

THE TIERING OF IMPACT STATEMENTS—CAN THE PROCESS BE STOPPED HALFWAY?

The National Environmental Policy Act of 1969¹ (NEPA) ushered in a new era in administrative decisionmaking by requiring federal agencies to consider the environmental consequences of their actions.² NEPA mandates that federal decisionmakers prepare detailed environmental impact statements (EIS) for all “major federal actions significantly affecting the quality of the human environment.”³ The proper scope⁴ of an EIS is a major source of NEPA controversy.⁵

1. 42 U.S.C. §§ 4321-4347 (1976).

2. Section 102(2)(B) directs federal agencies to “identify and develop methods and procedures, . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.” *Id.* § 4332(2)(B) (1976).

For arguments that NEPA has been ineffectual in actually changing agency decisionmaking, see Hill and Ortolano, *NEPA's Effect on the Consideration of Alternatives: A Crucial Test*, 18 NAT. RES. J. 285 (1978) (NEPA's effect on agency consideration of alternatives has been negligible); Ingram, *Information Channels and Environmental Decisionmaking*, 13 NAT. RES. J. 150, 164 (1973) (agencies are reluctant to include in impact statement information likely to produce conflict or hinder decisionmaking); Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 245 (1973) (significant self-reform by agencies will not be forthcoming under NEPA as currently enforced and structured). *But see* 6 COUNCIL ON ENV'TL QUALITY ANN. REP. 628 (1975) (NEPA has proven workable and has affected all levels of agency planning and decisionmaking). *See generally* F. ANDERSON, *NEPA IN THE COURTS* 246-74 (1973) [hereinafter cited as ANDERSON]; W. RODGERS, *HANDBOOK ON ENVIRONMENTAL LAW* 712-13 (1977) [hereinafter cited as RODGERS].

3. NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). An EIS must cover:

- (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.

Id.

Federal agencies must follow the Council on Environmental Quality (CEQ) regulations on EIS preparation. 40 C.F.R. § 1500.3 (1980).

4. The CEQ defines scope as the “range of actions, alternatives, and impacts to be considered in an environmental impact statement.” 40 C.F.R. § 1508.25 (1980). The

The process of tiering⁶ is emerging as a method for resolving scope problems relating to certain ongoing multi-stage programs or policies.⁷ Tiering involves sequential preparation of impact statements

proper scope of an EIS is to be determined first by agency consideration of three types of actions: connected, cumulative, and similar. Actions satisfying the criteria for connected or cumulative designation warrant single EIS treatment. Similar actions, defined as those which have similarities such as common geography or timing, should be discussed in the same EIS when that is the best way to consider their combined impact. An agency must next consider three types of alternatives to the proposed action: none available, other reasonable alternatives, and mitigation measures. The final factor for consideration in determining the proper scope of an EIS is the potential impact of the actions. The agency must determine if the impact will be direct, indirect, or cumulative. *Id.*

5. Numerous cases have considered scope issues. See notes 34 and 35 *infra*. See generally RODGERS, *supra* note 2, at 785-92; Note, *Appropriate Scope of an Environmental Impact Statement: The Interrelationship of Impacts*, 1976 DUKE L.J. 623.

6. The CEQ defines tiering as follows:

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

40 C.F.R. § 1508.28 (1980).

Tiering is considered the appropriate manner of environmental impact study in two situations. First, it is appropriate when a vertically constrictive sequence of statements or analyses is involved. A broad program, plan, or policy EIS is to be prepared first, followed by a program, plan, or policy EIS or Environmental Assessment (EA) of a lesser scope and/or a site-specific EIS or EA. The second circumstance in which tiering is appropriate is in the preparation of an EIS for a single action at an early stage with a supplemental or subsequent EIS or EA prepared at a later stage. *Id.* This Comment focuses upon the first type of situation.

7. Courts have found a number of federal programs most efficiently studied through the tiering process. See *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978) (Geothermal Leasing Program); *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978) (Outer Continental Shelf Oil and Gas Development); *NRDC v. Administrator, Energy Research and Dev. Adm'n*, 451 F. Supp. 1245 (D.D.C. 1978), *aff'd in part, rev'd in part, vacated in part on other grounds sub nom.* *NRDC v. United States Nuclear Regulatory Comm'n*, 606 F.2d 1261 (D.C. Cir. 1979) (radioactive nuclear waste storage); *Kelley v. Butz*, 404 F. Supp. 925 (W.D. Mich. 1975) (Forest Service's spraying of chemical defoliant in national forests); *NRDC v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1975), *cert. denied*, 427 U.S. 913 (1976) (Bureau of Land Management licensing program under Taylor Grazing Act).

The CEQ recommends tiering for federal programs and policies because it will eliminate repetitive consideration of the same issues and allow each EIS to focus upon the specific issues ripe for decision at each stage of environmental analysis. 40 C.F.R. § 1502.20 (1980). This avoidance of redundancy in environmental review should prove less costly and allow for more circumscribed decisionmaking. ANDER-

from a broad programmatic⁸ to a lesser⁹ or site-specific¹⁰ scope. In *Get Oil Out, Inc. v. Andrus*,¹¹ a federal district court allowed this process of sequential preparation to stop halfway, with site-specific EIS preparation obviated by the adequacy of earlier, broader EIS's.

In 1977, the Department of Interior (DOI) approved development plans for two oil and gas drilling and production platforms on the Outer Continental Shelf¹² of the Santa Barbara Channel.¹³ Relying

SON, *supra* note 2, at 290. Furthermore, tiering should enhance NEPA's effectiveness by requiring agency consideration of environmental impacts to begin at a higher level and by encouraging earlier public involvement in the decisionmaking process. Goggin, *Some Suggestions for Future Plaintiffs on Extending the Scope of the National Environmental Policy Act*, 24 KAN. L. REV. 307, 324 (1975).

8. A programmatic or program EIS encompasses broad federal programs or policies at the planning stage. For a discussion of cases holding programmatic EIS's necessary, see note 34 *infra*. See generally Note, *The Scope of the Program EIS Requirement: The Need for a Coherent Judicial Approach*, 30 STAN. L. REV. 767 (1978) (suggesting judicial adoption of a three-part test for determining the proper scope of a programmatic EIS). See also Note, *Program Environmental Impact Statements: Review and Remedies*, 75 MICH. L. REV. 107 (1976); Comment, *Planning Level and Program Impact Statements Under the National Environmental Policy Act: A Definitional Approach*, 23 U.C.L.A. L. REV. 124 (1975).

