

**PROCEDURAL SQUABBLING AHEAD OF GLOBAL ANNIHILATION:  
STRENGTHENING THE NATIONAL ENVIRONMENTAL POLICY  
ACT IN A NEW TECHNOLOGICAL ERA**

*Matthew M. Villmer\**

**I. INTRODUCTION**

The National Environmental Policy Act (NEPA or the Act)<sup>1</sup> greatly improved United States environmental policy, promising judicial oversight to federal actions. However, due to years of judicial interpretation that significantly reduced NEPA's requirements, the Act lost its substantive impact. This erosion of NEPA protections risked local and regional disaster in the nuclear era—but now, government contravention of NEPA provisions risks even more: complete global destruction.

This Article follows the creation, development, and eventual demise of NEPA's environmental protections. The Article tracks NEPA's application throughout the last thirty years using three case studies and particularly analyzes the United States government's intentional evasion of the Act's safeguards. This Article then culminates with a detailed proposition for rehabilitating NEPA to its former status as an environmental safeguard for not only the United States, but the earth as a whole. By amending NEPA to adequately protect the environment, humanity will ensure its future on this planet.

**II. THE NATIONAL ENVIRONMENTAL POLICY ACT**

NEPA integrates environmental policy considerations into everyday federal government decision making.<sup>2</sup> Historically, NEPA is the

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\* Matthew M. Villmer is an attorney with the law firm of Emmanuel, Sheppard & Condon in Pensacola, Florida. He received his J.D. from Florida Coastal School of Law in Jacksonville, Florida, and his B.A. from Western Kentucky University in Bowling Green, Kentucky. He would like to dedicate this article to his wife, Brittney, and his parents, Ben and Maureen.

<sup>1</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2006).

<sup>2</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 349-50 (1979).

most comprehensive overhaul to environmental policy in United States history.<sup>3</sup> Therefore, the Act's historical development, relevant requirements, and mandatory party actions necessitate discussion before delving into its functional inadequacies.

### A. *History, Purpose, and Applicability*

In the late 1960s an enormous coalition of environmental activists applied extreme political pressure on federal legislators to protect the environment from disastrous human actions.<sup>4</sup> By 1968 federal legislators acknowledged that a complete lack of standard environmental regulations led to severe environmental problems.<sup>5</sup> After the Act's crafting—consisting of a mere five pages of paper—President Richard Nixon signed NEPA into law on January 1, 1970.<sup>6</sup>

The purpose behind NEPA, according to Congress, was twofold: (1) to declare consistent national environmental policy that promoted harmony between the environment and man, and (2) to create a council that analyzed federal policy and environmental problems.<sup>7</sup> To achieve these goals, NEPA supplied a procedural framework the federal government must operate within when making changes that affect the environment.<sup>8</sup> As stated by the United States Supreme Court, “NEPA itself does not mandate particular results, but simply prescribes the necessary process”<sup>9</sup> for agencies to use in order to prevent agencies from making uninformed decisions.

Certain NEPA procedural requirements apply when the federal government undertakes “major Federal action.”<sup>10</sup> Courts readily recog-

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<sup>3</sup> See Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 245-46 (2000).

<sup>4</sup> JOHN WARFIELD SIMPSON, *VISIONS OF PARADISE: GLIMPSES OF OUR LANDSCAPE'S LEGACY* 227 (1999).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 227, 229.

<sup>7</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (Supp. I 2007).

<sup>8</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>9</sup> *Id.*

<sup>10</sup> *Citizens for Responsible Area Growth v. Adams*, 477 F. Supp. 994, 998, 999 (D.N.H. 1979) (interpreting 42 U.S.C. § 4332(2)(C) (1976), which states, “include in

nize there is no standardized test to determine what constitutes “major Federal action.”<sup>11</sup> However, courts generally look to a definition provided by the Council on Environmental Quality (CEQ).<sup>12</sup> This definition, included in CEQ regulations, defines “major Federal action” as (1) “actions by the federal government” itself, or (2) “actions by nonfederal actors ‘with effects that may be major *and which are potentially subject to Federal control and responsibility.*’”<sup>13</sup> More precisely, certain NEPA procedural requirements apply to nonfederal actors when a federal agency “possess[es] actual power to control the nonfederal activity.”<sup>14</sup>

Courts have held that NEPA procedural requirements demand maximum compliance by federal and nonfederal actors,<sup>15</sup> evidenced by the Act’s statement: “*to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA] . . .*”<sup>16</sup> With only one compliance exception—when existing law applicable to federal agencies expressly prohibits or makes full compliance with NEPA an impossibility<sup>17</sup>—NEPA “requir[es] nothing less than comprehensive and objective treatment by the responsible agency.”<sup>18</sup>

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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 [environmental impact]).

