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OBSTACLES TO INCREASING AIRSPACE: JUMPING THROUGH ENVIRONMENTAL LAW HOOPS

Tom Neuhoff, Jr.

I. INTRODUCTION

AIRSPACE, THE "region of the atmosphere above a plot of ground, municipality, state, or nation,"¹ can be increased by lengthening runways;² changing types of aircraft flown over an area;³ changing flight patterns, procedures, and practices over residential areas;⁴ and generally expanding airports, resulting in increased air traffic.⁵ These increases in airspace cannot simply be made by those wishing to make them, which is often the Federal Aviation Administration (FAA), the military, or the airport owner. Federal environmental laws and local zoning ordinances prevent expansions from infringing on the rights of those on the ground and on the environment in general.⁶ This comment discusses some of the major problems with expanding airspace, including the preemptive effect of federal laws over conflicting local laws and the mass of paper produced to procedurally satisfy the federal environmental laws.

The primary inquiry of this comment, however, is

¹ Random House College Dictionary 30 (rev. ed. 1982).
³ See Sierra Club v. Lehman, 825 F.2d 1366, 1367 (9th Cir. 1987).
⁶ See, e.g., infra notes 8-9 and accompanying text.
whether any major federal obstacle to increasing airspace really exists. Near-airport residents vitally need environmental laws preventing noise and air pollution increases which would dramatically affect their quality of life and their property values. But do the laws currently in effect achieve such protections? Case law suggests that as long as the proper federal agency performs the required studies before allowing the increase, the courts will defer to the agency's judgment. This judicial rationale seems logical since the agencies are more knowledgeable and experienced than the courts. The agencies, especially the military, however, are not wholly disinterested in the outcome of their studies. This fact shades the whole approval process with a tint of unfairness to those seeking to halt the expansions. The laws passed by Congress present no true obstacles but rather are mere procedural speed bumps in the runway to expansion.

II. CONFLICTS BETWEEN FEDERAL AND LOCAL LAWS

Often cities, counties, or states pass zoning laws forbidding airports from expanding or increasing noise levels. These laws often conflict with federal laws or, more accurately, attempt to regulate an area preempted by federal law. Currently, the power to regulate airport noise and use is "allocated under a scheme which leaves neither air-

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7 See infra notes 158-258 and accompanying text.
port proprietors nor the federal government in clear control. . . . It is a classic study in federalism — the national interest in promoting transportation versus the local interest in preserving the quality of life in residential neighborhoods near airports.10

The first major case concerning possible federal pre-emption was Cooley v. Board of Wardens.11 In Cooley, the Court held that "the power to regulate commerce, embraces a vast field. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan or regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."12 The Cooley philosophy surfaces in cases involving local regulations of aircraft activity. In City of Burbank v. Lockheed Air Terminal, Inc.,13 the operator of the Hollywood-Burbank Airport joined Pacific Southwest Airlines in bringing an action to have an ordinance14 passed by the City Council of Burbank, California declared unlawful and to enjoin its enforcement. The ordinance made it illegal for a jet aircraft to depart the airport between the hours of 11:00 p.m. and 7:00 a.m. and for an airport to permit such use. A Pacific Southwest flight was the only one affected by such ordinance.

Relying on both the Supremacy Clause15 and the Commerce Clause16 of the United States Constitution, the district court held the curfew ordinance unconstitutional.17

11 53 U.S. (1 How.) 299 (1851).
12 Id. at 319.
13 411 U.S. at 624.
15 U.S. Const. art. VI, cl. 2. The Supremacy Clause states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." Id.
16 Id. art. I, § 8, cl. 3. The Commerce Clause states that "[t]he Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." Id.
The court of appeals upheld the lower court’s ruling with respect to the Supremacy Clause on grounds of preemption and conflict. The Supreme Court affirmed and found the doctrine of preemption alone sufficient to dispose of the case.

The Supreme Court based its holding on the Federal Aviation Act of 1958, the Noise Control Act of 1972, and the regulations designed to implement the acts. The Federal Aviation Act (the Act) dictates that the United States possesses sole control over the country’s airspace. The Act empowers the FAA to regulate navigable airspace insuring safety and efficiency in the air and on the ground. The Noise Control Act of 1972 amended the Federal Aviation Act by providing that the Environmental Protection Agency (EPA) would have a role in controlling aircraft noise problems.

Despite the authority given to the agencies by the acts,

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18 Burbank, 457 F.2d at 676.

19 Burbank, 411 U.S. at 625.


23 49 U.S.C. § 1508(a). Section 1508(a) provides in part: “The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . .” Id.

24 49 U.S.C. §§ 1348(a), (c). Section 1348(a) provides in part:

The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace.

Id. § 1348(a). Section 1348(c) provides:

The administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

Id. § 1348(c).