9. Like a programmatic EIS, a 'lesser scope' EIS covers an overall program, plan, or policy, but merely does so at a narrower, more constrictive level. For example, a regional EIS discussing oil and gas development in the Atlantic coastal area is a tiered, lesser scope EIS as compared to a programmatic EIS covering Outer Continental Shelf (OCS) development nationwide. See *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1377 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978), discussed in notes 53-59 and accompanying text *infra*. It is nonetheless programmatic, since its scope encompasses more than an individual project.

10. An EIS of site-specific scope deals solely with a single, specific project. In the context of multi-stage federal programs, site-specific EIS's appear subsequent to all programmatic EIS's as the final tier of environmental review. They concentrate on the specifics of the individual project, while summarizing and incorporating by reference relevant information from the programmatic EIS's. 40 C.F.R. § 1502.20 (1980).

11. 477 F. Supp. 40 (C.D. Cal. 1979).

12. By authority of the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1976 & Supp. III 1979), *as amended by* Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, §§ 201-208, 92 Stat. 632, the Secretary of the Interior has broad responsibility for administering oil and gas leasing and development on the OCS. Within the DOI, the Bureau of Land Management (BLM) and the United States Geological Survey (USGS) share this responsibility. The BLM administers the leasing of particular tracts, 43 C.F.R. § 3300 (1979), while the USGS supervises and regulates operations on the leased tracts. 30 C.F.R. § 250.1-.97 (1979).

13. The two platforms at issue were Sun Oil's Platform Henry and Chevron's Platform Grace. Both are located in lease tracts initially purchased in 1968 in a sealed-bid lease sale conducted by the BLM. See note 12 *supra*. Sun Oil submitted a Development Plan for Platform Henry in 1969. As a result of the Santa Barbara oil

upon earlier national and regional EIS's,¹⁴ Environmental Assess-

spill of that year, however, all further OCS development off the California coast was suspended indefinitely. R. EASTON, *BLACK TIDE* (1972). Following completion of a number of environmental studies, the DOI extended the suspension in 1971 and recommended that Congress cancel the leases. The Ninth Circuit upheld this suspension pending Congressional action in *Gulf Oil Corp. v. Morton*, 493 F.2d 141, 148 (9th Cir. 1973). In light of the fact that the 92nd Congress adjourned in October, 1972 without acting, however, the court declared the suspension thereafter invalid. 493 F.2d at 149. *Accord*, *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 751 (9th Cir. 1975) (to the extent the DOI's suspension of activities under oil and gas leases relies on permanent adverse environmental consequences, the suspension amounts to a cancellation of the leases beyond the Secretary's power).

In November, 1973, President Nixon initiated "Project Independence," a program intended to free the United States from dependence upon foreign energy sources. President's Address to the Nation Outlining Steps to Deal with the Emergency, 9 WEEKLY COMP. OF PRES. DOC. 1312, 1317 (Nov. 7, 1973). In 1974, as part of Project Independence, the President directed the Secretary of the Interior to more than triple the acreage leased on the OCS. President's Message to the Congress Outlining Legislative Proposals and Executive Actions to Deal with the Crisis, 10 WEEKLY COMP. OF PRES. DOC. 72, 84 (Jan. 23, 1974). The DOI, however, was to ensure observation of environmental safeguards. *Id.*

In response to the President's directive, the DOI published a nationwide programmatic EIS in 1975. U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT, PROPOSED INCREASE IN OIL AND GAS LEASING ON THE OUTER CONTINENTAL SHELF (1975) [hereinafter cited as NATIONAL EIS]. *Get Oil Out, Inc. v. Andrus*, 477 F. Supp. 40, 44 n.1 (C.D. Cal. 1979). That EIS, together with a lease sale EIS for the Southern California OCS, U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT, OCS SALE NO. 35 OFFSHORE SOUTHERN CALIFORNIA, FES 75-35 (1975), was held to satisfy NEPA's requirements for allowing a lease sale to take place in California *ex rel. Younger v. Morton*, 404 F. Supp. 26, 32 (C.D. Cal. 1975). *See generally* McDermott, *Expanded Offshore Leasing and the Mandates of NEPA*, 10 NAT. RESOURCES LAW. 531 (1977). *See also* Southern Cal. Ass'n of Gov'ts v. Kleppe, 413 F. Supp. 563 (D.D.C. 1976).

A regional EIS for the Santa Barbara Channel was prepared in 1976: U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT, OIL AND GAS DEVELOPMENT IN THE SANTA BARBARA CHANNEL, FES 76-13 (1976). *Get Oil Out, Inc. v. Andrus*, 477 F. Supp. 40, 44 n.1 (C.D. Cal. 1979). It was following the preparation of both the national and regional EIS's that the DOI finally approved Development Plans for Platform Grace. The agency denied approval of Platform Henry until after a judicial determination that continued rejection of Sun Oil's Development Plans amounted to a breach of the oil company's lease. *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978).

14. NATIONAL EIS, *supra* note 13; FES 76-13, *supra* note 13. The DOI also relied upon a lesser scope EIS prepared prior to the programmatic EIS's: U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT, PROPOSED INSTALLATION OF PLATFORMS C AND HENRY ON FEDERAL OIL AND GAS LEASES OCS—P 0241; AND 0240 ISSUED UNDER THE OUTER CONTINENTAL SHELF LANDS ACT, SANTA BARBARA CHANNEL OFF THE COAST OF CALIFORNIA, FES 71-9 (1971). This EIS, covering the lease tract containing Platform Henry, had been rejected by the Secretary of Interior since its preparation in 1971. *See Sun Oil Co. v. United States*, 572 F.2d 786, 814 (Ct.

ments¹⁵ prepared on the two proposed platforms,¹⁶ and an EIS prepared for a "similar" platform,¹⁷ the DOI determined site-specific

Cl. 1978). In 1972, the Secretary issued a "Statement of Decision" listing six reasons for rejecting the EIS and Sun Oil's plans for development. *Id.* at 801. The court in *Sun Oil* criticized the Statement of Decision as a "post hoc rationalization" under *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *Sun Oil Co. v. United States*, 572 F.2d at 815. The court found the rejection unjustified, since on the record installation of Platform Henry did not pose a threat to the Channel environment. Accordingly, the Secretary did not have authority under the Outer Continental Shelf Lands Act or its implementing regulations to continually hold up the lease. *Id.* at 816-17. The court did not, however, pass judgment on the EIS. Its validity had not been formally challenged; therefore, the court accepted its findings as true.