<sup>11</sup> *Save Barton Creek Ass’n v. Fed. Highway Admin.*, 950 F.2d 1129, 1134 (5th Cir. 1992).

<sup>12</sup> *Id.* at 1134-35.

<sup>13</sup> *Id.* at 1134 (quoting 40 C.F.R. § 1508.18 (2008)).

<sup>14</sup> *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988); *see, e.g., Atlanta Coal. on the Transp. Crisis, Inc. v. Atlanta Reg’l Comm’n*, 599 F.2d 1333, 1346-47 (5th Cir. 1979).

<sup>15</sup> *Envtl. Def. Fund, Inc. v. Corps of Eng’rs of the U.S. Army*, 348 F. Supp. 916, 927 (N.D. Miss. 1972) (“[T]he procedural duties of [NEPA] § 102(2) require maximal compliance.”).

<sup>16</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2006).

<sup>17</sup> *See* 40 C.F.R. § 1500.6 (2008) (“The phrase ‘to the fullest extent possible’ in [NEPA] means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency’s operations expressly prohibits or makes compliance impossible.”).

<sup>18</sup> *Envtl. Def. Fund, Inc.*, 348 F. Supp. at 927.

In light of NEPA's history, purpose, and applicability to federal and nonfederal actors, one must consider the Act's various procedural requirements. In particular, the exceptionally valuable, yet abused, Environmental Impact Statement (EIS) requirement.

### ***B. Environmental Impact Statement Requirement***

NEPA includes several procedural requirements, but only one warrants close scrutiny. When preparing a recommendation or report regarding legislation, or any "other major Federal actions significantly affecting the quality of the human environment,"<sup>19</sup> federal agencies must provide a detailed environmental report.<sup>20</sup> This detailed report, referred to by courts as an EIS, must include the following elements:

- (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.<sup>21</sup>

Again, preparation of an EIS must occur when there are "major Federal actions significantly affecting the quality of the human environment."<sup>22</sup> To determine whether an action significantly affects the quality of the human environment, thus necessitating an EIS, federal agencies must prepare an Environmental Assessment (EA).<sup>23</sup> If, however, a federal agency simply prepares an EIS with the assumption that

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<sup>19</sup> 42 U.S.C. § 4332(C).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 40 C.F.R. § 1501.3(a) (2008).

the action significantly affects the quality of the human environment, federal regulations do not require an EA.<sup>24</sup>

Ultimately, federal agencies responsible for actions creating, or not creating, an environmental impact decide whether or not to prepare an EIS.<sup>25</sup> Moreover, when federal agencies deliberate whether to draft an EIS, NEPA does not require agencies to receive public input by way of announcement or publication.<sup>26</sup> After discussing the EIS requirements, one must consider when NEPA requires the filing of an EIS.

### *C. Environmental Impact Statement Timeline*

The specified time in which a federal agency must file an EIS is important to plaintiffs' challenges to the accuracy or comprehensiveness of the EIS. The United States Supreme Court delineates this time period as "the time at which [the federal agency] makes a recommendation or report on a proposal for federal action."<sup>27</sup> While this requirement appears unambiguous, it suffers from murky case law interpretation. On one side, a federal agency must write an EIS early enough to allow the government and public to review the report for potential environmental dangers or EIS inadequacies.<sup>28</sup> However, federal agencies must also draft the EIS late enough in the course of development to provide significant environmental and statistical data.<sup>29</sup>

Therein lies the difficult legal question: at what point must a federal agency file its EIS, in light of the report's possible comprehen-

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<sup>24</sup> *Id.*

<sup>25</sup> *Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir. 1972) ("[T]he responsible federal agency has the authority to make its own threshold determination as to each in deciding whether an impact statement is necessary.").

<sup>26</sup> *Como-Falcon Cmty. Coal., Inc. v. U.S. Dep't of Labor*, 609 F.2d 342, 345 (8th Cir. 1979) (noting that it may be advisable for an agency to receive public input on a particular decision, despite the fact that it is not statutorily required).

<sup>27</sup> *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 320 (1975) (stating further, "[w]here an agency initiates federal action by publishing a proposal and then holding hearings on the proposal [sic], the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing").

<sup>28</sup> *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1094 (D.C. Cir. 1973).

<sup>29</sup> *Id.*

siveness or potential insufficiency? In *Kleppe v. Sierra Club*, the United States Supreme Court discussed the timing of EIS filing.<sup>30</sup> The Court removed NEPA's *procedural bite*, stating that going beyond the current NEPA requirement—filing an EIS at the time of a recommendation or report on a proposal for federal action—“would invite judicial involvement in the day-to-day decisionmaking process of agencies.”<sup>31</sup> Therefore, beyond complying with the NEPA filing requirements, federal agencies have wide discretion as to when in the plan development process they begin to formulate an EIS.<sup>32</sup>

By providing federal agencies this discretion when timing EIS data collection and preparation, courts paved the way for future government malfeasance. Intentional discovery delays leading to successful mootness claims and rushed judicial opinions plague the courts and facilitate federal government impropriety.

