretary of the Interior promulgate criteria for the storage and release of water from all of the storage units of the Colorado River Project, which include units authorized by the Colorado River Storage Project Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act. There is no proposal for criteria or any other major action under the National Environmental Policy Act which involves the Glen Canyon Project singly. Moreover, the courts have recognized the interrelated and comprehensive development of this water resource project. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981).

In preparing the environmental impact statement for the first phase of the Teton Dam Project the Bureau of Reclamation was not required to discuss the environmental impact of the second phase (the facilities identified in section 4(c) of the Act) even though it has been held that a project must be covered in a single statement where it is composed of a series of interrelated steps wherein the initial project depends on subsequent phases and together all phases constitute an integrated plan. Here the first phase is substantially independent of the second as Congress clearly intended that the first phase of this project would be constructed without regard to whether the Secretary ever submits a finding of "feasibility" with regard to the second phase. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

Whether a final environmental impact statement for the Strawberry Aqueduct and Collection System must also include an evaluation, under the criteria of section 102 of the National Environmental Policy Act, of the Bonneville Unit or perhaps even the entire Central Utah Project, is a mixed question of fact and law. Whether the Strawberry system is a unit unto itself and can stand on its own two feet or, on the contrary, whether it is so intertwined with the rest of the Bonneville Unit and the Central Utah Project that it is but an increment of the larger plan, is essentially a fact question. Whether the "facts" as thus found by the trial court permit the Straw-

berry system to be classified as an independent "major Federal action" is essentially a question of law. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

The Strawberry Aqueduct and Collection System has an independent utility of its own as a collection and conveyance system of waters from the designated Uinta Mountain streams for storage in the enlarged Strawberry Reservoir for release and use in the Bonneville Basin. Such system can operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project. The termini of the Strawberry system, comprising the Soldier Creek Dam on the westerly end and the Upper Stillwater Reservoir on the easterly end, delineate a reasonable and logical segment of the Bonneville Unit for discussion and analysis of the environmental impacts resulting therefrom, which remain unchanged regardless of the systems to be constructed for delivery and use of project waters within the Bonneville Basin. Thus, the Strawberry system is an independent "major Federal action" for the purposes of section 102 of the National Environmental Policy Act and the Bureau of Reclamation's final environmental impact statement sufficiently covered the Currant Creek Dam feature of the Strawberry Aqueduct and Collection system by discussing the entire Strawberry system. It was not required to evaluate the Bonneville Unit or the Central Utah Project. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

The National Environmental Policy Act does not require that the environmental impact statement for the New Melones Project be delayed until a comprehensive study of the Central Valley Project, viewing the system of State and Federal water projects as an integrated unit, be made. So long as each major Federal action is undertaken individually and not as an indivisible, integral part of an integrated State-wide system, then the requirements of the Act are determined on an individual major Federal action basis. *Environmental Defense Fund, Inc. v. Armstrong*, 356 F. Supp. 131 (N.D. Cal. 1973), aff'd, 487 F.2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).

### 33. Standing to sue

A port district concerned about losing tax revenues and a financial guarantee for the purchase of a new dock facility does not have standing to sue to enjoin the Administrator

of the Bonneville Power Administration from signing an amendment to a contract with the Alumax Pacific Corporation to supply power for an aluminum reduction plant at a new location outside the district for failure to prepare an environmental impact statement because the district's alleged injuries are not environmental and therefore are outside the zone of interests to be protected by NEPA. However, an environmental organization whose members spend leisure time in, and individual plaintiffs residing in, the county where the new plant will be located, and a broadcasting company alleging the new plant will interfere with its broadcasts, do have standing to sue. *Port of Astoria v. Hodel*, 595 F.2d 467, 475-76 (9th Cir. 1979), affirming *Port of Astoria v. Hodel*, Civil No. 75-349, U.S.D.C. Oregon (August 26, 1975).