Sun Oil was decided prior to the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, §§ 201-208, 92 Stat. 632 (amending 43 U.S.C. §§ 1331-1356 (1976 & Supp. III 1979)). Prior to amendment, the Secretary's power under the Act's implementing regulations was limited to a temporary suspension in emergency situations. 30 C.F.R. § 250.12 (1980). Under the Amendments, however, the Secretary can permanently cancel a lease if, following a hearing arising from a temporary suspension, he determines the benefits of cancellation outweigh those of allowing the lease to continue in force. Pub. L. No. 95-372, § 204, 92 Stat. 636 (amending 43 U.S.C. § 1334(a) (1976 & Supp. II 1978)). A lease subject to termination must pose serious harm to the environment which cannot be expected to disappear or appreciably decrease within a reasonable time. *Id.* These Amendments, coupled with the fact that the 1971 EIS covering Platform Henry was never the subject of judicial review, effectively mitigate the precedential value of *Sun Oil* concerning the platforms at issue in *Get Oil Out*. For a discussion of the Amendments and their possible impact upon OCS development, see Note, *Environmental Considerations in Federal Oil and Gas Leasing on Outer Continental Shelf*, 19 NAT. RESOURCES J. 399, 407-09 (1979).

15. An Environmental Assessment (EA) is a public document prepared by a federal agency which presents adequate environmental evidence and analysis for determining whether an EIS is necessary. 40 C.F.R. § 1508.9 (1980). The agencies can establish their own procedures for EA preparation. *Id.* § 1507.3. Under the USGS's regulations for OCS development, the agency supervisor prepares an EA prior to approval of a proposed or significantly revised exploration or production and development plan. 30 C.F.R. § 250.34-4 (1979).

16. The USGS prepared a detailed EA for each platform. These described the proposed platforms and considered their environmental impacts both under normal operating conditions and in the event of accidents, such as oil spills. *Get Oil Out, Inc. v. Andrus*, 477 F. Supp. 40, 44 (C.D. Cal. 1979).

In an earlier decision on this case, the district court rejected both EA's as inadequate. *Get Oil Out, Inc. v. Andrus*, 468 F. Supp. 82, 86 (C.D. Cal. 1979). The court remanded the matter to the DOI for preparation of a statement of reasons explaining its decision that EIS's were unnecessary. *Id.* Prior to rehearing, the DOI prepared the required statements of reasons as well as a joint EA/Environmental Impact Report with the State of California. 477 F. Supp. at 44.

17. U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT, PROPOSED PLAN OF DEVELOPMENT, SANTA YNEZ UNIT, SANTA BARBARA CHANNEL, OFF

EIS's were not necessary.¹⁸ Get Oil Out, Inc., a California environmental group, objected. Contending there was a strong likelihood the platforms would have significant impacts,¹⁹ the group argued that a full determination could only be made through site-specific EIS preparation. The district court found that the DOI had not reached its decision in an unreasonable or arbitrary and capricious manner.²⁰

CALIFORNIA, FES 74-20 (1974). *Get Oil Out, Inc. v. Andrus*, 477 F. Supp. at 44, 44 n.1.

18. The DOI based its decision upon a determination that neither platform would have a significant impact upon the environment, and that, even if either did, site-specific EIS's would still be unnecessary "because the environmental impacts of a platform similar to the one[s] proposed have been comprehensively analyzed and described in existing EIS's." U.S. DEP'T OF THE INTERIOR, GRACE STATEMENT OF REASONS 29 (1979), *quoted in* Plaintiffs' Memorandum for Renewed Motion for Partial Summary Judgment at 2, *Get Oil Out, Inc. v. Andrus*, 477 F. Supp. 40 (C.D. Cal. 1979) [hereinafter cited as Plaintiffs' Memorandum]; U.S. DEP'T OF THE INTERIOR, HENRY STATEMENT OF REASONS 28 (1979), *quoted in* Plaintiffs' Memorandum, *supra*, at 2.

19. Plaintiffs contended that "each plan has or, at the least, may have, significant impacts on the human environment" not adequately analyzed in any existent environmental study. Plaintiffs' Memorandum, *supra* note 18, at 3. Plaintiffs feared a number of potentially significant environmental impacts. Of primary concern was the possibility that the structures could have adverse geologic impacts in the seismic channel, resulting in earthquake shaking, fault rupture, or other hazards which could in turn lead to an oil spill. *Id.* at 18-19. Plaintiffs also suggested air pollution, the elimination of fishing grounds, aesthetic impacts, and effects upon cultural resources such as Indian remains and shipwrecks believed to be in the area as objections to developmental approval prior to site-specific EIS preparation. *Id.* at 21-31.

20. 477 F. Supp. at 41-42. Plaintiffs had argued that in the Ninth Circuit the standard of review of agency threshold determinations that a proposed action will not significantly affect the quality of the human environment (negative determinations) is one of reasonableness. Plaintiffs' Memorandum, *supra* note 18, at 4. Plaintiffs based this contention upon *City of Davis v. Coleman*, 521 F.2d 661, 663 (9th Cir. 1975) (threshold test is whether agency has "reasonably concluded" project will not have significant adverse environmental consequences). Defendants averred that the Supreme Court overruled the 'reasonableness' standard in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), substituting it with the 'arbitrary and capricious' standard of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970). Memorandum of Intervenor Supporting Defendants' Renewed Motion for Summary Judgment and Joining Therein at 3, *Get Oil Out, Inc. v. Andrus*, 477 F. Supp. 40 (C.D. Cal. 1979). The district court in *Get Oil Out*, recognizing that the discussion of standard of review in *Kleppe* was dicta, refrained from deciding which was the proper standard. It implied, however, that the Ninth Circuit standard continued to be reasonableness. 477 F. Supp. at 43.