25 49 U.S.C. § 1431. Section 1431(b)(1) provides that “[i]n order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of
the Supreme Court recognized that there is no express provision mandating preemption of non-federal laws which infringe on the agency's power.\textsuperscript{26} Yet, the Court held the Burbank ordinance unlawful.\textsuperscript{27} "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption."\textsuperscript{28} Perhaps Justice Jackson made the most colorful description of federal preemption when he stated, "[p]lanes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection . . . . The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls."\textsuperscript{29} The Court feared other cities would enact similar curfew laws if it upheld the Burbank law.\textsuperscript{30} The timing of departures and arrivals would be disrupted, the FAA's control would be limited, and safety problems would result.\textsuperscript{31}

The \textit{Burbank} decision was not so clear-cut despite the seemingly rational fear of chaos if other cities followed suit. Four justices, led by Justice Rehnquist, dissented.

\begin{flushleft}
Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom. . . ." \textit{Id.} § 1431(b)(1).
\end{flushleft}

\textsuperscript{26} \textit{Burbank}, 411 U.S. at 633.

\textsuperscript{27} \textit{Id.} The Court maintained:

\begin{quote}
Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character or obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.
\end{quote}

\textit{Id.} (quoting \textit{Rice v. Sante Fe Elevator Corp.}, 331 U.S. 218, 230 (1947)).

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

\textsuperscript{30} \textit{Burbank}, 411 U.S. at 636.

\textsuperscript{31} \textit{Id.} at 639.
They believed that the power to control noise was well within those traditionally belonging to the states. The dissent believed that intent to preempt was not evident in the acts and that the ordinance should therefore be allowed to stand. Today's conservative Supreme Court may have decided Burbank as the dissenters had wished. The Bush administration would certainly have concurred with the dissenters in Burbank, viewing federal laws as infringing on state power.

Two years after Burbank, in 1975, the Court of the Northern District of California drew clearer lines as to when preemption occurs. In Air Transport Ass'n of America v. Crotti, the airlines and the airports were adversaries rather than united as in Burbank. The airlines sought to declare California regulations invalid under the Supremacy Clause and the Commerce Clause, just as in Burbank. The airports and cities where they were located were relying on the California regulations mandating statewide aircraft noise reduction for the benefit of residential communities. The permitted level was termed the Community Noise Equivalent Level (CNEL), and no noise was to be generated above this level after December 31, 1985. The regulations codified methods to reduce the noise level. Not only did California enact the CNEL standards for airports, it also established maximum Single

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32 Id. at 643 (Rehnquist, J., joined by Stewart, White & Marshall, JJ., dissenting).
33 Id.
37 U.S. CONST. art. VI, cl. 2.
38 Id. art. I, § 8, cl. 3.
40 CAL. ADMIN. CODE § 5011 (West 1991). The "Methodology for Controlling and Reducing Noise Problems" provided:
The methods whereby the impact of airport noise shall be controlled and reduced include but are not limited to the following:
(a) Encouraging use of the airport by aircraft classes with lower
Event Noise Exposure Levels (SENEL). If an aircraft exceeded the SENEL limit, the violation was a misdemeanor, and the county could fine the aircraft operator $1000.

The airlines relied on Burbank and claimed that both the CNEL and SENEL regulations were preempted by federal law because they attempted to regulate aircraft in direct flight. The airports, however, relied on a footnote from Burbank to distinguish themselves from the Burbank City Council. Footnote fourteen stated that “[a]irport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.” The Burbank ordinance was an act of police power, not an act of a proprietor of an airport. The Supreme Court in Burbank did not consider whether its limits would apply to a municipal proprietor of an airport attempting to limit noise. Yet such a scenario arose in Crotti. The district court in Crotti made the distinction between a municipal proprietor (the type in Crotti) and a private one (the type in Burbank), thus narrowing the scope of Burbank significantly, since most airports are owned by municipalities.

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noise level characteristics and discouraging use by higher noise level aircraft classes;
(b) Encouraging approach and departure flight paths and procedures to minimize the noise in residential areas;
(c) Planning runway utilization schedules to take into account adjacent periods;
(d) Reduction of the flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft;
(e) Employing shielding for advantage, using natural terrain, building, . . . and
(f) Development of a compatible land use within the noise impact boundary.

Id. § 5006(d).

Id.

Burbank, 411 U.S. at 635-36 n.14 (citing letter from the Secretary of Transportation to Aviation Sub-Committee of the Senate Committee on Commerce (June 22, 1968)).

Id.

Id.

