

# 50th Anniversary of NEPA: Summary of influential U.S. court decisions

(from the beginnings of EIA in the United States, through a journey of discovery considering seven fundamental cases, and what is in store for the future of EIA)

**P.E. “Pam” Hudson, Esq.**

*Senior Associate Counsel, NAVFAC SW*

*United States*

[pam.e.hudson.civ@us.navy.mil](mailto:pam.e.hudson.civ@us.navy.mil)



*\*Views expressed are my own; they do not represent the DoD or U.S. Navy.*

## First Court Interpretation of NEPA

*Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971)

To ensure that the balancing analysis is carried out and given full effect, § 102(2)(C) of the NEPA requires that responsible officials of all agencies prepare a "detailed statement" covering the impacts, the environmental costs which might be avoided, and alternative measures which might alter the cost-benefit equation.

§ 102(2)(D) requires all agencies specifically to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.



## NEPA is a Procedural Law/Agency Discretion

*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct 1835 (1989)

NEPA itself does not mandate particular results, but simply prescribes the necessary process (court discussed NEPA prohibits uninformed rather than unwise environmental decisions).

If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.



## Supplemental EIS

*Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851 (1989)*

The Supreme Court held that an agency's decision not to prepare a supplement EIS should only be set aside if the decision was **arbitrary and capricious**. An agency "must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." It would not "automatically defer" to an agency's determination on the need for a supplemental EIS, but would carefully review the record to ensure that "the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information."





# Standing

*Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177 (1990)

Applying the APA's test of standing, the Court found that plaintiffs' interest in recreational use and aesthetic enjoyment of the federal lands were within the "zone of interests" protected by NEPA and FLPMA. (Plaintiffs were planning to visit species in Egypt, Sri Lanka). Court concluded that plaintiffs, by simply claiming use "in the vicinity" of immense tracts of land managed by BLM, had not shown they would be "adversely affected" by the BLM actions. It also found that plaintiffs were attempting to challenge BLM operation of its land management program generally, not a final agency action in particular -- plaintiffs had not set forth "specific facts" in their affidavits sufficiently.



## Preliminary Injunction Standard/Agency Discretion

*Winter v. Natural Resources Defense Council*, 541 U.S. 752, 129 S. Ct. 364 (2008)

The preliminary injunction standard required parties seeking preliminary relief to demonstrate that irreparable injury was "likely" in the absence of an injunction. The lower district court did not reconsider the likelihood of irreparable harm in light of four restrictions not challenged by the Navy (the Navy was only challenging two out of six restrictions in the injunction). Even if plaintiffs had shown irreparable injury from the Navy's training exercises, any such injury was outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of such factors alone required denial of the requested injunctive relief.



## Federal Control and Responsibility and Agency Discretion – Review

*Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204 (2004)

The U.S. Supreme Court held that the Federal Motor Carrier Safety Administration (a federal agency within the U.S. Dep't of Transp.) had **no control** of the trucks once the regulations were passed and would therefore be unable to act on the findings of an EIS even if it did conduct one. Further, the Court found that the passage of the regulations was not sufficiently responsible for the increased pollution **caused** by the trucks to warrant an EIS.





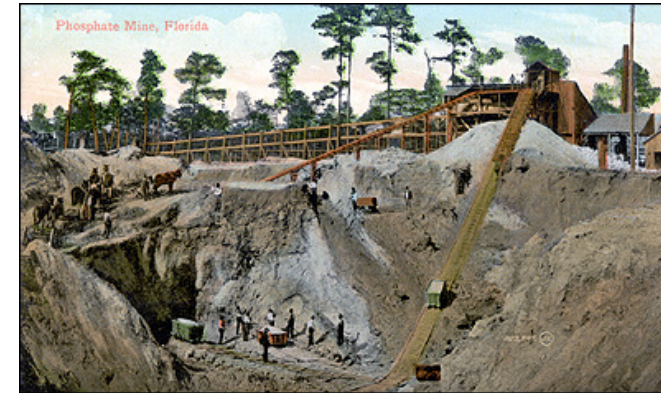
# Federal Control and Responsibility and Reasonably Foreseeable Effects

*Center for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019)

Challenge to the Corps approval of CWA § 404 permit (and EA) for discharge of dredge and fill materials to extend phosphate mining in Bone Valley, in Central Florida. Citing *Public Citizen*, the court recognized that a NEPA review is limited in scope to those effects proximately caused by the agency action.

Because the Corps has control and responsibility only over the discharge of dredged and fill material, not over fertilizer plants regulated by the State of Florida and EPA, the Corps properly concluded that the effects of separate fertilizer plants that process mined phosphate ore are not effects of the Corps permit.

**\*\* Robust Dissent**





## What we expect to see in future cases:

- Defining Federal Action
  - Control and Responsibility
  - Agency Discretion
- Application of the Legal Doctrine of Proximate Cause and the . . . .
- Scope of Reasonably Foreseeable Effects
  - Climate Change and GHG
  - Environmental Justice

# Let's continue the conversation!

Post questions and comments via chat in the IAIA22 platform.



## #iaia22

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