One district court within the Ninth Circuit has, since *Kleppe*, applied the reasonableness standard. *City and County of San Francisco v. United States*, 443 F. Supp. 1116, 1127 (N.D. Cal. 1977). For general discussions of the standard of review for negative determinations, see Comment, *Judicial Review of a NEPA Negative State-*

It held, therefore, that site-specific EIS's were not necessary.²¹ The projects could proceed upon the basis that the earlier, broad EIS's and the project Environmental Assessments constituted adequate compliance with NEPA.²²

An EIS primarily serves an "action-forcing" function,²³ ensuring "fully informed and well-considered" agency decisions²⁴ reached after consideration of environmental consequences.²⁵ Although federal agencies must comply with the EIS requirement "to the fullest extent possible,"²⁶ they are not to elevate environmental considerations above other appropriate but competing concerns.²⁷ NEPA mandates a balancing analysis,²⁸ not a particular result.²⁹ In order to protect

ment, 53 B.U. L. REV. 879 (1973); Comment, *Threshold Determinations by Federal Agencies Under the National Environmental Policy Act of 1969*, 1973 WASH. U. L.Q. 235.

21. 477 F. Supp. at 42.

22. *Id.*

23. *Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979); *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1344 (5th Cir. 1979). The term "action-forcing" originated in the Senate during consideration of the provisions which became § 102(2)(C) of NEPA. See, e.g., 115 CONG. REC. 40416 (1969) (remarks of Sen. Jackson).

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

25. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Swain v. Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976). See McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 804 (1977) (NEPA's overall purpose is to compel agency consideration of environmental consequences).

26. NEPA § 102, 42 U.S.C. § 4332 (1970). The requirement that NEPA's § 102 procedural mandates be followed "to the fullest extent possible" came out of conference. The phrase was not meant to restrict the Act's broad scope and force. See, e.g., *Major Changes in S. 1075 as Passed by the Senate*, 115 CONG. REC. 40417-18 (1969); *Provisions of the Conference Substitute*, 115 CONG. REC. 39702-04 (1969). The Supreme Court has recognized that the phrase "is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976), *rehearing denied*, 429 U.S. 875 (1976). See also *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (the phrase does not make compliance with NEPA discretionary).

27. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980). See note 28 *infra*.

28. *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (NEPA requires a case-by-case balancing analysis). It is open to speculation whether the Supreme Court's per curiam opinion in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980), overrules the NEPA balancing analysis enunciated in *Calvert Cliffs'* and numerous

the discretionary domain of the executive, judicial review of an

subsequent cases. *E.g.*, *NRDC v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972); *Chautauqua County Env'tl Defense Council v. Adams*, 452 F. Supp. 376, 380 (W.D. N.Y. 1978); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 927 (D. Or. 1977). Broadly interpreted, the *Strycker's Bay* Court's statement that "the only role for a court is to insure that the agency has considered the environmental consequences," can be read as precluding all substantive review of the agency's decision. 444 U.S. at 231 (Marshall, J., dissenting); N. ORLOFF & G. BROOKS, *THE NATIONAL ENVIRONMENTAL POLICY ACT: CASES AND MATERIALS* 307 (1980).

Such an interpretation of the Court's language is, however, far too broad. Since *Calvert Cliffs'*, courts have generally adopted a limited substantive standard of judicial review, ensuring reasonable good faith compliance with NEPA's procedural mandates. *See, e.g.*, *Monroe County Conserv. Council, Inc. v. Adams*, 566 F.2d 419, 422 (2d Cir. 1977) (court may determine whether EIS was prepared in objective good faith, permitting full consideration and balancing of environmental factors); *Carolina Env'tl Study Group v. United States*, 510 F.2d 796, 798, 801 (D.C. Cir. 1975) (EIS must be completed in objective good faith, allowing full consideration and balancing of environmental factors; agency officials, however, can be subjectively impartial); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974) (EIS must contain a reasonably thorough discussion of probable significant environmental impacts). A number of circuit courts of appeals have formulated this standard in terms of a "rule of reason." *See County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Sierra Club v. Froehlike*, 534 F.2d 1289, 1299 (8th Cir. 1976); *Environmental Defense Fund, Inc. v. Corps of Engineers (Tennessee-Tombigbee)*, 492 F.2d 1123, 1131 (5th Cir. 1974); *National Helium Corp. v. Morton*, 486 F.2d 995, 1002 n.5 (10th Cir. 1973); *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

Under the broad interpretation of *Strycker's Bay*, which views the Court's use of the word "consider" as meaning a mere mechanical observation that the agency looked at environmental factors, even these limited standards of review would be impermissible. A court could not apply the rule of reason to determine if the agency complied with NEPA in good faith; it could merely ask whether, on its face, the record showed the agency mechanically complied. It is unlikely the Court meant the word to have such a potentially debilitating impact upon NEPA, given its extensive reliance upon its earlier opinions in *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (court may ensure agency took a "hard look" at environmental factors), and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 555 (1978) (court has a limited role in reviewing the sufficiency of the agency's environmental consideration).

In one post-*Strycker's Bay* opinion, the First Circuit, in *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068 (1st Cir. 1980), adopted a two-part substantive and procedural standard of judicial review under NEPA. *Id.* at 1071-72. Citing *Strycker's Bay*, the court stated in part that a court should engage in a limited substantive review to ensure the agency gave a good faith consideration to environmental factors. *Id.* at 1072. The court read *Strycker's Bay* as merely reasserting the rule that a court may not second guess the substantive balancing judgment struck by the agency. *Id.* at 1072, 1072 n.2. *See also Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1376 (10th Cir. 1980) (applying good faith compliance/reasonable discussion standard of review, though making no reference to *Strycker's Bay*).

agency's decision is therefore limited to ensuring that the agency took a "hard look" at environmental consequences.³⁰

Agencies possess wide latitude in EIS preparation.³¹ The scope and detail required for each EIS depends upon the type of "major federal action"³² proposed.³³ Agency programs comprising numerous individual projects or segments often require broad, programmatic EIS's;³⁴ the program itself constitutes a major federal action.

29. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *North Slope Borough v. Andrus*, 486 F. Supp. 332, 345 (D.D.C. 1980).

30. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The "hard look" doctrine of judicial review in NEPA cases originated in *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972). The District of Columbia Circuit stated that courts should not "impose unreasonable extremes" upon federal agencies attempting to comply with NEPA "[s]o long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress." *Id.* Numerous courts have subsequently adopted the phrase. *E.g.*, *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 327 n.28 (1975) (proper scope of judicial review of EIS need not be determined since agency adequately gave environmental matters a "hard look"); *Ohio ex rel. Brown v. United States EPA*, 460 F. Supp. 248, 251 (S.D. Ohio 1978) (EIS clearly shows environmental impacts were given a "hard look"). *See generally* *Rodgers, A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 *Geo. L.J.* 699, 704-08 (1979).

31. *See* *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 241 (3d Cir. 1980) (agencies have flexibility with respect to timing of EIS preparation); *NRDC v. United States Nuclear Reg. Comm'n*, 606 F.2d 1261, 1272 (D.C. Cir. 1979) (agencies have "substantial discretion" in determining which alternatives to discuss and adopt); *Environmental Defense Fund, Inc. v. Corps of Engineers (Tennessee-Tombigbee)*, 492 F.2d 1123, 1139 n.33 (5th Cir. 1974) (decision whether to take a particular action is "broadly committed" to agency discretion). *But see* *Wyoming Outdoor Coordinating Counsel v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973) (agency latitude in deciding whether EIS is necessary is limited; must be reasonable regarding NEPA's standards and requirements).

32. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). The EIS requirement applies only to "major federal actions significantly affecting the quality of the human environment." *Id.*

33. *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 322 (1974) (in deciding what kind of EIS to prepare, it is necessary first to describe accurately the federal action being taken). *Accord*, *Manygoats v. Kleppe*, 558 F.2d 556, 560 (10th Cir. 1977) (EIS must be tailored to the federal action).

34. *See, e.g.*, *Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368 (10th Cir. 1980) (Prototype Oil Shale Leasing Program); *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978) (federal Geothermal Leasing Program); *Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth.*, 576 F.2d 573 (5th Cir. 1978) (metropolitan area rapid transit system); *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978) (OCS leasing program); *NRDC v. United States Nuclear Reg. Comm'n*, 539 F.2d 824 (2d Cir. 1976), *vacated*, 434 U.S.

When an individual project within the program is also a major federal action, a lesser or site-specific EIS may be necessary.³⁵ Problems arise when both a program and its component parts are major federal actions and the agency determines EIS's are not required for both.

In one of the first cases to deal with this issue, the district court in *Natural Resources Defense Council, Inc. (NRDC) v. TVA*³⁶ upheld the adequacy of a single programmatic EIS concerning long-term coal contracts. The court found that the TVA acted rationally in rejecting the argument that NEPA requires individual EIS's for each term coal contract.³⁷ Underlying this rational basis was a statutory conflict prohibiting individual EIS preparation for each contract.³⁸ In addi-

1030 (1978) (wide-scale use of radioactive mixed oxide fuel); *NRDC v. Callaway*, 524 F.2d 79 (2d Cir. 1975) (cumulative impact of individual Navy dumping and dredging projects); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973) (Liquid Metal Fast Breeder Reactor program); *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973) (entire urban renewal project); *Named Individual Members of San Antonio Conserv. Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971) (entire stretch of highway, not artificially chopped segments); *Kettle Range Conserv. Group v. Bergland*, 480 F. Supp. 1199 (E.D. Wash. 1979) (national forest timber sale); *NRDC v. Hodel*, 435 F. Supp. 590 (D. Or. 1977) (long-range electrical power program); *NRDC v. Morton*, 388 F. Supp. 829 (D. D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976) (federal livestock grazing program); *NRDC v. TVA*, 367 F. Supp. 122, *supplemented*, 367 F. Supp. 128 (E.D. Tenn. 1973), *aff'd*, 502 F.2d 852 (6th Cir. 1974) (TVA coal procurement program). See generally *RODGERS*, *supra* note 2, at 785-90.

35. *E.g.*, *Environmental Defense Fund, Inc. v. Armstrong*, 356 F. Supp. 131, 139 (N.D. Cal. 1973), *supplementing* 352 F. Supp. 50, *aff'd*, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 419 U.S. 1041 (1974) ("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 NEPA are determined on an individual major federal action basis"). See generally *RODGERS*, *supra* note 2, at 790-92.

36. 367 F. Supp. 122 (E.D. Tenn. 1973), *supplemented*, 367 F. Supp. 128, *aff'd*, 502 F.2d 852 (6th Cir. 1974).

37. *Id.* at 128.

38. *Id.* at 125. Section 104 of NEPA states that its provisions are not to affect the specific statutory obligations of federal agencies. 42 U.S.C. § 4334 (1976). The Supreme Court has held that conflicts between NEPA and specific statutes governing federal agencies must be resolved in favor of the agency statute. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1975) (where there is a clear and unavoidable conflict in statutory authority, NEPA must yield); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP I)*, 412 U.S. 669, 694 (1973) (NEPA is not to repeal by implication any other statute). *But see* *Environmental Defense Fund, Inc. v. Matthews*, 410 F. Supp. 336, 337 (D. D.C. 1976) (to extent reconcilable with other statutory duties, NEPA supplements them).

In *NRDC v. TVA*, the court found that EIS preparation for each contract would violate § 9(b) of the Tennessee Valley Authority Act, 16 U.S.C. § 831h(b) (1976).

tion, however, the court found the programmatic EIS itself satisfied NEPA's requirements.³⁹

The Supreme Court endorsed programmatic EIS's in *Kleppe v. Sierra Club*.⁴⁰ In a case where the agency had already prepared programmatic and site-specific EIS's,⁴¹ the Court determined that a middle-tier regional EIS was unnecessary.⁴² The Court held that NEPA applies neither to the mere contemplation of major federal action⁴³ nor to the existence of intimately related projects;⁴⁴ the EIS requirement extends only to *proposed* major federal actions.⁴⁵ Since there was no evidence of a regional development plan,⁴⁶ there was no

Section 9(b) requires the TVA to hold advertised open bidding for all contracts for services or supplies. *Id.* Due to extreme fluctuation in prices in the coal market, the court reasoned that individual contract EIS preparation would limit the number of companies capable of bidding to the few large enough to afford the extended processing time EIS preparation would require. 367 F. Supp. at 125-26.