Crotti, 389 F. Supp. at 63.
The court held that since an airport proprietor is responsible for the operation of its public airport, it must have the right to control the use of the facility, subject to state police power. Manifestly, such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities. The federal government cannot mandate that an airport build larger or more runways in order to accommodate larger or more aircraft. In addition, the government cannot force an airport to acquire additional noise easements so that it can receive noisier aircraft. The United States "should not substitute its judgment for that of the States or elements of local government who . . . own and operate our Nation's airports. [The Federal Aviation Act of 1958] is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations."

The Crotti court held that measuring noise levels at and near airports fails to invade or affect aircraft in direct flight. The methods to help accomplish the CNEL are "patently within local police power control and beyond the intent of Congress in the federal legislation" with the possible exception of Section 5011(d) which allows the reduction of flight frequency. After seeming to support the CNEL provisions as lawful, the court dodged that determination and merely ruled on the SENEL provisions.

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47 Id. at 63-64 (citing Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Trans World Airlines v. City and County of San Francisco, 228 F.2d 473 (9th Cir. 1955)).

48 Crotti, 389 F. Supp. at 64.


50 Id.

51 Crotti, 389 F. Supp. at 64.

52 Id. at 64-65.

53 Id. at 65.

54 Id. The court evaded the resolution of the CNEL laws, stating: Whether or not the CNEL requirements and regulations are in fact unrealistic, arbitrary and unreasonable, and an abuse of police pow-
The court resolved that the SENEL provisions, regulating the noise of an aircraft in direct flight, were an invalid use of state police power in the area concerning aircraft flights and operations as well as airspace management and utilization.55 "The thrust of the Single Event Noise Exposure Levels is clear and direct and collides head-on with the federal regulatory scheme for aircraft flights . . . ."56

Out of Crotti emerges the following rule: an airport proprietor (usually a local entity) has the right to control the use of its airport under the supervision and direction of state police power or on its own initiative.57 However, when such state or local supervision intrudes and touches aircraft in direct flight, an unlawful exercise of police power has occurred, and such police power will be preempted by federal law.58

In Faux-Burhans v. County Commissioners of Frederick County,59 the question of when preemption takes hold was quite clearly answered. The case involved the owner of a private airfield and a county’s law restricting its use.60 The court cited Burbank and the fact that the regulations involved there "clearly infringed upon the federally preempted regulation of navigable airspace, by directly affecting the manner in which, and the type of aircraft by which, flight operations were to be conducted from airports that were otherwise open to air traffic in general."61 The effect of the ordinance in the instant case, however, was different. It did not regulate noise emissions or flight operations but rather governed the numbers of aircraft,
types of aircraft, and types of aircraft operations (i.e. no instructional flights allowed). The court held these areas to be of local concern.

These guidelines regarding what local laws can be preempted are an exercise in fine line drawing. The Supreme Court proclaimed in Burbank that a curfew regulation passed by a city was invalid and preempted by federal law, yet stated in a footnote that an airport proprietor can nondiscriminarily refuse use of the facility by aircraft on the basis of noise considerations. Assuming that the airport was owned by the city and was in favor of the regulation but the airline was not, does Burbank mean that since only one airline had a flight after the 11:00 p.m. curfew, then the regulation will be held discriminatory, and that if all airlines had an equal number of flights after 11:00 p.m. the regulation would be upheld? Clearly not. Since the regulation concerned aircraft in direct flight, it was preempted, and the discrimination question was mute. The discrimination issue can only arise when the regulation does not impact aircraft in direct flight. Burbank, Crotti, and Faux-Burhans all show that airports and municipalities can limit certain types of aircraft activity that are historically subject to non-federal police power. Yet, when the regulation focuses directly on aircraft flight, it is preempted by federal law. Still, based on footnote fourteen of Burbank, it appears airport proprietors may infringe on this federal area more than the municipalities in which the airports lie. Of course, in most cases, the municipality is the airport owner and the difference becomes irrelevant.

Currently, a clash between owner-proprietor and non-owner-municipality is raging in Texas. The proprietors of the Dallas-Forth Worth International Airport (DFW) are

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62 Id.
63 Id.
64 Burbank, 411 U.S. at 639.
65 Id. at 635 n.14.
66 Recall that in Burbank both the airport and airline were opposed to the city's regulation. See supra text accompanying note 13.
the cities of Dallas and Fort Worth. The airport, however, lies within three communities in between the proprietors, Euless, Grapevine, and Irving (the Municipalities). In 1988, the airport announced plans to expand by adding two runways at a cost of $3.5 billion.\(^6\) The Municipalities passed zoning ordinances soon after the announced plans, forbidding the airport’s expansion without their permission.\(^6\) The airport claims the ordinances, purportedly for land use regulation, are actually an attempt to limit air traffic and noise, areas traditionally subject to federal control.\(^6\) The Municipalities, however, contend that the airport must, like any real estate developer, seek permission prior to expanding within city limits.\(^7\)

