**CALVERT CLIFFS' COORDINATING COMMITTEE, INC., et al., Petitioners,**

**v.**

**UNITED STATES ATOMIC ENERGY COMMISSION and United States of America, Respondents,**

**Baltimore Gas and Electric Company, Intervenor.**

**CALVERT CLIFFS' COORDINATING COMMITTEE, INC., et al., Petitioners,**

**v.**

**UNITED STATES ATOMIC ENERGY COMMISSION and United States of America, Respondents.**

**Nos. 24839, 24871.**

United States Court of Appeals, District of Columbia Circuit.

Argued April 16, 1971.

Decided July 23, 1971.

Proceeding to review order of Atomic Energy Commission. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that the courts have power to require agencies to comply with procedural directions of National Environmental Policy Act of 1969 and that the Commission's rules precluding review consideration of nonradiological environmental issues unless specifically raised, prohibiting raising such issues in certain pending proceedings or when issues have been passed on by other agencies, and precluding consideration between grant of construction permit and consideration of grant of operating license, did not comply with Act.

Remanded.

**1. Health ⇐20**

Direction of National Environmental Policy Act of 1969 that agencies consider environmental amenities along with economic and technical considerations involves a balancing process. National Environmental Policy Act of 1969, § 102(2) (A), 42 U.S.C.A. § 4332(2) (A).

**2. Health ⇐20**

Direction of National Environmental Policy Act of 1969 that, "to the fullest extent possible" agencies must give "appropriate" consideration to environmental amenities and values does not give agencies broad discretion to downplay environmental factors in decision-making process but sets high standard which must be rigorously enforced by courts. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

**3. Health ⇐20**

Requirements of National Environmental Policy Act of 1969 that agencies prepare detailed statements covering impact of actions on environment and describe alternatives seek to insure that each agency decision maker has before him and takes into proper account all possible approaches to particular project which would alter environmental impact and cost-benefit balance. National Environmental Policy Act of 1969, § 102 (2) (C, D), 42 U.S.C.A. § 4332(2) (C, D).

**4. Health ⇐20**

Unlike substantive duties under National Environmental Policy Act, with respect to which agencies must use "all practicable means consistent with other essential considerations", Act's direction that procedural duties must be fulfilled to the "fullest extent possible" makes these duties not inherently flexible but such as must be complied with to fullest extent unless there is clear conflict of statutory authority; considerations of administrative difficulty, delay, or economic cause do not strip provision of its fundamental importance. National Environmental Policy Act of 1969, §§ 101 (b), 102, 42 U.S.C.A. §§ 4331(b), 4332.

**5. Health ⇐20**

While reviewing courts probably cannot reverse substantive decision on its merits, under National Environmental Policy Act of 1969, unless it be shown that actual balance of cost and benefits

that was struck was arbitrary or clearly gave insufficient weight to environmental values, if decision was reached procedurally without individualized consideration and balance of environmental factors, conducted fully and in good faith, courts must reverse. National Environmental Policy Act of 1969, §§ 101 (b), 102, 42 U.S.C.A. §§ 4331(b), 4332.

**6. Health ⇐20**

National Environmental Policy Act requirement that copies of staff's detailed statement covering impact of particular action on environment accompany proposal through agency review processes requires that statement be considered through review processes, and Atomic Energy Commission rule that environmental factors need not be considered by hearing board conducting independent review of staff recomendations unless affirmatively raised by outside parties or staff members did not comply with Act. National Environmental Policy Act of 1969, § 102(2) (C), 42 U.S.C.A. § 4332(2) (C).

**7. Health ⇐20**

National Environmental Protection Act of 1969 requires that Atomic Energy Commission give at least as much automatic consideration of environmental factors as it gives to nonenvironmental factors; in uncontested hearings, reviewing board need not necessarily go over same ground covered in staff's detailed statement but must at least examine statement carefully to determine whether review by staff has been adequate and must independently consider final balance among conflicting factors struck in recommendation. National Environmental Policy Act of 1969, § 102 (2) (C), 42 U.S.C.A. § 4332(2) (C).

**8. Health ⇐20**

Atomic Energy Commission rule prohibiting the raising of nonradiological environmental issues at any hearing if notice for hearing appeared in Federal Register before March 4, 1971 (14 months after effective date of National Environmental Policy Act of 1969) did not satisfy procedural requirements of Act. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

**9. Health ⇐20**

National Environmental Policy Act of 1969 requires each agency to make case-by-case balancing judgment, and Atomic Energy Commission rule precluding independent evaluation and balancing of certain environmental factors if other responsible agencies have already certified that their own environmental standards are satisfied by proposed action conflicted with basic purpose of Act. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

**10. Health ⇐20**

Obedience to water quality certifications under Water Quality Improvement Act of 1970 is not mutually exclusive with procedures under National Environmental Policy Act of 1969 and does not preclude performance of duties under latter Act, since certifications essentially establish minimum condition for grant of license; Atomic Energy Commission can conduct balancing analysis of environmental effect of proposed action despite prior certification. National Environmental Policy Act of 1969, § 104, 42 U.S.C.A. § 4334; Water Pollution Control Act, § 21 as amended 33 U.S.C.A. § 1171.

**11. Health ⇐20**

Consideration of environmental matters under National Environmental Policy Act of 1969 must be more than pro forma ritual and requires consideration of action to avoid adverse consequences and full exercise of substantive discretion at every important, appropriate, and nonduplicative stage of agency's proceedings. National Environmental Policy Act of 1969, § 1 et seq., 42 U.S.C.A. § 4321 et seq.

**12. Health ⇐20**

Atomic Energy Commission rule that when construction permit for facility has been issued before National Environmental Policy Act compliance was required but operating license has yet to be issued, agency should not formally consider environmental factors or require modifications in proposed facility

until time of issuance of operating license did not comply with Act. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

Mr. Anthony Z. Roisman, Washington, D. C., with whom Messrs. Myron M. Cherry, Chicago, Ill., and Lewis Drain, Grand Rapids, Mich., were on the brief, for petitioners.

Mr. Marcus A. Rowden, Solicitor, Atomic Energy Commission, with whom Messrs. Howard K. Shapar, Asst. Gen. Counsel, Licensing and Regulation, Atomic Energy Commission, and Edmund Clark, Atty., Department of Justice, were on the brief, for respondents. Mr. William C. Parler, Atty., Atomic Energy Commission, also entered an appearance for respondent Atomic Energy Commission.

Mr. George F. Trowbridge, Washington, D. C., with whom Mr. Jay E. Silberg, Washington, D. C., was on the brief, for intervenor in No. 24,839.

Messrs. George D. Gibson and Arnold H. Quint, Washington, D. C., filed a brief on behalf of Duke Power Company et al. as amici curiae in No. 24,871.

Mr. Roy B. Snapp, Washington, D. C., filed a brief on behalf of Arkansas Power and Light Company as amicus curiae in No. 24,871.

Messrs. Arvin E. Upton, Leonard M. Trosten and Henry V. Nickel, Washington, D. C., filed a brief on behalf of Consolidated Edison Company as amicus curiae in No. 24,871.

Mr. Jerome E. Sharfman, Washington, D. C., filed a brief on behalf of Consumers Power Company as amicus curiae in No. 24,871.

Messrs. H. Edward Dunkelberger, Jr., Christopher M. Little and Peter M. Phillipes, Washington, D. C., filed a brief on behalf of Indiana and Michigan Electric Company and Portland General Electric Company as amici curiae in No. 24,871.

Before WRIGHT, TAMM and ROBINSON, Circuit Judges.

J. SKELLY WRIGHT, Circuit Judge:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." [1] But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environmental Policy Act of 1969 (NEPA).[2] We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.

NEPA, like so much other reform legislation of the last 40 years, is cast in terms of a general mandate and broad delegation of authority to new and old administrative agencies. It takes the major step of requiring all federal agencies to consider values of environmental preservation in their spheres of activity, and it prescribes certain procedural measures to ensure that those values are in fact fully respected. Petitioners argue that rules recently adopted by the Atomic Energy Commission to govern consideration of environmental matters

1. *See, e. g.*, Environmental Education Act, 20 U.S.C.A. § 1531 (1971 Pocket Part); Air Quality Act of 1967, 42 U.S.C. § 1857 *et seq.* (Supp. V 1965–1969); Environmental Quality Improvement Act of 1970, 42 U.S.C.A. §§ 4371–4374 (1971 Pocket Part); Water and Environmental Quality Improvement Act of 1970, Pub. L. 91–224, 91st Cong., 2d Sess. (1970), 84 Stat. 91.

2. 42 U.S.C.A. § 4321 *et seq.* (1971 Pocket Part).

fail to satisfy the rigor demanded by NEPA. The Commission, on the other hand, contends that the vagueness of the NEPA mandate and delegation leaves much room for discretion and that the rules challenged by petitioners fall well within the broad scope of the Act. We find the policies embodied in NEPA to be a good deal clearer and more demanding than does the Commission. We conclude that the Commission's procedural rules do not comply with the congressional policy. Hence we remand these cases for further rule making.

## I

We begin our analysis with an examination of NEPA's structure and approach and of the Atomic Energy Commission rules which are said to conflict with the requirements of the Act. The relevant portion of NEPA is Title I, consisting of five sections.[3] Section 101 sets forth the Act's basic substantive policy: that the federal government "use all practicable means and measures" to protect environmental values. Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations. In Section 101(b), imposing an explicit duty on federal officials, the Act provides that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy," to avoid environmental degradation, preserve "historic, cultural, and natural" resources, and promote "the widest range of beneficial uses of the environment without * * * undesirable and unintended consequences."

Thus the general substantive policy of the Act is a flexible one. It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances. However, the Act also contains very important "procedural" provisions—provisions which are designed to see that all federal agencies do in fact exercise the substantive discretion given them. These provisions are not highly flexible. Indeed, they establish a strict standard of compliance.

NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions.[4] Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to *consider* environmental issues just as they consider other matters within their mandates. This compulsion is most plainly stated in Section 102. There, "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 * * *." Congress also "authorizes and directs" that "(2) all agencies of the Federal Government shall" follow certain rigorous procedures in considering environmental values.[5] Senator Jackson,

3. The full text of Title I is printed as an appendix to this opinion.

4. Before the enactment of NEPA, the Commission did recognize its separate statutory mandate to consider the specific radiological hazards caused by its actions; but it argued that it could not consider broader environmental impacts. Its position was upheld in State of New Hampshire v. Atomic Energy Commission, 1 Cir., 406 F.2d 170, *cert. denied*, 395 U.S. 962, 89 S.Ct. 2100, 23 L.Ed.2d 748 (1969).

5. Only once—in § 102(2) (B)—does the Act state, in terms, that federal agencies must give full "consideration" to environmental impact as part of their decision making processes. However, a require-

NEPA's principal sponsor, stated that "[n]o agency will [now] be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions." [6] He characterized the requirements of Section 102 as "action-forcing" and stated that "[o]therwise, these lofty declarations [in Section 101] are nothing more than that." [7]

[1, 2] The sort of consideration of environmental values which NEPA compels is clarified in Section 102(2) (A) and (B). In general, all agencies must use a "systematic, interdisciplinary approach" to environmental planning and evaluation "in decisionmaking which may have an impact on man's environment." In order to include all possible environmental factors in the decisional equation, agencies must "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." [8] "Environmental amenities" will often be in conflict with "economic and technical considerations." To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance.[9]

ment of consideration is clearly implicit in the substantive mandate of § 101, in the requirement of § 102(1) that all laws and regulations be "interpreted and administered" in accord with that mandate, and in the other specific procedural measures compelled by § 102(2). The only circuit to interpret NEPA to date has said that "[t]his Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment." Zabel v. Tabb, 5 Cir., 430 F.2d 199, 211 (1970). Thus a purely mechanical compliance with the particular measures required in § 102 (2) (C) & (D) will not satisfy the Act if they do not amount to full good faith *consideration* of the environment. *See* text at page 1116 *infra*. The requirements of § 102(2) must not be read so narrowly as to erase the general import of §§ 101, 102(1) and 102(2) (A) & (B).

On April 23, 1971, the Council on Environmental Quality—established by NEPA—issued guidelines for federal agencies on compliance with the Act. 36 Fed. Reg. 7723 (April 23, 1971). The Council stated that "[t]he objective of section 102(2) (C) of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action * * *." *Id.* at 7724.

6. Hearings on S. 1075, S. 237 and S. 1752 Before Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969). Just before the Senate finally approved NEPA, Senator Jackson said on the floor that the Act "directs all agencies to assure consideration of the environmental impact of their actions in decisionmaking." 115 Cong.Rec. (Part 30) 40416 (1969).

7. Hearings on S. 1075, *supra* Note 6, at 116. Again, the Senator reemphasized his point on the floor of the Senate, saying: "To insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also established some important 'action-forcing' procedures." 115 Cong.Rec. (Part 30) at 40416. The Senate Committee on Interior and Insular Affairs Committee Report on NEPA also stressed the importance of the "action-forcing" provisions which require full and rigorous consideration of environmental values as an integral part of agency decision making. S.Rep.No.91-296, 91st Cong., 1st Sess. (1969).

8. The word "appropriate" in § 102(2) (B) cannot be interpreted to blunt the thrust of the whole Act or to give agencies broad discretion to downplay environmental factors in their decision making processes. The Act requires consideration "appropriate" to the problem of protecting our threatened environment, not consideration "appropriate" to the whims, habits or other particular concerns of federal agencies. *See* Note 5 *supra*.

9. Senator Jackson specifically recognized the requirement of a balancing judgment. He said on the floor of the Senate: "Subsection 102(b) requires the development of procedures designed to insure that all relevant environmental values and

[3] To ensure that the balancing analysis is carried out and given full effect, Section 102(2) (C) requires that responsible officials of all agencies prepare a "detailed statement" covering the impact of particular actions on the environment, the environmental costs which might be avoided, and alternative measures which might alter the cost-benefit equation. The apparent purpose of the "detailed statement" is to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action. Beyond the "detailed statement," Section 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." This requirement, like the "detailed statement" requirement, seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.

Of course, all of these Section 102 duties are qualified by the phrase "to the fullest extent possible." We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.

Unlike the substantive duties of Section 101(b), which require agencies to "use all practicable means consistent with other essential considerations," the procedural duties of Section 102 must be fulfilled to the "fullest extent possible." [10] This contrast, in itself, is revealing. But the dispositive factor in our interpretation is the expressed views of the Senate and House conferees who wrote the "fullest extent possible" language into NEPA. They stated: [11]

> "* * * The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in * * * [Section 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. * * * Thus, it is the intent of the conferees

amenities are considered in the calculus of project development and decisionmaking. Subsection 102(c) establishes a procedure designed to insure that in instances where a proposed major Federal action would have a significant impact on the environment that the impact has in fact been considered, that any adverse effects which cannot be avoided are justified by some other stated consideration of national policy, that short-term uses are consistent with long-term productivity, and that any irreversible and irretrievable commitments of resources are warranted." 115 Cong.Rec. (Part 21) 29055 (1969).

10. The Commission, arguing before this court, has mistakenly confused the two standards, using the § 101(b) language to suggest that it has broad discretion in performance of § 102 procedural duties. We stress the necessity to separate the two, substantive and procedural, standards. *See* text at page 1128 *infra*.

11. The Senators' views are contained in "Major Changes in S. 1075 as Passed by the Senate," 115 Cong.Rec. (Part 30) at 40417–40418. The Representatives' views are contained in a separate statement filed with the Conference Report, 115 Cong.Rec. (Part 29) 39702–39703 (1969).

that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."

[4] Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority.[12] Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.

[5] We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse. As one District Court has said of Section 102 requirements: "It is hard to imagine a clearer or stronger mandate to the Courts." [13]

In the cases before us now, we do not have to review a particular decision by

12. Section 104 of NEPA provides that the Act does not eliminate any duties already imposed by other "specific statutory obligations." Only when such specific obligations conflict with NEPA do agencies have a right under § 104 and the "fullest extent possible" language to dilute their compliance with the full letter and spirit of the Act. *See* text at page 1123 *infra*. Sections 103 and 105 also support the general interpretation that the "fullest extent possible" language exempts agencies from full compliance only when there is a conflict of statutory obligations. Section 103 provides for agency review of existing obligations in order to discover and, if possible, correct any conflicts. *See* text at pages 1020–1021 *infra*. And § 105 provides that "[t]he policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." The report of the House conferees states that § 105 "does not * * * obviate the requirement that the Federal agencies conduct their activities in accordance with the provisions of this bill unless to do so would clearly violate their existing statutory obligations." 115 Cong.Rec. (Part 29) at 39703. The section-by-section analysis by the Senate conferees makes exactly the same point in slightly different language. 115 Cong.Rec. (Part 30) at 40418. The guidelines published by the Council on Environmental Quality state that "[t]he phrase 'to the fullest extent possible' * * * is meant to make clear that each agency of the Federal Government shall comply with the requirement unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 36 Fed. Reg. at 7724.

13. Texas Committee on Natural Resources v. United States, W.D.Tex., 1 Envir. Rpts—Cas. 1303, 1304 (1970). A few of the courts which have considered NEPA to date have made statements stressing the discretionary aspects of the Act. *See, e. g.*, Pennsylvania Environmental Council v. Bartlett, M.D.Pa., 315 F.Supp. 238 (1970); Bucklein v. Volpe, N.D.Cal., 2 Envir. Rpts—Cas. 1082, 1083 (1970). The Commission and intervenors rely upon these statements quite heavily. However, their reliance is misplaced, since the courts in question were not referring to the *procedural* duties created by NEPA. Rather, they were concerned with the Act's substantive goals or with such peripheral matters as retroactive application of the Act.

The general interpretation of NEPA which we outline in text at page 1112 *supra* is fully supported by the scholarly commentary. *See, e. g.*, Donovan, The Federal Government and Environmental Control: Administrative Reform on the Executive Level, 12 B.C.Ind. & Com.L.Rev. 541 (1971); Hanks & Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969, 24 Rutg.

the Atomic Energy Commission granting a construction permit or an operating license. Rather, we must review the Commission's recently promulgated rules which govern consideration of environmental values in all such individual decisions.[14] The rules were devised strictly in order to comply with the NEPA procedural requirements—but petitioners argue that they fall far short of the congressional mandate.

The period of the rules' gestation does not indicate overenthusiasm on the Commission's part. NEPA went into effect on January 1, 1970. On April 2, 1970—three months later—the Commission issued its first, short policy statement on implementation of the Act's procedural provisions.[15] After another span of two months, the Commission published a notice of proposed rule making in the Federal Register.[16] Petitioners submitted substantial comments critical of the proposed rules. Finally, on December 3, 1970, the Commission terminated its long rule making proceeding by issuing a formal amendment, labelled Appendix D, to its governing regulations.[17] Appendix D is a somewhat revised version of the earlier proposal and, at last, commits the Commission to consider environmental impact in its decision making process.

The procedure for environmental study and consideration set up by the Appendix D rules is as follows: Each applicant for an initial construction permit must submit to the Commission his own "environmental report," presenting his assessment of the environmental impact of the planned facility and possible alternatives which would alter the impact. When construction is completed and the applicant applies for a license to operate the new facility, he must again submit an "environmental report" noting any factors which have changed since the original report. At each stage, the Commission's regulatory staff must take the applicant's report and prepare its own "detailed statement" of environmental costs, benefits and alternatives. The statement will then be circulated to other interested and responsible agencies and made available to the public. After comments are received from those sources, the staff must prepare a final "detailed statement" and make a final recommendation on the application for a construction permit or operating license.

Up to this point in the Appendix D rules petitioners have raised no challenge. However, they do attack four other, specific parts of the rules which, they say, violate the requirements of Section 102 of NEPA. Each of these parts in some way limits full consideration and individualized balancing of environmental values in the Commission's decision making process. (1) Although environmental factors must be considered by the agency's regulatory staff under the rules, such factors need not be considered by the hearing board conducting an independent review of staff recommenda-

L.Rev. 231 (1970); Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 Colum. L.Rev. 612, 643–650 (1970); Peterson, An Analysis of Title I of the National Environmental Policy Act of 1969, 1 Envir.L.Rptr. 50035 (1971); Yannacone, National Environmental Policy Act of 1969, 1 Envir.Law 8 (1970); Note, The National Environmental Policy Act: A Sheep in Wolf's Clothing?, 37 Brooklyn L.Rev. 139 (1970).

14. In Case No. 24,871, petitioners attack four aspects of the Commission's rules, which are outlined in text. In Case No. 24,839, they challenge a particular application of the rules in the granting of a particular construction permit—that for the Calvert Cliffs Nuclear Power Plant. However, their challenge consists largely of an attack on the substance of one aspect of the rules also attacked in Case No. 24,871. Thus we are able to resolve both cases together, and our remand to the Commission for further rule making includes a remand for further consideration relating to the Calvert Cliffs Plant in Case No. 24,839. *See* Part V of this opinion, *infra*.

15. 35 Fed.Reg. 5463 (April 2, 1970).

16. 35 Fed.Reg. 8594 (June 3, 1970).

17. 35 Fed.Reg. 18469 (December 4, 1970). The version of the rules finally adopted is now printed in 10 C.F.R. § 50, App. D, pp. 246–250 (1971).

tions, unless affirmatively raised by outside parties or staff members. (2) Another part of the procedural rules prohibits any such party from raising nonradiological environmental issues at any hearing if the notice for that hearing appeared in the Federal Register before March 4, 1971. (3) Moreover, the hearing board is prohibited from conducting an independent evaluation and balancing of certain environmental factors if other responsible agencies have already certified that their own environmental standards are satisfied by the proposed federal action. (4) Finally, the Commission's rules provide that when a construction permit for a facility has been issued before NEPA compliance was required and when an operating license has yet to be issued, the agency will not formally consider environmental factors or require modifications in the proposed facility until the time of the issuance of the operating license. Each of these parts of the Commission's rules will be described at greater length and evaluated under NEPA in the following sections of this opinion.

## II

NEPA makes only one specific reference to consideration of environmental values in agency review processes. Section 102(2) (C) provides that copies of the staff's "detailed statement" and comments thereon "shall accompany the proposal through the existing agency review processes." The Atomic Energy Commission's rules may seem in technical compliance with the letter of that provision. They state:

> "12. If any party to a proceeding * * * raises any [environmental] issue * * * the Applicant's Environmental Report and the Detailed Statement will be offered in evidence. The atomic safety and licensing board will make findings of fact on, and resolve, the matters in controversy among the parties with regard to those issues. Depending on the resolution of those issues, the permit or license may be granted, denied, or appropriately conditioned to protect environmental values.
>
> "13. When no party to a proceeding * * * raises any [environmental] issue * * * such issues will not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the Commission's review processes, they will not be received in evidence, and the Commission's responsibilities under the National Environmental Policy Act of 1969 will be carried out in toto outside the hearing process." [18]

The question here is whether the Commission is correct in thinking that its NEPA responsibilities may "be carried out in toto outside the hearing process" —whether it is enough that environmental data and evaluations merely "accompany" an application through the review process, but receive no consideration whatever from the hearing board.

[6] We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102 (2) (C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity—mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102(2) (C) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent

18. 10 C.F.R. § 50, App. D, at 249.

that environmental factors, as compiled in the "detailed statement," be *considered* through agency review processes.[19]

Beyond Section 102(2) (C), NEPA requires that agencies consider the environmental impact of their actions "to the fullest extent possible." The Act is addressed to agencies as a whole, not only to their professional staffs. Compliance to the *"fullest"* possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs. Of course, consideration which is entirely duplicative is not necessarily required. But independent review of staff proposals by hearing boards is hardly a duplicative function. A truly independent review provides a crucial check on the staff's recommendations. The Commission's hearing boards automatically consider nonenvironmental factors, even though they have been previously studied by the staff. Clearly, the review process is an appropriate stage at which to balance conflicting factors against one another. And, just as clearly, it provides an important opportunity to reject or significantly modify the staff's recommended action. Environmental factors, therefore, should not be singled out and excluded, at this stage, from the proper balance of values envisioned by NEPA.

[7] The Commission's regulations provide that in an uncontested proceeding the hearing board shall on its own "determine whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's regulatory staff has been adequate, to support affirmative findings on" various nonenvironmental factors.[20] NEPA requires at least as much automatic consideration of environmental factors. In uncontested hearings, the board need not necessarily go over the same ground covered in the "detailed statement." But it must at least examine the statement carefully to determine whether "the review * * * by the Commission's regulatory staff has been adequate." And it must independently consider the final balance among conflicting factors that is struck in the staff's recommendation.

The rationale of the Commission's limitation of environmental issues to hearings in which parties affirmatively raise those issues may have been one of economy. It may have been supposed that, whenever there are serious environmental costs overlooked or uncorrected by the staff, some party will intervene to bring those costs to the hearing board's attention. Of course, independent review of the "detailed statement" and independent balancing of factors in an uncontested hearing will take some time. If it is done properly, it will take a significant amount of time. But all of the NEPA procedures take time. Such administrative costs are not enough to undercut the Act's requirement that environmental protection be considered "to the fullest extent possible," *see* text at page 1114, *supra*. It is, moreover, unrealistic to assume that there will always be an intervenor with the information, energy and money required to challenge a staff recommendation which ig-

19. The guidelines issued by the Council on Environmental Quality emphasize the importance of consideration of alternatives to staff recommendations during the agency review process: "A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects." 36 Fed.Reg. at 7725. The Council also states that an objective of its guidelines is "to assist agencies in implementing not only the letter, but the spirit, of the Act." *Id.* at 7724.

20. 10 C.F.R. § 2.104(b) (2) (1971).

nores environmental costs. NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.[21]

## III

Congress passed the final version of NEPA in late 1969, and the Act went into full effect on January 1, 1970. Yet the Atomic Energy Commission's rules prohibit any consideration of environmental issues by its hearing boards at proceedings officially noticed before March 4, 1971.[22] This is 14 months after the effective date of NEPA. And the hearings affected may go on for as much as a year longer until final action is taken. The result is that major federal actions having a significant environmental impact may be taken by the Commission, without full NEPA compliance, more than two years after the Act's effective date. In view of the importance of environmental consideration during the agency review process, *see* Part II *supra*, such a time lag is shocking.

The Commission explained that its very long time lag was intended "to provide an orderly period of transition in the conduct of the Commission's regulatory proceedings and to avoid unreasonable delays in the construction and operation of nuclear power plants urgently needed to meet the national requirements for electric power." [23] Before this court, it has claimed authority for its action, arguing that "the statute did not lay down detailed guidelines and inflexible timetables for its implementation; and we find in it no bar to agency provisions which are designed to accommodate transitional implementation problems." [24]

Again, the Commission's approach to statutory interpretation is strange indeed—so strange that it seems to reveal a rather thoroughgoing reluctance to meet the NEPA procedural obligations in the agency review process, the stage at which deliberation is most open to public examination and subject to the participation of public intervenors. The Act, it is true, lacks an "inflexible timetable" for its implementation. But it does have a clear effective date, consist-

21. In recent years, the courts have become increasingly strict in requiring that federal agencies live up to their mandates to consider the public interest. They have become increasingly impatient with agencies which attempt to avoid or dilute their statutorily imposed role as protectors of public interest values beyond the narrow concerns of industries being regulated. *See, e. g.*, Udall v. FPC, 387 U.S. 428, 87 S.Ct. 1712, 18 L.Ed.2d 869 (1967); Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U.S.App.D.C. 74, 439 F.2d 584 (1971); Moss v. C. A. B., 139 U.S.App.D.C. 150, 430 F.2d 891 (1970); Environmental Defense Fund, Inc. v. U. S. Dept. of H. E. & W., 138 U.S.App.D.C. 381, 428 F.2d 1083 (1970). In commenting on the Atomic Energy Commission's pre-NEPA duty to consider health and safety matters, the Supreme Court said "the responsibility for safeguarding that health and safety belongs under the statute to the Commission." Power Reactor Development Co. v. International Union of Elec., Radio and Mach. Workers, 367 U.S. 396, 404, 81 S.Ct. 1529, 1533, 6 L.Ed.2d 924 (1961). The Second Circuit has made the same point regarding the Federal Power Commission: "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." Scenic Hudson Preservation Conference v. FPC, 2 Cir., 354 F.2d 608, 620 (1965).

22. 10 C.F.R. § 50, App. D, at 249.

23. 35 Fed.Reg. 18470 (December 4, 1970).