#### 34. When required—Case or controversy

Section 110 of Public Law 95-465, which provides that, irrespective of the National Environmental Policy Act, water resource projects or project features within the Colorado River Basin may proceed to completion so long as a site specific environmental impact statement has been filed, prevents the construction of such projects or features from being delayed by the preparation of a basin-wide environmental impact statement. Consequently, an action by the State of Utah for a declaratory judgment that the National Environmental Policy Act does not require a comprehensive basin-wide impact statement for the entire Colorado River Basin does not present a justiciable controversy as no basin-wide impact statement had yet been funded and no injury could occur until after the earliest date for completion of the basin-wide statement, 1985. *Utah v. Andrus*, 636 F.2d 276 (10th Cir. 1980).

#### 35.—Federal responsibility

By entering into a contract to supply power to the Alcoa magnesium smelting plant at Addy, Washington, and to construct the transmission line to the plant, the Bonneville Power Administration has so federalized the entire project that it has become "major Federal action" requiring a federally responsible environmental impact statement on it which cannot be satisfied by a statement prepared purely by and for the State of Washington and not considered, approved and adopted by BPA. *Sierra Club v. Hodel*, 544 F.2d 1036 (9th Cir. 1976).

#### 36.—Generally

Where it was conceded that additional

NEPA analysis would be required prior to making a decision to continue development of the Garrison Diversion Unit in stages so that the first phase thereof would preclude return flows from flowing into Canada and cause additional return flows in the James River in South Dakota, although the question was a close one, the Secretary had not yet gone beyond mere contemplation and accompanying study of such a course of action so as to trigger additional NEPA compliance at that time. *James River Flood Control Association v. Watt*, 553 F. Supp. 1284 (D. S.Dak. 1982).

A separate environmental impact statement is not required for Memoranda of Understanding between the Bonneville Power Administration and the Bureau of Land Management and between BPA and the Bureau of Reclamation regarding the granting of rights-of-way for transmission lines, or for applications for rights-of-way for specific lines. *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 596-98 (9th Cir. 1981), affirming *Columbia Basin Land Protection Association v. Kleppe*, 417 F. Supp. 46 (E.D. Wash. 1976).

A proposed major Federal action will significantly affect the quality of human life and thereby necessitate the filing of an environmental impact statement when reasonably expected environmental consequences would affect a decision by the Federal agency concerning the need for, or the proposed location or design of, the proposed Federal action. In order to apply this test there must be an analysis of: the need for the Federal proposal; the environmental consequences which can reasonably be expected to be generated; and the availability of alternatives to achieve the objectives of the Federal proposal. Thus the Department of Interior's proposal to apply the herbicide 2,4—dichlorophenoxyacetic acid to the public water supply at the Fort Cobb Reservoir in order to obtain data on the residual levels and rate of dissipation of the herbicide in fish and hydro-soil and to control the growth of Eurasian watermilfoil, although a major Federal action, does not require the filing of an environmental impact statement as it will not significantly affect the human environment. The evidence demonstrates that (1) the presence of the watermilfoil represents a serious problem, (2) in the quantity planned for application, the concentration of the herbicide in the reservoir will not exceed the established safe tolerance for human consumption as established by the Environmental Protection Agency, and (3) four alternatives

to herbicide control were considered but rejected. *Citizens Against 2, 4-D v. Watt*, 527 F. Supp. 465 (W.D. Okla. 1981).

No environmental impact statement is required on the decision of the Southeastern Power Administration to allocate power from the Carters, Jones Bluff, and West Point projects to preference customers within the service areas of the four Southern Companies. *Greenwood Utilities Commission v. Schlesinger*, 515 F. Supp. 653, 662-63 (M.D. Ga. 1981). [Editor's note: This holding was affirmed sub nom. *Greenwood Utilities Commission v. Hodel*, 764 F.2d 1459, 1465 (11th Cir. 1985)]

The Pacific Northwest Electric Power Planning and Conservation Act is fundamentally and conceptually different from the approach contemplated by the Bonneville Power Administration in Phase 2 of the Hydro Thermal Power Program. It is in part a legislative solution to the impasse created by the injunction previously entered in this case pending preparation of a programmatic environmental impact statement (EIS) on Phase 2. Such an EIS is no longer necessary. *Natural Resources Defense Council v. Munro*, 520 F. Supp. 17 (D. Ore. 1981).