### III. MOOTNESS AND HURRIED JUDICIAL OPINIONS: SELECTED NEPA NONCOMPLIANCE CASES

When private citizens or environmental organizations hear of a federal agency's construction or testing plans, they often file a NEPA violation suit if the government failed to prepare an EIS.<sup>33</sup> In some instances, even if the government prepares an EIS, the report proves deficient after careful analysis.<sup>34</sup> While a case remains stagnant on the trial calendar, the government often staves off discovery, completing the construction or testing while the case awaits judicial determination.

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<sup>30</sup> See *Kleppe v. Sierra Club*, 427 U.S. 390, 405-06 (1976).

<sup>31</sup> *Id.* at 406.

<sup>32</sup> *Concerned Citizens of R.I. v. Nuclear Regulatory Comm'n*, 430 F. Supp. 627, 632 n.8 (D.R.I. 1977) (“[T]he timing of EIS preparation is largely committed to agency discretion . . . .”) (citing *Kleppe*, 427 U.S. at 412).

<sup>33</sup> See, e.g., *Friends of the Earth, Inc. v. Butz*, 406 F. Supp. 742, 744 (D. Mont. 1975), *aff'd sub nom. Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377 (9th Cir. 1978).

<sup>34</sup> See, e.g., *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 181 (4th Cir. 2005); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 965 (9th Cir. 2005).

### A. Friends of the Earth, Inc. v. Bergland

The United States Court of Appeals for the Ninth Circuit decided *Friends of the Earth, Inc. v. Bergland* (*Bergland*), a controversy rendered moot due to the defendant's actions during the pending appeal.<sup>35</sup> In 1967 Johns-Manville Sales Corporation (JMSC) submitted a proposal to the United States Forest Service (Forest Service), requesting its approval for an exploratory mining venture in Custer National Forest.<sup>36</sup> JMSC requested approval to (1) drill a three thousand-foot exploration tunnel next to a river, (2) create a three hundred-foot access road to the exploration tunnel, (3) construct a fifty-foot bridge across the river, (4) build a temporary campsite next to the river, and (5) dump approximately four thousand cubic yards of rock in the forest, amongst other requests.<sup>37</sup> In supposed compliance with NEPA, in 1974 the Forest Service wrote an EA that concluded the above activities would not significantly affect the quality of the human environment in Custer National Forest.<sup>38</sup> In late December of 1974 construction began—drilling, building, and paving.<sup>39</sup>

On March 27, 1975, Friends of the Earth filed a NEPA violation suit against the secretary of agriculture to protect the forest from environmental damage, alleging (1) the Forest Service's EA was insufficient to prove an EIS was not necessary, and (2) subsequently, the Forest Service approved the mining exploration operation without preparing the necessary EIS.<sup>40</sup> The first court to hear the controversy was the United States District Court for the District of Montana.<sup>41</sup> In support of the EA's insufficiencies, Friends of the Earth pointed to the following facts: (1) the EA did not contain necessary discussions on secondary consequences, mitigating measures, or relevant factors required to make a *negative determination*; (2) the EA made assumptions without factual

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<sup>35</sup> *Bergland*, 576 F.2d at 1378.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Butz*, 406 F. Supp. at 743-45 (detailed facts presented in *Butz*, which was Friends of the Earth's initial attempt to enjoin JMSC at the district court level).

<sup>39</sup> *Id.* at 744.

<sup>40</sup> *Id.* In addition to these two arguments, the plaintiffs made an unsuccessful claim that the agency's approval of the operation was made in violation of NEPA's requirements for agency consultation and public participation. *Id.*

<sup>41</sup> *Id.* at 742.

support, stating for example that the United States' dependence on foreign sources of platinum would decrease; and (3) the EA made unwarranted conclusions, stating "[n]oise pollution exists only if there are people in the area to hear the noise."<sup>42</sup>

In response to the alleged EA insufficiencies, the court summarily dismissed the claim, equating the adequacy of an EA to that of an EIS, stating "adequacy of an EIS should be determined through the rule of reason, and it is not fatally defective because it speaks in conclusory terms or lacks detail."<sup>43</sup> Responding to the lack of an EIS, the court reviewed the Forest Service's conclusions regarding mining exploration environmental impact.<sup>44</sup> After deciding the activities resulted in only *minor disturbances* to the national park, the court approved summary judgment in favor of the defendant on September 17, 1975.<sup>45</sup>

Friends of the Earth then appealed to the United States Court of Appeals for the Ninth Circuit without requesting a stay on appeal.<sup>46</sup> As the case remained pending, JMSC commenced drilling the three thousand-foot exploratory tunnel and began all other proposed construction.<sup>47</sup> While boring the exploratory tunnel, JMSC penetrated a cavern filled with water, flooding the land and ceasing further drilling.<sup>48</sup> By May of 1976 all exploratory work ceased, and JMSC promised to remove the temporary campsite by December of 1978.<sup>49</sup>

Therefore, the appellate court dismissed the complaint as moot, stating "[w]here the activities sought to be enjoined have already occurred, . . . the appellate courts cannot undo what has already been done . . . ."<sup>50</sup> By quickly commencing the proposed mining operation while the case remained in appellate limbo, JMSC completed the detrimental activities the Friends of the Earth's suit attempted to prevent.