24. Brief for respondents in No. 24,871 at 49.

ently enforced by reviewing courts up to now. Every federal court having faced the issues has held that the procedural requirements of NEPA must be met in order to uphold federal action taken after January 1, 1970.[25] The absence of a "timetable" for compliance has never been held sufficient, in itself, to put off the date on which a congressional mandate takes effect. The absence of a "timetable," rather, indicates that compliance is required forthwith.

The only part of the Act which even implies that implementation may be subject, in some cases, to some significant delay is Section 103. There, Congress provided that all agencies must 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 NEPA. Agencies finding some such insuperable difficulty are obliged to "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."

The Commission, however, cannot justify its time lag under these Section 103 provisions. Indeed, it has not attempted to do so; only intervenors have raised the argument. Section 103 could support a substantial delay only by an agency which in fact discovered an insuperable barrier to compliance with the Act and required time to formulate and propose the needed reformative measures. The actual review of existing statutory authority and regulations cannot be a particularly lengthy process for experienced counsel of a federal agency. Of course, the Atomic Energy Commission discovered no obstacle to NEPA implementation. Although it did not report its conclusion to the President until October 2, 1970, that nine-month delay (January to October) cannot justify so long a period of noncompliance with the Act. It certainly cannot justify a further delay of compliance until March 4, 1971.

No doubt the process formulating procedural rules to implement NEPA takes some time. Congress cannot have expected that federal agencies would immediately begin considering environmental issues on January 1, 1970. But the effective date of the Act does set a time for agencies to begin adopting rules and it demands that they strive, "to the fullest extent possible," to be prompt in the process. The Atomic Energy Commission has failed in this regard.[26] Consideration of environmental issues in the agency review process, for example, is quite clearly compelled by the Act.[27] The Commission cannot justify its 11-month delay in adopting rules on this point as part of a difficult, discretionary effort to decide whether or not its hearing boards should deal with environmental questions at all.

Even if the long delay had been necessary, however, the Commission would not be relieved of all NEPA responsibility to hold public hearings on the environmental consequences of actions taken between January 1, 1970 and final adop-

25. In some cases, the courts have had a difficult time determining whether particular federal actions were "taken" before or after January 1, 1970. But they have all started from the basic rule that any action taken after that date must comply with NEPA's procedural requirements. *See* Note, Retroactive Application of the National Environmental Policy Act of 1969, 69 Mich.L.Rev. 732 (1971), and cases cited therein. Clearly, any hearing held between January 1, 1970 and March 4, 1971 which culminates in the grant of a permit or license is a federal action taken after the Act's effective date.

26. *See* text at page 1116 *supra*.

27. As early as March 5, 1970, President Nixon stated in an executive order that NEPA requires consideration of environmental factors at public hearings. Executive Order 11514, 35 Fed.Reg. 4247 (March 5, 1970). *See also* Part II of this opinion.

tion of the rules. Although the Act's effective date may not require instant compliance, it must at least require that NEPA procedures, once established, be applied to consider prompt alterations in the plans or operations of facilities approved without compliance.[28] Yet the Commission's rules contain no such provision. Indeed, they do not even apply to the hearings still being conducted at the time of their adoption on December 3, 1970—or, for that matter, to hearings initiated in the following three months. The delayed compliance date of March 4, 1971, then, cannot be justified by the Commission's long drawn out rule making process.

Strangely, the Commission has principally relied on more pragmatic arguments. It seems an unfortunate affliction of large organizations to resist new procedures and to envision massive roadblocks to their adoption. Hence the Commission's talk of the need for an "orderly transition" to the NEPA procedures. It is difficult to credit the Commission's argument that several months were needed to work the consideration of environmental values into its review process. Before the enactment of NEPA, the Commission already had regulations requiring that hearings include health, safety and radiological matters.[29] The introduction of environmen-

28. In Part V of this opinion, we hold that the Commission must promptly consider the environmental impact of projects initially approved before January 1, 1970 but not yet granted an operating license. We hold that the Commission may not wait until construction is entirely completed and consider environmental factors only at the operating license hearings; rather, before environmental damage has been irreparably done by full construction of a facility, the Commission must consider alterations in the plans. Much the same principle—of making alterations while they still may be made at relatively small expense—applies to projects approved without NEPA compliance *after* the Act's effective date. A total reversal of the basic decision to construct a particular facility or take a particular action may then be difficult, since substantial resources may already have been committed to the project. Since NEPA must apply to the project in some fashion, however, it is essential that it apply as effectively as possible—requiring alterations in parts of the project to which resources have not yet been inalterably committed at great expense.

One District Court has dealt with the problem of instant compliance with NEPA. It suggested another measure which agencies should take while in the process of developing rules. It said: "The NEPA does not require the impossible. Nor would it require, in effect, a moratorium on all projects which had an environmental impact while awaiting compliance with § 102(2) (B). It would suffice if the statement pointed out this deficiency. The decisionmakers could then determine whether any purpose would be served in delaying the project while awaiting the development of such criteria." Environmental Defense Fund, Inc. v. Corps of Engineers, E.D.Ark., 325 F.Supp. 749, 758 (1971). Apparently, the Atomic Energy Commission did not even go this far toward *considering* the lack of a NEPA public hearing as a basis for delaying projects between the Act's effective date and adoption of the rules.

Of course, on the facts of these cases, we need not express any final view on the legal effect of the Commission's failure to comply with NEPA after the Act's effective date. Mere *post hoc* alterations in plans may not be enough, especially in view of the Commission's long delay in promulgating rules. Less than a year ago, this court was asked to review a refusal by the Atomic Energy Commission to consider environmental factors in granting a license. We held that the case was not yet ripe for review. But we stated: "If the Commission persists in excluding such evidence, it is courting the possibility that if error is found a court will reverse its final order, condemn its proceeding as so much waste motion, and order that the proceeding be conducted over again in a way that realistically permits de novo consideration of the tendered evidence." Thermal Ecology Must be Preserved v. AEC, 139 U.S.App.D.C. 366, 368, 433 F.2d 524, 526 (1970).

29. *See* 10 C.F.R. § 20 (1971) for the standards which the Commission had developed to deal with radioactive emissions which might pose health or safety problems.

tal matters cannot have presented a radically unsettling problem. And, in any event, the obvious sense of urgency on the part of Congress should make clear that a transition, however "orderly," must proceed at a pace faster than a funeral procession.

[8] In the end, the Commission's long delay seems based upon what it believes to be a pressing national power crisis. Inclusion of environmental issues in pre-March 4, 1971 hearings might have held up the licensing of some power plants for a time. But the very purpose of NEPA was to tell federal agencies that environmental protection is as much a part of their responsibility as is protection and promotion of the industries they regulate. Whether or not the spectre of a national power crisis is as real as the Commission apparently believes, it must not be used to create a blackout of environmental consideration in the agency review process. NEPA compels a case-by-case examination and balancing of discrete factors. Perhaps there may be cases in which the need for rapid licensing of a particular facility would justify a strict time limit on a hearing board's review of environmental issues; but a blanket banning of such issues until March 4, 1971 is impermissible under NEPA.

## IV

The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action. However, the Atomic Energy Commission's rules specifically exclude from full consideration a wide variety of environmental issues. First, they provide that no party may raise and the Commission may not independently examine any problem of water quality—perhaps the most significant impact of nuclear power plants. Rather, the Commission indicates that it will defer totally to water quality standards devised and administered by state agencies and approved by the federal government under the Federal Water Pollution Control Act.[30] Secondly, the rules provide for similar abdication of NEPA authority to the standards of other agencies:

> "With respect to those aspects of environmental quality for which environmental quality standards and requirements have been established by authorized Federal, State, and regional agencies, proof that the applicant is equipped to observe and agrees to observe such standards and requirements will be considered a satisfactory showing that there will not be a significant, adverse effect on the environment. Certification by the appropriate agency that there is reasonable assurance that the applicant for the permit or license will observe such standards and requirements will be considered dispositive for this purpose." [31]

The most the Commission will do is include a condition in all construction permits and operating licenses requiring compliance with the water quality or other standards set by such agencies.[32] The upshot is that the NEPA procedures, viewed by the Commission as superfluous, will wither away in disuse, applied

30. 10 C.F.R. § 50, App. D, at 249. Appendix D does require that applicants' environmental reports and the Commission's "detailed statements" include "a discussion of the water quality aspects of the proposed action." *Id.* at 248. But, as is stated in text, it bars independent consideration of those matters by the Commission's reviewing boards at public hearings. It also bars the Commission from requiring—or even considering—any water protection measures not already required by the approving state agencies. *See* Note 31 *infra*.

The section of the Federal Water Pollution Control Act establishing a system of state agency certification is § 21, as amended in the Water Quality Improvement Act of 1970. 33 U.S.C.A. § 1171 (1970). In text below, this section is discussed as part of the Water Quality Improvement Act.

31. 10 C.F.R. § 50, App. D, at 249.

32. *Ibid.*

only to those environmental issues wholly unregulated by any other federal, state or regional body.

[9] We believe the Commission's rule is in fundamental conflict with the basic purpose of the Act. NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values. *See* text at page 1113 *supra*. The magnitude of possible benefits and possible costs may lie anywhere on a broad spectrum. Much will depend on the particular magnitudes involved in particular cases. In some cases, the benefits will be great enough to justify a certain quantum of environmental costs; in other cases, they will not be so great and the proposed action may have to be abandoned or significantly altered so as to bring the benefits and costs into a proper balance. The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.

Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (*e. g.*, water pollution), but not quite enough to violate applicable (*e. g.*, water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action—the agency to which NEPA is specifically directed.

The Atomic Energy Commission, abdicating entirely to other agencies' certifications, neglects the mandated balancing analysis. Concerned members of the public are thereby precluded from raising a wide range of environmental issues in order to affect particular Commission decisions. And the special purpose of NEPA is subverted.

Arguing before this court, the Commission has made much of the special environmental expertise of the agencies which set environmental standards. NEPA did not overlook this consideration. Indeed, the Act is quite explicit in describing the attention which is to be given to the views and standards of other agencies. Section 102 (2) (C) provides:

> "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 * * *."

Thus the Congress was surely cognizant of federal, state and local agencies "authorized to develop and enforce environmental standards." But it provided, in Section 102(2) (C), only for full consultation. It most certainly did not authorize a total abdication to those agencies. Nor did it grant a license to disregard the main body of NEPA obligations.

Of course, federal agencies such as the Atomic Energy Commission may have specific duties, under acts other than NEPA, to obey particular environmental standards. Section 104 of NEPA makes clear that such duties are not to be ignored:

> "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."

On its face, Section 104 seems quite unextraordinary, intended only to see that the general procedural reforms achieved in NEPA do not wipe out the more specific environmental controls imposed by other statutes. Ironically, however, the Commission argues that Section 104 in fact allows other statutes to wipe out NEPA.

Since the Commission places great reliance on Section 104 to support its abdication to standard setting agencies, we should first note the section's obvious limitation. It deals only with deference to such agencies which is compelled by "specific statutory obligations." The Commission has brought to our attention one "specific statutory obligation": the Water Quality Improvement Act of 1970 (WQIA).[33] That Act prohibits federal licensing bodies, such as the Atomic Energy Commission, from issuing licenses for facilities which pollute "the navigable waters of the United States" unless they receive a certification from the appropriate agency that compliance with applicable water quality standards is reasonably assured. Thus Section 104 applies in some fashion to consideration of water quality matters. But it definitely cannot support—indeed, it is not even relevant to—the Commission's wholesale abdication to the standards and certifications of any and all federal, state and local agencies dealing with matters other than water quality.

As to water quality, Section 104 and WQIA clearly require obedience to standards set by other agencies. But obedience does not imply total abdication. Certainly, the language of Section 104 does not authorize an abdication. It does not suggest that other "specific statutory obligations" will entirely replace NEPA. Rather, it ensures that three sorts of "obligations" will not be undermined by NEPA: (1) the obligation to "comply" with certain standards, (2) the obligation to "coordinate" or "consult" with certain agencies, and (3) the obligation to "act, or refrain from acting contingent upon" a certification from certain agencies. WQIA imposes the third sort of obligation. It makes the granting of a license by the Commission "contingent upon" a water quality certification. But it does not *require* the Commission to grant a license once a certification has been issued. It does not preclude the Commission from demanding water pollution controls from its licensees which are *more strict* than those demanded by the applicable water quality standards of the certifying agency.[34] It is very important to understand

33. The relevant portion is 33 U.S.C.A. § 1171. *See* Note 30 *supra*.

34. The relevant language in WQIA seems carefully to avoid any such restrictive implication. It provides that "[e]ach Federal agency * * * shall * * * insure compliance with applicable water quality standards * * *." 33 U.S.C.A. § 1171(a). It also provides that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived * * *. No license or permit shall be granted if certification has been denied * * *." 33 U.S.C.A. § 1171(b) (1). Nowhere does it indicate that certification must be the final and only protection against unjustified water pollution—a fully sufficient as well as a necessary condition for issuance of a federal license or permit.

We also take note of § 21(c) of WQIA, which states: "Nothing in this section shall be construed to limit the authority of any department or agency pursuant to

these facts about WQIA. For all that Section 104 of NEPA does is to reaffirm other "specific statutory obligations." Unless those obligations are plainly mutually exclusive with the requirements of NEPA, the specific mandate of NEPA must remain in force. In other words, Section 104 can operate to relieve an agency of its NEPA duties only if other "specific statutory obligations" clearly preclude performance of those duties.

[10] Obedience to water quality certifications under WQIA is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties. Water quality certifications essentially establish a *minimum condition* for the granting of a license. But they need not end the matter. The Commission can then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and consider alterations (above and beyond the applicable water quality standards) which would further reduce environmental damage. Because the Commission *can* still conduct the NEPA balancing analysis, consistent with WQIA, Section 104 does not exempt it from doing so. And it, therefore, *must* conduct the obligatory analysis under the prescribed procedures.

We believe the above result follows from the plain language of Section 104 of NEPA and WQIA. However, the Commission argues that we should delve beneath the plain language and adopt a significantly different interpretation. It relies entirely upon certain statements made by Senator Jackson and Senator Muskie, the sponsors of NEPA and WQIA respectively.[35] Those statements indicate that Section 104 was the product of a compromise intended to eliminate any conflict between the two bills then in the Senate. The overriding purpose was to prevent NEPA from eclipsing obedience to more specific standards under WQIA. Senator Muskie, distrustful of "self-policing by Federal agencies which pollute or license pollution," was particularly concerned that NEPA not undercut the independent role of standard setting agencies.[36] Most of his and Senator Jackson's comments stop short of suggesting that NEPA would have *no* application in water quality matters; their goal was to protect WQIA, not to undercut NEPA. Our interpretation of Section 104 is perfectly consistent with that purpose.

Yet the statements of the two Senators occasionally indicate they were willing to go farther, to permit agencies such as the Atomic Energy Commission to forego at least some NEPA procedures in consideration of water quality. Senator Jackson, for example, said, "The compromise worked out between the bills provides that the licensing agency will not have to make a detailed statement on water quality if the State or other appropriate agency has made a certification pursuant to [WQIA]." [37]

any other provision of law to require compliance with applicable water quality standards. * * *" 33 U.S.C.A. § 1171 (c).

35. The statements by Senators Jackson and Muskie were made, first, at the time the Senate originally considered WQIA. 115 Cong.Rec. (Part 21) at 29052–29056. Another relevant colloquy between the two Senators occurred when the Senate considered the Conference Report on NEPA. 115 Cong.Rec. (Part 30) at 40415–40425. Senator Muskie made a further statement at the time of final Senate approval of the Conference Report on WQIA. 116 Cong.Rec. (daily ed.) S4401 (March 24, 1970).

36. 115 Cong.Rec. (Part 21) at 29053.

37. *Ibid.* *See also id.* at 29056. Senator Jackson appears not to have ascribed major importance to the compromise. He said, "It is my understanding that there was never any conflict between this section [of WQIA] and the provisions of [NEPA]. If both bills were enacted in their present form, there would be a requirement for State certification, as well as a requirement that the licensing agency make environmental findings." *Id.* at 29053. He added, "The agreed-upon changes mentioned previously would change the language of some of these requirements, but their substance would remain relatively unchanged." *Id.* at

Perhaps Senator Jackson would have required some consideration and balancing of environmental costs—despite the lack of a formal detailed statement—but he did not spell out his views. No Senator, other than Senators Jackson and Muskie, addressed himself specifically to the problem during floor discussion. Nor did any member of the House of Representatives.[38] The section-by-section analysis of NEPA submitted to the Senate clearly stated the overriding purpose of Section 104: that "no agency may substitute the procedures outlined in this Act for more restrictive and specific procedures established by law governing its activities." [39] The report does not suggest there that NEPA procedures should be entirely abandoned, but rather that they should not be "substituted" for more specific standards. In one rather cryptic sentence, the analysis does muddy the waters somewhat, stating that "[i]t is the intention that where there is no more effective procedure already established, the procedure of this act will be followed." [40] Notably, however, the sentence does not state that in the presence of "more effective procedures" the NEPA procedure will be abandoned entirely. It seems purposefully vague, quite possibly meaning that obedience to the certifications of standard setting agencies must alter, by supplementing, the *normal* "procedure of this act."

This rather meager legislative history, in our view, cannot radically transform the purport of the plain words of Section 104. Had the Senate sponsors fully intended to allow a total abdication of NEPA responsibilities in water quality matters—rather than a supplementing of them by strict obedience to the specific standards of WQIA—the language of Section 104 could easily have been changed. As the Supreme Court often has said, the legislative history of a statute (particularly such relatively meager and vague history as we have here) cannot radically affect its interpretation if the language of the statute is clear. *See, e. g.,* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947); Kuehner v. Irving Trust Co., 299 U.S. 445, 57 S.Ct. 298, 81 L.Ed. 340 (1937); Fairport, Painesville & Eastern R. Co. v. Meredith, 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446 (1934); Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co., 284 U.S. 231, 52 S.Ct. 113, 76 L.Ed. 261 (1931). In a recent case interpreting a veterans' act, the Court set down the principle which must govern our approach to the case before us:

> "Having concluded that the provisions of § 1 are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act. Since the State has placed such heavy reliance upon that history, however, we do deem it appropriate to point out that this history is at best inconclusive. It is true, as the State points out, that Representative Rankin, as Chairman of the Committee handling the bill on the floor of the House, expressed his view during the course of discussion of the bill on the floor that the 1941 Act would not apply to [the sort of case in question] * * *. But such statements, even when they stand alone, have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute. * * *"

29055. Senator Muskie seemed to give greater emphasis to the supposed conflict between the two bills. *See id.* at 29053; 115 Cong.Rec. (Part 30) at 40425; 116 Cong.Rec. (daily ed.) at S4401.

38. The Commission has called to our attention remarks made by Congressman Harsha. The Congressman did refer to a statement by Senator Muskie regarding NEPA, but it was a statement regarding application of the Act to established environmental control agencies, not regarding the relationship between NEPA and WQIA. 115 Cong.Rec. (Part 30) at 40927–40928.

39. *Id.* at 40420.

40. *Ibid.*

United States v. Oregon, 366 U.S. 643, 648, 81 S.Ct. 1278, 1281, 6 L.Ed.2d 575 (1961). (Footnotes omitted.) It is, after all, the plain language of the statute which *all* the members of both houses of Congress must approve or disapprove. The courts should not allow that language to be significantly undercut. In cases such as this one, the most we should do to interpret clear statutory wording is to see that the *overriding purpose* behind the wording supports its plain meaning. We have done that here. And we conclude that Section 104 of NEPA does not permit the sort of total abdication of responsibility practiced by the Atomic Energy Commission.

V

Petitioners' final attack is on the Commission's rules governing a particular set of nuclear facilities: those for which construction permits were granted without consideration of environmental issues, but for which operating licenses have yet to be issued. These facilities, still in varying stages of construction, include the one of most immediate concern to one of the petitioners: the Calvert Cliffs nuclear power plant on Chesapeake Bay in Maryland.

The Commission's rules recognize that the granting of a construction permit before NEPA's effective date does not justify bland inattention to environmental consequences until the operating license proceedings, perhaps far in the future. The rules require that measures be taken *now* for environmental protection. Specifically, the Commission has provided for three such measures during the pre-operating license stage. First, it has required that a condition be added to all construction permits, "whenever issued," which would oblige the holders of the permits to observe all applicable environmental standards imposed by federal or state law. Second, it has required permit holders to submit their own environmental report on the facility under construction. And third, it has initiated procedures for the drafting of its staff's "detailed environmental statement" in advance of operating license proceedings.[41]

The one thing the Commission has refused to do is take any independent action based upon the material in the environmental reports and "detailed statements." Whatever environmental damage the reports and statements may reveal, the Commission will allow construction to proceed on the original plans. It will not even consider requiring alterations in those plans (beyond compliance with external standards which would be binding in any event), though the "detailed statements" must contain an analysis of possible alternatives and may suggest relatively inexpensive but highly beneficial changes. Moreover, the Commission has, as a blanket policy, refused to consider the possibility of temporarily halting construction in particular cases pending a full study of a facility's environmental impact. It has also refused to weigh the pros and cons of "backfitting" for particular facilities (alteration of already constructed portions of the facilities in order to incorporate new technological developments designed to protect the environment). Thus reports and statements will be produced, but nothing will be done with them. Once again, the Commission seems to believe that the mere drafting and filing of papers is enough to satisfy NEPA.

The Commission appears to recognize the severe limitation which its rules impose on environmental protection. Yet it argues that full NEPA consideration of alternatives and independent action would cause too much delay at the pre-operating license stage. It justifies its rules as the most that is "practicable, in the light of environmental needs and 'other essential considerations of national policy'." [42] It cites, in particular, the "national power crisis" as a considera-

41. 10 C.F.R. § 50, App. D, ¶¶ 1, 14.

42. Brief for respondents in No. 24,871 at 59.

tion of national policy militating against delay in construction of nuclear power facilities.

[11] The Commission relies upon the flexible NEPA mandate to "use all practicable means consistent with other essential considerations of national policy." As we have previously pointed out, however, that mandate applies only to the substantive guidelines set forth in Section 101 of the Act. *See* page 1114 *supra*. The procedural duties, the duties to give full *consideration* to environmental protection, are subject to a much more strict standard of compliance. By now, the applicable principle should be absolutely clear. NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual. Clearly, it is pointless to "consider" environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings. *See* text at page 1114 *supra*.

The special importance of the pre-operating license stage is not difficult to fathom. In cases where environmental costs were not considered in granting a construction permit, it is very likely that the planned facility will include some features which do significant damage to the environment and which could not have survived a rigorous balancing of costs and benefits. At the later operating license proceedings, this environmental damage will have to be fully considered. But by that time the situation will have changed radically. Once a facility has been completely constructed, the economic cost of any alteration may be very great. In the language of NEPA, there is likely to be an "irreversible and irretrievable commitment of resources," which will inevitably restrict the Commission's options. Either the licensee will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.

By refusing to consider requirement of alterations until construction is completed, the Commission may effectively foreclose the environmental protection desired by Congress. It may also foreclose rigorous consideration of environmental factors at the eventual operating license proceedings. If "irreversible and irretrievable commitment[s] of resources" have already been made, the license hearing (and any public intervention therein) may become a hollow exercise. This hardly amounts to consideration of environmental values "to the fullest extent possible."

A full NEPA consideration of alterations in the original plans of a facility, then, is both important and appropriate well before the operating license proceedings. It is not duplicative if environmental issues were not considered in granting the construction permit. And it need not be duplicated, absent new information or new developments, at the operating license stage. In order that the pre-operating license review be as effective as possible, the Commission should consider very seriously the requirement of a temporary halt in construction pending its review and the "backfitting" of technological innovations. For no action which might minimize environmental damage may be dismissed out of hand. Of course, final operation of the facility may be delayed thereby. But some delay is inherent whenever the NEPA consideration is conducted—whether before or at the license proceedings. It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.

[12] Thus we conclude that the Commission must go farther than it has in

its present rules. It must consider action, as well as file reports and papers, at the pre-operating license stage. As the Commission candidly admits, such consideration does not amount to a retroactive application of NEPA. Although the projects in question may have been commenced and initially approved before January 1, 1970, the Act clearly applies to them since they must still pass muster before going into full operation.[43] All we demand is that the environmental review be as full and fruitful as possible.

## VI

We hold that, in the four respects detailed above, the Commission must revise its rules governing consideration of environmental issues. We do not impose a harsh burden on the Commission. For we require only an exercise of substantive discretion which will protect the environment "to the fullest extent possible." No less is required if the grand congressional purposes underlying NEPA are to become a reality.

Remanded for proceedings consistent with this opinion.

## APPENDIX

Public Law 91–190
91st Congress, S. 1075
January 1, 1970
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.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "National Environmental Policy Act of 1969."

### 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.

### 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

43. The courts which have held NEPA to be nonretroactive have not faced situations like the one before us here—situations where there are two, distinct stages of federal approval, one occurring before the Act's effective date and one after that date. *See* Note, *supra* Note 25.

The guidelines issued by the Council on Environmental Quality urge agencies to employ NEPA procedures to minimize environmental damage, even when approval of particular projects was given before January 1, 1970: "To the maximum extent practicable the section 102(2) (C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of [NEPA] on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to mimimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program." 36 Fed.Reg. at 7727.

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 without 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.

Sec. 102. The 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 spe-

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

(E) 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;

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

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

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. 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.

Sec. 104. 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.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.


**Willie STRICKLAND, Jr., Appellant,**

**v.**

**UNITED STATES of America, Appellee.**

**No. 22224.**

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 6, 1970.

Decided Oct. 6, 1971.

Defendant appealed from judgment of the United States District Court for the District of Columbia, Oliver Gasch, J., determining that juvenile court had properly waived jurisdiction over defendant, then aged 17. The Court of Appeals, Tamm, Circuit Judge, held that, given presumption of regularity, finding that juvenile court had properly waived jurisdiction over 17-year-old defendant was supported by waiver order of the juvenile court reciting, inter alia, that defendant had been afforded a hearing and had been represented by counsel at both investigation and waiver proceeding, and by statement of the juvenile court judge

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by White Tanks Concerned Citizens, Inc. v. Strock, 9th Cir.(Ariz.), April 29, 2009

124 S.Ct. 2204
Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, et al., Petitioners,
v.
PUBLIC CITIZEN et al.

No. 03–358.
|
Argued April 21, 2004.
|
Decided June 7, 2004.

**Synopsis**

**Background:** Various unions and environmental groups petitioned for review of order of Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA), regarding promulgation of three regulations. The United States Court of Appeals for the Ninth Circuit, Wardlaw, Circuit Judge, 316 F.3d 1002, granted petition and remanded matter to agency. Certiorari was granted.

**[Holding:]** The Supreme Court, Justice Thomas, held that: because FMCSA lacked discretion to prevent cross-border operations of Mexican motor carriers, neither National Environmental Policy Act (NEPA) nor Clean Air Act (CAA) required FMCSA to evaluate environmental effects of such operations.

Reversed and remanded.

West Headnotes (9)

**[1] Automobiles**
Eligibility for and vehicles subject to license or certificate

**Environmental Law**
Federal Regulation

Federal Motor Carrier Safety Administration (FMCSA) has only limited discretion regarding motor vehicle carrier registration; it must grant registration to all domestic or foreign motor carriers that are willing and able to comply with applicable safety, fitness, and financial-responsibility requirements, and FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety. Motor Carriers Safety Improvement Act of 1999, § 101(a), 113 Stat. 1750; 49 U.S.C.A. § 13902(a)(1).

17 Cases that cite this headnote

**[2] Environmental Law**
Assessments and impact statements

Agency's decision not to prepare environmental impact statement (EIS) can be set aside only upon showing that it was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2)(A); National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. § 1501.4.

82 Cases that cite this headnote

**[3] Environmental Law**
Impacting human environment

A "but for" causal relationship is insufficient to make agency responsible for particular effect under NEPA and relevant regulations; NEPA requires reasonably close causal relationship between environmental effect and alleged cause. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. §§ 1508.8, 1508.18.

126 Cases that cite this headnote

**[4] Environmental Law**
"Hard look" test; reasoned elaboration

Inherent in NEPA and its implementing regulations is "rule of reason," which ensures

that agencies determine whether and to what extent to prepare environmental impact statement (EIS) based on usefulness of any new potential information to decisionmaking process; where preparation of EIS would serve no purpose in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require agency to prepare EIS. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. §§ 1500.1(b, c), 1508.8, 1508.9, 1508.18.