Where the Bonneville Power Administration (BPA), which supplies about one-half of the electric power consumed in the Pacific Northwest region and provides about four-fifths of the high-voltage bulk transmission capacity in the region, has entered into cooperative efforts with the public and private utilities and BPA's direct-service industries for the planning, construction and operation of the region's power facilities as if they were under a single ownership to meet forecasted electrical power needs of the region, there exists a major "Federalized" regional proposal which requires the preparation of an environmental impact statement (EIS). The fact that details of the specific agreement of December 14, 1973 termed "Phase 2" of the Hydro-Thermal Power Program (HTPP) may have changed does not eliminate the requirement for an EIS so long as the basic concepts do not change. *Natural Resources Defense Council, Inc. v. Hodel*, 435 F. Supp. 590 (D. Ore. 1977), affirmed sub nom. *Natural Resources Defense Council, Inc. v. Munro*, 626 F.2d 134 (9th Cir. 1980).

Where the Government enters into option contracts for the sale of water for industrial uses from the Yellowtail and Boysen Reservoirs, Missouri River Basin Project, an environmental impact statement must be

prepared when the contract is executed and cannot be delayed until the option is exercised. The execution of the contract itself constitutes a major Federal action under the National Environmental Policy Act since the Government, by the terms of the contract, thereby enters into an irreversible and irretrievable commitment of the availability of the water. While the details of the option holder's future use of the diverted water may not be known at the time of contract execution, it is at that time that the Government must decide among various potential users and, in so doing, must conjecture as to the possible effects of commitment to one user versus another. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

The preparation of an environmental impact statement is required in conjunction with both the Industrial Water Marketing Plan and the option contracts entered into thereunder to sell water from the Yellowtail and Boysen Reservoirs for industrial use. Any uncertainty which may exist about the details of subsequent use of the diverted water does not obviate the importance of the decision to divert and the necessity to evaluate the environmental consequences of that decision. Here, there is more than mere "contemplation" of Federal action; there is a developed marketing program and executed option contracts. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

An amendment to a contract with the Almax Pacific Corporation requiring the Bonneville Power Administration to supply power and build transmission lines to an aluminum reduction plant at a new location is a major Federal action requiring the preparation of an environmental impact statement on the plant itself. *Port of Astoria v. Hodel*, 595 F.2d 467, 477 (9th Cir. 1979), affirming *Port of Astoria v. Hodel*, Civil No. 75-349, U.S.D.C. Oregon (August 26, 1975).

An amendment to a contract with the Almax Pacific Corporation under which the Bonneville Power Administration (BPA) will provide a new form of industrial firm power service to an aluminum reduction plant at a new location is a major Federal action because it creates a new commitment of BPA's energy resources, and because it sets the stage for the initiation of the proposed Phase 2 of the Hydro Thermal Power Program, particularly through the "third quartile" provisions whereby industrial customers would have the option to buy power from new thermal power

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plants or suffer restrictions in power service. Therefore, BPA must prepare an environmental impact statement on the relation between industrial firm power contracts and the coordinated regional activities known as Phase 2 as well as an assessment of the additional power commitments. *Port of Astoria v. Hodel*, 595 F.2d 467, 477-480 (9th Cir. 1979), affirming *Port of Astoria v. Hodel*, Civil No. 75-349, U.S.D.C. Oregon (August 26, 1975).

The change in recreation management at Lake Berryessa from Napa County to the United States, in accord with section 601 of the Reclamation Development Act of 1974, and subsequent Bureau of Reclamation directives restricting the use of houseboats on the lake and ordering the removal of privately-owned floating structures from the lake do not constitute major Federal actions having a significant effect on the quality of the human environment, within the meaning of section 102 of the National Environmental Policy Act. *Lake Berryessa Tenants' Council v. United States*, 588 F.2d 267 (9th Cir. 1978).

No environmental impact statement was required on the decision of the Secretary of the Interior to deny the request of the City of Santa Clara for an allocation of nonwithdrawable power from the Central Valley Project (CVP) because it is highly improbable that one allocation scheme will have a more deleterious impact than any other when the total geographic area served by the CVP is considered. *City of Santa Clara, California v. Andrus*, 572 F.2d 660, 679-80 (9th Cir. 1978), affirming *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

A reallocation of power from the California-Pacific Utilities Company (Cal-Pac) to preference customers is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act, and hence neither preparation of an environmental impact statement nor public hearings was required. *The Fort Mojave Indian Tribe, et al. v. United States*, U.S.D.C., C.D. California, CV77-4790 ALS (July 6, 1978).