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<sup>42</sup> *Id.* at 746 (citation omitted).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 747-48.

<sup>45</sup> *Id.* at 742, 748.

<sup>46</sup> *Friends of the Earth v. Bergland*, 576 F.2d 1377, 1378-79 (9th Cir. 1978).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1378.

<sup>49</sup> *Id.* at 1378-79.

<sup>50</sup> *Id.* at 1379.

### **B. Committee for Nuclear Responsibility, Inc. v. Schlesinger**

*Bergland* involved local environmental damage; however, as the United States transitioned into the nuclear age, the importance of NEPA procedural compliance significantly increased. Unlike *Bergland*, *Committee for Nuclear Responsibility, Inc. v. Schlesinger* (*Schlesinger*) turned on hurried judicial decision making.<sup>51</sup> In *Schlesinger*, the Atomic Energy Commission (AEC) planned to detonate a nuclear bomb below the surface of the earth on Amchitka Island, Alaska.<sup>52</sup> This underground nuclear test, code-named *Cannikin*, required the AEC to file an EIS.<sup>53</sup> After filing the EIS, the Committee for Nuclear Responsibility noticed severe deficiencies and omissions in the report.<sup>54</sup> Specifically, the Committee alleged the EIS lacked any mention of existing scientific reports discussing potential negative environmental consequences, and the AEC intentionally withheld existing federal agency reports recommending against the nuclear test due to environmental concerns.<sup>55</sup> During initial discovery, the government moved for summary judgment, and the United States District Court for the District of Columbia granted the motion with no articulated reason.<sup>56</sup>

The United States Court of Appeals for the District of Columbia Circuit reversed the lower court's summary judgment in favor of the AEC, allowing the Committee for Nuclear Responsibility to continue the discovery process in hopes of uncovering the missing scientific reports.<sup>57</sup> After sending the case back to the district court, the plaintiff again attempted to seek governmental documents articulating environmental concerns.<sup>58</sup> The government blocked the production of docu-

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<sup>51</sup> See *Comm. for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917, 920 (1971).

<sup>52</sup> *Comm. for Nuclear Responsibility, Inc. v. Seaborg* (*Seaborg I*), 463 F.2d 783, 785 (D.C. Cir. 1971), *rev'd sub nom. Schlesinger*, 404 U.S. 917.

<sup>53</sup> *Id.* at 784-85.

<sup>54</sup> *Id.* at 787-88.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 785.

<sup>57</sup> *Id.*

<sup>58</sup> *Comm. for Nuclear Responsibility, Inc. v. Seaborg* (*Seaborg II*), 463 F.2d 788, 790 (D.C. Cir. 1971), *rev'd sub nom. Comm. for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971).

ments, citing strict executive privilege.<sup>59</sup> In hopes of settling the evidentiary battle, the district court ordered the government to produce relevant documents for in camera inspection after removing all government and military secrets.<sup>60</sup> The government filed an application for immediate appeal claiming that even in camera inspection of nuclear testing documents violated the claim of executive privilege.<sup>61</sup>

The appellate court took up the case again to resolve the evidentiary issue.<sup>62</sup> Two hours before oral arguments, the AEC issued a press release, stating:

The Atomic Energy Commission is now planning to proceed with the Cannikin test. We have now received the requisite authority to go ahead including detonation. . . . We expect to be in a readiness state to detonate within a week. . . . Some objections have been raised on environmental grounds. In the careful examination of these issues within the Executive Branch *environmental damage has been exhaustively considered and overriding requirements of national security have, of necessity, taken precedence.*<sup>63</sup>

In support of withholding all nuclear testing documents from the plaintiff, the government posited two defenses: executive privilege and the separation of powers doctrine.<sup>64</sup> Regarding executive privilege, the government argued it was absolute “even where the document[s] only relate[ ] to certain factual material that is essential for disposition of the lawsuit.”<sup>65</sup> In the same legal vein, the government argued the separation of powers doctrine provides the executive branch with inherent powers to decide which documents, if any, it must produce in court.<sup>66</sup> The appellate court held both of the government’s arguments insuffi-

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 790-91.

<sup>62</sup> *Id.* at 788.

<sup>63</sup> *Id.* at 791 (emphasis added).