204 Cases that cite this headnote

**[5] Environmental Law**
Sufficiency

Causal connection between issuance by Federal Motor Carrier Safety Administration (FMCSA) of proposed regulations implementing variety of specific application and safety-monitoring requirements for Mexican carriers and entry of Mexican trucks was insufficient to make FMCSA responsible under NEPA to consider environmental effects of trucks' entry; such a requirement would fulfill neither of statutory purposes of ensuring that agency, in reaching its decision, would have available, and would carefully consider, detailed information concerning significant environmental impacts and of guaranteeing that relevant information would be made available to larger audience that might also play role in both decisionmaking process and implementation of that decision. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. §§ 1500.1, 1500.2, 1502.1.

109 Cases that cite this headnote

**[6] Environmental Law**
Sufficiency

Where agency has no ability to prevent certain effect due to its limited statutory authority over relevant actions, agency cannot be considered legally relevant "cause" of effect; hence, under NEPA and implementing Council on Environmental Quality (CEQ) regulations, agency need not consider these effects in its environmental assessment (EA) when determining whether its action is "major Federal action." National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. §§ 1508.8, 1508.18.

187 Cases that cite this headnote

**[7] Environmental Law**
Sufficiency

Federal Motor Carrier Safety Administration (FMCSA) environmental assessment (EA) did not, under NEPA and implementing Council on Environmental Quality (CEQ) regulations, have to consider environmental effects arising from entry of Mexican trucks as result of President's lifting or modification of moratorium thereon; President, not FMCSA, could authorize or not authorize cross-border operations from Mexican motor carriers, and FMCSA has no discretion to prevent entry of Mexican trucks. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 49 U.S.C.(1994 Ed.) § 10922(*l*); 40 C.F.R. §§ 1508.8, 1508.18.

52 Cases that cite this headnote

**[8] Statutes**
Reenactment or incorporation of prior statute

The "doctrine of ratification" states that Congress is presumed to be aware of judicial interpretation of statute and to adopt that interpretation when it reenacts statute without change.

3 Cases that cite this headnote

**[9] Environmental Law**
Mobile sources; motor vehicles

Federal Motor Carrier Safety Administration (FMCSA) did not act improperly by not performing full conformity analysis, pursuant to CAA and relevant regulations, when it

  

considered only emissions that would occur from increased roadside inspections of Mexican trucks as result of President's lifting of moratorium, not any emissions attributable to increased presence of Mexican trucks within United States; emissions were not "direct emissions" because they would not occur at same time as promulgation of regulations, and they were not "indirect emissions" because FMCSA could not practicably control or maintain control over them. Clean Air Act, § 176(c)(1), as amended, 42 U.S.C.A. § 7506(c)(1); 40 C.F.R. §§ 93.150, 93.152, 93.153.

12 Cases that cite this headnote

****2205** *Syllabus* *

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to analyze the environmental impact ****2206** of their proposals and actions in an Environmental Impact Statement (EIS), but Council of Environmental Quality (CEQ) regulations allow an agency to prepare a more limited Environmental Assessment (EA) if the agency's proposed action neither is categorically excluded from the EIS production requirement nor would clearly require production of an EIS. An agency that decides, pursuant to an EA, that no EIS is required must issue a "finding of no significant impact" (FONSI). The Clean Air Act (CAA or Act) leaves States to develop "implementation plan [s]" to comply with national air quality standards mandated by the Act, and requires federal agencies' actions to "conform" to those state plans, 42 U.S.C. § 7506(c)(1). In 1982, Congress enacted a moratorium, prohibiting, *inter alia,* Mexican motor carriers from obtaining operating authority within the United States and authorizing the President to lift the moratorium. In 2001, the President announced his intention to lift the moratorium once new regulations were prepared to grant operating authority to Mexican motor carriers. The Federal Motor Carrier Safety Administration (FMCSA) published one proposed rule addressing the application form for such carriers and another addressing the establishment of a safety-inspection regime for carriers receiving operating authority. Congress subsequently provided, in § 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, that no funds appropriated could be obligated or expended to review or process any Mexican motor carrier's applications until FMCSA implemented specific application and safety-monitoring requirements. Acting pursuant to NEPA, FMCSA issued an EA for its proposed rules. The EA did not consider the environmental impact that might be caused by the increased presence of Mexican trucks in the United States, concluding that any such impact would be an effect of the moratorium's modification, not the regulations' implementation. Concluding that the regulations' issuance would have no significant environmental impact, FMCSA issued a FONSI. In subsequent interim rules, FMCSA relied on the EA and FONSI to demonstrate compliance with NEPA, and determined ***753** that any emissions increase from the regulations would fall below the Environmental Protection Agency's (EPA) threshold levels needed to trigger a conformity review under the CAA. Before the moratorium was lifted, respondents sought judicial review of the proposed rules, arguing that their promulgation violated NEPA and the CAA. The Court of Appeals agreed, finding the EA deficient because it did not consider the environmental impact of lifting the moratorium, when that action was reasonably foreseeable at the time FMCSA prepared the EA and directing FMCSA to prepare an EIS and a full CAA conformity determination for the regulations.

*Held:* Because FMCSA lacks discretion to prevent cross-border operations of Mexican motor carriers, neither NEPA nor the CAA requires FMCSA to evaluate the environmental effects of such operations. Pp. 2213–2219.

(a) FMCSA did not violate NEPA or the relevant CEQ regulations. Pp. 2213–2217.

(1) An agency's decision not to prepare an EIS can be set aside only if it is arbitrary and capricious, see 5 U.S.C. § 706(2)(A). Respondents argue that the issuance of a FONSI was arbitrary and capricious because the EA did not take into account the environmental effects of an increase in cross-border operations of Mexican motor carriers. The relevant question, under NEPA, is whether that increase, and the correlative release of emissions, is an "effect," 40 CFR § 1508.8, of FMCSA's rules; if not, FMCSA's failure ****2207** to address these effects in the EA did not violate NEPA, and the FONSI's issuance cannot be arbitrary and capricious. P. 2213.

(2) Respondents have forfeited any objection to the EA on the ground that it did not adequately discuss potential alternatives to the proposed action because respondents never identified in their comments to the rules any alternatives beyond those the EA evaluated. Pp. 2213–2214.

(3) Respondents argue that the EA must take the increased cross-border operations' environmental effects into account because § 350's expenditure bar makes it impossible for any Mexican truck to operate in the United States until the regulations are issued, and hence the trucks' entry is a "reasonably foreseeable" indirect effect of the issuance of the regulations. 40 CFR § 1508.8. Critically, that argument overlooks FMCSA's inability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican trucks from operating in the United States. While § 350 restricted FMCSA's ability to authorize such operations, FMCSA remains subject to 49 U.S.C. § 13902(a)(1)'s mandate that it register any motor carrier willing and ***754** able to comply with various safety and financial responsibility rules. Only the moratorium prevented it from doing so for Mexican trucks before 2001. Respondents must rest on "but for" causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect. However, "but for" causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. NEPA requires a "reasonably close causal relationship" akin to proximate cause in tort law. *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534. Also, inherent in NEPA and its implementing regulations is a "rule of reason," which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. The underlying policies behind NEPA and Congress' intent, as informed by the "rule of reason," make clear that the causal connection between the proposed regulations and the entry of Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of entry. Neither of the purposes of NEPA's EIS requirement—to ensure both that an agency has information to make its decision and that the public receives information so it might also play a role in the decisionmaking process—will be fulfilled by requiring FMCSA to consider the environmental impact at issue. Since FMCSA has no ability to prevent such cross-border operations, it lacks the power to act on whatever information might be contained in an EIS and could not act on whatever input the public could provide. This analysis is not changed by the CEQ regulation requiring an agency to evaluate the "cumulative impact" of its action, 40 CFR § 1508.7, since that rule does not require FMCSA to treat the lifting of the moratorium itself or the consequences from that lifting as an effect of its rules promulgation. Pp. 2214–2217.

(b) FMCSA did not act improperly by not performing a full conformity analysis pursuant to the CAA and relevant regulations. To ensure that its actions are consistent with 42 U.S.C. § 7506, a federal agency must undertake "a conformity determination ... where the total of direct and indirect emissions in a nonattainment or maintenance area caused by [the] action would equal or exceed" certain threshold levels established by the EPA. ****2208** 40 CFR § 93.153(b). "Direct emissions" "are caused or initiated by the Federal action and occur at the same time and place as the action," § 93.152; and "indirect emissions" are "caused by the Federal action" but may occur later in time, and may be practicably controlled or maintained by the federal agency, *ibid.* Some sort of "but for" causation is sufficient for evaluating causation in the conformity review process. See *ibid.* Because it excluded emissions attributable ***755** to the increased presence of Mexican trucks within the United States, FMCSA concluded that its regulations would not exceed EPA thresholds. Although arguably FMCSA's proposed regulations would be "but for" causes of the entry of Mexican trucks into the United States, such trucks' emissions are not "direct" because they will not occur at the same time or place as the promulgation of the regulations. And they are not "indirect" because FMCSA cannot practicably control or maintain control over the emissions: FMCSA has no ability to countermand the President's decision to lift the moratorium or to act categorically to prevent Mexican carriers from registering and Mexican trucks from entering the country; and once the regulations are promulgated, FMCSA will not be able to regulate any aspect of vehicle exhaust from those trucks. Pp. 2217–2219.

316 F.3d 1002, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

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**Opinion**

Justice THOMAS delivered the opinion of the Court.

***756** In this case, we confront the question whether the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (codified, as amended, at 42 U.S.C. §§ 4321–4370f), and the Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q, require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA's promulgation of certain regulations would allow such cross-border operations to occur. Because FMCSA lacks discretion to prevent these cross-border operations, we conclude that these statutes impose no such requirement on FMCSA.

I

Due to the complex statutory and regulatory provisions implicated in this case, we begin with a brief overview of the relevant statutes. We then turn to the factual and procedural background.

A

1

Signed into law on January 1, 1970, NEPA establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and was intended to reduce or eliminate environmental damage and to promote "the understanding of the ecological systems and natural resources important to" the United States. 42 U.S.C. § 4321. "NEPA itself does not mandate particular results" in order to accomplish these ends. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses ***757** of the environmental impact of their proposals and actions. See *id.,* at 349–350, 109 S.Ct. 1835. At the heart of NEPA is a requirement that federal agencies

> "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." 42 U.S.C. § 4332(2)(C).

This detailed statement is called an Environmental Impact Statement (EIS). The Council of Environmental Quality (CEQ), established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. See 40 CFR § 1500.3 (2003). The CEQ regulations allow an agency to prepare a more limited document, an Environmental ****2210** Assessment (EA), if the agency's proposed action neither is categorically excluded from the requirement to produce an EIS nor would clearly require the production of an EIS. See §§ 1501.4(a)-(b). The EA is to be a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." § 1508.9(a). If, pursuant to the EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a "finding of no significant impact" (FONSI), which briefly presents ***758** the reasons why the proposed agency action will not have a significant impact on the human environment. See §§ 1501.4(e), 1508.13.

2

What is known as the CAA became law in 1963, 77 Stat. 392. In 1970, Congress substantially amended the CAA into roughly its current form. 84 Stat. 1713. The 1970 amendments mandated national air quality standards and deadlines for their attainment, while leaving to the States the development of "implementation plan[s]" to comply with the federal standards. *Ibid.*

In 1977, Congress again amended the CAA, 91 Stat. 749, to prohibit the Federal Government and its agencies from "engag[ing] in, support[ing] in any way or provid[ing] financial assistance for, licens[ing] or permit[ting], or approv [ing], any activity which does not conform to [a state] implementation plan." 42 U.S.C. § 7506(c)(1). The definition of "conformity" includes restrictions on, for instance, "increas[ing] the frequency or severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard ... in any area." § 7506(c)(1)(B). These safeguards prevent the Federal Government from interfering with the States' abilities to comply with the CAA's requirements.

3

**[1]** FMCSA, an agency within the Department of Transportation (DOT), is responsible for motor carrier safety and registration. See 49 U.S.C. § 113(f). FMCSA has a variety of statutory mandates, including "ensur[ing]" safety, § 31136, establishing minimum levels of financial responsibility for motor carriers, § 31139, and prescribing federal standards for safety inspections of commercial motor vehicles, § 31142. Importantly, FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers ***759** that are "willing and able to comply with" the applicable safety, fitness, and financial-responsibility requirements. § 13902(a)(1). FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.

B

We now turn to the factual and procedural background of this case. Before 1982, motor carriers domiciled in Canada and Mexico could obtain certification to operate within the United States from the Interstate Commerce Commission (ICC). [1] In 1982, Congress, concerned about discriminatory treatment of United States motor carriers in Mexico and Canada, enacted a 2–year moratorium on new grants of operating authority. Congress authorized ****2211** the President to extend the moratorium beyond the 2–year period if Canada or Mexico continued to interfere with United States motor carriers, and also authorized the President to lift or modify the moratorium if he determined that doing so was in the national interest. 49

U.S.C. § 10922(*l* ) (1982 ed.). Although the moratorium on Canadian motor carriers was quickly lifted, the moratorium on Mexican motor carriers remained, and was extended by the President.

In December 1992, the leaders of Mexico, Canada, and the United States signed the North American Free Trade Agreement (NAFTA), 32 I.L.M. 605 (1993). As part of NAFTA, the United States agreed to phase out the moratorium and permit Mexican motor carriers to obtain operating authority within the United States' interior by January 2000. On NAFTA's effective date (January 1, 1994), the President began to lift the trade moratorium by allowing the licensing ***760** of Mexican carriers to provide some bus services in the United States. The President, however, did not continue to ease the moratorium on the timetable specified by NAFTA, as concerns about the adequacy of Mexico's regulation of motor carrier safety remained.

The Government of Mexico challenged the United States' implementation of NAFTA's motor carrier provisions under NAFTA's dispute-resolution process, and in February 2001, an international arbitration panel determined that the United States' "blanket refusal" of Mexican motor carrier applications breached the United States' obligations under NAFTA. App. 279, ¶ 295. Shortly thereafter, the President made clear his intention to lift the moratorium on Mexican motor carrier certification following the preparation of new regulations governing grants of operating authority to Mexican motor carriers.

In May 2001, FMCSA published for comment proposed rules concerning safety regulation of Mexican motor carriers. One rule (the Application Rule) addressed the establishment of a new application form for Mexican motor carriers that seek authorization to operate within the United States. Another rule (the Safety Monitoring Rule) addressed the establishment of a safety-inspection regime for all Mexican motor carriers that would receive operating authority under the Application Rule.

In December 2001, Congress enacted the Department of Transportation and Related Agencies Appropriations Act, 2002, 115 Stat. 833. Section 350 of this Act, *id.,* at 864, provided that no funds appropriated under the Act could be obligated or expended to review or to process any application by a Mexican motor carrier for authority to operate in the interior of the United States until FMCSA implemented specific application and safety-monitoring requirements for Mexican carriers. Some of these requirements went beyond those proposed by FMCSA in the Application and Safety ***761** Monitoring Rules. Congress extended the § 350 conditions to appropriations for Fiscal Years 2003 and 2004.

In January 2002, acting pursuant to NEPA's mandates, FMCSA issued a programmatic EA for the proposed Application and Safety Monitoring Rules. FMCSA's EA evaluated the environmental impact associated with three separate scenarios: where the President did not lift the moratorium; where the President did but where (contrary to what was legally possible) FMCSA did not issue any new regulations; and the Proposed Action Alternative, where the President would modify the moratorium and where FMCSA would adopt the proposed regulations. The EA considered the environmental impact in the categories of traffic and congestion, public safety and health, air quality, ****2212** noise, socioeconomic factors, and environmental justice. Vital to the EA's analysis, however, was the assumption that there would be no change in trade volume between the United States and Mexico due to the issuance of the regulations. FMCSA did note that § 350's restrictions made it impossible for Mexican motor carriers to operate in the interior of the United States before FMCSA's issuance of the regulations. But, FMCSA determined that "this and any other associated effects in trade characteristics would be the result of the modification of the moratorium" by the President, not a result of FMCSA's implementation of the proposed safety regulations. App. 60. Because FMCSA concluded that the entry of the Mexican trucks was not an "effect" of its regulations, it did not consider any environmental impact that might be caused by the increased presence of Mexican trucks within the United States.

The particular environmental effects on which the EA focused, then, were those likely to arise from the increase in the number of roadside inspections of Mexican trucks and buses due to the proposed regulations. The EA concluded that these effects (such as a slight increase in emissions, noise from the trucks, and possible danger to passing motorists) ***762** were minor and could be addressed and avoided in the inspections process itself. The EA also noted that the increase of inspection-related emissions would be at least partially offset by the fact that the safety requirements would reduce the number of Mexican trucks operating in the United States. Due to these calculations, the EA concluded that the issuance of the proposed regulations would have no significant impact on the environment, and hence FMCSA, on the same day as it released the EA, issued a FONSI.

  

On March 19, 2002, FMCSA issued the two interim rules, delaying their effective date until May 3, 2002, to allow public comment on provisions that FMCSA added to satisfy the requirements of § 350. In the regulatory preambles, FMCSA relied on its EA and its FONSI to demonstrate compliance with NEPA. FMCSA also addressed the CAA in the preambles, determining that it did not need to perform a "conformity review" of the proposed regulations under 42 U.S.C. § 7506(c)(1) because the increase in emissions from these regulations would fall below the Environmental Protection Agency's (EPA) threshold levels needed to trigger such a review.

In November 2002, the President lifted the moratorium on qualified Mexican motor carriers. Before this action, however, respondents filed petitions for judicial review of the Application and Safety Monitoring Rules, arguing that the rules were promulgated in violation of NEPA and the CAA. The Court of Appeals agreed with respondents, granted the petitions, and set aside the rules. 316 F.3d 1002 (C.A.9 2003).

The Court of Appeals concluded that the EA was deficient because it failed to give adequate consideration to the overall environmental impact of lifting the moratorium on the cross-border operation of Mexican motor carriers. According to the Court of Appeals, FMCSA was required to consider the environmental effects of the entry of Mexican trucks because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the EA was prepared ***763** and the decision not to prepare an EIS was made." *Id.*, at 1022 (quoting 40 CFR §§ 1508.7, 1508.8(b) (2003)). Due to this perceived deficiency, the Court of Appeals remanded the case for preparation of a full EIS.

****2213** The Court of Appeals also directed FMCSA to prepare a full CAA conformity determination for the challenged regulations. It concluded that FMCSA's determination that emissions attributable to the challenged rules would be below the threshold levels was not reliable because the agency's CAA determination reflected the "illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry." 316 F.3d, at 1030.

We granted certiorari, 540 U.S. 1088, 124 S.Ct. 957, 157 L.Ed.2d 793 (2003), and now reverse.

II

**[2]** An agency's decision not to prepare an EIS can be set aside only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See also *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 375–376, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Kleppe v. Sierra Club,* 427 U.S. 390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). Here, FMCSA based its FONSI upon the analysis contained within its EA; respondents argue that the issuance of the FONSI was arbitrary and capricious because the EA's analysis was flawed. In particular, respondents criticize the EA's failure to take into account the various environmental effects caused by the increase in cross-border operations of Mexican motor carriers.

Under NEPA, an agency is required to provide an EIS only if it will be undertaking a "major Federal actio[n]," which "significantly affect[s] the quality of the human environment." 42 U.S.C. § 4332(2)(C). Under applicable CEQ regulations, "[m]ajor Federal action" is defined to "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility." ***764** 40 CFR § 1508.18 (2003). "Effects" is defined to "include: (a) Direct effects, which are caused by the action and occur at the same time and place," and "(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." § 1508.8. Thus, the relevant question is whether the increase in cross-border operations of Mexican motor carriers, with the correlative release of emissions by Mexican trucks, is an "effect" of FMCSA's issuance of the Application and Safety Monitoring Rules; if not, FMCSA's failure to address these effects in its EA did not violate NEPA, and so FMCSA's issuance of a FONSI cannot be arbitrary and capricious.

A

To answer this question, we begin by explaining what this case does *not* involve. What is not properly before us, despite respondents' argument to the contrary, see Brief for Respondents 38–41, is any challenge to the EA due

to its failure properly to consider possible alternatives to the proposed action (*i.e.,* the issuance of the challenged rules) that would mitigate the environmental impact of the authorization of cross-border operations by Mexican motor carriers. Persons challenging an agency's compliance with NEPA must "structure their participation so that it ... alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 553, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). None of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the EA, and none urged FMCSA ****2214** to consider alternatives. Because respondents did not raise these particular objections to the EA, FMCSA was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection ***765** to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action.

Admittedly, the agency bears the primary responsibility to ensure that it complies with NEPA, see *ibid.,* and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action. But that situation is not before us. With respect to FMCSA's ability to mitigate, respondents can argue only that FMCSA could regulate emissions from Mexican trucks indirectly, through making the safety-registration process more onerous or by removing older, more polluting trucks through more effective enforcement of motor carrier safety standards. But respondents fail to identify any evidence that shows that any effect from these possible actions would be significant, or even noticeable, for air-quality purposes. The connection between enforcement of motor carrier safety and the environmental harms alleged in this case is also tenuous at best. Nor is it clear that FMCSA could, consistent with its limited statutory mandates, reasonably impose on Mexican carriers standards beyond those already required in its proposed regulations.

B

With this point aside, respondents have only one complaint with respect to the EA: It did not take into account the environmental effects of increased cross-border operations of Mexican motor carriers. Respondents' argument that FMCSA was required to consider these effects is simple. Under § 350, FMCSA is barred from expending any funds to process or review any applications by Mexican motor carriers until FMCSA implemented a variety of specific application and safety-monitoring requirements for Mexican carriers. This expenditure bar makes it impossible for any Mexican motor carrier to receive authorization to operate within the United States until FMCSA issued the regulations challenged here. The promulgation of the regulations, ***766** the argument goes, would "caus[e]" the entry of Mexican trucks (and hence also cause any emissions such trucks would produce), and the entry of the trucks is "reasonably foreseeable." 40 CFR § 1508.8 (2003). Thus, the argument concludes, under the relevant CEQ regulations, FMCSA must take these emissions into account in its EA when evaluating whether to produce an EIS.

Respondents' argument, however, overlooks a critical feature of this case: FMCSA has no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States. To be sure, § 350 did restrict the ability of FMCSA to authorize cross-border operations of Mexican motor carriers, but Congress did not otherwise modify FMCSA's statutory mandates. In particular, FMCSA remains subject to the mandate of 49 U.S.C. § 13902(a)(1), that FMCSA "*shall* register a person to provide transportation ... as a motor carrier if [it] finds that the person is willing and able to comply with" the safety and financial responsibility requirements established by DOT. (Emphasis added.) Under FMCSA's entirely reasonable reading of this provision, it must certify *any* motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial ****2215** responsibility contained in DOT regulations; only the moratorium prevented it from doing so for Mexican motor carriers before 2001. App. 51–55. Thus, upon the lifting of the moratorium, if FMCSA refused to authorize a Mexican motor carrier for cross-border services, where the Mexican motor carrier was willing and able to comply with the various substantive safety and financial responsibilities rules, it would violate § 13902(a)(1).

If it were truly impossible for FMCSA to comply with both § 350 and § 13902(a)(1), then we would be presented with an irreconcilable conflict of laws. As the later enacted provision, § 350 would quite possibly win out. See *Posadas v. National*

***767** *City Bank,* 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936). But FMCSA can easily satisfy both mandates: It can issue the application and safety inspection rules required by § 350, and start processing applications by Mexican motor carriers and authorize those that satisfy § 13902(a)(1)'s conditions. Without a conflict, then, FMCSA must comply with all of its statutory mandates.

**[3]** Respondents must rest, then, on a particularly unyielding variation of "but for" causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect. However, a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. As this Court held in *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983), NEPA requires "a reasonably close causal relationship" between the environmental effect and the alleged cause. The Court analogized this requirement to the "familiar doctrine of proximate cause from tort law." *Ibid.* In particular, "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.,* at 774, n. 7, 103 S.Ct. 1556. See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274–275 (5th ed.1984) (proximate cause analysis turns on policy considerations and considerations of the "legal responsibility" of actors).

**[4]** Also, inherent in NEPA and its implementing regulations is a " 'rule of reason,' " which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. See *Marsh,* 490 U.S., at 373–374, 109 S.Ct. 1851. Where the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS. See *Aberdeen & Rockfish R. Co. v. Students* ***768** *Challenging Regulatory Agency Procedures (SCRAP),* 422 U.S. 289, 325, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975); see also 40 CFR §§ 1500.1(b)-(c) (2003).

**[5]** In these circumstances, the underlying policies behind NEPA and Congress' intent, as informed by the "rule of reason," make clear that the causal connection between FMCSA's issuance of the proposed regulations and the entry of the Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of the entry. The NEPA EIS requirement serves two purposes. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson,* 490 U.S., at 349, 109 S.Ct. 1835. Second, it "guarantees ****2216** that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Ibid.* Requiring FMCSA to consider the environmental effects of the entry of Mexican trucks would fulfill neither of these statutory purposes. Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS.

Similarly, the informational purpose is not served. The "informational role" of an EIS is to "giv[e] the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' *Baltimore Gas & Electric Co. [v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) ], and, perhaps more significantly, provid[e] a springboard for public comment" in the agency decisionmaking process itself, *ibid.* The purpose here is to ensure that the "larger audience," *ibid.,* can provide input as necessary to the agency making the relevant decisions. See 40 CFR § 1500.1(c) (2003) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent ***769** action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment"); § 1502.1 ("The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government"). But here, the "larger audience" can have no impact on FMCSA's decisionmaking, since, as just noted,

  

FMCSA simply could not act on whatever input this "larger audience" could provide. [2]

It would not, therefore, satisfy NEPA's "rule of reason" to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform. Put another way, the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion.

Consideration of the CEQ's "cumulative impact" regulation does not change this analysis. An agency is required to evaluate the "[c]umulative impact" of its action, which is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." § 1508.7. The "cumulative impact" regulation required FMCSA to consider the "incremental impact" of the safety rules themselves, in the context of the President's lifting of the moratorium ***770** and other relevant circumstances. But this is exactly what FMCSA did in its EA. FMCSA appropriately and reasonably examined the incremental impact of its safety rules assuming the President's modification of the moratorium ****2217** (and, hence, assuming the increase in cross-border operations of Mexican motor carriers). The "cumulative impact" regulation does not require FMCSA to treat the lifting of the moratorium itself, or consequences from the lifting of the moratorium, as an effect of its promulgation of its Application and Safety Monitoring Rules. [3]

C

**[6]** **[7]** **[8]** We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action." Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry. [4]

***771** III

**[9]** Under the CAA, a federal "department, agency, or instrumentality" may not, generally, "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity" that violates an applicable state air-quality implementation plan. 42 U.S.C. § 7506(c)(1); 40 CFR § 93.150(a) (2003). Federal agencies must, in many circumstances, undertake a conformity determination with respect to a proposed action, to ensure that the action is consistent with § 7506(c)(1). See 40 CFR §§ 93.150(b), 93.153(a)-(b). However, an agency is exempt from the general conformity determination under the CAA if its action would not cause new emissions to exceed certain threshold emission rates set forth in § 93.153(b). FMCSA determined that its proposed regulations would not cause emissions to exceed the relevant threshold amounts and therefore concluded that the issuance of its regulations would comply with the CAA.App. to Pet. for Cert. 65a–66a, 155a. Critical to its calculations was its consideration of only those emissions that would occur from the increased roadside inspections of Mexican trucks; like its NEPA analysis, FMCSA's CAA analysis did not consider any emissions attributable to the increased presence of Mexican trucks within the United States.

The EPA's rules provide that "a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed" the threshold levels established by the EPA. 40 CFR § 93.153(b) (2003). "Direct emissions" are defined as those covered emissions "that ****2218** are caused or initiated by the Federal action and occur at the same time and place as the ***772** action." § 93.152. The term "[i]ndirect emissions" means covered emissions that

> "(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and
>
> "(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." *Ibid.*

Unlike the regulations implementing NEPA, the EPA's CAA regulations have defined the term "[c]aused by." *Ibid.* In particular, emissions are "[c]aused by" a federal action if the "emissions ... would not ... occur in the absence of the Federal action." *Ibid.* Thus, the EPA has made clear that for purposes of evaluating causation in the conformity review process, some sort of "but for" causation is sufficient.

Although arguably FMCSA's proposed regulations would be "but for" causes of the entry of Mexican trucks into the United States, the emissions from these trucks are neither "direct" nor "indirect" emissions. First, the emissions from the Mexican trucks are not "direct" because they will not occur at the same time or at the same place as the promulgation of the regulations.