No environmental impact statement was required prior to the signing of a contract between the Northern Colorado Water Conservancy District and Municipal Subdistrict with the United States which provided that the surplus capacity of the Colorado-Big Thompson project could be used to carry

water from the Western slope to the Eastern slope of Colorado if the Subdistrict could obtain the necessary water rights, and which further provided that no water should be transported until the final environmental statement had been approved, because: (1) the contract does not constitute a recommendation or report on a major Federal action but rather is merely an agreement which precipitated the planning for the diversion of water which the Subdistrict has yet to obtain. Moreover, until the source of the water to be transferred has been identified it is impossible to determine definitely the overall environmental impacts; (2) the contract expressly recognizes that an environmental impact statement must be prepared and approved, and the agency cannot recommend the proposal until the statement has been approved; and (3) in a practical sense, it would be overly burdensome to require the agency to prepare an environmental impact statement before the plans for the proposal are prepared. *Colorado River Water Conservation District v. United States*, 539 F.2d 907 (10 Cir. 1977).

Where the Bonneville Power Administration entered into a contract to supply up to 124,000 kilowatts of interruptible power to Alcoa's proposed magnesium smelting plant at Addy, Washington, it was not necessary for an environmental impact statement to consider that the contract may have environmental consequences because, in the event massive deficits in hydroelectric power were to occur, Bonneville would need to divert power from municipal use to the smelting operations and thereby cause utilities to resort to pollution-generating thermal or nuclear fuel sources, as such possibilities are too remote and conjectural. Moreover, by definition, interruptible power cannot be made available to the smelting facilities until prime and second-preference commitments have been filled. Nor does the contract violate the National Environmental Policy Act because it was not accompanied by an environmental statement showing the interrelationship between the power allotments to Alcoa and other power allotments to users in other regions of the system and even those outside the system under the Pacific Northwest-Pacific Southwest Intertie agreement. Even though there is a general Pacific-Northwest Region to which Bonneville supplies a great amount of hydro-power, there is no evidence of a master plan for development of the region, either by geographical area, by customer, or by percentage

of total power generation capacity. *Sierra Club v. Hodel*, 544 F.2d 1036 (9th Cir. 1976).

An environmental impact statement is not required for the construction of a fence on the boundary line of 6,816.5 acres of land condemned by the United States as part of the Heron Reservoir, San Juan-Chama Project, as 1) the entire project, including the fencing, was planned and scheduled long before January 1, 1970, the date the National Environmental Policy Act became effective, 2) it is unreasonable to assume that Congress would intend that the Government, having acquired fee simple title to this land for the purpose of constructing a reservoir and for the additional purpose of protecting wildlife, would now be required to have an environmental study made on a relatively small part of the entire project—the fencing of the boundary lines—and 3) the evidence indicates that the creation of the fence will enhance rather than detract from proper environmental control of the area. *Maddox v. Bradley*, 345 F. Supp. 1255 (N.D. Tex. 1972).

### 37.—Legislative proposals

No environmental impact statement was required to accompany the proposed "Federal Water Projects Financing Act of 1979," which would require States within whose boundaries projects are located to make certain contributions to the implementation costs of the project, as this cost-sharing proposal applies only to projects authorized after it is enacted. Since the States could respond to this legislation in a variety of ways, it is impossible to predict presently whether or how this legislation will significantly affect the quality of the human environment. Moreover, when a specific project is proposed under the terms of this proposed law an environmental impact statement will be required if the project will significantly affect the quality of the human environment. *North Dakota v. Andrus*, 483 F. Supp. 255 (D. N.D. 1980).