39. 367 F. Supp. 128, 131 (E.D. Tenn. 1973), *supplementing* 367 F. Supp. 122, *aff'd*, 502 F.2d 852 (6th Cir. 1974).

40. 427 U.S. 390, 409-10 (1976).

41. The DOI had prepared site-specific EIS's for four coal mining plans in the Powder River Basin as well as a nationwide Coal Programmatic EIS. *Id.* at 395, 398. Respondents contended that a middle-tier "Northern Great Plains region" EIS was necessary as well. *Id.* at 395.

42. *Id.* at 399.

43. *Id.* at 406.

44. *Id.* at 414.

45. *Id.* at 401. *Accord*, *Andrus v. Sierra Club*, 442 U.S. 347, 362 (1979) (EIS requirement applies to those recommendations and reports which actually propose programmatic action, not to those merely suggesting how to fund such actions); *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 320 (1975) (agency must have EIS ready at the time it makes a recommendation or report on a proposal for major federal action). *Kleppe* has been thoroughly analyzed in numerous law review articles. *See generally* McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 824-35, 884-86 (1977); Note, *The Scope of the Program EIS Requirement: The Need for a Coherent Judicial Approach*, 30 STAN. L. REV. 767, 785-92 (1978).

46. The Court found no evidence in the record of a proposal for action at the regional level. 427 U.S. at 400. The court of appeals, however, which had ruled a regional EIS was necessary, concluded that a regional plan was "contemplated." *Sierra Club v. Morton*, 514 F.2d 856, 878 (D.C. Cir. 1975). In reaching a conclusion accepted by Justice Marshall in dissent, the District of Columbia Circuit adopted a four-part test for determining whether a contemplated program is "ripe" for EIS preparation. *Id.* at 880. This test involves examining (1) the likelihood of the program coming to fruition, (2) the present availability of meaningful information on its environmental effects and alternatives, (3) the extent to which irretrievable commitments are being made, and (4) the severity of environmental impacts if the program is

need for a corresponding EIS.⁴⁷ Although the court was enigmatic concerning tiering, its decision did not question the rectitude of multi-tiered EIS's. The Court implied that for certain ongoing federal programs, the preparation of sequential, tiered EIS's may be requisite.⁴⁸

Numerous lower federal courts have articulated tests to determine whether preparation of either a programmatic or component EIS supersedes need for the other.⁴⁹ In *NRDC v. Morton*,⁵⁰ the district court determined that a programmatic EIS standing alone is ade-

implemented. *Id.* The Supreme Court rejected this test as an unauthorized departure from NEPA's statutory language. 427 U.S. at 406.

47. 427 U.S. at 401. *See also* *Peshlakai v. Duncan*, 476 F. Supp. 1247, 1258 (D. D.C. 1979) (regional EIS required only if there is a regional comprehensive federal plan or a number of major federal actions in the region with cumulative or synergistic effects).

48. The Court stated:

[NEPA] speaks solely in terms of *proposed* actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions. Should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects.

427 U.S. at 410 n.20. (Emphasis in original).

49. *E.g.*, *NRDC v. Callaway*, 524 F.2d 79, 89 (2d Cir. 1975) (court relied upon geographical proximity, interrelatedness of action, and similarity of environmental effects to determine that the projects at issue were closely enough related to create a cumulative environmental impact warranting programmatic EIS preparation); *Sierra Club v. Callaway* (Wallisville Dam), 499 F.2d 982, 990 (5th Cir. 1974) (programmatic EIS necessary if a strong enough logical nexus exists between individual project and overall program); *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360 (D. Md. 1973), *aff'd per curiam*, 500 F.2d 29 (4th Cir. 1974) (programmatic EIS necessary only if first, there is nominal federal consideration of treating the individual actions as a unit, and second, a logical nexus exists); *Environmental Defense Fund v. Armstrong*, 352 F. Supp. 50 (N.D. Cal. 1972), *supplemented*, 356 F. Supp. 131 (N.D. Cal. 1972), *aff'd*, 487 F.2d 814 (9th Cir. 1973) (programmatic EIS unnecessary if each major federal action is undertaken individually and is not an indivisible part of an integrated system). A number of courts have held a programmatic EIS is not necessary if each project has "independent utility." *See Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973). *Cf.* *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105 (D. N.H. 1975) (independent significance). *See generally* RODGERS, *supra* note 2, at 788-89.

50. 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976). At issue in *NRDC v. Morton* was the Bureau of Land Management's livestock grazing permit program. The district court held the Bureau's programmatic EIS insufficient, determining that site-specific EIS's for each district issuing permits were required. *Id.* at 841.

quate if it satisfies two criteria. First, the agency must analyze local geographic conditions in sufficient detail to permit consideration of the environmental impacts of and alternatives to each individual major federal action within the program.⁵¹ Second, the contents must be detailed enough to allow particularized public evaluation and comment on the individual projects.⁵²

In *County of Suffolk v. Secretary of Interior*,⁵³ the Second Circuit effectively established Outer Continental Shelf oil and gas development as an ongoing program requiring tiered EIS preparation under *Kleppe*. The court determined the DOI should prepare a series of constrictive EIS's, beginning at a national programmatic level, narrowing first to a regional and finally to a Development Plan scope.⁵⁴ Ruling upon the adequacy of a regional EIS,⁵⁵ the court held that discussion of proper transportation routes could be deferred⁵⁶ until final-tier EIS preparation.⁵⁷ The court reasoned in part that there

51. 388 F. Supp. at 838-39.

52. *Id.* at 839. For a favorable appraisal of this two-part test, see McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 836 (1977).

53. 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

54. *Id.* at 1377. The court determined that NEPA first requires the DOI to prepare a national programmatic EIS discussing its decision for accelerating the OCS leasing program. Second, the agency must decide which specific offshore areas should be offered for lease and prepare regional EIS's for each. Finally, Development Plan EIS's discussing the particular environmental consequences of each tract are necessary prior to agency approval of any specific proposals for production and transportation of oil and gas. *Id.* The Second Circuit did not discuss whether or not site-specific EIS's for each platform would be necessary. The court implied transportation and production could begin following completion of tract level EIS's. Nothing the court said precludes preparation for each platform, however, since that issue was not before the court. For a critical discussion of the Second Circuit's analysis, see Comment, *Offshore Oil Development and the Demise of NEPA*, 7 B.C. ENV'T'L AFF. L. REV. 83 (1978).