<sup>64</sup> *Id.* at 792-93.

<sup>65</sup> *Id.* at 792.

<sup>66</sup> *Id.* at 793.

cient and allowed for in camera inspection of relevant documents by the district court.<sup>67</sup>

In addition to litigation over document inspection, the plaintiff requested the government halt its nuclear test until judicial determination of the NEPA violation claim.<sup>68</sup> The appellate court first acknowledged its government-imposed limitation to relevant nuclear testing information.<sup>69</sup> Then, the court avoided the issuance of the stay order pending appeal, stating “[t]he Court limits its actions in this litigation to matters within the judicial province; it is in no position at this juncture to enter a stay order that would interject the Court into national security matters that lie outside its province.”<sup>70</sup>

The case traveled back to the district court, which reviewed the documents and again refused to issue an injunction preventing the nuclear test until final judicial determination.<sup>71</sup> When reviewing the documents provided by the government, the district court concluded the documents contained no environmental concerns that were not alluded to in the EIS.<sup>72</sup> Thus, the district court held the AEC complied with all procedural aspects of NEPA.<sup>73</sup>

Again, the plaintiff appealed to the United States Court of Appeals for the District of Columbia Circuit, arguing the government’s EIS proved insufficient and requested temporary enjoinder of the nuclear test.<sup>74</sup> The appellate court reviewed the government’s secret documents in camera, as the district court did, but concluded it was “left with difficult questions about the validity of the AEC’s environmental statement.”<sup>75</sup> Despite the questionable nature of the government’s EIS,

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<sup>67</sup> *Id.* at 793-94.

<sup>68</sup> *Id.* at 795.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Comm. for Nuclear Responsibility, Inc. v. Seaborg (Seaborg III)*, 463 F.2d 796, 797-98 (D.C. Cir. 1971), *aff’d sub nom.* *Comm. for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971) (“[G]iven the meager state of the record before us, we are constrained to refuse an injunction.” (citations omitted)).

<sup>72</sup> *Id.* at 797.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 798.

the appellate court refused to grant the preliminary injunction, partly due to time pressures.<sup>76</sup>

The court noted the plaintiff promptly began discovery after filing suit, but the government produced the required documents only a few days before the final appellate arguments.<sup>77</sup> The court expressed its frustration with the government's actions, stating "a hurried review of several hundred pages of technical documents cannot provide a satisfactory basis for resolving this litigation . . . . The NEPA process—which is designed to minimize the likelihood of harm—has not run its course in the courts."<sup>78</sup>

In addition to time limitations, the court reviewed the government's list of alleged harms that would result if the court allowed a temporary enjoinder of the nuclear test.<sup>79</sup> In particular, the government argued: (1) it already buried the nuclear bomb in the Alaskan island with no way to recover the device; (2) it spent \$118 million on the test; (3) if the court halted the test, it would require an additional \$70 to \$120 million expenditure to prepare for another test; (4) the weather on the island was deteriorating, requiring immediate action to begin the test; and (5) delaying the test would jeopardize Strategic Arms Limitation Talks with foreign nations.<sup>80</sup> In light of the above ramifications to allowing a preliminary injunction, and "given the meager state of the record" before the court, the appellate court refused to grant the plaintiff's injunction request.<sup>81</sup>

In desperation, the plaintiff appealed to the United States Supreme Court in hopes of receiving the sought-after injunction order.<sup>82</sup> Publishing a one-sentence opinion, the Court denied the plaintiff's application for injunction with no discussion of the pressing legal issues.<sup>83</sup> In a scathing dissent, Justice William Douglas outlined in detail several

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<sup>76</sup> *See id.* at 797.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 798.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Comm. for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917, 917 (1971).

<sup>83</sup> *Id.*

obvious deficiencies in the government's EIS<sup>84</sup> and stated he would grant the injunction so the Court could hear the case on its merits.<sup>85</sup> Moreover, Justice Douglas stated “[w]e plainly do not have time to resolve this question between now and the scheduled detonation.”<sup>86</sup>

Beyond the pressing time restraints, Justice Douglas pointed out several intentional deceptions and distortions by the government in the EIS, including ignoring scientists' concerns the blast could create a massive earthquake<sup>87</sup> or contaminate the nearby sea with radioactive groundwater.<sup>88</sup> Justice William Brennan and Justice Thurgood Marshall also dissented, suggesting the necessity of a temporary restraining order to avoid mootness.<sup>89</sup>

Despite a brief but intense legal battle, the Committee for Nuclear Responsibility did not prevail, and the test went forward as planned.<sup>90</sup> Throughout the litigation process, the government continued with nuclear testing preparation, dragging its feet during the discovery process until the testing date arrived. When the appeal finally went before the appellate court and United States Supreme Court, it was too late to turn back—even in light of the deceptive and wholly insufficient EIS.