### 38.—Ongoing programs and activities

Environmental impact statements are required for the Industrial Water Marketing Plan and all option contracts entered into thereunder to sell water from the Yellowtail and Boysen Reservoirs, Missouri River Basin Project, even though the plan and some contracts were executed before January 1, 1970. Both the overall plan and the individual contracts are ongoing programs which require continuing attention and action and must therefore comply with the National Environ-

mental Policy Act even though initiated before its enactment. *Environmental Defense Fund, Inc., v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

The Bureau of Reclamation's drawdown of carryover storage capacity at Clair Engle Lake to mitigate drought damages does not necessitate the preparation of an environmental impact statement even after the expiration of the Emergency Drought Act's exemption from the filing requirements of § 102 of the National Environmental Policy Act for such activities. Although the latter Act may be applicable, in limited circumstances, to a project initiated before it became effective in 1970, the present action is neither a major incremental stage of project development nor a revision or extension of the original facilities. Rather, an environmental impact statement is not required where, as here, the Bureau is simply operating the Trinity River Division within the range originally available pursuant to the authorizing statute, in response to changing environmental conditions. *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977).

As the National Environmental Policy Act applies to all ongoing "major Federal actions," in considering whether an environmental impact statement is required for a project authorized before the Act became effective on January 1, 1970, the extent to which the project has been completed is a factor to be carefully weighed. Thus, an impact statement is required for the first stage of the Palmetto Bend Project, authorized in 1968, since, while land had been purchased and cleared and some roads and railroad tracks relocated, no construction had been commenced. *Sierra Club v. Morton*, 431 F. Supp. 11 (S.D. Tex. 1975).

Whether the National Environmental Policy Act is to be retroactively applied, so that the continuing operation of the Glen Canyon Dam is deemed a major Federal action "significantly affecting the quality of the human environment" and therefore requiring an environmental impact statement, is a question which must be determined, in the first instance, by the Department of the Interior, the agency operating the project. Until such determination has been made or the Department has in some formal manner indicated its refusal to make it, the challenge to the Dam's continuing operation is not ripe for judicial consideration. *Grand Canyon Dorries, Inc. v. Walker*, 500 F.2d 588 (10th Cir. 1974).

No environmental impact statement was required for the construction of the Molokai Irrigation system even though it was financed, in part, under the Small Reclamation Projects Act of 1956, as the repayment contract was executed in 1963 and the project completed in 1969, before enactment of the National Environmental Policy Act. That Hawaii's repayment obligation continued after 1969 and that, as provided by section 5(d) of the 1956 Act, the Secretary of the Interior had a continuing right to interject himself into the affairs of the system in the event of noncompliance with the repayment contract, is insufficient to render the Secretary's decision not to participate in negotiations between the Board of Land and National Resources of Hawaii and the Kaiuakoi Corporation for rental of system facilities a "major Federal action." *Molokai Homesteaders Cooperative Association v. Morton*, 506 F.2d 572 (9th Cir. 1974).

Although the National Environmental Policy Act may be applicable to continuing activities, it is not meant to be retroactive. Thus the Bonneville Power Administration was not required to file an environmental impact statement evaluating its construction of a 230 kilovolt power transmission line from Bandon to Gold Beach, Oregon, where 1) Congress demonstrated its approval of the project in 1967 when it authorized the appropriation of funds for the line and by January 1, 1970, when the Act became effective, money had been appropriated for almost all phases of the project, including most of the construction, and 2) the government had acquired easements over twenty-two of the proposed parcels of land on the proposed line before January 1, 1970. The fact that the government did not let contracts for clearing the new right-of-way and for construction of the line until early in 1970 is insufficient to require the filing of an environmental impact statement as these activities constitute merely a small portion of the work required to complete the project. Congress did not intend the Act to apply to "major Federal actions" which had reached this stage of completion as of the date of its enactment. *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970).

### 39.—Supplemental EIS

Where the ultimate operation of a project is still in doubt at the time the environmental impact statement required by section

102(2)(C) of the National Environmental Policy Act is filed, the initial environmental impact statement should be viewed as an interim statement, the first part of a two-step process whereby the responsible Federal officials would first give their best estimate of the uses to which the project will be put. Then, prior to actual use, a revised or supplemental statement should be filed either reaffirming those estimates or describing the newer proposed uses and their environmental impacts. Thus, where the initial environmental impact statement for the New Melones Dam failed to address the tentative alternative uses for, and the environmental impact of, the 285,000 acre feet of conservation yield, the court may require the filing of a supplemental impact statement to discuss these issues, notwithstanding the Government's proposal to file a separate environmental impact statement at a point nearer in time to the dam's actual operation, some years in the future. *Environmental Defense Fund, Inc. v. Armstrong*, 352 F. Supp. 50 (N.D. Cal. 1972), aff'd, 487 F.2d 814 (9th Cir. 1973), cert. denied sub nom. *Environmental Defense Fund, Inc. v. Stamm*, 416 U.S. 974 (1974).