Second, FMCSA cannot practicably control, nor will it maintain control, over these emissions. As discussed above, FMCSA does not have the ability to countermand the President's decision to lift the moratorium, nor could it act categorically to prevent Mexican carriers from being registered or Mexican trucks from entering the United States. Once the regulations are promulgated, FMCSA would have no ability to regulate any aspect of vehicle exhaust from these Mexican trucks. FMCSA could not refuse to register Mexican motor carriers simply on the ground that their trucks would pollute excessively. FMCSA cannot determine ***773** whether registered carriers actually will bring trucks into the United States, cannot control the routes the carriers take, and cannot determine what the trucks will emit. Any reduction in emissions that would occur at the hands of FMCSA would be mere happenstance. It cannot be said that FMCSA "practicably control[s]" or "will maintain control" over the vehicle emissions from the Mexican trucks, and it follows that the emissions from the Mexican trucks are not "indirect emissions." *Ibid.;* see also Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed.Reg. 63214, 63221 (1993) ("The EPA does not believe that Congress intended to extend the prohibitions and responsibilities to cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity").

The emissions from the Mexican trucks are neither "direct" nor "indirect" emissions caused by the issuance of FMCSA's proposed regulations. Thus, FMCSA did not violate the CAA or the applicable regulations by failing to consider them when it evaluated whether it needed to perform a full "conformity determination."

IV

FMCSA did not violate NEPA or the relevant CEQ regulations when it did not consider the environmental effect of the increase in cross-border operations of Mexican motor carriers in its EA. Nor did FMCSA act improperly by not performing, pursuant to the CAA and relevant regulations, a full conformity review analysis for its proposed regulations. We therefore reject respondents' challenge to the procedures ****2219** used in promulgating these regulations. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**All Citations**

541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60, 58 ERC 1545, 26 ITRD 1097, Fed. Carr. Cas. P 84,339, 72 USLW 4445, 34 Envtl. L. Rep. 20,033, 04 Cal. Daily Op. Serv. 4846, 2004 Daily Journal D.A.R. 6655, 19 Fla. L. Weekly Fed. S 353

## Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 In 1995, Congress abolished the ICC and transferred most of its responsibilities to the Secretary of Transportation. See ICC Termination Act of 1995, § 101, 109 Stat. 803. In 1999, Congress transferred

  

responsibility for motor carrier safety within DOT to the newly created FMCSA. See Motor Carrier Safety Improvement Act of 1999, 113 Stat. 1748.

2 Respondents are left with arguing that an EIS would be useful for informational purposes entirely outside FMCSA's decisionmaking process. See Brief for Respondents 42. But such an argument overlooks NEPA's core focus on improving agency decisionmaking. See 40 CFR §§ 1500.1, 1500.2, 1502.1 (2003).

3 The Court of Appeals and respondents contend that the EA contained numerous other errors, but their contentions are premised on the conclusion that FMCSA was required to take into account the increased cross-border operations of Mexican motor carriers.

4 Respondents argue that Congress ratified the Court of Appeals' decision when it, after the lower court's opinion, reenacted § 350 in two appropriations bills. The doctrine of ratification states that "Congress is presumed to be aware of [a] ... judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons,* 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). But this case involves the interpretation of NEPA and the CAA, not § 350. Indeed, the precise requirements of § 350 were not below, and are not here, in dispute. Hence, congressional reenactment of § 350 tells us nothing about Congress' view as to the requirements of NEPA and the CAA, and so, on the legal issues involved in this case, Congress has been entirely silent.

**Case No. 18-36082**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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KELSEY CASCADIA ROSE JULIANA, *et al*.,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, *et al*.,
Defendants-Appellants.

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On Interlocutory Appeal from the United States District Court
for the District of Oregon (No. 6:15-cv-01517-AA)

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# PETITION FOR REHEARING *EN BANC* OF PLAINTIFFS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellee Earth Guardians states that it does not have a parent corporation and that no publicly-held companies hold 10% or more of its stock.

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## FRAP 35(b) STATEMENT

In this constitutional case of great national and public importance involving children's rights to life and liberty, wherein "the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation,"[1] a sharply divided panel denied American children Article III standing solely on redressability grounds, threatening the very basis of federal jurisdiction. The majority encapsulates the chasm: "Our dissenting colleague quite correctly notes the gravity of the plaintiffs' evidence; we differ only as to whether an Article III court can provide their requested redress"—declaratory relief under 28 U.S.C. § 2201 in the first instance, or other equitable relief, if warranted, after the remedial phase of a bifurcated trial. App. 29. The central questions presented by this petition are whether this Court will allow the political branches to arrogate to themselves the "judicial Power" granted exclusively to the judiciary by Article III, and whether this Court will allow the majority to upend the role of the district courts by resolving issues of material fact against the non-moving party on interlocutory appeal of denial of summary judgment.

In reviewing the order denying summary judgment, the panel agreed the children presented "copious expert evidence" to establish Defendants are a substantial cause of Plaintiffs' particularized and actual injuries, satisfying the first

[1] *Juliana v. United States*, No. 178-36082, 2020 WL 254149 (9th Cir. Jan. 17, 2020), App. 33.

two prongs of standing. App. 14. However, the majority "reluctantly concluded" "the specific relief they seek is [not] within the power of an Article III court." App. 11, 25. Consequently, the majority directed the children—*who cannot vote*—to plead their Fifth Amendment rights "to the political branches or to the electorate at large . . . through the ballot box." App. 32.

The majority made significant errors of law irreconcilable with the Constitution, the Declaratory Judgment Act, and decisions of the Supreme Court, this Court, and sister Circuits. If not remedied, these errors will debilitate Article III courts in deciding constitutional cases and controversies on the evidence at trial, thereby denigrating fundamental rights of life and liberty to constitutional *suggestions*—subject to the tyranny of the majority.

*First*, the panel decision erred in finding declaratory relief insufficient for standing, contrary to Supreme Court and this Circuit's precedent, which confirms the important role of declaratory judgments in similar constitutional cases where an actual controversy will persist until the court declares the challenged conduct unconstitutional. *Evers v. Dwyer,* 358 U.S. 202, 203 (1958). Here, a declaratory judgment would resolve the controversy of whether the government's decades-long, *ongoing, and expanding* conduct in causing "carbon emissions from fossil fuel production, extraction, and transportation," and therefore these children's injuries, is a constitutional violation. App. 20.

*Second*, the majority rejected partial redress of the children's injuries as insufficient for standing, overstating Plaintiffs' redressability burden by requiring Plaintiffs to seek a remedy that would "stop catastrophic climate change" or completely "ameliorate their injuries," App. 23, contrary to precedent of the Supreme Court and every Circuit, which requires a court order be "likely" to provide "redress," even if it does not remedy Plaintiffs' every injury. *Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982); *Ibrahim v. Dept. of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012). The majority's strawman remedy of fully stopping climate change, App. 23, *cf.* ER 614-15, improperly ignores genuine disputed issues of material fact raised by Plaintiffs' experts that the government could substantially reduce emissions to minimize the risk of worsening these children's injuries, issues requiring a trial.

*Third*, the majority contravened Supreme Court precedent in holding it is "beyond the power of an Article III court to order . . . the plaintiffs' requested remedial plan." App. 25. "Plaintiffs' request for a 'plan' is neither novel nor judicially incognizable," but "consistent with [] historical [remedial] practices," where the government's policies and programs infringe individual constitutional rights. App. 60 (dissent); *Hills v. Gautreaux*, 425 U.S. 284 (1976). The majority's analysis negates decades of remedial plans like those ordered and overseen by various circuits to enforce the declaratory judgment of *Brown v. Board of Education*,

347 U.S. 483 (1954). Government systems of segregation were no less complex to remedy than the government system of promoting fossil fuels, which harms America's children. *Id.* at 495 (finding "formulation of decrees in these cases presents problems of considerable complexity."). The evidence shows material factual issues as to the viability of a remedial plan to redress Plaintiffs' injuries, facts which would be determined utilizing expert evidence at trial. As the dissent notes, "[w]e must not get ahead of ourselves." App. 57.

*Fourth*, even though the panel found the children's claims not to implicate a political question, App. 31, n.9, the majority created a new redressability test infused with the political question analysis from *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The panel decision thus contravened Supreme Court and Circuit precedent, which establishes separate and distinct tests for whether a *claim* is barred by the political question doctrine under the factors in *Baker v. Carr*, 369 U.S. 186 (1962), and standing, which examines "whether the person . . . is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). "The Article III standing inquiry serves a single purpose: to maintain the limited role of courts by ensuring they protect against only concrete, non-speculative injuries." *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274, slip op. 24 (9th Cir. Feb. 28, 2020). Moreover, *Rucho*'s

context of partisan gerrymandering is a far cry from this Fifth Amendment case about non-partisan government conduct that harms children's lives and liberties.

In considering twenty-two *en banc* petitions involving important children's rights over the past decade, this Court consistently granted rehearing in cases where children's constitutional rights were denied by the 3-judge panel,[2] only denying rehearing in such cases where the 3-judge panel originally upheld the children's rights or allowed them to pursue their claims in another tribunal.[3] In this case, where the majority "reluctantly" denied these children any access to justice for infringement of their rights to life, personal security, and equal protection, and dismantled the equitable authority of district courts in the process, *en banc* review is both vital and consistent with the protection afforded children by this Circuit, the Supreme Court, and the Constitution.

The panel decision should be vacated and the case remanded to the district court to proceed to the first phase of the bifurcated trial and, if the children prove their standing and the merits, to issue the foundational remedy: declaratory judgment.

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[2] *See, e.g.*, *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1147 (9th Cir. 2018), reh'g *en banc* granted, 904 F.3d 642 (9th Cir. 2018) (reviewing panel decision on children's Fifth Amendment right to court-appointed counsel in immigration removal hearings).

[3] *See, e.g.*, *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 864 (9th Cir. 2016) (denying rehearing *en banc* where panel directed district court to grant disabled children intervention in action against school district).

## ARGUMENT

This case meets every test for *en banc* consideration: the published panel decision (1) implicates profoundly important issues; (2) conflicts with Supreme Court and circuit law, and the law of sister circuits; and (3) affects the uniformity of rules of national application. 9th Cir. R. 35–1; Fed. R. App. P. 35(a)(1)-(2). *En banc* review is especially warranted here where "'there is a difference in view among the judges upon a question of fundamental importance . . . .'" *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (citation omitted).

### I. This Children's Rights Case is of Unparalleled Gravity.

At stake before this honorable Court are the lives and liberties of 21 young Americans, fundamental rights guaranteed to them by the Constitution. The majority places at risk the ability of this Court to decide cases and controversies and uphold the system of checks and balances vital to our separation of powers. When governmental conduct catastrophically harms America's children, the judiciary must perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional.

The majority found the government conduct challenged herein "may hasten an environmental apocalypse," that "will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies," including rising seas of "15 to 30 feet by 2100." App. 11, 15. Relying on expert evidence, the dissent

describes the children's injuries "directly facilitated" by the government as "the first small wave in an oncoming tsunami—now visible on the horizon of the not-so-distant future." App. 34-35. "What sets this harm apart from all others is not just its magnitude, but its irreversibility." App. 34.

While these children cannot vote to secure their fundamental rights, because of the Founders' foresight, Plaintiffs can invoke the constitutional duty of the federal judiciary to protect them from government-inflicted harm. Plaintiffs deserve this full Court's rehearing of their constitutional pleas, when their health, their homes, their personal safety, and their familial heritage are being knowingly harmed by the majoritarian policies of both parties. What these children seek first and foremost is a fair trial of the evidence, followed by an application of constitutional law to the proven facts, and a declaration of their rights and their government's responsibilities. Plaintiffs seek to resolve the ongoing controversy of whether their government may continue to exercise its extensive power to harm their lives and personal security and discriminate against them as children. No other branch of government can perform this function because the "judicial Power" is exclusively in the hands of Article III courts. Art. III, § 1. To deny these children standing in the face of the government's insistence "that it has the absolute and unreviewable power to destroy the Nation," App. 33, portends a standing decision akin to *Dred Scott*. App. 58-59, n.14.

Alexander Hamilton explained "the job of the judge is to enforce the supreme and enduring law of the Constitution over the current will of the majority,"[4] which Hamilton acknowledged would "require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution."[5] Constitutional limitations on a majoritarian government "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78* (Alexander Hamilton).

The majority wrongly speculates the district court might one day order a remedy too intrusive on the power of the political branches, ignoring that such an order could be overturned on appeal. The majority also disregards that its decision grants the political branches unfettered power to interpret the Constitution, judge their own acts, and deny the fundamental rights of these children, without having to prove their conduct is narrowly tailored to achieve a compelling state interest. Such concentration of power threatens the foundation of our Republic.

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[4] Justice Neil Gorsuch, *A Republic, If You Can Keep It*, 186 (1st ed. 2019).

[5] *Id.* (quoting *The Federalist No. 78*). Judges like J. Waties Waring and J. Frank M. Johnson, Jr. of the Fifth Circuit exemplified "faithful guardians" in rigorous application of the Constitution to segregation. Jack Bass, *Unlikely Heroes* (1st ed. 1990).

## II. The Majority's Decision Contravenes Settled Redressability Precedent by Holding Declaratory Relief Insufficient in a Fundamental Rights Case.

In a single paragraph, the majority denounces declaratory relief as insufficient redress, stating "a declaration that the government is violating the Constitution" is "not substantially likely to mitigate the plaintiffs' asserted concrete injuries." App. 22. However, the Supreme Court has long acknowledged the important role of declaratory relief in resolving persisting constitutional controversies. *Evers*, 358 U.S. at 202-04 (*ongoing* governmental enforcement of segregation laws created actual controversy for declaratory judgment); *Utah v. Evans*, 536 U.S. 452, 463–64 (2002) (declaratory relief changes the legal status of the challenged conduct, sufficient for redressability); *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus."). Like here, in *Brown v. Board*, "the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education." 347 U.S. at 495.

Even as a freestanding remedy, a declaratory judgment carries an expectation that even non-defendant government officials "would abide by an authoritative interpretation of the . . . constitution[.]" *Evans*, 536 U.S. at 463-64 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (opinion of O'Connor, J.)); *accord Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992) (assuming non-

party legislature would abide by judicial determination, making it "likely that the alleged injury would be to some extent ameliorated"); *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) ("a declaratory judgment is a real judgment, not just a bit of friendly advice"); 28 U.S.C. § 2201 (a court may declare the rights "of any interested party . . . whether or not further relief is or could be sought.").

To assess standing, the *en banc* Court must evaluate what the majority did not: "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The government's position that its ongoing conduct neither infringes the children's fundamental rights nor denies them equal protection is a live controversy in need of judicial resolution. Even discretionary agency conduct under statutory authority must comply with the Constitution. *Webster v. Doe*, 486 U.S. 592, 603-04 (1988).

## III. The Majority Contravened Settled Precedent by Rejecting Partial Redressability of the Children's Injuries.

Contrary to Supreme Court and this Circuit's precedent, the majority created a heightened redressability burden, requiring *full* resolution of Plaintiffs' injuries to establish standing. The majority erred in inquiring whether there was expert

evidence that a favorable decision can "stabilize the global climate," App. 28-29, or "stop catastrophic climate change," App. 23, rather than "minimize the risk" of further harm to Plaintiffs, which is all that is needed for standing.[6] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010). The remedy need not guarantee complete or inevitable redress for Plaintiffs' injuries. *Larson*, 456 U.S. at 243 n. 15. A court order to "minimize the risk" of harm is sufficient for standing. *Doe v. Nestle, S.A.*, 929 F.3d 623, 625 (9th Cir. 2018), *petition for cert. filed*, WL 129527 (U.S. Jan. 13, 2020) (No. 19-416) (children's claims redressable where order would "minimize the risk that the harm-causing conduct will be repeated"). The majority also contradicts harmonious precedent of sister Circuits on this issue, disrupting the national uniformity of the redressability analysis. *See, e.g.*, *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310 (1st Cir. 2012); *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2020); *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 716 (6th Cir. 2015); *Planned Parenthood Ass'n of Chicago Area v. Kempiners*, 700 F.2d 1115, 1120 (7th Cir. 1983); *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 903 (10th Cir. 2012) ("[E]ven if [plaintiffs] would not be out of the woods, a favorable decision would relieve their problem 'to some extent,' which is all the law requires.").

[6] The definitions of "minimize" is "to reduce," and "risk" is "possibility of loss or injury." Merriam-Webster's Online Dictionary (2020).

The degree to which Plaintiffs' injuries can be minimized, and the scope of remedy necessary to achieve that mitigation, involve disputed issues of material fact to be resolved on a full record after trial, not on interlocutory appeal of summary judgment, where the evidence must be viewed in the light most favorable to these children. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Plaintiffs were not required to establish standing on summary judgment, but only to raise "a genuine factual dispute," including whether a remedy could reduce the possibility of further injury, a standard the majority applied in its causation analysis, but abandoned for redressability. *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 947 (9th Cir. 2002); *Cf.* App. 20 (finding genuine factual dispute on causation).

The majority agrees "plaintiffs' alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation," a significant portion of which are caused by Defendants. App. 20. The district court found Plaintiffs presented ample evidence that "reducing domestic emissions, . . . controlled by federal defendants' actions, could slow or reduce the harm plaintiffs are suffering." ER 44-45. Indeed, the majority found twelve-year old Levi "had to evacuate his coastal home multiple times because of flooding," a concrete harm that will continue, and worsen, unless emissions are reduced. App. 18-19. Plaintiffs' expert Dr. Trenberth confirms: "Swift action to reduce emissions and transition off of fossil fuels *can slow and eventually stop further damage to the climate system*

*and water cycle*," "an essential step to protect children." SER 178 (emphasis added). Dr. Wanless testified that delaying emission reductions poses "clear and irreversible harm to [Levi's] interests." SER 42, 44; *accord* SER 365. Physician-experts affirmed the government should reduce emissions immediately to minimize these children's health crises, SER 84, to reduce Plaintiffs' mental health injuries, avoid future harms, SER 111, and "reduce the risk and limit the cumulative harms experienced over the lifetimes of these children." ER 313; App. 22 (admitting psychological redress). Plaintiffs' other experts provide evidence that swiftly reducing national emissions and sequestering more carbon are feasible if ordered. SER 390 (showing technical and economic feasibility to plan for and swiftly transition away from fossil fuels nationally); SER 341 (national sequestration can be greatly enhanced).

Thus, viewing this evidence in the light most favorable to Plaintiffs, the Court must presume there is, at the very least, a factual dispute as to whether Defendants could swiftly reduce emissions within their control if their existing policies were declared unconstitutional, and that risk of harm to Plaintiffs could be minimized. In its own rendering of the facts, App. 23-26, the majority ignored this evidence and improperly resolved disputed factual issues in favor of the moving party, the government. *Tolan v. Cotton*, 572 U.S. 650, 657-58 (2014). However, on summary judgment review, "[t]his court does not weigh the evidence." *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999) (*en banc*). The district court's and the

dissent's disagreement with the majority's construction of the redressability facts only highlights the need for trial. After presenting "more than a scintilla" of evidence, as the district court determined they had, these children are "entitled to a bench trial and specific findings of fact by the district court . . . ." *Tuscon Woman's Clinic v. Eden*, 379 F.3d 531, 541-42 (9th Cir. 2004) (internal citations omitted).

The majority's reasoning would lead to disastrous results for children where a complete remedy is impossible. Courts cannot wholly eliminate child sexual abuse imagery online, but declare it illegal where found, just as courts cannot wholly eliminate racism against children in schools, but declare government-sanctioned discrimination unconstitutional where found. The majority insulates unconstitutional government conduct from Article III review, in circumstances where the government is one, indeed the largest, among many perpetrators causing harm to children. The dissent correctly states a court order could do something to help Plaintiffs, "[a]nd 'something' is all that standing requires." App. 46.

## IV. The Majority Rejects the Established Propriety of Government-Prepared Remedial Plans as Redress for Systemic Violations of Fundamental Rights.

Ignoring Plaintiffs' requests for declaratory, injunctive, and "such other relief" as may be "just and proper," ER 614-15, the majority determined Plaintiffs could not "surmount" the second prong of its redressability analysis due to "doubt" as to the judiciary's power to order, supervise, or enforce a remedial plan of

Defendants' own devising. App. 25-29. In concluding the district court cannot order the government to prepare a remedial plan, the majority contradicts longstanding Supreme Court precedent. *See*, *e.g., Hills*, 425 U.S. at 290, 306 (approving order for a "comprehensive plan to remedy" unconstitutional public housing system "created by HUD").

The majority carelessly lumps together other remedial language plainly not sought by Plaintiffs, such as purportedly requesting that *the court* "design . . . or implement" a remedial plan. App. 25; *cf.* ER 43 (district court: "their request for relief, at its core, is one for a declaration that their constitutional rights have been violated and an order for federal defendants to develop their own plan . . . ."). As in the lineage of cases beginning with *Brown v. Board*, these children seek a remedial plan *from the Defendants*, who are causing their injuries and have the authority to correct course. As the district court repeatedly stated, the first step in the bifurcated trial is to rule on the merits, and then carefully consider appropriate remedies based on the evidence, cabined by the separation of powers. ER 44. To require Plaintiffs to plead with a crystal ball the precise relief the court might one day award asks too much, which is why Plaintiffs requested "such other and further relief as the Court deems just and proper." ER 43, 615; *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 65–66 (1978) ("[A] federal court should not dismiss a meritorious constitutional

claim because the complaint seeks one remedy rather than another plainly appropriate one.").

The majority also suggests Defendants may not be enjoined "from exercising discretionary authority expressly granted by Congress," App. 22, but executive agencies cannot violate the Constitution when exercising their discretionary authority. App. 61 (dissent); *LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985); *Owen v. City of Indep., Mo.*, 445 U.S. 622, 649-50 (1980); *Powell*, 395 U.S. at 506 (citation omitted).

Finally, the majority also expressed "doubt that any such [remedial] plan can be supervised or enforced by an Article III court," App. 29, which is belied by the progeny of *Brown v. Board*. Contrary to the majority's skepticism, Plaintiffs' evidence, which must be accepted in the light most favorable to these children, shows the government already has systems for tracking annual emissions and sequestration and could readily report to the court on Defendants' progress in reducing emissions, pursuant to Defendants' own plan, if so ordered. SER 431-433.

## V. The Majority's Analysis Contradicts Settled Precedent by Conflating the Standing and Political Question Doctrines.

The majority's redressability analysis conflates and eviscerates any meaningful distinction between the standing and political question doctrines. The majority relied heavily on the political question analysis in *Rucho*, in which the Supreme Court held, *after trial*, that *partisan* gerrymandering claims are

nonjusticiable. 139 S.Ct. 2484 (2019).[7] Contrary to the majority's analysis, the standing and political question doctrines are "distinct and separate limitation[s]," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974), and "separate aspects of justiciability" with distinct foci. *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988); *accord Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 37-38 (1976). Indeed, *Rucho* affirms the distinct nature of the inquiries: prior to its political question analysis, the Supreme Court recounted its holding that plaintiffs can establish standing in partisan gerrymandering claims. 139 S.Ct. at 2492 (discussing *Gill v. Whitford*, 138 S.Ct. 1916 (2018)). Here, on appeal, Defendants did not contest the district court's thorough political question analysis under *Baker v. Carr*, and the panel did not reverse it. Nevertheless, relying on political question considerations articulated in *Rucho* to determine the redressability element of standing, the majority eviscerated any meaningful distinction between the discrete doctrines, contravening clear precedent.[8]

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[7] *Rucho* was decided after this appeal was submitted and without briefing apart from 28(j) letters.

[8] *Republic of Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017), which the majority invoked to justify its hybrid analysis, highlights the majority's errors. Confirming that standing and the political question doctrine "overlap" only insofar as they both relate to the "separation-of-powers principle," this Court conducted the requisite *separate* inquiries, confirming their nature as "distinct doctrines." *Id.* at 1192, 1199-1201.

## CONCLUSION

This case involves important questions of Article III authority to adjudicate constitutional controversies involving government wrongdoing. In a dangerous era, the majority dismantles a pillar of our democracy by removing participation of the only branch of government that can impartially judge facts at trial pertaining to harm to fundamental rights of America's children, all because it wrongly, albeit "reluctantly," believes that if infringement of their rights to life, liberty, and equal protection of the law are found, the Court would be impotent to provide these children any meaningful relief against majoritarian government. For the foregoing reasons, the Court should grant rehearing *en banc*, vacate the standing decision, affirm the orders of the district court, and remand the case to the district court for a trial of the disputed facts on redressability and the other factual prerequisites to a fair rendering of constitutional protection for these children.

DATED this 2nd day of March, 2020, at Eugene, OR.

Respectfully submitted,

*s/ Julia A. Olson*
JULIA A. OLSON
PHILIP L. GREGORY
ANDREA K. RODGERS

*Attorneys for Plaintiffs-Appellees*

On the Brief:
Andrew Welle, Esq.

**CERTIFICATE OF COMPLIANCE**

I hereby certify that pursuant to Circuit Rule 40-1, this petition for rehearing *en banc* is proportionately spaced, has a typeface of 14 points or more, and contains 4,197 words.

DATED: March 2, 2020

*s/ Julia A. Olson*
JULIA A. OLSON

**CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2020, I electronically filed the foregoing petition for rehearing *en banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: March 2, 2020

*s/ Julia A. Olson*
JULIA A. OLSON

# APPENDIX

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

| | |
|---|---|
| KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamel Vergun; HAZEL V., through her Guardian Margo Van Ummerson; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a | No. 18-36082<br><br>D.C. No. 6:15-cv-01517-AA<br><br>OPINION |

nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

*Plaintiffs-Appellees*,

v.

UNITED STATES OF AMERICA; MARY B. NEUMAYR, in her capacity as Chairman of Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and the Budget; KELVIN K. DROEGEMEIR, in his official capacity as Director of the Office of Science and Technology Policy; DAN BROUILLETTE, in his official capacity as Secretary of Energy; U.S. DEPARTMENT OF THE INTERIOR; DAVID L. BERNHARDT, in his official capacity as Secretary of Interior; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; MARK T.

ESPER, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; ANDREW WHEELER, in his official capacity as Administrator of the EPA; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

*Defendants-Appellants*.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted June 4, 2019
Portland, Oregon

Filed January 17, 2020

Before: Mary H. Murguia and Andrew D. Hurwitz, Circuit Judges, and Josephine L. Staton,* District Judge.

Opinion by Judge Hurwitz;
Dissent by Judge Staton

* The Honorable Josephine L. Staton, United States District Judge for the Central District of California, sitting by designation.

## SUMMARY**

### Climate Change / Standing

The panel reversed the district court's interlocutory orders in an action brought by an environmental organization and individual plaintiffs against the federal government, alleging climate-change related injuries to the plaintiffs caused by the federal government continuing to "permit, authorize, and subsidize" fossil fuel; and remanded to the district court with instructions to dismiss for lack of Article III standing.

Some plaintiffs claimed psychological harms, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. Plaintiffs alleged violations of their constitutional rights, and sought declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."

The panel held that: the record left little basis for denying that climate change was occurring at an increasingly rapid pace; copious expert evidence established that the unprecedented rise in atmospheric carbon dioxide levels stemmed from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked; the record conclusively established that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions; and the record established that the government's

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

contribution to climate change was not simply a result of inaction.

The panel rejected the government's argument that plaintiffs' claims must proceed, if at all, under the Administrative Procedure Act ("APA"). The panel held that because the APA only allows challenges to discrete agency decisions, the plaintiffs could not effectively pursue their constitutional claims – whatever their merits – under that statute.

The panel considered the three requirements for whether plaintiffs had Article III standing to pursue their constitutional claims. First, the panel held that the district court correctly found that plaintiffs claimed concrete and particularized injuries. Second, the panel held that the district court properly found the Article III causation requirement satisfied for purposes of summary judgment because there was at least a genuine factual dispute as to whether a host of federal policies were a "substantial factor" in causing the plaintiffs' injuries. Third, the panel held that plaintiffs' claimed injuries were not redressable by an Article III court. Specifically, the panel held that it was beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches.

The panel reluctantly concluded that the plaintiffs' case must be made to the political branches or to the electorate at large.

District Judge Staton dissented, and would affirm the district court. Judge Staton wrote that plaintiffs brought suit to enforce the most basic structural principal embedded in

our system of liberty: that the Constitution does not condone the Nation's willful destruction. She would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial.