### C. *Sancho v. United States Department of Energy*

Moving from local environmental impact in *Bergland* and regional environmental impact in *Schlesinger*, we now concentrate on global destruction. In September 2008 the United States District Court for the District of Hawaii heard *Sancho v. United States Department of Energy*, a case involving complete worldwide annihilation.<sup>91</sup>

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<sup>84</sup> *See id.* at 920-29 (Douglas, J., dissenting).

<sup>85</sup> *Id.* at 920.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 926.

<sup>88</sup> *Id.* at 928-29.

<sup>89</sup> *Id.* at 930 (Brennan and Marshall, JJ., dissenting).

<sup>90</sup> David Perlman, *Blast from the Past: Researchers Worry that Radiation from Nuclear Test Decades Ago May Be Damaging Marine Life Today*, S.F. CHRON., Dec. 17, 2001, at A-4, available at 2001 WLNR 5717877.

<sup>91</sup> *Sancho v. U.S. Dep't of Energy*, 578 F. Supp. 2d 1258 (D. Haw. 2008).

In *Sancho*, two private citizens filed a NEPA violation suit against several governmental agencies involved in the development, construction, and operation of the Large Hadron Collider (LHC) particle accelerator.<sup>92</sup> The LHC's construction on the French-Swiss border resulted from years of research and development by the Center for Nuclear Energy Research (CERN), a consortium of various European nations.<sup>93</sup> The LHC collides atoms into each other by way of a twenty-seven-kilometer circular tunnel lined with superconducting magnets.<sup>94</sup> After colliding, the atoms break into fundamental particles, capable of observation.<sup>95</sup>

The plaintiffs filed suit under NEPA, claiming the federal government did not prepare an EIS when planning or constructing the LHC.<sup>96</sup> Supporting their NEPA compliance concerns, the plaintiffs presented scientific research discussing the possibility that "operation of the LHC could potentially trigger various irreversible processes that could lead to the destruction of the Earth."<sup>97</sup> The three scenarios leading to the possible "end of all mankind" were: "(1) the creation of a runaway fusion reaction that would eventually convert all of Earth into a single, large 'strangelet'; (2) the creation of a 'micro black hole' into which the Earth would fall; and (3) the creation of a runaway reaction due to the formation of a 'magnetic monopole.'"<sup>98</sup>

The United States filed a motion to dismiss the plaintiffs' complaint for lack of jurisdiction, arguing that the United States' involvement in the project was not tantamount to "major Federal action," and therefore NEPA did not apply.<sup>99</sup> Moreover, the government argued that even if NEPA applied, a report prepared by CERN, "Review of the

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<sup>92</sup> *Id.* at 1259.

<sup>93</sup> *Id.* at 1261; *see* LHC Milestones, <http://lhc-milestones.web.cern.ch/LHC-Milestones/LHCMilestones-en.html> (last visited May 5, 2010). Along with the United States Department of Energy and the National Science Foundation, the plaintiffs also named CERN as a defendant in this case. *Sancho*, 578 F. Supp. 2d at 1261.

<sup>94</sup> *Sancho*, 578 F. Supp. 2d at 1261.

<sup>95</sup> *Id.*

<sup>96</sup> *See id.* at 1259.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1261.

<sup>99</sup> *Id.* at 1259, 1262; *see id.* at 1265.

Safety of LHC Collisions,” stated the experiment was completely safe.<sup>100</sup>

The court eventually concluded the United States’ involvement in the experiment was not intimate enough to rise to the level of “major Federal action” due to the small amount of United States funding and participation in the project.<sup>101</sup> Therefore, NEPA did not apply and the court lacked jurisdiction over the plaintiffs’ action.<sup>102</sup>

Although the court failed to note the time constraints, focusing on the timeline of events proves useful. On March 21, 2008, the plaintiffs filed their complaint with the United States District Court for the District of Hawaii, requesting both a preliminary and permanent injunction.<sup>103</sup> During discovery, the government filed its motion to dismiss on June 24, 2008.<sup>104</sup> Finally, after a hearing, the court orally granted the government’s motion to dismiss on September 2, 2008.<sup>105</sup> Eight days after the judicial decision, on September 10, 2008, CERN powered up the LHC and accelerated its first particles, as planned.<sup>106</sup>

Despite *Sancho* turning on other procedural matters,<sup>107</sup> the overall hurriedness of the court’s decision influenced the outcome of the case. Similar to *Bergland*, scientists had already completed the project, spending a total of \$5.84 billion on the LHC.<sup>108</sup> The rush to begin the experiment, coupled with the multibillion-dollar expenditure, virtually guaranteed a favorable judicial decision, despite possible NEPA noncompliance.

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<sup>100</sup> *Id.* at 1261-62.

<sup>101</sup> *Id.* at 1268.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1259.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1260.