### 51. Procedural compliance—Alternative studies

The claims of the Environmental Defense Fund that the Secretary of the Interior, the Bureau of Reclamation and the Environmental Protection Agency should evaluate and develop on-farm salinity control techniques as "alternatives" to current salinity control programs as required by the 1972 policy to be implemented under section 201(a) of the Colorado River Basin Salinity Control Act, and as required by section 102(2)(E) of the National Environmental Policy Act, are properly dismissed because on-farm management measures comprise an integral part of the current program itself. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 296-98 (D.C. Cir. 1981).

### 52.—Judicial review

The National Environmental Policy Act does not give the courts the ultimate authority to approve or disapprove construction of a properly authorized project where an adequate environmental impact statement has been prepared and circulated in accordance with the requirements of the Act. *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).



**Sec. 103. [Present authorities, regulations, policies, procedures to be reviewed—Proposed measures to President by July 1, 1971.]**—All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act. (83 Stat. 854; 42 U.S.C. § 4333)

**Sec. 104. [Certain specific statutory obligations not affected.]**—Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency. (83 Stat. 854; 42 U.S.C. § 4334)

**Sec. 105. [Policies and goals supplemental to existing authorizations.]**—The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies. (83 Stat. 854; 42 U.S.C. § 4335)

## TITLE II

### COUNCIL ON ENVIRONMENTAL QUALITY

**Sec. 201. [President to submit annual Environmental Quality Report to Congress.]**—The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the “report”) which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation. (83 Stat. 854; 42 U.S.C. § 4341)

**Sec. 202. [Council on Environmental Quality established—Membership.]**—There is created in the Executive Office of the President a Council

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on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment. (83 Stat. 854; 42 U.S.C. § 4342)

**Sec. 203. [Employment of officers, employees, experts and consultants.]—**(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council. (83 Stat. 855; Act of July 3, 1975, 89 Stat. 258; 42 U.S.C. § 4343)

**Sec. 204. [Duties and functions of Council.]—**It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

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(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request. (83 Stat. 855; 42 U.S.C. § 4344)

**Sec. 205. [Consultation with other organizations—Utilization of services, facilities and information of other organizations to avoid duplication.]**—In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) utilize to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies. (83 Stat. 855; 42 U.S.C. § 4345)

**Sec. 206. [Compensation of members.]**—Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the council shall be compensated at the rate provided for Level IV or the Executive Schedule Pay Rates (5 U.S.C. 5315). (83 Stat. 856; 42 U.S.C. § 4346)

EXPLANATORY NOTE

**Error in the Text.** The word "or" following "Level IV" and preceding "the Executive Schedule Pay Rates" should probably be "of".

**Sec. 207. [Reimbursement for travel.]**—The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council. (Added by Act of July 3, 1975, § 3, 89 Stat. 258; 42 U.S.C. § 4346a)

**Sec. 208. [Expenditures for international activities.]**—The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange

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programs in the United States and in foreign countries. (Added by Act of July 3, 1975, § 3, 89 Stat. 258; 42 U.S.C. § 4346b)

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EXPLANATORY NOTE

**Legislative History.** S. 1075, Public Law 91-190 in the 91st Congress. Reported in Senate from Interior and Insular Affairs July 9, 1969; S. Rept. No. 91-296. Passed Senate July 10, 1969. Passed House, amended, September 23, 1969. House asks for a conference September 23, 1969. Senate agrees to a conference October 8, 1969. Conference report

filed December 17, 1969; H.R. Rept. No. 91-765. Senate agrees to conference report December 20, 1969. House agrees to conference report December 22, 1969. Companion bill H.R. 12549 reported in House from Merchant Marine and Fisheries July 11, 1969; H.R. Rept. No. 91-378.