## COUNSEL

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Richard K. Eichstaedt, University Legal Assistance, Spokane, Washington, for Amici Curiae Eco-Justice Ministries; Interfaith Moral Action on Climate; General Synod of the United Church of Christ; Temple Beth Israel of Eugene, Oregon; National Advocacy Center of the Sisters of the Good Shepherd; Leadership Counsel of the Sisters Servants of the Immaculate Heart of Mary of Monroe, Michigan; Sisters of Mercy of the Americas' Institute Leadership Team; GreenFaith; Leadership Team of the Sisters of Providence of Saint-Mary-of-the-Woods Indiana; Leadership Conference of Women Religious; Climate Change Task Force of the Sisters of Providence of Saint-Mary-of-the-Woods; Quaker Earthcare Witness; Colorado

Interfaith Power and Light; and the Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces.

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Protect Our Winters; National Ski Areas Association; Snowsports Industries America; and American Sustainable Business Council.

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**OPINION**

HURWITZ, Circuit Judge:

In the mid-1960s, a popular song warned that we were "on the eve of destruction."[1] The plaintiffs in this case have presented compelling evidence that climate change has brought that eve nearer. A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.

The plaintiffs claim that the government has violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a "climate system capable of sustaining human life." The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2." Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government.

**I.**

The plaintiffs are twenty-one young citizens, an environmental organization, and a "representative of future generations." Their original complaint named as defendants

[1] Barry McGuire, *Eve of Destruction*, *on* Eve of Destruction (Dunhill Records, 1965).

the President, the United States, and federal agencies (collectively, "the government"). The operative complaint accuses the government of continuing to "permit, authorize, and subsidize" fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs. Some plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. The complaint asserts violations of: (1) the plaintiffs' substantive rights under the Due Process Clause of the Fifth Amendment; (2) the plaintiffs' rights under the Fifth Amendment to equal protection of the law; (3) the plaintiffs' rights under the Ninth Amendment; and (4) the public trust doctrine. The plaintiffs seek declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."[2]

The district court denied the government's motion to dismiss, concluding that the plaintiffs had standing to sue, raised justiciable questions, and stated a claim for infringement of a Fifth Amendment due process right to a "climate system capable of sustaining human life." The court defined that right as one to be free from catastrophic climate change that "will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem." The court also concluded that the

[2] The plaintiffs also assert that section 201 of the Energy Policy Act of 1992, Pub. L. No. 102-486, § 201, 106 Stat. 2776, 2866 (codified at 15 U.S.C. § 717b(c)), which requires expedited authorization for certain natural gas imports and exports "without modification or delay," is unconstitutional on its face and as applied. The plaintiffs also challenge DOE/FE Order No. 3041, which authorizes exports of liquefied natural gas from the proposed Jordan Cove terminal in Coos Bay, Oregon.

plaintiffs had stated a viable "danger-creation due process claim" arising from the government's failure to regulate third-party emissions. Finally, the court held that the plaintiffs had stated a public trust claim grounded in the Fifth and the Ninth Amendments.

The government unsuccessfully sought a writ of mandamus. *In re United States*, 884 F.3d 830, 837–38 (9th Cir. 2018). Shortly thereafter, the Supreme Court denied the government's motion for a stay of proceedings. *United States v. U.S. Dist. Court for Dist. of Or.*, 139 S. Ct. 1 (2018). Although finding the stay request "premature," the Court noted that the "breadth of respondents' claims is striking . . . and the justiciability of those claims presents substantial grounds for difference of opinion." *Id.*

The government then moved for summary judgment and judgment on the pleadings. The district court granted summary judgment on the Ninth Amendment claim, dismissed the President as a defendant, and dismissed the equal protection claim in part.[3] But the court otherwise denied the government's motions, again holding that the plaintiffs had standing to sue and finding that they had presented sufficient evidence to survive summary judgment. The court also rejected the government's argument that the plaintiffs' exclusive remedy was under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*

The district court initially declined the government's request to certify those orders for interlocutory appeal. But, while considering a second mandamus petition from the government, we invited the district court to revisit

[3] The court found that age is not a suspect class, but allowed the equal protection claim to proceed on a fundamental rights theory.

certification, noting the Supreme Court's justiciability concerns. *United States v. U.S. Dist. Court for the Dist. of Or.*, No. 18-73014, Dkt. 3; *see In re United States*, 139 S. Ct. 452, 453 (2018) (reiterating justiciability concerns in denying a subsequent stay application from the government). The district court then reluctantly certified the orders denying the motions for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed the proceedings, while "stand[ing] by its prior rulings . . . as well as its belief that this case would be better served by further factual development at trial." *Juliana v. United States*, No. 6:15-cv-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018). We granted the government's petition for permission to appeal.

**II.**

The plaintiffs have compiled an extensive record, which at this stage in the litigation we take in the light most favorable to their claims. *See Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014). The record leaves little basis for denying that climate change is occurring at an increasingly rapid pace. It documents that since the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years. For hundreds of thousands of years, average carbon concentration fluctuated between 180 and 280 parts per million. Today, it is over 410 parts per million and climbing. Although carbon levels rose gradually after the last Ice Age, the most recent surge has occurred more than 100 times faster; half of that increase has come in the last forty years.

Copious expert evidence establishes that this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked. Temperatures have already risen 0.9 degrees Celsius above

pre-industrial levels and may rise more than 6 degrees Celsius by the end of the century. The hottest years on record all fall within this decade, and each year since 1997 has been hotter than the previous average. This extreme heat is melting polar ice caps and may cause sea levels to rise 15 to 30 feet by 2100. The problem is approaching "the point of no return." Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.

The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions. As early as 1965, the Johnson Administration cautioned that fossil fuel emissions threatened significant changes to climate, global temperatures, sea levels, and other stratospheric properties. In 1983, an Environmental Protection Agency ("EPA") report projected an increase of 2 degrees Celsius by 2040, warning that a "wait and see" carbon emissions policy was extremely risky. And, in the 1990s, the EPA implored the government to act before it was too late. Nonetheless, by 2014, U.S. fossil fuel emissions had climbed to 5.4 billion metric tons, up substantially from 1965. This growth shows no signs of abating. From 2008 to 2017, domestic petroleum and natural gas production increased by nearly 60%, and the country is now expanding oil and gas extraction four times faster than any other nation.

The record also establishes that the government's contribution to climate change is not simply a result of inaction. The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and

overseas projects, and leases for fuel extraction on federal land.[4]

**A.**

The government by and large has not disputed the factual premises of the plaintiffs' claims. But it first argues that those claims must proceed, if at all, under the APA. We reject that argument. The plaintiffs do not claim that any individual agency action exceeds statutory authorization or, taken alone, is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A), (C). Rather, they contend that the totality of various government actions contributes to the deprivation of constitutionally protected rights. Because the APA only allows challenges to discrete agency decisions, *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890–91 (1990), the plaintiffs cannot effectively pursue their constitutional claims—whatever their merits—under that statute.

The defendants argue that the APA's "comprehensive remedial scheme" for challenging the constitutionality of agency actions implicitly bars the plaintiffs' freestanding constitutional claims. But, even if some constitutional challenges to agency action must proceed through the APA, forcing all constitutional claims to follow its strictures would

[4] The programs and policies identified by the plaintiffs include: (1) the Bureau of Land Management's authorization of leases for 107 coal tracts and 95,000 oil and gas wells; (2) the Export-Import Bank's provision of $14.8 billion for overseas petroleum projects; (3) the Department of Energy's approval of over 2 million barrels of crude oil imports; (4) the Department of Agriculture's approval of timber cutting on federal land; (5) the undervaluing of royalty rates for federal leasing; (6) tax subsidies for purchasing fuel-inefficient sport-utility vehicles; (7) the "intangible drilling costs" and "percentage depletion allowance" tax code provisions, 26 U.S.C. §§ 263(c), 613; and (8) the government's use of fossil fuels to power its own buildings and vehicles.

bar plaintiffs from challenging violations of constitutional rights in the absence of a discrete agency action that caused the violation. *See Sierra Club v. Trump*, 929 F.3d 670, 694, 696 (9th Cir. 2019) (stating that plaintiffs could "bring their challenge through an equitable action to enjoin unconstitutional official conduct, or under the judicial review provisions of the [APA]"); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017) (holding "that the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's 'final agency action' limitation applies only to APA claims"). Because denying "any judicial forum for a colorable constitutional claim" presents a "serious constitutional question," Congress's intent through a statute to do so must be clear. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)); *see also Allen v. Milas*, 896 F.3d 1094, 1108 (9th Cir. 2018) ("After *Webster*, we have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims."). Nothing in the APA evinces such an intent.[5] Whatever the merits of the plaintiffs' claims, they may proceed independently of the review procedures mandated by the APA. *See Sierra Club*, 929 F.3d at 698–99 ("Any constitutional challenge that Plaintiffs may advance under the APA would exist regardless of whether they could also assert an APA claim . . . . [C]laims challenging agency

[5] The government relies upon *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 328–29 (2015), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74–76 (1996), both of which held that statutory remedial schemes implicitly barred freestanding equitable claims. Neither case, however, involved claims by the plaintiffs that the federal government was violating their constitutional rights. *See Armstrong*, 575 U.S. at 323–24 (claiming that state officials had violated a federal statute); *Seminole Tribe*, 517 U.S. at 51–52 (same).

actions—particularly constitutional claims—may exist wholly apart from the APA."); *Navajo Nation*, 876 F.3d at 1170 (explaining that certain constitutional challenges to agency action are "not grounded in the APA").

**B.**

The government also argues that the plaintiffs lack Article III standing to pursue their constitutional claims. To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Jewel v. NSA*, 673 F.3d 902, 908 (9th Cir. 2011). A plaintiff need only establish a genuine dispute as to these requirements to survive summary judgment. *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

**1.**

The district court correctly found the injury requirement met. At least some plaintiffs claim concrete and particularized injuries. Jaime B., for example, claims that she was forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (finding separation from relatives to be a concrete injury). Levi D. had to evacuate his coastal home multiple times because of flooding. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1070–71 (9th Cir. 2011) (finding diminution in home property value to be a concrete injury). These injuries are not simply "'conjectural' or 'hypothetical;'" at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do

so unless checked. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)); *cf. Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (finding no standing because plaintiffs could "only aver that any significant adverse effects of climate change 'may' occur at some point in the future").

The government argues that the plaintiffs' alleged injuries are not particularized because climate change affects everyone. But, "it does not matter how many persons have been injured" if the plaintiffs' injuries are "concrete and personal." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)); *see also Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) ("[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance.") (alteration in original) (quoting *Jewel*, 673 F.3d at 909). And, the Article III injury requirement is met if only one plaintiff has suffered concrete harm. *See Hawaii*, 138 S. Ct. at 2416; *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint. . . . For all relief sought, there must be a litigant with standing.").

**2.**

The district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment. Causation can be established "even if there are multiple links in the chain," *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014), as long as the chain is not "hypothetical or tenuous," *Maya*, 658 F.3d at 1070 (quoting *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002), *amended on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002)). The causal chain here is sufficiently established.

The plaintiffs' alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%. *See Massachusetts*, 549 U.S. at 524–25 (finding that emissions amounting to about 6% of the worldwide total showed cause of alleged injury "by any standard"). And, the plaintiffs' evidence shows that federal subsidies and leases have increased those emissions. About 25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government. *See* 30 U.S.C. §§ 181–196 (establishing legal framework governing the disposition of fossil fuels on federal land), § 201 (authorizing the Secretary of the Interior to lease land for coal mining).

Relying on *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1141–46 (9th Cir. 2013), the government argues that the causal chain is too attenuated because it depends in part on the independent actions of third parties. *Bellon* held that the causal chain between local agencies' failure to regulate five oil refineries and the plaintiffs' climate-change related injuries was "too tenuous to support standing" because the refineries had a "scientifically indiscernible" impact on climate change. *Id.* at 1143–44. But the plaintiffs here do not contend that their injuries were caused by a few isolated agency decisions. Rather, they blame a host of federal policies, from subsidies to drilling permits, spanning "over 50 years," and direct actions by the government. There is at least a genuine factual dispute as to whether those policies were a "substantial factor" in causing the plaintiffs' injuries. *Mendia*, 768 F.3d at 1013 (quoting *Tozzi v. U.S. Dep't of*

*Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001)).

**3.**

The more difficult question is whether the plaintiffs' claimed injuries are redressable by an Article III court. In analyzing that question, we start by stressing what the plaintiffs do and do not assert. They do not claim that the government has violated a statute or a regulation. They do not assert the denial of a procedural right. Nor do they seek damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Rather, their sole claim is that the government has deprived them of a substantive constitutional right to a "climate system capable of sustaining human life," and they seek remedial declaratory and injunctive relief.

Reasonable jurists can disagree about whether the asserted constitutional right exists. *Compare Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–53 (E.D. Pa. 2019) (finding no constitutional right), *with Juliana*, 217 F. Supp. 3d at 1248–50; *see also In re United States*, 139 S. Ct. at 453 (reiterating "that the 'striking' breadth of plaintiffs' below claims 'presents substantial grounds for difference of opinion'"). In analyzing redressability, however, we assume its existence. *See M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). But that merely begins our analysis, because "not all meritorious legal claims are redressable in federal court." *Id.* To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award. *Id.* Redress need not be guaranteed, but it must be more than "merely speculative." *Id.* (quoting *Lujan*, 504 U.S. at 561).

The plaintiffs first seek a declaration that the government is violating the Constitution. But that relief alone is not substantially likely to mitigate the plaintiffs' asserted concrete injuries. A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action. *See Clean Air Council*, 362 F. Supp. 3d at 246, 249; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."); *see also Friends of the Earth*, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

The crux of the plaintiffs' requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress, *see, e.g.*, 30 U.S.C. § 201 (authorizing the Secretary of the Interior to lease land for coal mining), but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands, *see* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

As an initial matter, we note that although the plaintiffs contended at oral argument that they challenge only affirmative activities by the government, an order simply enjoining those activities will not, according to their own experts' opinions, suffice to stop catastrophic climate change or even ameliorate their injuries.[6] The plaintiffs' experts opine that the federal government's leases and subsidies have contributed to global carbon emissions. But they do not show that even the total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth. Nor does any expert contend that elimination of the challenged pro-carbon fuels programs would by itself prevent further injury to the plaintiffs. Rather, the record shows that many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources.

Indeed, the plaintiffs' experts make plain that reducing the global consequences of climate change demands much more than cessation of the government's promotion of fossil fuels. Rather, these experts opine that such a result calls for no less than a fundamental transformation of this country's energy system, if not that of the industrialized world. One expert opines that atmospheric carbon reductions must come "largely via reforestation," and include rapid and immediate decreases in emissions from many sources. "[L]eisurely reductions of one of two percent per year," he explains, "will not suffice." Another expert has opined that although the required emissions reductions are "technically feasible," they can be achieved only through a comprehensive plan for "nearly complete decarbonization" that includes both an "unprecedently rapid build out" of renewable energy and a

[6] The operative complaint, however, also seems to challenge the government's inaction.

"sustained commitment to infrastructure transformation over decades." And, that commitment, another expert emphasizes, must include everything from energy efficient lighting to improved public transportation to hydrogen-powered aircraft.

The plaintiffs concede that their requested relief will not alone solve global climate change, but they assert that their "injuries would be to some extent ameliorated." Relying on *Massachusetts v. EPA*, the district court apparently found the redressability requirement satisfied because the requested relief would likely slow or reduce emissions. *See* 549 U.S. at 525–26. That case, however, involved a procedural right that the State of Massachusetts was allowed to assert "without meeting all the normal standards for redressability;" in that context, the Court found redressability because "there [was] some possibility that the requested relief [would] prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 517–18, 525–26 (quoting *Lujan*, 504 U.S. at 572 n.7). The plaintiffs here do not assert a procedural right, but rather a substantive due process claim.[7]

[7] The dissent reads *Massachusetts* to hold that "a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms." Diss. at 47. But *Massachusetts* "permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions," *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420 (2011), finding that as a sovereign it was "entitled to special solicitude in [the] standing analysis," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 n.10 (2015) (quoting *Massachusetts*, 549 U.S. at 520). Here, in contrast, the plaintiffs are not sovereigns, and a substantive right, not a procedural one, is at issue. *See Massachusetts*, 549 U.S. at 517–21, 525–26; *see also Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a

We are therefore skeptical that the first redressability prong is satisfied. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court. There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. *See Brown*, 902 F.3d at 1086 (finding the plaintiff's requested declaration requiring the government to issue driver cards "incompatible with democratic principles embedded in the structure of the Constitution"). These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." *Collins v. City of Harker Heights*, 503 U.S. 115, 128–29 (1992); *see Lujan*, 504 U.S. at 559–60 ("[S]eparation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

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procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

The plaintiffs argue that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best "phase out fossil fuel emissions and draw down excess atmospheric CO2." To be sure, in some circumstances, courts may order broad injunctive relief while leaving the "details of implementation" to the government's discretion. *Brown v. Plata*, 563 U.S. 493, 537–38 (2011). But, even under such a scenario, the plaintiffs' request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking. And inevitably, this kind of plan will demand action not only by the Executive, but also by Congress. Absent court intervention, the political branches might conclude—however inappropriately in the plaintiffs' view—that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate change than the plaintiffs believe is necessary. "But we cannot substitute our own assessment for the Executive's [or Legislature's] predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" *Hawaii*, 138 S. Ct. at 2421 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). And, given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades. *See Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) ("Injunctive relief could involve

extraordinary supervision by this court. . . . [and] may be inappropriate where it requires constant supervision.").[8]

As the Supreme Court recently explained, "a constitutional directive or legal standards" must guide the courts' exercise of equitable power. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). *Rucho* found partisan gerrymandering claims presented political questions beyond the reach of Article III courts. *Id.* at 2506–07. The Court did not deny extreme partisan gerrymandering can violate the Constitution. *See id.* at 2506; *id.* at 2514–15 (Kagan, J., dissenting). But, it concluded that there was no "limited and precise" standard discernible in the Constitution for redressing the asserted violation. *Id.* at 2500. The Court

[8] However belatedly, the political branches are currently debating such action. Many resolutions and plans have been introduced in Congress, ranging from discrete measures to encourage clean energy innovation to the "Green New Deal" and comprehensive proposals for taxing carbon and transitioning all sectors of the economy away from fossil fuels. *See, e.g.*, H.R. Res. 109, 116th Cong. (2019); S.J. Res. 8, 116th Cong. (2019); Enhancing Fossil Fuel Energy Carbon Technology Act, S. 1201, 116th Cong. (2019); Climate Action Now Act, H.R. 9, 116th Cong. (2019); Methane Waste Prevention Act, H.R. 2711, 116th Cong. (2019); Clean Energy Standard Act, S. 1359, 116th Cong. (2019); National Climate Bank Act, S. 2057, 116th Cong. (2019); Carbon Pollution Transparency Act, S. 1745, 116th Cong. (2019); Leading Infrastructure for Tomorrow's America Act, H.R. 2741, 116th Cong. (2019); Buy Clean Transparency Act, S. 1864, 116th Cong. (2019); Carbon Capture Modernization Act, H.R. 1796, 116th Cong. (2019); Challenges & Prizes for Climate Act, H.R. 3100, 116th Cong. (2019); Energy Innovation and Carbon Dividend Act, H.R. 763, 116th Cong. (2019); Climate Risk Disclosure Act, S. 2075, 116th Cong. (2019); Clean Energy for America Act, S. 1288, 116th Cong. (2019). The proposed legislation, consistent with the opinions of the plaintiffs' experts, envisions that tackling this global problem involves the exercise of discretion, trade-offs, international cooperation, private-sector partnerships, and other value judgments ill-suited for an Article III court.

rejected the plaintiffs' proposed standard because unlike the one-person, one-vote rule in vote dilution cases, it was not "relatively easy to administer as a matter of math." *Id.* at 2501.

*Rucho* reaffirmed that redressability questions implicate the separation of powers, noting that federal courts "have no commission to allocate political power and influence" without standards to guide in the exercise of such authority. *See id.* at 2506–07, 2508. Absent those standards, federal judicial power could be "unlimited in scope and duration," and would inject "the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role." *Id.* at 2507; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (noting the "separation-of-powers principles underlying" standing doctrine); *Brown*, 902 F.3d at 1087 (stating that "in the context of Article III standing, . . . federal courts must respect their 'proper—and properly limited—role . . . in a democratic society'" (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)). Because "it is axiomatic that 'the Constitution contemplates that democracy is the appropriate process for change,'" *Brown*, 902 F.3d at 1087 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015)), some questions—even those existential in nature—are the province of the political branches. The Court found in *Rucho* that a proposed standard involving a mathematical comparison to a baseline election map is too difficult for the judiciary to manage. *See* 139 S. Ct. at 2500–02. It is impossible to reach a different conclusion here.

The plaintiffs' experts opine that atmospheric carbon levels of 350 parts per million are necessary to stabilize the global climate. But, even accepting those opinions as valid,

they do not suggest how an order from this Court can achieve that level, other than by ordering the government to develop a plan. Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a plan is beguiling, it ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a "climate system capable of sustaining human life." We doubt that any such plan can be supervised or enforced by an Article III court. And, in the end, any plan is only as good as the court's power to enforce it.

**C.**

Our dissenting colleague quite correctly notes the gravity of the plaintiffs' evidence; we differ only as to whether an Article III court can provide their requested redress. In suggesting that we can, the dissent reframes the plaintiffs' claimed constitutional right variously as an entitlement to "the country's perpetuity," Diss. at 35–37, 39, or as one to freedom from "the amount of fossil-fuel emissions that will irreparably devastate our Nation," *id.* at 57. But if such broad constitutional rights exist, we doubt that the plaintiffs would have Article III standing to enforce them. Their alleged individual injuries do not flow from a violation of these claimed rights. Indeed, any injury from the dissolution of the Republic would be felt by all citizens equally, and thus would not constitute the kind of discrete and particularized injury necessary for Article III standing. *See Friends of the Earth*, 528 U.S. at 180–81. A suit for a violation of these reframed rights, like one for a violation of the Guarantee Clause, would also plainly be nonjusticiable. *See, e.g.*, *Rucho*, 139 S. Ct. at 2506 ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.") (citing *Pac. States*

*Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149 (1912)); *Luther v. Borden*, 48 U.S. 1, 36–37, 39 (1849).

More importantly, the dissent offers no metrics for judicial determination of the level of climate change that would cause "the willful dissolution of the Republic," Diss. at 40, nor for measuring a constitutionally acceptable "perceptible reduction in the advance of climate change," *id.* at 47. Contrary to the dissent, we cannot find Article III redressability requirements satisfied simply because a court order might "postpone[] the day when remedial measures become insufficiently effective." *Id.* at 46; *see Brown*, 902 F.3d at 1083 ("If, however, a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability[.]"). Indeed, as the dissent recognizes, a guarantee against government conduct that might threaten the Union—whether from political gerrymandering, nuclear proliferation, Executive misconduct, or climate change—has traditionally been viewed by Article III courts as "not separately enforceable." *Id.* at 39. Nor has the Supreme Court recognized "the perpetuity principle" as a basis for interjecting the judicial branch into the policy-making purview of the political branches. *See id.* at 42.

Contrary to the dissent, we do not "throw up [our] hands" by concluding that the plaintiffs' claims are nonjusticiable. *Id.* at 33. Rather, we recognize that "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges. As Judge Cardozo once aptly warned, a judicial commission does not

confer the power of "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness;" rather, we are bound "to exercise a discretion informed by tradition, methodized by analogy, disciplined by system.'" Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921).[9]

The dissent correctly notes that the political branches of government have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals. But, although inaction by the Executive and Congress may affect the form of judicial relief ordered when there is Article III standing, it cannot bring otherwise nonjusticiable claims within the province of federal courts. *See Rucho*, 139 S. Ct. at 2507–08; *Gill*, 138 S. Ct. at 1929 ("'Failure of political will does not justify unconstitutional remedies.' . . . Our power as judges . . . rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." (quoting *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring))); *Brown*, 902 F.3d at 1087 ("The *absence* of a law, however, has never been held to constitute a 'substantive result' subject to judicial review[.]").

The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record

[9] Contrary to the dissent, we do not find this to be a political question, although that doctrine's factors often overlap with redressability concerns. Diss. at 51–61; *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1192 (9th Cir. 2017) ("Whether examined under the . . . the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch. Although these are distinct doctrines . . . there is significant overlap.").

for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. Diss. at 45–46, 49–50, 57–61. We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

## III.

For the reasons above, we reverse the certified orders of the district court and remand this case to the district court with instructions to dismiss for lack of Article III standing.[10]

**REVERSED**.

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STATON, District Judge, dissenting:

In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses.

[10] The plaintiffs' motion for an injunction pending appeal, Dkt. 21, is **DENIED**. Their motions for judicial notice, Dkts. 134, 149, are **GRANTED**.

Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation.

My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.

Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction. So viewed, plaintiffs' claims adhere to a judicially administrable standard. And considering plaintiffs seek no less than to forestall the Nation's demise, even a partial and temporary reprieve would constitute meaningful redress. Such relief, much like the desegregation orders and statewide prison injunctions the Supreme Court has sanctioned, would vindicate plaintiffs' constitutional rights without exceeding the Judiciary's province. For these reasons, I respectfully dissent.[1]

[1] I agree with the majority that plaintiffs need not bring their claims under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Webster v. Doe*, 486 U.S. 592, 603–04 (1988).

## I.

As the majority recognizes, and the government does not contest, carbon dioxide ("$CO_2$") and other greenhouse gas ("GHG") emissions created by burning fossil fuels are devastating the planet. Maj. Op. at 14–15. According to one of plaintiffs' experts, the inevitable result, absent immediate action, is "an inhospitable future . . . marked by rising seas, coastal city functionality loss, mass migrations, resource wars, food shortages, heat waves, mega-storms, soil depletion and desiccation, freshwater shortage, public health system collapse, and the extinction of increasing numbers of species." Even government scientists[2] project that, given current warming trends, sea levels will rise two feet by 2050, nearly four feet by 2070, over eight feet by 2100, 18 feet by 2150, and over 31 feet by 2200. To put that in perspective, a three-foot sea level rise will make two million American homes uninhabitable; a rise of approximately 20 feet will result in the total loss of Miami, New Orleans, and other coastal cities. So, as described by plaintiffs' experts, the injuries experienced by plaintiffs are the first small wave in an oncoming tsunami—now visible on the horizon of the not-so-distant future—that will destroy the United States as we currently know it.

What sets this harm apart from all others is not just its magnitude, but its irreversibility. The devastation might look and feel somewhat different if future generations could simply pick up the pieces and restore the Nation. But plaintiffs' experts speak of a certain level of global warming as "locking in" this catastrophic damage. Put more starkly by plaintiffs' expert, Dr. Harold R. Wanless, "[a]tmospheric

[2] NOAA, Technical Rep. NOS CO-OPS 083, Global and Regional Sea Level Rise Scenarios for the United States 23 (Jan. 2017).

warming will continue for some 30 years after we stop putting more greenhouse gasses into the atmosphere. But that warmed atmosphere will continue warming the ocean for centuries, and the accumulating heat in the oceans *will persist for millennia*" (emphasis added). Indeed, another of plaintiffs' experts echoes, "[t]he fact that GHGs dissipate very slowly from the atmosphere . . . and that the costs of taking $CO_2$ out of the atmosphere through non-biological carbon capture and storage are very high means that *the consequences of GHG emissions should be viewed as effectively irreversible*" (emphasis added). In other words, "[g]iven the self-reinforcing nature of climate change," the tipping point may well have arrived, and we may be rapidly approaching the point of no return.

Despite countless studies over the last half century warning of the catastrophic consequences of anthropogenic greenhouse gas emissions, many of which the government conducted, the government not only failed to act but also "affirmatively promote[d] fossil fuel use in a host of ways." Maj. Op. at 15. According to plaintiffs' evidence, our nation is crumbling—at our government's own hand—into a wasteland. In short, the government has directly facilitated an existential crisis to the country's perpetuity.[3]

## II.

In tossing this suit for want of standing, the majority concedes that the children and young adults who brought suit have presented enough to proceed to trial on the first two aspects of the inquiry (injury in fact and traceability). But

[3] My asteroid analogy would therefore be more accurate if I posited a scenario in which the government itself accelerated the asteroid towards the earth before shutting down our defenses.

the majority provides two-and-a-half reasons for concluding that plaintiffs' injuries are not redressable. After detailing its "skeptic[ism]" that the relief sought could "suffice to stop catastrophic climate change or even ameliorate [plaintiffs'] injuries[,]" Maj. Op. at 23–25, the majority concludes that, at any rate, a court would lack any power to award it. In the majority's view, the relief sought is too great and unsusceptible to a judicially administrable standard.