55. The DOI had prepared a regional EIS for the Atlantic coastal area as well as a programmatic EIS for OCS development nationwide. Plaintiffs contended the regional EIS was insufficient for allowing exploration activities because it did not adequately discuss possible transportation routes. The EIS assumed oil would be pipelined to shore; plaintiffs, however, argued that the possibility of state and local government refusal to permit pipeline landings upon their shores made it requisite that the alternative of tankering be discussed. 562 F.2d at 1374.

56. The Second Circuit reasoned that the acceptability of deferring examination of development and production problems in a middle-tier EIS depends upon (1) whether it is "meaningfully possible" to obtain additional detailed information about the subject at that stage, and (2) how important it is to gather the information at that stage in deciding whether to continue the project. *Id.* at 1378.

57. *Id.* at 1382. The court based its decision upon four factors. First, the project

was no need to make that determination at the regional stage since the permitted exploration activities would not involve an irrevocable and irreversible commitment of public resources.⁵⁸ Furthermore, any such discussion would be purely speculative, and thus properly postponed until more precise data became available.⁵⁹

The Ninth Circuit in *Sierra Club v. Hathaway*⁶⁰ dealt with a situation similar to *County of Suffolk* under the federal Geothermal Leasing Program.⁶¹ Relying heavily upon *Kleppe*, the court held that a programmatic EIS would suffice for the initial "casual use" exploration stage of geothermal resource development.⁶² The court based this holding upon several factors. First, regional or site-specific development within the Geothermal Leasing Program was still at the contemplation stage; it did not qualify, under *Kleppe*, as a proposal for major federal action.⁶³ Second, by permitting "casual use," the DOI had not made a "critical agency decision" leading to an irreversible and irretrievable commitment of resources.⁶⁴ Third, the district court was closely supervising all exploration activities to ensure

could be modified or changed in the future should grave environmental hazards emerge. *Id.* at 1378. Second, the government retained overall control over the program possessing the power to make necessary modifications in the future. *Id.* Third, any discussion of pipeline routes at the regional stage was purely conjectural since it was still unknown where, by whom, and what type oil was to be found. *Id.* at 1379. Finally, the DOI was permitting only exploration activities; an irrevocable and irreversible commitment of resources was not being made. *Id.* at 1390-91.

58. *Id.* at 1390-91. See NEPA § 102(2)(C)(v), 42 U.S.C. § 4332(2)(C)(v) (1976). See also *Alaska v. Andrus*, 580 F.2d 465, 477 (D.C. Cir. 1978), cert. granted in part, vacated in part sub nom. *Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (middle-tier EIS on Operating Orders not required for lease sale to take place; considerable environmental impact from the Orders can arise only after lease sale has been held and its consideration can be deferred until after that time).

59. 562 F.2d at 1378.

60. 579 F.2d 1162 (9th Cir. 1978).

61. In *Hathaway*, plaintiff environmental group sought to enjoin the DOI from executing lease agreements giving private parties the right to explore for and commercially produce geothermal steam within the Alvord Desert of southeast Oregon. The agency had prepared a programmatic EIS covering the Geothermal Leasing Program nationwide. The Alvord Desert, a known geothermal resource area, was under consideration for designation as a roadless primitive and/or wilderness area. Plaintiffs contended a regional EIS was necessary, and accordingly sought a preliminary injunction halting all geothermal activity until its preparation. *Id.* at 1166.

62. *Id.* at 1169.

63. *Id.* at 1168.

64. *Id.*

agency compliance with its regulations.⁶⁵ Moreover, there was every indication that the agency intended to comply with NEPA at the appropriate stage of development.⁶⁶

In *Get Oil Out*, the court applied the "hard look" doctrine⁶⁷ to find that the DOI had satisfactorily complied with NEPA's procedural mandates.⁶⁸ The court was not free to decide whether the agency's substantive determination of no significant environmental impact was correct.⁶⁹ It did not, therefore, pass judgment on the propriety of a programmatic EIS superseding site-specific EIS preparation; rather, it reached its conclusion by determining that the agency exercised its discretion appropriately.⁷⁰

Nevertheless, the implications of *Get Oil Out* upon tiering are significant. Absent a statutory conflict as in *NRDC v. TVA*,⁷¹ no previous tiering case involving an irreversible and irretrievable commitment of resources had allowed the process to stop halfway.⁷²

65. *Id.* The court considered it important that there would be continuing federal control over implementation of the leasing program. *Id. Accord*, *Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1377 (10th Cir. 1980); *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977).

66. 579 F.2d at 1167.

67. 477 F. Supp. at 43. For a discussion of the "hard look" doctrine, see note 30 *supra*.

68. 477 F. Supp. at 43.

69. The scope of judicial review under NEPA is limited. See notes 8-30 and accompanying text *supra*.

70. 477 F. Supp. at 45.

71. See note 38 and accompanying text *supra*.

72. See notes 58 & 64 and accompanying text *supra*. See also *Mobil Oil Corp. v. FTC*, 562 F.2d 170, 173 (2d Cir. 1977) (EIS not necessary until the point where an irreversible and irretrievable commitment of resources is made); *Friends of the Earth v. Coleman*, 513 F.2d 295, 299 (9th Cir. 1975) (scope of EIS does not depend upon the interrelatedness of projects; rather it depends upon whether completion of one inevitably leads to an irreversible and irretrievable commitment of resources at the other); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1094 (D.C. Cir. 1973) (timing of EIS depends in part upon extent irretrievable commitments of resources are being made).

Subsequent to the *Get Oil Out* decision, a district court determined that a programmatic EIS covering the entire Black Hills National Forest made site-specific EIS's for individual timber sales within the forest unnecessary. *Ventling v. Bergland*, 479 F. Supp. 174, 179 (D. S.D. 1979). Although the Forest Service determined that the individual sales were not major federal actions significantly affecting the environment, the court concluded that even if they were, site-specific EIS's would still be unnecessary. *Id.* The court stated: "where the programmatic EIS is sufficiently detailed and there is no change in circumstances or departure from the policy in the programmatic EIS, no useful purpose would be served by requiring a site-specific EIS." *Id.* at 180.