<sup>106</sup> Press Release, European Organization for Nuclear Research (CERN), First Beam in the LHC-Accelerating Science (Oct. 9, 2008), <http://press.web.cern.ch/press/PressReleases/Releases2008/PR08.08E.html>.

<sup>107</sup> *See Sancho*, 578 F. Supp. 2d at 1265-68.

<sup>108</sup> *Id.* at 1267.

#### IV. PROPOSALS FOR THE FUTURE: CREATE A SPECIALIZED NEPA COURT AND AMEND NEPA TO REQUIRE PRELIMINARY INJUNCTION ISSUANCE

In a new technological era laden with global consequences of scientific and governmental experimentation, NEPA requires substantial modification. When applying NEPA to simple mining operations,<sup>109</sup> procedural safeguards and judicial expediency matter little. However, when transitioning to the nuclear era,<sup>110</sup> governmental obscurement of EIS data and environmental consequences beg for NEPA alterations. In the current uncharted scientific environment of particle accelerators, which could possibly result in global annihilation,<sup>111</sup> NEPA modifications must become a paramount concern.

##### A. Congress Must Create a NEPA Court

The United States Congress must create a specialized NEPA court, capable of analyzing and dispensing with cases in a timely fashion. Article I, Section 8 of the United States Constitution provides Congress with the power to “constitute Tribunals inferior to the supreme court[.]”<sup>112</sup> When the court system faced overwhelming bankruptcy filings, Congress created the United States Bankruptcy Courts by utilizing this constitutional authority in 1978.<sup>113</sup> This separate court system efficiently handled 1,402,816 bankruptcy filings in 2009 alone.<sup>114</sup> This same judicial expediency would certainly allow for prompt resolution of NEPA litigation.

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<sup>109</sup> See *supra* Part III.A. (discussing *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377 (9th Cir. 1978)).

<sup>110</sup> See *supra* Part III.B. (discussing *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971)).

<sup>111</sup> See *supra* part III.C. (discussing *Sancho*, 578 F. Supp. 2d at 1258).

<sup>112</sup> U.S. CONST. art. I, § 8, cl. 9.

<sup>113</sup> See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1532 (2006)).

<sup>114</sup> JAMES C. DUFF, DIR. OF ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 288-90 tbl.F (2009), available at <http://www.uscourts.gov/judbus2009/JudicialBusinesspdfversion.pdf>.

Likewise, when state legislatures noticed children suffering from judicial injustice, they created a specialized juvenile court system to combat this iniquity.<sup>115</sup> Illinois was the first state to create such a system—however, within twenty years almost every state adopted some form of a separate juvenile justice system.<sup>116</sup> State legislatures created these specialized courts through statutory authorization.<sup>117</sup> In the same logical vein, preserving the environment to sustain mankind's future surely deserves a specialized NEPA court.

Currently, NEPA jurisdiction resides with federal district courts.<sup>118</sup> These courts take responsibility for “all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>119</sup> As of September 2009 civil filings in federal district courts alone totaled 306,816 cases.<sup>120</sup> Moreover, as of the end of 2008 federal agencies have filed 34,148 EISes since the passage of NEPA by Congress,<sup>121</sup> with each of these filings subject to judicial challenge. The enormous caseloads encountered by federal district judges protract NEPA litigation. As it did when creating the bankruptcy court system in 1978, Congress may utilize Article I, Section 8 of the United States Constitution and create a specialized NEPA court. Requiring all NEPA violation cases to appear before a specialized court facilitates rational and prompt determination of NEPA compliance—a necessity in light of possible catastrophic global consequences.

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<sup>115</sup> Britney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Sex Offenders?*, 57 CATH. U. L. REV. 817, 837 (2008) (“The first United States juvenile court system was created in Illinois by statute in 1899.”).

<sup>116</sup> Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1096 (1991) (“[W]ithin twenty years [of Illinois’ adoption of a juvenile justice system,] all but three states had similar juvenile justice systems in place.” (citations omitted)).

<sup>117</sup> See *id.* at 1083 n.1 (citing fifty-one statutes, including the District of Columbia, establishing juvenile court systems).

<sup>118</sup> See 28 U.S.C. § 1331 (2006).

<sup>119</sup> *Id.*

<sup>120</sup> DUFF, *supra* note 114, at 138-40 tbl.C-1.

<sup>121</sup> National Association of Environmental Professionals, *Environmental Impact Statements Filed 1973 to 2007*, available at [http://ceq.hss.doe.gov/nepa/EISs\\_by\\_Year\\_1970\\_2007.pdf](http://ceq.hss.doe.gov/nepa/EISs_by_Year_1970_2007.pdf) (last visited May 5, 2010); Council on Environmental Quality, *Calendar Year 2008 Filed EISs*, available at [http://ceq.hss.doe.gov/nepa/Calendar\\_Year\\_2008\\_Filed\\_EISs.pdf](http://ceq.hss.doe.gov/nepa/Calendar_Year_2008_Filed_EISs.pdf) (last visited May 5, 2010).