To explain why I disagree, I first step back to define the interest at issue. While standing operates as a threshold issue distinct from the merits of the claim, "it often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). And, unlike the majority, I believe the government has more than just a nebulous "moral responsibility" to preserve the Nation. Maj. Op. at 31–32.

**A.**

The Constitution protects the right to "life, liberty, and property, to free speech, a free press, [and] freedom of worship and assembly." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Through "reasoned judgment," the Supreme Court has recognized that the Due Process Clause, enshrined in the Fifth and Fourteenth Amendments, also safeguards certain "interests of the person so fundamental that the [government] must accord them its respect." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). These include the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), to maintain a family and rear children, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), and to pursue an occupation of one's choosing, *Schware v. Bd. of Bar Exam.*, 353 U.S. 232, 238–39 (1957). As fundamental rights, these "may not be submitted to vote; they depend on the outcome of no elections." *Lucas v. Forty-Fourth Gen. Assembly*,

377 U.S. 713, 736 (1964) (quoting *Barnette*, 319 U.S. at 638).

Some rights serve as the necessary predicate for others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections. *Cf., e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (deeming a right fundamental because its deprivation would "undermine other constitutional liberties"). For example, the right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Because it is "preservative of all rights," the Supreme Court has long regarded suffrage "as a fundamental political right." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). This holds true even though the right to vote receives imperfect express protection in the Constitution itself: While several amendments proscribe the denial or abridgement of suffrage based on certain characteristics, the Constitution does not guarantee the right to vote *ab initio*. *See* U.S. Const. amends. XV, XIX, XXIV, XXVI; *cf.* U.S. Const. art. I, § 4, cl. 1.

Much like the right to vote, the perpetuity of the Republic occupies a central role in our constitutional structure as a "guardian of all other rights," *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982). "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society . . . ." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *see also The Ku Klux Cases*, 110 U.S. 651, 657–68 (1884). And, of course, in our system, that organized society consists of the Union. Without it, all the liberties protected by the Constitution to live the good life are meaningless.

This observation is hardly novel. After securing independence, George Washington recognized that "the destiny of unborn millions" rested on the fate of the new Nation, cautioning that "whatever measures have a tendency to dissolve the Union, or contribute to violate or lessen the Sovereign Authority, ought to be considered as hostile to the Liberty and Independency of America[.]" President George Washington, Circular Letter of Farewell to the Army (June 8, 1783). Without the Republic's preservation, Washington warned, "there is a natural and necessary progression, from the extreme of anarchy to the extreme of Tyranny; and that arbitrary power is most easily established on the ruins of Liberty abused to licentiousness." *Id.*

When the Articles of the Confederation proved ill-fitting to the task of safeguarding the Union, the framers formed the Constitutional Convention with "the great object" of "preserv[ing] and perpetuat[ing]" the Union, for they believed that "the prosperity of America depended on its Union." The Federalist No. 2, at 19 (John Jay) (E. H. Scott ed., 1898); *see also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787)[4] ("It appeared to be the sincere and unanimous wish of the Convention to cherish and preserve the Union of the States."). In pressing New York to ratify the Constitution, Alexander Hamilton spoke of the gravity of the occasion: "The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the Union, the safety and welfare of the parts of which it is composed—the fate of an empire, in many respects the most interesting in the world." The Federalist No. 1, at 11 (Alexander Hamilton) (E. H. Scott ed., 1898). In light of this animating principle, it is fitting that the

[4] Available at https://founders.archives.gov/documents/Jefferson/01-12-02-0274.

Preamble declares that the Constitution is intended to secure "the Blessings of Liberty" not just for one generation, but for all future generations—our "Posterity."

The Constitution's structure reflects this perpetuity principle. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) (examining how "[v]arious textual provisions of the Constitution assume" a structural principle). In taking the Presidential Oath, the Executive must vow to "preserve, protect and defend the Constitution of the United States," U.S. Const. art. II, § 1, cl. 8, and the Take Care Clause obliges the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. Likewise, though generally not separately enforceable, Article IV, Section 4 provides that the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and . . . against domestic Violence." U.S. Const. art. IV, § 4; *see also New York v. United States*, 505 U.S. 144, 184–85 (1992).

Less than a century after the country's founding, the perpetuity principle undergirding the Constitution met its greatest challenge. Faced with the South's secession, President Lincoln reaffirmed that the Constitution did not countenance its own destruction. "[T]he Union of these States is perpetual[,]" he reasoned in his First Inaugural Address, because "[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination." President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861). In justifying this constitutional principle, Lincoln drew from history, observing that "[t]he Union is much older than the Constitution." *Id.* He reminded his fellow citizens, "one of

the declared objects for ordaining and establishing the Constitution was 'to form a *more perfect* Union.'" *Id.* (emphasis added) (quoting U.S. Const. pmbl.). While secession manifested the existential threat most apparently contemplated by the Founders—political dissolution of the Union—the underlying principle applies equally to its physical destruction.

This perpetuity principle does not amount to "a right to live in a contaminant-free, healthy environment." *Guertin v. Michigan*, 912 F.3d 907, 922 (6th Cir. 2019). To be sure, the stakes can be quite high in environmental disputes, as pollution causes tens of thousands of premature deaths each year, not to mention disability and diminished quality of life.[5] Many abhor living in a polluted environment, and some pay with their lives. But mine-run environmental concerns "involve a host of policy choices that must be made by . . . elected representatives, rather than by federal judges interpreting the basic charter of government[.]" *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992). The perpetuity principle is not an environmental right at all, and it does not task the courts with determining the optimal level of environmental regulation; rather, it prohibits only the willful dissolution of the Republic.[6]

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[5] *See, e.g.*, Andrew L. Goodkind et al., *Fine-Scale Damage Estimates of Particulate Matter Air Pollution Reveal Opportunities for Location-Specific Mitigation of Emissions*, *in* 116 Proceedings of the National Academy of Sciences 8775, 8779 (2019) (estimating that fine particulate matter caused 107,000 premature deaths in 2011).

[6] Unwilling to acknowledge that the very nature of the climate crisis places this case in a category of one, the government argues that "the Constitution does not provide judicial remedies for every social and economic ill." For support, the government cites *Lindsey v. Normet*,

That the principle is structural and implicit in our constitutional system does not render it any less enforceable. To the contrary, our Supreme Court has recognized that "[t]here are many [] constitutional doctrines that are not spelled out in the Constitution" but are nonetheless enforceable as "historically rooted principle[s] embedded in the text and structure of the Constitution." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498–99 (2019). For instance, the Constitution does not in express terms provide for judicial review, *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803); sovereign immunity (outside of the Eleventh Amendment's explicit restriction), *Alden*, 527 U.S. at 735–36; the anticommandeering doctrine, *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018); or the regimented tiers of scrutiny applicable to many constitutional rights, *see, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994). Yet these doctrines, as well as many other implicit principles, have become firmly entrenched in our constitutional landscape. And, in an otherwise justiciable case, a private litigant may seek to vindicate such structural principles, for they "protect the individual as well" as the Nation. *See Bond v. United States*, 564 U.S. 211, 222, 225–26 (2011); *INS. v. Chadha*, 462 U.S. 919, 935–36 (1983).

In *Hyatt*, for instance, the Supreme Court held that a state could not be sued in another state's courts without its consent. Although nothing in the text of the Constitution expressly forbids such suits, the Court concluded that they

405 U.S. 56, 74 (1972), which held Oregon's wrongful detainer statute governing landlord/tenant disputes constitutional. The perpetuity principle, however, cabins the right and avoids any slippery slope. While the principle's goal is to preserve the most fundamental individual rights to life, liberty, and property, it is not triggered absent an existential threat to the country arising from a "point of no return" that is, at least in part, of the government's own making.

contravened "the 'implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.'" *Hyatt*, 139 S. Ct. at 1492 (quoting *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting)). So too here.

Nor can the perpetuity principle be rejected simply because the Court has not yet had occasion to enforce it as a limitation on government conduct. Only over time, as the Nation confronts new challenges, are constitutional principles tested. For instance, courts did not recognize the anticommandeering doctrine until the 1970s because "[f]ederal commandeering of state governments [was] such a novel phenomenon." *Printz v. United States*, 521 U.S. 898, 925 (1997). And the Court did not recognize that cell-site data fell within the Fourth Amendment until 2018. In so holding, the Court rejected "a 'mechanical interpretation' of the Fourth Amendment" because "technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes[.]" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018). Thus, it should come as no surprise that the Constitution's commitment to perpetuity only now faces judicial scrutiny, for never before has the United States confronted an existential threat that has not only gone unremedied but is actively backed by the government.

The mere fact that we have alternative means to enforce a principle, such as voting, does not diminish its constitutional stature. Americans can vindicate federalism, separation of powers, equal protection, and voting rights through the ballot box as well, but that does not mean these constitutional guarantees are not independently enforceable.

By its very nature, the Constitution "withdraw[s] certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. When fundamental rights are at stake, individuals "need not await legislative action." *Obergefell*, 135 S. Ct. at 2605.

Indeed, in this *sui generis* circumstance, waiting is not an option. Those alive today are at perhaps the singular point in history where society (1) is scientifically aware of the impending climate crisis, and (2) can avoid the point of no return. And while democracy affords citizens the right "to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times[,]" *id.* (quoting *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 312 (2014)), that process cannot override the laws of nature. Or, more colloquially, we can't shut the stable door after the horse has bolted.

As the last fifty years have made clear, telling plaintiffs that they must vindicate their right to a habitable United States through the political branches will rightfully be perceived as telling them they have no recourse. The political branches must often realize constitutional principles, but in a justiciable case or controversy, courts serve as the ultimate backstop. To this issue, I turn next.

**B.**

Of course, "it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). So federal courts are not free to address *every* grievance.

"Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972). Standing is "a doctrine rooted in the traditional understanding of a case or controversy," developed to "ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

A case is fit for judicial determination only if the plaintiff has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); then citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). As to the first two elements, my colleagues and I agree: Plaintiffs present adequate evidence at this pre-trial stage to show particularized, concrete injuries to legally-protected interests, and they present further evidence to raise genuine disputes as to whether those injuries—at least in substantial part—are fairly traceable to the government's conduct at issue. *See* Maj. Op. at 18–21. Because I find that plaintiffs have also established the third prong for standing, redressability, I conclude that plaintiffs' legal stake in this action suffices to invoke the adjudicative powers of the federal bench.

**1.**

"Redressability" concerns whether a federal court is capable of vindicating a plaintiff's legal rights. I agree with the majority that our ability to provide redress is animated by two inquiries, one of efficacy and one of power. Maj. Op. at 21 (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir.

2018)). First, as a causal matter, is a court order likely to actually remediate the plaintiffs' injury? If so, does the judiciary have the constitutional authority to levy such an order? *Id.*

Addressing the first question, my colleagues are skeptical that curtailing the government's facilitation of fossil-fuel extraction and combustion will ameliorate the plaintiffs' harms. *See* Maj. Op. at 22–25. I am not, as the nature of the injury at stake informs the effectiveness of the remedy. *See Warth*, 422 U.S. at 500.

As described above, the right at issue is not to be entirely free from any climate change. Rather, plaintiffs have a constitutional right to be free from *irreversible and catastrophic climate change*. Plaintiffs have begun to feel certain concrete manifestations of this violation, ripening their case for litigation, but such prefatory harms are just the first barbs of an *ongoing* injury flowing from an *ongoing* violation of plaintiffs' rights. The bulk of the injury is yet to come. Therefore, practical redressability is not measured by our ability to stop climate change in its tracks and immediately undo the injuries that plaintiffs suffer today—an admittedly tall order; it is instead measured by our ability to curb by some meaningful degree what the record shows to be an otherwise inevitable march to the point of no return. Hence, the injury at issue is not climate change writ large; it is climate change beyond the threshold point of no return. As we approach that threshold, the significance of every emissions reduction is magnified.

The majority portrays any relief we can offer as just a drop in the bucket. *See* Maj. Op. at 22–25. In a previous generation, perhaps that characterization would carry the day and we would hold ourselves impotent to address plaintiffs' injuries. But we are perilously close to an overflowing

bucket. These final drops matter. *A lot.* Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm. Accordingly, I conclude that the court could do something to help the plaintiffs before us.

And "something" is all that standing requires. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court explicitly held that a non-negligible reduction in emissions—there, by regulating vehicles emissions—satisfied the redressability requirement of Article III standing:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.
>
> . . . .

> . . . The risk of catastrophic harm, though remote, is nevertheless real.

*Id.* at 525–26 (internal citation omitted).

In other words, under Article III, a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms. Full stop. The majority dismisses this precedent because *Massachusetts v. EPA* involved a procedural harm, whereas plaintiffs here assert a purely substantive right. Maj. Op. at 24. But this difference in posture does not affect the outcome.

While the redressability requirement is relaxed in the procedural context, that does not mean (1) we must engage in a similarly relaxed analysis whenever we invoke *Massachusetts v. EPA* or (2) we cannot rely on *Massachusetts v. EPA*'s substantive examination of the relationship between government action and the course of climate change. Accordingly, here, we do not consider the likelihood that plaintiffs will prevail in any newly-awarded agency procedure, nor whether granting access to that procedure will redress plaintiffs' injury. *Cf. Massachusetts v. EPA*, 549 U.S. at 517–18; *Lujan*, 504 U.S. at 572 n.7. Rather, we assume plaintiffs *will* prevail—removing the procedural link from the causal chain—and we resume our traditional analysis to determine whether the desired outcome would in fact redress plaintiffs' harms.[7] In

[7] The presence of a procedural right is more critical when determining whether the first and second elements of standing are present. This is especially true where Congress has "define[d] injuries and articulate[d] chains of causation that will give rise to a case or controversy where none existed before" by conferring procedural rights that give certain persons a "stake" in an injury that is otherwise not their own. *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580

*Massachusetts v. EPA*, the remaining substantive inquiry was whether reducing emissions from fossil-fuel combustion would likely ameliorate climate change-induced injuries despite the global nature of climate change (regardless of whether renewed procedures were themselves likely to mandate such lessening). The Supreme Court unambiguously answered that question in the affirmative. That holding squarely applies to the instant facts,[8] rendering the absence of a procedural right here irrelevant.[9]

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(Kennedy, J., concurring)). But who seeks to vindicate an injury is irrelevant to the question of whether a court has the tools to relieve that injury.

[8] Indeed, the majority has already acknowledged as much in finding plaintiffs' injuries traceable to the government's misconduct because the traceability and redressability inquiries are largely coextensive. *See* Maj. Op. at 19–21; *see also Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (2013) ("The Supreme Court has clarified that the 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.' The two are distinct insofar as causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief.") (internal citation omitted). Here, where the requested relief is simply to stop the ongoing misconduct, the inquiries are nearly identical. *Cf. Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) ("[I]t is important to keep the inquiries separate" where "the relief requested goes well beyond the violation of law alleged."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *see also infra* Part II.B.3.

[9] Nor am I persuaded that *Massachusetts v. EPA* is distinguishable because of the relaxed standing requirements and "special solicitude" in cases brought by a state against the United States. *Massachusetts v. EPA*, 549 U.S. at 517–20. When *Massachusetts v. EPA* was decided, more than a decade ago, there was uncertainty and skepticism as to whether an individual could state a sufficiently definite climate change-induced

**2.**

The majority laments that it cannot step into the shoes of the political branches, *see* Maj. Op. at 32, but appears ready to yield even if those branches walk the Nation over a cliff. This deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles. Our tripartite system of government is often and aptly described as one of "checks and balances." The doctrine of standing preserves *balance* among the branches by keeping separate questions of general governance and those of specific legal entitlement. But the doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that we instruct the other branches as to the constitutional limitations on their power. Indeed, sometimes "the [judicial and governance] roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, . . . orders the alteration of an institutional organization or procedure that causes the harm." *Lewis*, 518 U.S. at 350; *cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("Proper regard for the

harm based on gradually warming air temperatures and rising seas. But the Supreme Court sidestepped such questions of the *concreteness* of the plaintiffs' injuries by finding that "[Massachusetts's] stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Id.* at 519. Here and now, the plaintiffs submit *undisputed scientific evidence* that their distinct and discrete injuries are caused by climate change brought about by emissions from fossil-fuel combustion. They need not rely on the "special solicitude," *id.* at 520, of a state to be heard. Regardless, any distinction would go to the concreteness or particularity of plaintiffs' injuries and not to the issue of redressability.

complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury."). In my view, this Court must confront and reconcile this tension before deciding that thorny questions of standing preclude review in this case. And faithful application of our history and precedents reveals that a failure to do so leads to the wrong result.

Taking the long (but essential) way around, I begin first by acknowledging explicitly what the majority does not mention: our history plainly establishes an ambient presumption of judicial review to which separation-of-powers concerns provide a rebuttal under limited circumstances. Few would contest that "[i]t is emphatically the province and duty of the judicial department" to curb acts of the political branches that contravene those fundamental tenets of American life so dear as to be constitutionalized and thus removed from political whims. *See Marbury*, 5 U.S. at 177–78. This presumptive authority entails commensurate power to grant appropriate redress, as recognized in *Marbury*, "which effectively place[s] upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1874 (2017) (Breyer, J., dissenting). That is, "there must be something 'peculiar' (*i.e.*, special) about a case that warrants 'excluding the injured party from legal redress and placing it within that class of cases which come under the description of *damnum absque injuria*—a loss without an injury.'" *Id.* (cleaned up) (quoting *Marbury*, 5 U.S. at 163–64). In sum, although it is the plaintiffs' burden to establish injury in fact, causation,

and redressability, it is the government's burden to establish why this otherwise-justiciable controversy implicates grander separation-of-powers concerns not already captured by those requirements. We do not otherwise abdicate our duty to enforce constitutional rights.

Without explicitly laying this groundwork, the majority nonetheless suggests that this case is "special"—and beyond our redress—because plaintiffs' requested relief requires (1) the messy business of evaluating competing policy considerations to steer the government away from fossil fuels and (2) the intimidating task of supervising implementation over many years, if not decades. *See* Maj. Op. at 25–27. I admit these are daunting tasks, but we are constitutionally empowered to undertake them. There is no justiciability exception for cases of great complexity and magnitude.

**3.**

I readily concede that courts must on occasion refrain from answering those questions that are truly reserved for the political branches, even where core constitutional precepts are implicated. This deference is known as the "political question doctrine," and its applicability is governed by a well-worn multifactor test that counsels judicial deference where there is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the

> impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195–201 (2012) (discussing and applying *Baker* factors); *Vieth v. Jubelirer*, 541 U.S. 267, 277–90 (2004) (same); *Nixon v. United States*, 506 U.S. 224, 228–38 (1993) (same); *Chadha*, 462 U.S. at 940–43 (same).[10] In some sense, these factors are frontloaded in significance. "We have characterized the first three factors as 'constitutional limitations of a court's jurisdiction' and the other three factors as 'prudential considerations.'" *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1200 (9th Cir. 2017) (quoting *Corrie*

[10] The political question doctrine was first conceived in *Marbury*. *See Marbury*, 5 U.S. at 165–66 ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."). The modern incarnation of the doctrine has existed relatively unaltered since its exposition in *Baker* in 1962. Although the majority disclaims the applicability of the political question doctrine, *see* Maj. Op. at 31, n.9, the opinion's references to the lack of discernable standards and its reliance on *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), as a basis for finding this case nonjusticiable blur any meaningful distinction between the doctrines of standing and political question.

*v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007)).[11] Moreover, "we have recognized that the first two are likely the most important." *Marshall Islands*, 865 F.3d at 1200 (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005)). Yet, we have also recognized that the inquiry is highly case-specific, the factors "often collaps[e] into one another[,]" and any one factor of sufficient weight is enough to render a case unfit for judicial determination. *See Marshall Islands*, 865 F.3d at 1200 (first alteration in original) (quoting *Alperin*, 410 F.3d at 544). Regardless of any intra-factor flexibility and flow, however, there is a clear mandate to apply the political question doctrine both shrewdly and sparingly.

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether

[11] The six *Baker* factors have been characterized as "reflect[ing] three distinct justifications for withholding judgment on the merits of a dispute." *Zivotofsky v. Clinton*, 566 U.S. at 203 (Sotomayor, J., concurring). Under the first *Baker* factor, "abstention is warranted because the court lacks authority to resolve" "issue[s] whose resolution is textually committed to a coordinate political department[.]" *Id.* Under the second and third factors, abstention is warranted in "circumstances in which a dispute calls for decisionmaking beyond courts' competence[.]" *Id.* Under the final three factors, abstention is warranted where "prudence . . . counsel[s] against a court's resolution of an issue presented." *Id.* at 204.

> some action denominated 'political' exceeds constitutional authority.

*Baker*, 369 U.S. at 217; *see also Corrie*, 503 F.3d at 982 ("We will not find a political question 'merely because [a] decision may have significant political overtones.'") (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478U.S. 221, 230 (1986)). Rather, when detecting the presence of a "political question," courts must make a "discriminating inquiry into the precise facts and posture of the particular case" and refrain from "resolution by any semantic cataloguing." *Baker*, 369 U.S. at 217.

Here, confronted by difficult questions on the constitutionality of *policy*, the majority creates a minefield of *politics* en route to concluding that we cannot adjudicate this suit. And the majority's map for navigating that minefield is *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), an inapposite case about gerrymandering. My colleagues conclude that climate change is too political for the judiciary to touch by likening it to the process of political representatives drawing political maps to elect other political representatives. I vehemently disagree.

The government does not address on appeal the district judge's reasoning that the first, third, fourth, fifth and sixth *Baker* factors do not apply here. Neither does the majority rely on any of these factors in its analysis. In relevant part, I find the opinion below both thorough and well-reasoned, and I adopt its conclusions. I note, however, that the absence of the first *Baker* factor—whether the Constitution textually delegates the relevant subject matter to another branch—is especially conspicuous. As the district judge described, courts invoke this factor only where the Constitution makes an unambiguous commitment of responsibility to one branch

of government. Very few cases turn on this factor, and almost all that do pertain to two areas of constitutional authority: foreign policy and legislative proceedings. *See, e.g.*, *Marshall Islands*, 865 F.3d at 1200–01 (treaty enforcement); *Corrie*, 503 F.3d at 983 (military aid); *Nixon*, 506 U.S. at 234 (impeachment proceedings); *see also Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979) ("[J]udicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause[,] . . . [which is] a paradigm example of a textually demonstrable constitutional commitment of [an] issue to a coordinate political department.") (internal quotation marks omitted); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) ("The text and structure of the Constitution grant the President the power to recognize foreign nations and governments.").

Since this matter has been under submission, the Supreme Court cordoned off an additional area from judicial review based in part on a textual commitment to another branch: partisan gerrymandering. *See Rucho*, 139 S. Ct. at 2494–96.[12] Obviously, the Constitution does not explicitly address climate change. But neither does climate change *implicitly* fall within a recognized political-question area. As the district judge described, the questions of energy

[12] *Rucho* does not turn exclusively on the first *Baker* factor and acknowledges that there are some areas of districting that courts may police, notwithstanding the Elections Clause's "assign[ment] to state legislatures the power to prescribe the 'Times, Places and Manner of holding Elections' for Members of Congress, while giving Congress the power to 'make or alter' any such regulations." *Rucho*, 139 S. Ct. at 2495. Instead, *Rucho* holds that a combination of the text (as illuminated by historical practice) and absence of clear judicial standards precludes judicial review of excessively partisan gerrymanders. *See infra* Part II.B.4.

policy at stake here may have rippling effects on foreign policy considerations, but that is not enough to wholly exempt the subject matter from our review. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1238 (D. Or. 2016) ("[U]nlike the decisions to go to war, take action to keep a particular foreign leader in power, or give aid to another country, climate change policy is not *inherently*, or even primarily, a foreign policy decision."); *see also Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

Without endorsement from the constitutional text, the majority's theory is grounded exclusively in the second *Baker* factor: a (supposed) lack of clear judicial standards for shaping relief. Relying heavily on *Rucho*, the majority contends that we cannot formulate standards (1) to determine what relief "is sufficient to remediate the claimed constitutional violation" or (2) to "supervise[] or enforce[]" such relief. Maj. Op. at 29.

The first point is a red herring. Plaintiffs submit ample evidence that there is a discernable "tipping point" at which the government's conduct turns from facilitating mere pollution to inducing an unstoppable cataclysm in violation of plaintiffs' rights. Indeed, the majority itself cites plaintiffs' evidence that "atmospheric carbon levels of 350 parts per million are necessary to stabilize the climate." *Id.* at 24. This clear line stands in stark contrast to *Rucho*, which held that—even assuming an excessively partisan gerrymander was unconstitutional—no standards exist by which to determine *when a rights violation has even occurred*. There, "[t]he central problem [wa]s not determining whether a jurisdiction has engaged in partisan gerrymandering. It [wa]s determining when political

gerrymandering has gone too far." *Rucho*, 139 S. Ct. at 2497 (internal quotation marks omitted); *see also id.* at 2498 ("[T]he question is one of degree: How to provide a standard for deciding how much partisan dominance is too much.") (internal quotation marks omitted); *id.* at 2499 ("If federal courts are to . . . adjudicat[e] partisan gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from constitutional political gerrymandering.") (internal quotation marks and citation omitted).

Here, the right at issue is fundamentally one of a discernable standard: the amount of fossil-fuel emissions that will irreparably devastate our Nation. That amount can be established by scientific evidence like that proffered by the plaintiffs. Moreover, we need not *definitively* determine that standard today. Rather, we need conclude only that plaintiffs have submitted sufficient evidence to create a genuine dispute as to whether such an amount can possibly be determined as a matter of scientific fact. Plaintiffs easily clear this bar. Of course, plaintiffs will have to carry their burden of proof to establish this fact in order to prevail at trial, but that issue is not before us. We must not get ahead of ourselves.

The procedural posture of this case also informs the question of oversight and enforcement. It appears the majority's real concerns lie not in the judiciary's ability to draw a line between lawful and unlawful conduct, but in our ability to equitably walk the government back from that line without wholly subverting the authority of our coequal branches. My colleagues take great issue with plaintiffs' request for a "plan" to reduce fossil-fuel emissions. I am not so concerned. At this stage, we need not promise plaintiffs the moon (or, more apropos, the earth in a habitable state).

For purposes of standing, we need hold only that the trial court could fashion some sort of meaningful relief should plaintiffs prevail on the merits.[13]

Nor would any such remedial "plan" necessarily require the courts to muck around in policymaking to an impermissible degree; the *scope* and *number* of policies a court would have to reform to provide relief is irrelevant to the second *Baker* factor, which asks only if there are judicially discernable standards to guide that reformation. Indeed, our history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary's commitment to requiring adherence to the Constitution. Upholding the Constitution's prohibition on cruel and unusual punishment, for example, the Court ordered the overhaul of prisons in the Nation's most populous state. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") And in its finest hour, the Court mandated the racial integration of every public school—state and federal—in the Nation, vindicating the Constitution's guarantee of equal protection under the law.[14] *See Brown v. Bd. of Educ.* (*Brown I*), 347 U.S. 483

[13] It is possible, of course, that the district court ultimately concludes that it is unable to provide meaningful redress based on the facts proved at trial, but trial has not yet occurred. Our present occasion is to decide only whether plaintiffs have raised a genuine dispute as to the judiciary's ability to provide meaningful redress under *any* subset of the facts at issue today. *See* Maj. Op. at 18 (citing *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002)).

[14] In contrast, we are haunted by the days we declined to curtail the government's approval of invidious discrimination in public life, *see Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)

(1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954). In the school desegregation cases, the Supreme Court was explicitly unconcerned with the fact that crafting relief would require individualized review of thousands of state and local policies that facilitated segregation. Rather, a unanimous Court held that the judiciary could work to dissemble segregation over time while remaining cognizant of the many public interests at stake:

> To effectuate [the plaintiffs'] interest[s] may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*]. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> . . . [T]he courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the

("[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."), and neglected to free thousands of innocents prejudicially interned by their own government without cause, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided[.]").

> earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

*Brown v. Bd. of Educ.* (*Brown II*), 349 U.S. 294, 300–01 (1955).