In fact, the decisions in both *Hathaway* and *County of Suffolk* rested in part upon the fact that such a "critical agency decision" had not been made.⁷³ Moreover, the courts of appeals inferred in each case that consideration of some environmental consequences can be deferred only if agency compliance with NEPA at the appropriate later stage may be expected.⁷⁴

The alleged EIS deficiencies in *Hathaway* and *County of Suffolk* concerned tentative future actions of uncertain dimensions.⁷⁵ The platform construction at issue in *Get Oil Out*, on the other hand, comprised a specific imminent action with reasonably foreseeable consequences. The resource commitment was not, as in *County of Suffolk*, merely speculative.⁷⁶ Rather, it constituted a proposal for federal action under *Kleppe*.⁷⁷

The district court in *Get Oil Out* found that the DOI had sufficiently examined the possible environmental consequences of both platform sites upon the resource commitment.⁷⁸ The court accepted the agency's finding that the proposed federal actions would not significantly affect the environment.⁷⁹ Part of the evidence relied upon by the agency, however, creates doubt as to the adequacy of its examination and exemplifies one of the major problems inherent in the process of tiering.

The DOI extended the process horizontally, basing its determination in part upon an EIS prepared for "a platform *similar* to the one[s] proposed."⁸⁰ Tiering, however, is a vertical process.⁸¹ It is the

Should conditions or the policy significantly change, site-specific EIS's for future sales would be required. *Id.*

73. *Sierra Club v. Hathaway*, 579 F.2d 1162, 1168 (9th Cir. 1978); *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1390-91 (2d Cir. 1977).

74. 579 F.2d at 1167; 562 F.2d at 1391. In *County of Suffolk*, the court stated: "We are satisfied that the Department of Interior, which will have continuous control over the venture, will deal with [these issues] thoroughly in the Development Plan EIS before approving any plans. . . ." *Id.*

75. 579 F.2d at 1168; 562 F.2d at 1378.

76. 562 F.2d at 1378.

77. See note 45 and accompanying text *supra*. The district court in *Get Oil Out* did not directly address the question of whether the proposed federal action was "major" under NEPA. The issue concerned the DOI's determination that the platforms would not "significantly" affect the environment. 477 F. Supp. at 42.

78. 477 F. Supp. at 43-45.

79. *Id.* at 43.

80. U.S. DEP'T OF THE INTERIOR, GRACE STATEMENT OF REASONS at 29 (1979), quoted in Plaintiffs' Memorandum, *supra* note 17, at 2; U.S. DEP'T OF THE INTERIOR,

preparation of a series of constrictive EIS's in sequent order.⁸² As stated in *NRDC v. Morton*, the sequence may be stopped halfway only if the programmatic EIS sufficiently analyzes local geographic conditions.⁸³ Horizontal extension, as in *Get Oil Out*, violates this sequence. The DOI avoided studying the environmental impact of a particular project within a particular local geographical setting through reliance upon an EIS prepared for a similar project within a similar setting.

Tiering will undoubtedly play a significant role in future EIS preparation. The Council on Environmental Quality regulations⁸⁴ authorize and encourage federal agency adherence to the process.⁸⁵ Tiering provides efficiency in EIS preparation by avoiding redundancy.⁸⁶ Furthermore, it promises full and detailed environmental assessments of multi-stage programs and policies, from the planning stage through specific project development.⁸⁷ As applied in *Get Oil Out*, however, that promise becomes nothing more than an exercise in empty rhetoric.⁸⁸ For when applied horizontally, tiering under-

HENRY STATEMENT OF REASONS at 28 (1979), *quoted in* Plaintiffs' Memorandum, *supra* note 17, at 2. (Emphasis added).

81. *See* notes 6-10 and accompanying text *supra*.

82. 40 C.F.R. § 1508.28 (1980); 43 Fed. Reg. 55978, 56006 (1978).

83. 388 F. Supp. 829, 838-39 (D.D.C. 1974). *Cf.* *NRDC v. Administrator, Energy Research and Dev. Adm'n*, 451 F. Supp. 1245, 1259 (D. D.C. 1978), *aff'd in part, rev'd in part, vacated in part on other grounds sub nom.* *NRDC v. United States Nuclear Regulatory Comm'n*, 606 F.2d 1261 (D.C. Cir. 1979) (sequence may stop only if programmatic EIS contains all the environmental analysis required by NEPA).

84. Council on Environmental Quality: National Environmental Policy Act—Regulations, 40 C.F.R. § 1500.00-1508.28 (1980). For a discussion of these regulations as they apply to tiering, *see* notes 6-7 & 10 *supra*.

85. 40 C.F.R. § 1502.20 (1980). Prior to issuance of the regulations in 1979, the CEQ gave limited endorsement to tiering. *See* 2 COUNCIL ON ENVIRONMENTAL QUALITY, 102 MONITOR 19 (1972).

86. 43 Fed. Reg. 55978, 55984 (1978). The CEQ contends tiering will provide more focused, efficient EIS preparation. *Id.* Furthermore, the process is seen as promoting the Council's primary objectives of reducing paperwork and delay. 40 C.F.R. § 1500.4(i) (1980); 43 Fed. Reg. 55978-79, 55991 (1978). *See* note 7 *supra*.

87. *See* note 6 *supra*.

88. *See* *Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368 (10th Cir. 1980). In a case concerning the national Prototype Oil Shale Leasing Program, the Tenth Circuit in *Environmental Defense Fund v. Andrus* found preparation of a single 'combination' programmatic, regional, and site-specific EIS satisfied NEPA's requirements. *Id.* at 1382. The court relied in part upon assurances given the Secretary of Interior by the program's area supervisor that the environmental impact had not changed in the seven years since the EIS was prepared. *Id.* at 1380-82. Judge Doyle,

mines NEPA's basic purpose of ensuring that every proposal for major federal action receive a detailed and independent environmental study.

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in concurrence, admitted that the agency's entire procedure constituted "an 'end run' . . . designed to skirt NEPA as well as EIS." *Id.* at 1383 (Doyle, J., concurring). He nonetheless concurred in the result since he believed the energy crisis has made oil shale development so crucial that "[i]t is too late to stand on [NEPA's] ceremony." *Id.*