### ***B. Preliminary Injunctions Must Become Mandatory***

The United States Congress must amend NEPA to include the mandatory issuance of a preliminary injunction upon the filing of a NEPA violation suit, only in circumstances reasonably thought to threaten human life. Although this requirement appears harsh, Congress has an obligation to combat the current federal agency custom of expediting experiment or construction progress while NEPA suits remain stagnant on the court docket.<sup>122</sup> This practice, coupled with the government's tradition of intentionally prolonging the discovery process by obfuscating necessary documents and opinions,<sup>123</sup> requires congressional action.

The mandatory issuance of a preliminary injunction is common practice in American jurisprudence. Both state legislatures and the United States Congress require courts to issue injunctions by statute. For example, in *Forest Guardians v. Babbitt*, the United States Court of Appeals for the Tenth Circuit held the Administrative Procedure Act (APA) requires courts to issue injunctions when federal agencies fail to take timely action.<sup>124</sup> The court first acknowledged that *shall* means *shall*, noting Congress's use of the word in the APA "imposed a mandatory duty" upon the courts to issue an injunction.<sup>125</sup> In reversing the lower court's denial of an injunction, the court of appeals stated "we hold that Congress, through [the APA], has explicitly removed from the courts the traditional equity balancing that ordinarily attends decisions whether to issue injunctions."<sup>126</sup>

State legislatures also require courts to issue injunctions, with no exercise of judicial discretion. For example, the Louisiana legislature enacted a trespassing statute that mandates injunction issuance, stating: "The injunction *must* be granted . . . [w]hen the defendant disturbs the plaintiff in the actual and real possession which such plaintiff has had for more than one year, either of a real estate or of a real right, of which

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<sup>122</sup> See *supra* Part III.

<sup>123</sup> See *supra* Part III.B.

<sup>124</sup> See *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1181 (10th Cir. 1999).

<sup>125</sup> *Id.* at 1187 (citing *United States v. Monsanto*, 491 U.S. 600, 607 (1989)).

<sup>126</sup> *Id.* at 1192.

he claims either the ownership, the possession, or the enjoyment.”<sup>127</sup> In upholding this statute, the Supreme Court of Louisiana held the legislature’s statutory language removed equitable judicial discretion, requiring the court to issue the injunction.<sup>128</sup> Similar to Louisiana, the Arkansas legislature required courts to issue injunctions in trade name infringement actions.<sup>129</sup> These mandatory injunction statutes accomplish the respective legislature’s goals by using the words must or shall. If Congress mandates injunctions when federal agencies act sluggishly, and states mandate injunctions for trespass and trade infringement, surely the potential destruction of mankind by unrestrained scientific advancement deserves the same compulsory injunctive protection.

Although one might argue the issuance of a preliminary injunction as a matter of automatic procedure might hinder scientific or governmental progress, the creation of a specialized NEPA court provides rapid response to all NEPA claims. In addition, only mandating the issuance of a preliminary injunction in circumstances reasonably thought to threaten human life limits such injunctions to only the gravest of situations.

## V. CONCLUSION

The United States Congress must recognize the risk of possible global destruction due to modern scientific advancements. NEPA’s procedural holes, coupled with bureaucratic delay tactics, demonstrate NEPA’s failure to adequately protect the environment in the modern technological era. Although NEPA provided necessary protections to the environment and its human inhabitants in 1970, the Act’s safeguards

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<sup>127</sup> *Vicksburg, Shreveport & Pac. Ry. Co. v. Webster Sand, Gravel & Constr. Co.*, 62 So. 140, 143 (La. 1913) (emphasis added) (citation omitted).

<sup>128</sup> *Id.* (“And it is well settled that ‘in such case the judge to whom the application is made is without discretion in the matter and must grant the writ upon the petitioner’s complying with the prescribed conditions.’” (citations omitted)).

<sup>129</sup> *Tri-County Funeral Serv., Inc. v. Eddie Howard Funeral Home, Inc.*, 957 S.W.2d 694, 696 (Ark. 1997) (“We agree . . . that when a statute provides terms that constitute grounds for issuing an injunction, a chancellor’s discretion is somewhat circumscribed.” (citations omitted)). The court then points to *State Industrial Accident Commission v. Miller*, 162 P.2d 146, 150 (Or. 1945), which states the court should issue an injunction when a statute imposes a positive duty upon the court to grant injunctive relief. *Id.*

prove wholly inadequate in light of the government's ability to evade the Act's requirements. Creating an environmental court system and mandating injunctions through NEPA creates new and robust legislative protections. By modernizing NEPA to preserve the environment, we might prevent a worldwide cataclysm of epic proportions.