As we are all too aware, it took decades to even partially realize *Brown*'s promise, but the slow churn of constitutional vindication did not dissuade the *Brown* Court, and it should not dissuade us here. Plaintiffs' request for a "plan" is neither novel nor judicially incognizable. Rather, consistent with our historical practices, their request is a recognition that remedying decades of institutionalized violations may take some time. Here, too, decelerating from our path toward cataclysm will undoubtedly require "elimination of a variety of obstacles." Those obstacles may be great in number, novelty, and magnitude, but there is no indication that they are devoid of discernable standards. Busing mandates, facilities allocation, and district-drawing were all "complex policy decisions" faced by post-*Brown* trial courts, *see* Maj. Op. at 25, and I have no doubt that disentangling the government from promotion of fossil fuels will take an equally deft judicial hand. Mere complexity, however, does not put the issue out of the courts' reach. Neither the government nor the majority has articulated why

the courts could not weigh scientific and prudential considerations—as we often do—to put the government on a path to constitutional compliance.

The majority also expresses concern that any remedial plan would require us to compel "the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change[.]" *Id.* at 25. Even if the operative complaint is fairly read as requesting an affirmative scheme to address *all* drivers of climate change, however caused, *see id.* at 23 n.6., such an overbroad request does not doom our ability to redress those drivers implicated by the conduct at issue here. Courts routinely grant plaintiffs less than the full gamut of requested relief, and our inability to compel legislation that addresses emissions beyond the scope of this case—such as those purely in the private sphere or within the control of foreign governments—speaks nothing to our ability to enjoin the government from exercising its discretion in violation of plaintiffs' constitutional rights.

**4.**

In sum, resolution of this action requires answers only to scientific questions, not political ones. And plaintiffs have put forth sufficient evidence demonstrating their entitlement to have those questions addressed at trial in a court of law.

As discussed above, the majority reaches the opposite conclusion not by marching purposefully through the *Baker* factors, which carve out a narrow set of nonjusticiable *political* cases, but instead by broadly invoking *Rucho* in a manner that would cull from our dockets any case that presents administrative issues "too difficult for the judiciary to manage." Maj. Op. at 28. That simply is not the test. Difficult questions are not necessarily political questions and, beyond reaching the wrong conclusion in this case, the

majority's application of *Rucho* threatens to eviscerate judicial review in a swath of complicated but plainly apolitical contexts.

*Rucho*'s limitations should be apparent on the face of that opinion. *Rucho* addresses the political process itself, namely whether the metastasis of partisan politics has unconstitutionally invaded the drawing of political districts within states. Indeed, the *Rucho* opinion characterizes the issue before it as a request for the Court to reallocate political power between the major parties. *Rucho*, 139 S. Ct. at 2502, 2507, 2508. *Baker* factors aside, *Rucho* surely confronts fundamentally "political" questions in the common sense of the term. Nothing about climate change, however, is inherently political. The majority is correct that redressing climate change will require consideration of scientific, economic, energy, and other policy factors. But that endeavor does not implicate the way we elect representatives, assign governmental powers, or otherwise structure our polity.

Regardless, we do not limit our jurisdiction based on common parlance. Instead, legal and constitutional principles define the ambit of our authority. In the present case, the *Baker* factors provide the relevant guide and further distinguish *Rucho*. As noted above, *Rucho*'s holding that policing partisan gerrymandering is beyond the courts' competence rests heavily on the first *Baker* factor, *i.e.*, the textual and historical delegation of electoral-district drawing to state legislatures. The *Rucho* Court decided it could not discern mathematical standards to navigate a way out of that particular political thicket. It did not, however, hold that mathematical (or scientific) difficulties in creating appropriate standards divest jurisdiction in *any* context.

Such an expansive reading of *Rucho* would permit the "political question" exception to swallow the rule.

Global warming is certainly an imposing conundrum, but so are diversity in higher education, the intersection between prenatal life and maternal health, the role of religion in civic society, and many other social concerns. *Cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) ("[T]he line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear[.]"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (stating that *Roe v. Wade*, 410 U.S. 113 (1973), involved the "difficult question" of determining the "weight to be given [the] state interest" in light of the "strength of the woman's [privacy] interest"); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (noting that determining the constitutionality of a large cross's presence on public land was "difficult because it represents a clash of genuine and important interests"). These issues may not have been considered within the purview of the judicial branch had the Court imported wholesale *Rucho*'s "manageable standards" analysis even in the absence of *Rucho*'s inherently political underpinnings. Beyond the outcome of the instant case, I fear that the majority's holding strikes a powerful blow to our ability to hear important cases of widespread concern.

**III.**

To be sure, unless there is a constitutional violation, courts should allow the democratic and political processes to perform their functions. And while all would now readily agree that the 91 years between the Emancipation Proclamation and the decision in *Brown v. Board* was too long, determining when a court must step in to protect

fundamental rights is not an exact science. In this case, my colleagues say that time is "never"; I say it is now.

Were we addressing a matter of social injustice, one might sincerely lament any delay, but take solace that "the arc of the moral universe is long, but it bends towards justice."[15] The denial of an individual, constitutional right—though grievous and harmful—can be corrected in the future, even if it takes 91 years. And that possibility provides hope for future generations.

Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?

I would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial. I would therefore affirm the district court.

With respect, I dissent.

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[15] Dr. Martin Luther King, Jr., Remaining Awake Through a Great Revolution, Address at the National Cathedral, Washington, D.C. (Mar. 31, 1968). In coining this language, Dr. King was inspired by an 1853 sermon by abolitionist Theodore Parker. *See* Theodore Parker, *Of Justice and the Conscience*, *in* Ten Sermons of Religion 84–85 (Boston, Crosby, Nichols & Co. 1853).

96 S.Ct. 2718
Supreme Court of the United States

Thomas S. KLEPPE, Secretary of the Interior, et al., Petitioners,
v.
SIERRA CLUB et al.
AMERICAN ELECTRIC POWER SYSTEM et al., Petitioners,
v.
SIERRA CLUB et al.

Nos. 75-552 and 75-561.
|
Argued April 28, 1976.
|
Decided June 28, 1976.

**Synopsis**

Environmental groups brought action against Department of Interior and other federal agencies responsible for developing coal reserves on federally owned or controlled land in the Northern Great Plains region seeking declaration that defendants were required to prepare a regionwide, comprehensive environmental impact statement, as well as related injunctive relief. The United States District Court for the District of Columbia, granted defendants' motions for summary judgment and plaintiffs appealed. The Court of Appeals, 169 U.S.App.D.C. 20, 514 F.2d 856, reversed and remanded, and certiorari issued. The Supreme Court, Mr. Justice Powell, held that a regionwide environmental impact statement was not required absent an existing proposal for regionwide action, that Court of Appeals had no authority to promulgate a balancing test for purpose of determining a point during the germination process of a potential proposal at which an impact statement should be prepared and that contentions as to relationships between all proposed coal-related projects in the region did not require preparation of a regionwide impact statement.

Judgment of Court of Appeals reversed; judgment of district court reinstated and affirmed and case remanded.

Mr. Justice Marshall concurred in part and dissented in part and filed opinion in which Mr. Justice Brennan joined.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (17)

**[1] Environmental Law**
Mining; oil and gas

Department of Interior and other federal agencies responsible for developing coal reserves on land owned or controlled by the federal government were not required to prepare comprehensive environmental impact statement on the entire Northern Great Plains region where the agencies had proposed neither legislation on nor major federal action with respect to the region and all proposals were for actions either local or national in scope and there was no evidence that individual coal development projects undertaken or proposed in the region were integrated into a plan or otherwise interrelated. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

163 Cases that cite this headnote

**[2] Environmental Law**
Mining; oil and gas

Since Department of Interior's new national coal leasing program was a coherent plan of national scope and its adoption posed significant environmental consequences, the National Environmental Policy Act required preparation of an environmental impact statement; such a statement was properly included as part of final report on the proposal for adoption of such program. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

10 Cases that cite this headnote

**[3] Environmental Law**
Major government action

National Environmental Policy Act requires an environmental impact statement only in the event of proposed agency action. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

41 Cases that cite this headnote

[4] **Environmental Law**
Mining; oil and gas

Apart from fact that National Environmental Policy Act requires an impact statement only in event of proposed action, environmental organizations' desire for regional environmental impact statement covering development of coal reserves on land owned or controlled by federal government in the Northern Great Plains region could not be met for practical reasons since absent a proposal for a regional plan of development there was nothing that could be the subject of the analysis envisioned by the statute for an impact statement, i. e., there was no factual predicate for production of impact statement of the type envisioned by the Act. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

11 Cases that cite this headnote

[5] **Environmental Law**
Mining; oil and gas

Studies undertaken by Department of Interior, including north central power study, Montana-Wyoming aqueducts study and the Northern Great Plains research program, did not mandate preparation of regional environmental impact statement concerning development of coal reserves on land owned or controlled by the federal government in the Northern Great Plains region absent any indication that such studies represented attempts to control development on a regional scale, rather than merely efforts to gain background environmental information for considering subsequent individual coal-related projects; in any event, even if a regional program was contemplated no impact statement was due until the agencies made a recommendation or report on a proposal for major federal action. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

116 Cases that cite this headnote

[6] **Environmental Law**
Assessments and impact statements

Court of Appeals had no authority to depart from language of National Environmental Policy Act and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an environmental impact statement should be prepared; although statute imposes no duties on an agency prior to making its report or recommendation on a proposal for action, it contemplates a consideration of environmental factors by agencies during the evolution of a report or recommendation on a proposal but it does not envision court intervention until a report or recommendation on the proposal is made and someone protests either absence or inadequacy of the final impact statement. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

60 Cases that cite this headnote

[7] **Environmental Law**
Injunction

Even if "contemplation" of regional action concerning development of coal reserves on land owned or controlled by federal government in the Northern Great Plains region would permit a court to require preproposal preparation of an environmental impact statement, Court of Appeals' injunction against approval of four mining plans was erroneously issued where, on the court's own terms, there was in fact no harm; even if a regional statement was found to be due at the moment, injunction still could not stand absent finding that impact statement covering such plans inadequately analyzed environmental impacts of, and alternatives to, their approval. National Environmental Policy Act of 1969, §§

  

2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

14 Cases that cite this headnote

**[8] Environmental Law**

Assessments and impact statements

Attack on sufficiency of impact statements already prepared on coal-related projects in the Northern Great Plains region could not be considered in action charging various federal agencies with violating National Environmental Policy Act by failing to prepare a regionwide environmental impact statement since case was not brought as a challenge to a particular impact statement and there was no such impact statement in the record. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

5 Cases that cite this headnote

**[9] Environmental Law**

Mining; oil and gas

National Environmental Policy Act may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time; for example, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact on a region are pending concurrently before an agency, their environmental consequences must be considered together since only through comprehensive consideration of pending proposals can the agency evaluate different courses of action. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

98 Cases that cite this headnote

**[10] Environmental Law**

Consideration and disclosure of effects

As regards preparation of an environmental impact statement the National Environmental Policy Act 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 action; should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval on the existing environment and the condition of that environment presumably will reflect earlier proposed actions and their effects. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

65 Cases that cite this headnote

**[11] Environmental Law**

Assessments and impact statements

Neither the National Environmental Policy Act nor its legislative history contemplate that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions; only role for court is to insure that the agency has taken a "hard look" at the environmental consequences; a court cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

361 Cases that cite this headnote

**[12] Environmental Law**

Mining; oil and gas

Contention that all coal-related activity in the Northern Great Plains region was "programmatically, geographically and environmentally" related did not require the various federal agencies engaged in developing coal reserves on land owned or controlled by the federal government in the region to prepare a single comprehensive regionwide environmental impact statement before approving specific pending applications; determination of the region, if any, with respect to which an impact statement was necessary was a matter committed to agency discretion; absent showing that the agencies acted arbitrarily in refusing to prepare

  

a regionwide statement it would be assumed that the agencies appropriately exercised their discretion. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

101 Cases that cite this headnote

**[13] Environmental Law**
Mining; oil and gas

Fact that all of the coal-related projects involved in development of coal reserves on land owned or controlled by the federal government in the Northern Great Plains region may involve similar methods of mining and converting the region's coal did not, of itself, require preparation of a regionwide environmental impact statement. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

3 Cases that cite this headnote

**[14] Environmental Law**
Impacting human environment

Although cumulative environmental impacts are what require a comprehensive impact statement, determination of the extent and effect of such factors, particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

72 Cases that cite this headnote

**[15] Environmental Law**
Mining; oil and gas

Determination of various federal agencies engaged in development of coal reserves on land owned and controlled by the federal government in the Northern Great Plains region that appropriate scope of comprehensive environmental impact statements should be based on basins, drainage areas and other factors, rather than merely on geographical area, could not be said to be arbitrary; even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate limiting geographic scope of the impact statements. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

31 Cases that cite this headnote

**[16] Environmental Law**
Scope of project; multiple projects

It is not necessary that an agency contemplate a comprehensive impact statement on all proposed actions in appropriate region before approving any individual projects. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

15 Cases that cite this headnote

**[17] Environmental Law**
Mining; oil and gas

Federal agencies engaged in development of coal reserves on land owned or controlled by the federal government in the Northern Great Plains region were not required to prepare a comprehensive impact statement on all coal-related actions before approving individual projects, especially since approval of one lease or mining plan did not commit any of the agencies to approval of any others; hence, an agency could approve one project that was fully covered by an impact statement and take into consideration the environmental effects of such project when preparing a comprehensive statement on the cumulative impact of the remaining proposals. National Environmental Policy Act of 1969, §§ 2 et seq., 102, 42 U.S.C.A. §§ 4321 et seq., 4332.

106 Cases that cite this headnote

  

****2721 *390** Syllabus [**]

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) requires that all federal agencies include an environmental impact statement (EIS) "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Respondent environmental organizations, alleging a widespread interest in the rich coal reserves of the "Northern Great Plains region" (embracing parts of Wyoming, Montana, North Dakota, and South Dakota) and a threat from coal-related operations to their members' enjoyment of the region's environment, brought suit against petitioner officials of the Department of the Interior and other federal agencies responsible for issuing coal leases, approving mining plans, and taking other actions to enable private companies and public utilities to develop coal reserves on federally owned or controlled land. Respondents claimed that petitioners ****2722** could not allow further development of coal reserves in the region without preparing a comprehensive EIS under s 102(2)(C) on the entire region, and sought declaratory and injunctive relief. The District Court, on the basis of extensive findings of fact and conclusions of law, held that the complaint stated no claim for relief, and granted petitioners' motion for summary judgment. While accepting the District Court's findings of fact, the Court of Appeals held, on the basis of the soon-forthcoming interim report of the Northern Great Plains Resources Program (NGPRP) (a study of the potential environmental impact from resource development in Montana, Wyoming, North Dakota, South Dakota, and Nebraska) as well as other such studies of areas either inclusive of or included within the Northern Great Plains region, that petitioners "contemplated" a regional plan or program, and reversed and remanded with instructions to petitioners to inform the 391>> 391District Court of their role in the further development of the region within 30 days after the NGPRP interim report issued, and that if they decided to control that development, an EIS would be required. The Court of Appeals also enjoined the Department of the Interior's approval of mining plans in one section of the region for which an EIS already had been prepared. *Held* :

1. The NEPA does not require petitioners to prepare an EIS on the entire Northern Great Plains region. Petitioners have proposed no legislation on the region, and there is no evidence in the record of any proposal for major federal action with respect to the region, but rather it appears that all proposals have been for actions of either local or national scope. Unless there is a proposal for a regional plan of development, it is not practical to prepare a regional EIS, since, absent such a plan, it is impossible to predict the level of coal-related activity that will occur in the region, and thus to analyze the environmental consequences and the resource commitments involved, and alternatives to, such activity. Pp. 2725-2727.

2. The Court of Appeals erred in both its factual assumptions that the several studies undertaken by petitioners represented attempts to control development on a regional scale, and in its interpretation of the NEPA. There is nothing in the record to indicate that the NGPRP was aimed toward a regional plan or program, but even if the record justified such a finding the Court of Appeals' legal conclusion cannot be squared with the NEPA, which in s 102(2)(C) clearly states that an EIS is not required until an agency makes a recommendation or report on a Proposal for major federal action. The Court of Appeals had no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point at which an EIS Should be prepared. Pp. 2727-2729.

3. Assuming that the Court of Appeals' theory about "contemplation" of regional action would permit a court to require preproposal preparation of an EIS, that court's injunction against approval of the mining plans in one part of the region nevertheless would have been error, since on the court's own terms there was in fact no harm and thus no ground for the injunction. Pp. 2729-2730.

4. Respondents' contention as to the relationships of all proposed coal-related projects in the Northern Great Plains region does not require that petitioners prepare one comprehensive EIS 392covering such projects before proceeding to approve specific pending applications. Absent a showing that petitioners acted arbitrarily in refusing to prepare one comprehensive EIS on the entire region, it must be assumed that the responsible federal agencies have exercised appropriately their discretion to resolve the technical issues involved in determining the region, if any, with respect to which a comprehensive EIS covering several proposals is necessary. Pp. 2730-2732.

169 U.S.App.D.C. 20, 514 F.2d 856, reversed and remanded.

  

**Attorneys and Law Firms**

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****2723** V. Frank Mendicino, Cheyenne, Wyo., for the State of Wyoming, as amicus curiae, by special leave of Court.

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Francis M. Shea, Washington, D. C., for petitioners in both cases.

**Opinion**

***394** Mr. Justice POWELL delivered the opinion of the Court.

Section 102(2)(C) of the National Environmental Policy Act of 1969[1] (NEPA) requires that all federal agencies include a detailed statement of environmental consequences known as an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. s 4332(2)(C). The United States Court of Appeals for the District of Columbia Circuit held that officials of the Department of the Interior (Department) and certain other federal agencies must take additional steps under this section, beyond those already taken, before allowing further development of federal coal reserves in a specific area of the country. For the reasons set forth, we reverse.

I

Respondents, several organizations concerned with the environment, brought this suit in July 1973 in the United States District Court for the District of Columbia.[2] The defendants in the suit, petitioners here, were the officials ***395** of the Department and other federal agencies responsible for issuing coal leases, approving mining plans, granting rights-of-way, and taking the other actions necessary to enable private companies and public utilities to develop coal reserves on land owned or controlled by the Federal Government. Citing widespread interest in the reserves of a region identified as the "Northern Great Plains region," and an alleged threat from coal-related operations to their members' enjoyment of the region's environment, respondents claimed that the federal officials could not allow further development without preparing a "comprehensive environmental impact statement" under s 102(2)(C) on the entire region. They sought declaratory and injunctive relief.

The District Court, on the basis of extensive findings of fact and conclusions of law, held that the complaint stated no claim for relief and granted the petitioners' motions for summary judgment.[3] Respondents appealed. Shortly after oral argument but before issuing an opinion on the merits, the Court of Appeals in January 1975 issued an injunction over a dissent against the Department's approval of four mining plans in the Powder River Coal Basin, which is one small but coal-rich section of the region that concerns respondents. 166 U.S.App.D.C. 200, 509 F.2d 533. An impact statement had been prepared on these plans, but it had not been before the District Court and was not before the Court of Appeals. In June 1975 the Court of Appeals ruled on the merits and, for reasons discussed below, reversed the District Court and remanded for further proceedings. ***396** 169 U.S.App.D.C. 20, 514 F.2d 856. The court continued its injunction in force.

The federal officials petitioned for writ of certiorari on October 9, 1975. On November 7, the Court of Appeals refused to dissolve its injunction,[4] and a week later ****2724** petitioners moved this Court for a stay. On January 12, 1976, we stayed the injunction and granted the petitions for certiorari. 423 U.S. 1047, 96 S.Ct. 772, 46 L.Ed.2d 635. We have been informed that shortly thereafter the Secretary of the Interior (Secretary) approved the four mining plans in the Powder River Coal Basin that had been stayed by the injunction.

II

The record and the opinions of the courts below contain extensive facts about coal development and the geographic area involved in this suit. The facts that we consider essential, however, can be stated briefly.

The Northern Great Plains region identified in respondents' complaint encompasses portions of four States northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota. There is no dispute about its richness in coal, nor about the waxing interest in developing that coal, nor about the crucial role the federal petitioners will play due to the significant percentage of the coal to which they control access. The Department has initiated, in this decade, three

  

studies in areas either inclusive of or included within this ***397** The North Central Power Study was addressed to the potential for coordinated development of electric power in an area encompassing all or part of 15 States in the North Central United States. It aborted in 1972 for lack of interest on the part of electric utilities. The Montana-Wyoming Aqueducts Study, intended to recommend the best use of water resources for coal development in southeastern Montana and northeastern Wyoming, was suspended in 1972 with the initiation of the third study, the Northern Great Plains Resources Program (NGPRP

While the record does not reveal the degree of concern with environmental matters in the first two studies, it is clear that the NGPRP was devoted entirely to the environment. It was carried out by an interagency, federal-state task force with public participation, and was designed "to assess the potential social, economic and environmental impacts" from resource development in five States Montana, Wyoming, South Dakota, North Dakota, and Nebraska.[5] Its primary objective was "to provide an analytical and informational framework for policy and planning decisions at all levels of government"[6] by formulating several "scenarios" showing the probable consequences for the area's environment and culture from the various possible techniques and levels of resource development. The final interim report of the NGPRP was issued August 1, 1975, shortly after the decision of the Court of Appeals in this case.

In addition, since 1973 the Department has engaged in a complete review of its coal-leasing program for the entire Nation. On February 17 of that year the Secretary announced the review and announced also that during study a "short-term leasing policy" would prevail, ***398** under which new leasing would be restricted to narrowly defined circumstances and even then allowed only when an environmental impact statement had been prepared if required under NEPA.[7] The purpose of the program review was to study the environmental impact of the Department's entire range of coal-related activities and to develop a planning system to guide the national leasing program. The impact statement, known as the "Coal Programmatic EIS," went through several drafts before issuing in final ****2725** form on September 19, 1975 shortly before the petitions for certiorari were filed in this case. The Coal Programmatic EIS proposed a new leasing program based on a complex planning system called the Energy Minerals Activity Recommendation System (EMARS), and assessed the prospective environmental impact of the new program as well as the alternatives to it. We have been informed by the parties to this litigation that the Secretary is in the process of implementing the new program.[8]

Against this factual background, we turn now to consider the issues raised by this case in the status in which it reached this Court.

III

**[1]** The major issue remains the one with which the suit began: whether NEPA requires petitioners to prepare an environmental impact statement on the entire Northern Great Plains region.[9] Petitioners, arguing the negative, ***399** rely squarely upon the facts of the se and the language of s 102(2)(C) of NEPA. We find their reliance well placed.

As noted in the first sentence of this opinion, s 102(2)(C) requires an impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Since no one has suggested that petitioners have proposed legislation on respondents' region, the controlling phrase in this section of the Act, for this case, is "major Federal actions." Respondents can prevail only is there has been a report or recommendation on a proposal for major federal action with respect to the Northern Great Plains region. Our statement of the relevant facts shows there has been none; instead, all proposals are for actions of either local or national scope.

**[2]** The local actions are the decisions by the various petitioners to issue a lease, approve a mining plan, issue a right-of-way permit, or take other action to allow private activity at some point within the region identified by respondents. Several Courts of Appeals have held that an impact statement must be included in the report or recommendation on a proposal for such action if the private activity to be permitted is one "significantly affecting the quality of the human environment" within the meaning of s 102(2)(C). See, E. g., Scientists' Institute for Public Information, Inc. v. AEC, 156 U.S.App.D.C. 395, 404-405, 481 F.2d 1079, 1088-1089 (1973); Davis v. Morton, 469 F.2d 593 (CA10 1972). ***400** The petitioners do not dispute this requirement in this case, and indeed have prepared impact statements on several proposed actions of this type in the Northern Great Plains during the course of this litigation.[10] Similarly, the federal petitioners agreed at oral argument that

  

s 102(2)(C) required the Coal ****2726** Programmatic EIS that was prepared in tandem with the new national coal-leasing program and included as part of the final report on the proposal for adoption of that program. Tr. of Oral Arg. 9. Their admission is well made, for the new leasing program is a coherent plan of national scope, and its adoption surely has significant environmental consequences.

But there is no evidence in the record of an action or a proposal for an action of regional scope. The District Court, in fact, expressly found that there was no existing or proposed plan or program on the part of the Federal Government for the regional development of the area described in respondents' complaint. It found also that the three studies initiated by the Department in areas either included within or inclusive of respondents' region that is, the Montana-Wyoming Aqueducts Study, the North Central Power Study, and the ***401** NGPRP were not parts of any plan or program to develop or encourage development of the Northern Great Plains. That court found no evidence that the individual coal development projects undertaken or proposed by private industry and public utilities in that part of the country are integrated into a plan or otherwise interrelated. These findings were not disturbed by the Court of Appeals, and they remain fully supported by the record in this Court. [11]

**[3]** **[4]** Quite apart from the fact that the statutory language requires an impact statement only in the event of a proposed action, [12] respondents' desire for a regional environmental impact statement cannot be met for practical reasons. In the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement. Section 102(2)(C) requires that an impact statement contain, in essence a detailed statement of the expected adverse environmental consequences of an action, the resource commitments involved ***402** in it, and the alternatives to it. [13] Absent an overall plan for regional development, it is impossible to predict the level of coal-related activity that will occur in the region identified by respondents, and thus impossible to analyze the environmental consequences and the resource commitments involved in, and the alternatives to, such activity. A regional plan would define fairly precisely the scope and limits of the proposed development of the region. Where no such plan exists, any attempt to produce an impact statement would be little more than a study along the lines of the NGPRP, containing estimates of potential development and attendant environmental consequences. There would be no factual predicate for the production of an environmental ****2727** impact statement of the type envisioned by NEPA. [14]

***403** IV

A

The Court of Appeals, in reversing the District Court, did not find that there was a regional plan or program for development of the Northern Great Plains region. It accepted all of the District Court's findings of fact, but concluded nevertheless that the petitioners "contemplated" a regional plan or program. The court thought that the North Central Power Study, the Montana-Wyoming Aqueducts Study, and the NGPRP all constituted "attempts to control development" by individual companies on a regional scale. It also concluded that the interim report of the NGPRP, then expected to be released at any time, would provide the petitioners with the information needed to formulate the regional plan they had been "contemplating." The Court therefore remanded with instructions to the petitioners to inform the District Court of their role in the further development of the region within 30 days after the NGPRP interim report issued; if they decided to control that development, an impact statement would be required.

**[5]** We conclude that the Court of Appeals erred in both its factual assumptions and its interpretation of NEPA. We think the court was mistaken in concluding, on the record before it, that the petitioners were "contemplating" a regional development plan or program. It considered the several studies undertaken by the petitioners to represent attempts to control development on a regional scale. This conclusion was based on a finding by the District Court that those studies, as well as the new national coal-leasing policy, were "attempts to control development by individual companies in a manner consistent with the policies and procedures of the National ***404** Environmental Policy Act of 1969." But in context, that finding meant only that the named studies were efforts to gain background environmental information for subsequent application in the decisionmaking with respect to individual coal-related projects. This is the sense in which the District Court spoke of controlling development consistently with NEPA. Indeed, in the same paragraph containing the language relied upon by the Court of Appeals, the District Court expressly found that the studies were not part of a plan or program to develop or encourage development. See *supra*, at 2726.

  

Moreover, at the time the Court of Appeals ruled there was no indication in the record that the NGPRP was aimed toward a regional plan or program, and subsequent events have shown that this was not its purpose. The interim report of the study, issued shortly after the Court of Appeals ruled, described the effects of several possible rates of coal development but stated in its preface that the alternatives "are for study and comparison only; they do not represent specific plans or proposals." All parties agreed in this Court that there still exists no proposal for a regional plan or program of development. See Tr. of Oral Arg. 48.

Even had the record justified a finding that a regional program was contemplated by the petitioners, the legal conclusion drawn by the Court of Appeals cannot be squared with the Act. The court recognized ****2728** that the mere "contemplation" of certain action is not sufficient to require an impact statement. But it believed the statute nevertheless empowers a court to require the preparation of an impact statement to begin at some point prior to the formal recommendation or report on a proposal. The Court of Appeals accordingly devised its own four-part "balancing" test for determining when during the contemplation of a plan or ***405** othertype of federal action, an agency must begin a statement. The factors to be considered were identified as the likelihood and imminence of the program's coming to fruition, the extent to which information is available on the effects of implementing the expected program and on alternatives thereto, the extent to which irretrievable commitments are being made and options precluded "as refinement of the proposal progresses," and the severity of the environmental effects should the action be implemented.

The Court of Appeals thought that as to two of these factors the availability of information on the effects of any regional development program, and the severity of those effects the time already was "ripe" for an impact statement. It deemed the record unclear, however, as to the likelihood of the petitioners' actually producing a plan to control the development, and surmised that irretrievable commitments were being avoided because petitioners had ceased approving most coal-related projects while the NGPRP study was underway. The court also thought that the imminent release of the NGPRP interim report would provide the officials with sufficient information to define their role in development of the region, and it believed that as soon as the NGPRP was completed the petitioners would begin approving individual projects in the region, thus permitting irrevocable commitments of resources. It was for this reason that the court in its remand required the petitioners to report to the District Court their decision on the federal role with respect to the Northern Great Plains as a region within 30 days after issuance of the NGPRP report.

**[6]** The Court's reasoning and action find no support in the language or legislative history of NEPA. The statute clearly states when an impact statement is required, and mentions nothing about a balancing of factors. Rather, as we noted last Term, under the first ***406** sentence of s 102(2)(C) the moment at which an agency must have a final statement ready "is the time at which it makes a recommendation or report on a *proposal* for federal action." *Aberdeen & Rockfish R. C. v. SCRAP*, 422 U.S. 289, 320, 95 S.Ct. 2336, 2356,5 L.Ed.2d 191 (1975) (SCRAP II ) (emphasis in original). The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise. A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement Should be prepared. Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation. As the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action, it may be assumed that the balancing process devised by the Court of Appeals also would result in the preparation of a good many unnecessary impact statements. [15]

***407 **2729** B

**[7]** Assuming that the Court of Appeals' theory about "contemplation" of regional action would permit a court to require preproposal preparation of an impact statement, the court's injunction against the Secretary's approval of the four mining plans in the Powder River Basin nevertheless would have been error. The District Court had found that respondents would not have been entitled to an injunction against any individual projects even if their claim of the need for a regional impact statement had been valid, because they had shown no irreparable harm that would result absent such an injunction and the record disclosed that irreparable harm Would result to the intervenors who sought to carry out their business ventures and to the public who depended upon

  

their operations. The Court of Appeals made no finding as to the equities at the time it originally entered the injunction; when it continued the injunction following its decision on the merits, it stated only that the "harm" justifying an injunction "matured" whenever an impact statement is due and not filed. But on the Court of Appeals' own terms there was in fact no harm. First, the Court of Appeals itself held that no regional impact statement was due at that moment, and it was uncertain whether one ever would be due. Second, there had been filed a comprehensive impact statement on the proposed Powder River Basin mining plans themselves, and its adequacy had not been challenged either before the District Court or the Court of Appeals in this case, or anywhere else.[16] Thus, in simple equitable terms there were ***408** no grounds for the injunction: the District Court's finding of irreparable injury to the intervenors and to the public still stood, and there were on the Court of Appeals' own terms no countervailing equities.

V

Our discussion thus far has been addressed primarily to the decision of the Court of Appeals. It remains, however, to consider the contention now urged by respondents. They have not attempted to support the Court of Appeals' decision. Instead, respondents renew an argument they appear to have made to the Court of Appeals, but which that court did not reach. Respondents insist that, even without a comprehensive federal plan for the development of the Northern Great Plains, a "regional" impact statement nevertheless is required on all coal-related projects in the region because they are intimately related.

**[8]** There are two ways to view this contention. First, it amounts to an attack on the sufficiency of the impact statements already prepared by the petitioners on the coal-related projects that they have approved or stand ready to approve. As such, we cannot consider it in this proceeding, for the case was not brought as a challenge to a particular impact statement and there is no impact statement in the record.[17] It also is possible to view the ***409** respondents' argument as an attacK upon the decision of the petitioners not to prepare one comprehensive ****2730** impact statement on all proposed projects in the region. This contention properly is before us, for the petitioners have made it clear they do not intend to prepare such a statement.

**[9]** **[10]** **[11]** We begin by stating our general agreement with respondents' basic premise that s 102(2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time. NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by "all practicable means, consistent with other essential considerations of national policy." s 101(b), 42 U.S.C. s 4331(b). Section 102(2)(C) is one of the "action-forcing" provisions intended as a directive to "all agencies to assure consideration of the environmental impact of their actions in decisionmaking." Conference Report on NEPA, 115 Cong.Rec. 40416 (1969).[18] By requiring on impact statement Congress intended to assure such consideration during the development of a proposal or as in this case during the formulation of a position on a proposal submitted by private parties.[19] A comprehensive impact statement may be necessary in some cases for an agency to meet ***410** this duty. Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.[20] Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.[21]

**[12]** Agreement to this extent with respondents' premise, however, does not require acceptance of their conclusion that all proposed coal-related actions in the Northern Great Plains region are so "related" as to require their analysis in a single comprehensive impact statement. Respondents informed us that the Secretary recently adopted an approach to impact statements on coal-related actions that provides:

"A. As a general proposition, and as determined by the Secretary, when action is proposed involving ***411** coal development such as issuing several coal leases or approving mining plans in the same region, su actions will be covered by a single ****2731** EIS rather than by multiple statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors." Brief for Respondents 20a.

At another point, the document containing the Secretary's approach[22] states that a "regional EIS" will be prepared "if a series of proposed actions with interrelated impacts are involved . . . unless a previous EIS has sufficiently analyzed

  

the impacts of the proposed action(s).” Id., at 20a-21a. Thus, the Department has decided to prepare comprehensive impact statements of the type contemplated by s 102(2)(C), although it has not ***412** deemed it appropriate to prepare such a statement on all proposed actions in the region identified by respondents.

Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement on this entire region, and we agree. Tr. of Oral Arg. 67. The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Cf. SCRAP II, 422 U.S., at 325-326, 95 S.Ct., at 2358-2359. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately. Respondents have made no showing to the contrary.

**[13]** **[14]** **[15]** Respondents' basic argument is that one comprehensive statement on the Northern Great Plains is required because all coal-related activity in that region is “programmatically,” “geographically,” and “environmentally” related. Both the alleged “programmatic” relationship and the alleged “geographic” relationship resolve, ultimately, into an argument that the region is proper for a comprehensive impact statement because the petitioners themselves have approached environmental study in this area on a regional basis.[23] Respondents point primarily to the NGPRP, which they claim and petitioners ***413** deny focused on the region described in the complaint.[24] The precise region of the NGPRP ****2732** is unimportant, for its irrelevance to the delineation of an appropriate area for analysis in a comprehensive impact statement has been well stated by the Secretary:

“Resource studies (like the NGPRP) are one of many analytical tools employed by the Department to inform itself as to general resource availability, resource need and general environmental considerations so that it can intelligently determine the scope of environmental analysis and review specific actions it may take. Simply put, resource studies are a prelude to informed agency planning, and provide the data base on which the Department may decide to take specific actions for which impact statements are prepared. The scope of environmental impact statements seldom coincide with that of a given resource study, since the statements evolve from specific proposals for federal action while the studies simply provide an educational backdrop.” Affidavit of Oct. 28, 1975, App. 191.

As for the alleged “environmental” relationship, respondents contend that the coal-related projects “will produce a wide variety of cumulative environmental impacts” throughout the Northern Great Plains region. They described them as follows: Diminished availability of water, air and water pollution, increases in population and industrial densities, and perhaps even climatic changes. Cumulative environmental impacts are, indeed, what require a comprehensive impact statement. ***414** But determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies. Petitioners dispute respondents' contentions that the interrelationship of environmental impacts is regionwide[25] and, as respondents' own submissions indicate, petitioners appear to have determined that the appropriate scope of comprehensive statements should be bas on basins, drainage areas, and other factors. See Supra, at 2730-2731.

We cannot say that petitioners' choices are arbitrary. Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.

**[16]** **[17]** In sum, respondents' contention as to the relationships between all proposed coal-related projects in the Northern Great Plains region does not require that petitioners prepare one comprehensive impact statement covering all before proceeding to approve specific pending applications.[26] As we already have determined that there ***415** exists no proposal for regionwide action tt could require a regional impact statement, the judgment of the Court of Appeals must be reversed, and the judgment of the District ****2733** Court reinstated and affirmed. The case is remanded for proceedings consistent with this opinion.

So ordered.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, concurring in part and dissenting in part.

  

While I agree with much of the Court's opinion, I must dissent from Part IV, which holds that the federal courts may not remedy violations of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. s 4321 Et seq. no matter how blatant until it is too late for an adequate remedy to be formulated. As the Court today recognizes, NEPA contemplates agency consideration of environmental factors throughout the decisionmaking process.

Since NEPA's enactment, however, litigation has been brought primarily at the end of that process challenging agency decisions to act made without adequate environmental impact statements or without any statements at all. In such situations, the courts have had to content themselves with the largely unsatisfactory remedy of enjoining the proposed federal action and ordering the preparation of an adequate impact statement. This remedy is insufficient because, except by deterrence, it does nothing to further early consideration of environmental factors. And, as ***416** with all after-the-fact remedies, a remand for preparation of an impact statement after the basic decision to act has been made invites *post hoc* rationalizations, cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971), rather than the candid and balanced environmental assessments envisioned by NEPA. Moreover, the remedy is wasteful of resources and time, causing fully developed plans for action to be laid aside while an impact statement is prepared.

Nonetheless, until this lawsuit, such belated remedies were all the federal courts had had the opportunity to impose under NEPA. In this case, confronted with a situation in which, according to respondents' allegations, federal agencies were violating NEPA prior to their basic decision to act, the Court of Appeals for the District of Columbia Circuit seized the opportunity to devise a different and effective remedy. It recognized a narrow class of cases essentially those where both the likelihood of eventual agency action and the danger posed by nonpreparation of an environmental impact statement were great in which it would allow judicial intervention prior to the time at which an impact statement must be ready. The Court today loses sight of the inadequacy of other remedies and the narrowness of the category constructed by the Court of Appeals, and construes NEPA so as to preclude a court from ever intervening prior to a formal agency proposal. This decision, which unnecessarily limits the ability of the federal courts to effectuate the intent of NEPA, is mandated neither by the statute nor by the various equitable considerations upon which the Court relies.

I

The premises of the Court of Appeals' approach are not novel and indeed are reaffirmed by the Court today. ***417** Under s 102(2)(C) of NEPA, 42 U.S.C. s 4332(2) (C), "the moment at which an agency *must have a final (environmtal impact) statement ready* 'is the time at which it makes a recommendation or report on a Proposal for federal action.' " Ante, at 2728, quoting *Aberdeen & Rockfish R. Co. v. SCRAP,* 422 U.S. 289, 320, 95 S.Ct. 2336, 2356, 45 L.Ed.2d 191 (1975) (first emphasis added). Preparation of an impact statement, particularly on a complicated project, takes a considerable amount of time. Flint Ridge Dev. Co. v. Scenic Rivers Assn., 426 U.S. 776, 789 n. 10, 96 S.Ct. 2430, 2438, 49 L.Ed.2d 205 (1976); Sixth Annual Report, Council on Environmental Quality 639 ****2734** (1975). Necessarily, if the statement is to be completed by the time the agency makes its formal proposal to act, preparation must begin substantially before the proposal must be ready. In this litigation, for instance, the federal petitioners assert that a statement on the region in which respondents are interested would take more than three years to complete. Brief for Federal Petitioners 28 n. 22. Accordingly, since it would violate NEPA for the Government to propose a plan for regional development of the Northern Great Plains without an accompanying environmental impact statement, if the Government contemplates making such a proposal at any time in the next three years it should already be working on its impact statement.

But an early start on the statement is more than a procedural necessity. Early consideration of environmental consequences through production of an environmental impact statement is the whole point of NEPA, as the Court recognizes. The legislative history of NEPA demonstrates that "(b)y requiring an impact statement Congress intended to assure (environmental) consideration During the development of a proposal . . . ." Ante, at 2730 (emphasis added). Compliance with this duty allows the decisionmaker to take environmental ***418** factors into account when he is making decisions, at a time when he has an open mind and is more like to be receptive to such considerations. Thus, the final impact statement itself is but "the tip of an iceberg, the visible evidence of an underlying planning and decisionmaking process that is usually unnoticed by the public." Sixth Annual Report, Council on Environmental Quality 628 (1975).

  

Because an early start in preparing an impact statement is necessary if an agency is to comply with NEPA, there comes a time when an agency that fails to begin preparation of a statement on a contemplated project is violating the law. It is this fact, which is not disputed by the Court today, that was recognized by the Court of Appeals and that formed the basis of its remedy. The Court devised a four-part test to enable a reviewing court to determine when judicial intervention might be proper in such cases. The questions formulated by the Court of Appeals were:

"How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?" 169 U.S.App.D.C. 20, 44, 514 F.2d 856, 880 (1975).

While the Court's disapproval of this four-part inquiry precludes any future demonstration of its workability, the test is designed to allow judicial intervention only in the small number of cases where the need for work to begin on an environmental impact statement is clear ***419** and the agency violation blatant. [1] And, indeed, the Court ****2735** of Appeals refused to find a violation in this case, concluding instead that on two of the four factors the evidence was such as to negate the need for a prompt start on an impact statement.

***420** II

I believe the Court of Appeals' test is a sensible way to approach enforcement of NEPA, and none of the Court's reasons for concluding otherwise are, for me, persuasive. [2]

The Court begins its rejection of the four-part test by announcing that the procedural duty imposed on the agencies by s 102(2)(C) is "quite precise" and leaves a court "no authority to depart from the statutory language . . . ." Ante, at 2729. Given the history and wording of NEPA's impact statement requirement, this statement is baffling. A statute that imposes a complicated procedural requirement on all "proposals" for "major Federal actions significantly affecting the quality of the human environment" and then assiduously avoids giving any hint, either expressly or by way of legislative history, of what is meant by a "proposal" or by a "major Federal ***421** action" can hardly be termed precise. In fact, this vaguely worded statute seems designed to serve as no more than a catalyst for development of a "common law" of NEPA. To date, the courts have responded in just that manner and have created such a "common law." 169 U.S.App.D.C., at 34-36, 514 F.2d, at 870-872. Indeed, that development is the source of NEPA's success. Of course, the Court is correct that the courts may not dart from NEPA's language. They must, however, give meaning to that language if there is to be anything in NEPA to enforce at all. And that is all the Court of Appeals did in this case.

But, claims the Court, judicial intervention of the sort approved by the Court of Appeals would leave the agencies uncertain about their procedural duties under NEPA. There is no basis for this claim. The agencies ****2736** already know their duties under NEPA and the Court of Appeals did not alter them. All it did was create a mechanism to allow it to enforce those pre-existing duties.

Next, the Court fears, the four-part test, would "invite judicial involvement in the day-to-day decisionmaking process of the agencies. . . ." Ante, at 2729. This concern is in part untrue and in part exaggerated. The test would certainly result in judicial involvement with the single decision whether the time is right to begin an impact statement. But this is hardly a day-to-day process, and the involvement even in that decision would be limited to timing alone. The Court of Appeals made clear that, so long as their decision was not arbitrary or capricious, "definition of the proper region for comprehensive development and, therefore, the comprehensive impact statement should be left in the hands of the federal appellees," 169 U.S.App.D.C., at 45 n. 33, 514 F.2d, at 881 n. 33, a position which the Court adopts today. Ante, at 2731. And, most important, a federal ***422** court would intervene at all only when the four-part test indicated an abdication of the agency's statutory duty and the necessity for judicial intervention.

The Court is also concerned that the proposed rule would invite litigation. But the recognition of any right invites litigation, and it is a curious notion of statutory construction that makes substantive rights depend on whether persons would seek to enforce them in court. See United States v. Watson, 423 U.S. 411, 433, 452 n. 19, 96 S.Ct. 820, 832, 842, 46 L.Ed.2d 598 (1976) (Marshall, J., dissenting). In any case, to the extent the litigation is the result of agency noncompliance with NEPA, the Court can hardly complain about it. And to the extent the litigation is frivolous, the four-

  

part test is a stiff one and "the plaintiff can be hastened from (the) court by summary judgment." Barlow v. Collins, 397 U.S. 159, 175 n. 10, 90 S.Ct. 832, 842, 25 L.Ed.2d 192 (1970) (opinion of Brennan, J.).

Lastly, the Court complains, since some contemplated projects might never come to fruition, the Court of Appeals' test might result "in the preparation of a good many unnecessary impact statements." Ante, at 2729 (footnote omitted). Even bypassing the instances in which a project is dropped as a result of environmental considerations discovered in the course of preparing an impact statement, the Court's concerns are exaggerated. The Court of Appeals showed great sensitivity to the need for federal officials to be able "to dream out loud without filing an impact statement," 169 U.S.App.D.C., at 43, 514 F.2d, at 879, and did not seek to disturb that freedom. Indeed, a major point of the four-part test is to avoid wasted effort including the wasted effort of enjoining an already proposed project to allow the belated preparation of an impact statement and the Court suggests, and I can imagine, no reason why the test is unlikely to be successful in achieving that goal.

***423** In short, the Court offers nothing but speculation, misconception, and exaggeration to reject a reasonably designed test for enforcing the duty NEPA imposes upon the federal agencies. Whatever difficulties the Court may have with the initial application of the test in this case and I agree that an injunction was not warranted on the facts before the Court of Appeals the Court has articulated no basis for interring the test before it has been given a chance to breathe.

**All Citations**

427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576, 8 ERC 2169, 6 Envtl. L. Rep. 20,532

## Footnotes

** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 83 Stat. 852, 42 U.S.C. s 4321 Et seq.

2 Respondents asserted jurisdiction under 5 U.S.C. ss 701-706, 28 U.S.C. s 1331(a), and 28 U.S.C. s 1361.

3 Prior to ruling on motions for summary judgment, the District Court permitted intervention as defendants by several public utilities, coal mining companies, and natural gas companies, by an Indian tribe, and by an individual rancher. Most of these intervenors have joined in a separate petition for certiorari in No. 75-561, which is decided together with this case.

4 On the same date the Court of Appeals remanded to the District Court respondents' motion for modification of the injunction to prohibit the Secretary from approving a new mining plan submitted by a coal company, not then a party to the suit, that had been mining coal on leased federal land since 1972. The new mining plan was covered by an impact statement. The Secretary of the Interior approved the plan on November 11. On November 14, the District Court partially enjoined the company from mining under the approved plan.

5 Department of Interior News Release (Oct. 3, 1972), App. 132.

6 NGPRP outline, App. 136.

7 Department of Interior News Release (Feb. 17, 1973), App. 125-127.

8 The petitioners in No. 75-561 have included in their brief a press release by the Secretary announcing the new program, and a detailed description of the program. Pending full operation thereof, the short-term leasing policy remains in effect.

9 In the District Court respondents also contended that petitioners had failed to comply with ss 102(2)(A) and (D), 42 U.S.C. ss 4332(2)(A) and (D), which require an agency to use a specified approach to

decisionmaking and to describe alternatives when a proposal involves unresolved conflicts concerning uses of resources. (Subparagraph (D) was redesignated subparagraph (E) by Pub.L. 94-83, 89 Stat. 424.) The District Court ruled against respondents on the count based on these subparagraphs, and it has dropped out of the case.

10 In an affidavit submitted in support of the application for a stay of the Court of Appeals' injunction, the Secretary described four impact statements completed by the petitioners on coal-related activity in Montana and Wyoming. One was the multiproject statement on the Powder River Coal Basin that was the subject of that injunction. See Supra, at 2723-2724. Another was on the single mining plan subsequently brought under the injunction as modified by the District Court. See n. 4, Supra. A third covered one leased tract, and apparently was occasioned by an application for approval of a new mining plan on the tract. The fourth, on another single mining plan, has been the subject of litigation, on the merits of which we intimate no view. See Cady v. Morton, 527 F.2d 786 (CA9 1975).

11 The Secretary's affidavit in support of the application for a stay of the Court of Appeals' injunction confirms that the situation regarding regional planning or a regional development program has not changed. See App. 195-196.

12 The legislative history of NEPA fully supports our reading of s 102(2)(C) as to when an impact statement is required. The bill passed by the House contained no provision comparable to s 102(2)(C) of the Act. The bill that was reported to and, as amended, passed by the Senate did contain the forerunner of s 102(2)(C). The committee report made clear that the impact statement was required in conjunction with specific proposals for action. S.Rep.No.91-296, p. 20 (1969)S.Rep.No.91-296, p. 20 (1969). After the House-Senate Conference, the managers on the part of the House, in a separate statement, explained s 102(2)(C) in language that tracks the statute on the requirement of a proposal. H.R.Conf.Rep.No.91-765, p. 8H.R.Conf.Rep.No.91-765, p. 8 (1969), U.S.Code Cong. & Admin.News 1969, p. 2767. See also 115 Cong.Rec. 40420 (1969).

13 Section 102(2)(C) states that the statement must be a detailed statement 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.” (Emphasis added.)

14 In contrast, with both an individual coal-related action and the new national coal leasing program, an agency deals with specific action of known dimensions. With appropriate allowances for the inexactness of all predictive ventures, the agency can analyze the environmental consequences and describe alternatives as envisioned by s 102(2)(C). Of course, since the kind of impact statement required depends upon the kind of “ ‘federal action’ being taken,” Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 322, 95 S.Ct. 2336, 2357, 45 L.Ed.2d 191 (1975), the statement on a proposed mining plan or a lease application may bear little resemblance to the statement on the national coal-leasing program. Nevertheless, in each case the bounds of the analysis are defined, which is not the case with coal development in general in the region identified by respondents.

15 This is not to say that s 102(2)(C) imposes no duties upon an agency prior to its making a report or recommendation on at proposal for action. This section states that prior to preparing the impact statement the responsible 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.” Thus, the section contemplates a consideration of environmental factors by agencies during the evolution of a report or recommendation on a proposal. But the time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the

  

final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption.

16 Even had the Court of Appeals determined that a regional impact statement was due at that moment, it still would have erred in enjoining approval of the four mining plans unless it had made a finding that the impact statement covering them inadequately analyzed the environmental impacts of, and the alternatives to, their approval. So long as the statement covering them was adequate, there would have been no reason to enjoin their approval pending preparation of a broader regional statement; that broader statement, when prepared, simply would have taken into consideration the regional environmental effects of the four mining plans once they were in operation, in determining the permissibility of further coal-related operations in the region. See Part V, Infra.

17 Petitioners lodged with this Court a copy of the massive six-volume impact statement on the projects in the Powder River Coal Basin, but it is not part of the record.

18 The term "action-forcing" was applied to the provisions of what became s 102(2) throughout their consideration by the Senate. See, E. g., S.Rep.No.91-296, p. 9 (1969)S.Rep.No.91-296, p. 9 (1969); 115 Cong.Rec. 40416, 40419 (1969).

19 The legislative history of the provision in the Senate, where it originated and where it received the most attention, supports this interpretation. See S.Rep.No.91-296S.Rep.No.91-296, Supra, at 2, 20-21; 115 Cong.Rec. 29052-29053, 29055, 29058, 40416 (1969). The Conference Report to the House is consistent. See Id., at 40923-40928.

20 At some points in their brief respondents appear to seek a comprehensive impact statement covering contemplated projects in the region as well as those that already have been proposed. The statute, however, 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. Cf. n. 26, Infra.

21 Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. See Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 481 (CA2 1971), cert. denied, 407 U.S. 926, 92 S.Ct. 2453, 32 L.Ed.2d 813 (1972). The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." Natural Resources Defense Council v. Morton, 148 U.S.App.D.C. 5, 16, 458 F.2d 827, 838 (1972).

22 The document is an "Executive Summary and Decision Document" signed by the Secretary and dated December 16, 1975. The decision as to impact statements is part of the implementation of the new coal-leasing policy based on staff recommendations following release of the Coal Programmatic EIS. See Supra, at 2725.

Respondents contend that this document represents a significant shift in Department policy since the start of this litigation, but we disagree. Early in the litigation the Department and three other agencies prepared the comprehensive impact statement on proposed actions in the Powder River Coal Basin, see Supra, at 2723-2724; its preface quoted by the District Court states that it evaluated "the collective impacts of the proposed actions and, insofar as now possible, the impacts of potential future coal mining within the geographic area." Moreover, the Secretary's consistent position, in affidavits dating back to the District Court, has been that statements might be prepared on regions or "subregions" once the Coal Programmatic EIS was completed. While the affidavits did not, until the application for a stay of the injunction, expressly predicate preparation of such statements upon the pendency of several proposals within the region or subregion, neither are they inconsistent with such predication.

  

23 On the "programmatic" relationship, respondents also rely on the assertion that all of the projects involve similar methods of mining and converting the region's coal. Assuming this to be correct, we do not think it significant.

24 They rely also on the North Central Power Study and the Montana-Wyoming Aqueducts Study, but each covered an area different from respondents' region and, moreover, it is not clear that either was primarily an environmental study. See Supra, at 2724.

25 For example, respondents assert that coal mines in the region are environmentally interrelated because opening one reduces the supply of water in the region for others. Petitioners contend that the water supply for each aquifer or basin within the region of which there are many is independent.

Moreover, petitioners state in their reply brief that few active or proposed mines in respondents' region are located within 50 miles of any other mine, and there are only 30 active or proposed mines in the entire 90,000 square miles of the region.

26 Nor is it necessary that petitioners always complete a comprehensive impact statement on all proposed actions in an appropriate region before approving any of the projects. As petitioners have emphasized, and respondents have not disputed, approval of one lease or mining plan does not commit the Secretary to approval of any others; nor, apparently, do single approvals by the other petitioners commit them to subsequent approvals. Thus, an agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project when preparing the comprehensive statement on the cumulative impact of the remaining proposals. Cf. n. 20, Supra.

1 Nothing in Flint Ridge Dev. Co. v. Scenic Rivers Assn., 426 U.S. 776, 96 S.Ct. 2430, 49 L.Ed.2d 205 (1976), suggests that work on an impact statement cannot successfully begin in situations identified by this four-part test. In Flint Ridge, in considering whether an agency should begin work on an impact statement arguably necessary for federal approval of certain private action by a real estate developer, we rejected the claim that the agency should begin work before the private action was submitted to the agency for approval. "The agency could not fruitfully begin the impact statement until the developer's plans were fully or largely worked out. . . . " Id., at 791 n. 13, 96 S.Ct., at 2439 n. 13.

This language is not contrary to the Court of Appeals' position here for two reasons. First, the quoted language recognizes that an impact statement could be begun when the developer's plans were largely worked out, essentially the situation the four-part test would identify as appropriate for initiation of work on an impact statement. Second, and more important, Flint Ridge concerned federal approval of private action rather than federal initiation of its own project, at issue here. This distinction has been recognized before, Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320, 95 S.Ct. 2336, 2356, 45 L.Ed.2d 191 (1975), and is recognized by the Court today. When the federal agency is initiating its own proposal, NEPA is more demanding. In such circumstances, NEPA is "intended to assure (environmental) consideration during the development of (the) proposal," whereas when private action is to be approved, NEPA seeks only to assure such consideration "during the formulation of a position on (the) proposal submitted by private parties." Ante, at 2730 (footnote omitted).

Nor are other parts of the Court's opinion today inconsistent with the Court of Appeals' approach. While it is true in general, as the Court observes, that in the absence of a proposal there is nothing for an impact statement to analyze, Ante, at 2726-2727, the observation is a generalization plainly inapplicable to situations identified by the four-part test.

2 The Court attempts to discredit the Court of Appeals' conclusion that the Government contemplates a regional development plan or proposal. The Court confuses the possibility of such a plan all that is needed to prompt application of the four-part test with its reality. All the parties, the District Court, and the Court of Appeals are agreed that no regional plan exists in this case. But the Government concedes that a regional plan is contemplated in the sense the Court of Appeals used the term. "(I)t would be accurate to conclude that petitioners 'contemplate' regional planning (although not necessarily for the region defined by respondents) because, as the district court found . . . , and as the National Impact Statement confirms, '(i)t is possible a

  

decision will be made to prepare a statement for the entire Northern Great Plains region, but the information available (to petitioners) may indicate that statements on smaller subregions, geologic structures, basin, or selected individual actions' will be preferable." Brief for Federal Petitioners 40 n. 32.

Thus, the Court's conclusion that "the Court of Appeals erred in . . . its factual assumptions," Ante, at 2727, either misapprehends the factual assumptions necessary to the Court of Appeals' theory or is entirely without support in the record.