The Municipalities won the first legal battle.\(^7\) A Texas district judge ruled that a city has the right to enforce its own zoning laws despite state and federal laws.\(^7\)

Federal preemption would clearly apply were this a case of a more ‘classic’ nature, e.g., adjacent cities attempting to regulate noise, establish curfew, limit landing weight or otherwise regulate aircraft at an existing facility. The critical circumstance here, however, is not the day-to-day operation of an existing airport but a planned $3.5 billion expansion, including a territorial expansion.\(^7\)

The judge stated that this distinction began in other courts between regulations affecting flight operations and those concerning traditional areas of police power, such as land use regulation.\(^7\) The airport has asked for the judge to clarify his opinion and currently plans an ap-

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\(^6\) Irving, Tex., Ordinances 5792, 5793 (Jan. 4, 1990); Euless, Tex., Ordinance 1016 (Nov. 20, 1989); Grapevine, Tex., Ordinances 89-81 to 82 (Dec. 21, 1989).


\(^7\) Id.

\(^7\) Id. at 9.

\(^7\) Id. at 2.

\(^7\) Id. at 2-3.
peal, so the fight is not concluded.

It appears that the law as it now stands depends upon the nature of the regulation. If it is one limiting aircraft activity in direct flight, it will be preempted by federal law. If, on the other hand, it focuses primarily on operations and aircraft use on the ground, the regulation will be permitted.

III. THE FEDERAL LAWS

Though it is unclear whether the proponent of change through expansion or restriction must comply with local laws, it is clear that the effects of the proposed change must be studied and reported by a federal agency. These studies are mandated by the federal environmental laws. The process of wading through the federal requirements is a long one, but it is not as complicated as it may first appear. Even if all the federal studies conclude that the change will have no significant impact on the environment, it may still not be allowed to progress if a local law prohibits such a change and if this law is not preempted by the federal ones under the standards discussed above.

At the outset, one must look to the National Environmental Policy Act of 1969 (NEPA). "The [NEPA] is our

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75 Nancy St. Pierre & Steve Scott, Judge Rules D/FW Airport Must Get Cities' OK to Expand, DALLAS MORNING NEWS, Oct. 9, 1991, at 1A.
77 Pub. L. No. 91-190, 83 Stat. 852 (1970) (current version at 42 U.S.C. §§ 4321-70 (1988 & Supp. 1991)). This comment is concerned with the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) regulations designed to implement the NEPA. See 42 U.S.C. §§ 4321-4370; 40 C.F.R. §§ 1500-1508 (1988). Despite claims that an agency has not satisfied the procedural requirements of the NEPA, those seeking to halt the proposed action often bring claims under other federal statutes. See, e.g., Steele Creek Community Ass'n v. United States Dep't of Transp., 435 F. Supp. 196, 197 (W.D.N.C. 1977) (plaintiffs brought action under Airport and Airway Development Act of 1970, 49 U.S.C. § 1716(c)(4) (1988), in addition to the NEPA). Congress has taken a shotgun approach to protecting the environment by passing legislation in response to each problem. Hence, there are many acts that have historically been used to accomplish the same objectives as NEPA, including the Department of Transportation Act of 1966, Id. § 303 (1988); the Federal Aviation Act of 1958, Id. § 1301; the Airport and Airway Development Act of 1970, Id. §§ 1716(c)(4), 2201(a)(7),(11); the Airport and Airway Improvement Act of 1982, Id.
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basic national charter for protection of the environment. It establishes policy, sets goals . . . , and provides means . . . for carrying out the policy." The NEPA has three goals: (1) to outline a national policy encouraging worthwhile and enjoyable harmony between man and his environment; (2) to prevent or extinguish environmental damage and foster the health and welfare of man; and (3) to educate the nation on the importance of ecological systems and natural resources.

The Council on Environmental Quality (CEQ) was created to implement the NEPA and to orchestrate the details of implementation. CEQ regulations invoke the NEPA and inform federal agencies of actions they must take in order to comply with NEPA procedures. The executive (including agencies) and judicial branches of government share the burden of enforcing the Act in order to accomplish the goals mentioned above. The NEPA procedures guarantee provision of environmental information to public officials and citizens prior to final decisions and irreversible actions. Unfortunately, the task involves an immense amount of paperwork, beginning with an Environmental Assessment (EA), followed by either a Finding of No Significant Impact (FONSI) or a more detailed Environmental Impact Statement (EIS).

A. THE ENVIRONMENTAL ASSESSMENT

The NEPA never calls for an EA. It only calls for an

§ 2208(b)(5) (1988); and the Aviation Safety and Noise Abatement Control Act of 1970, Id. §§ 2103, 2104, 2107 (1988). These statutes are not discussed in this comment.

81 Id. §§ 1500-1508. For example, agencies must interpret the Act, implement procedures, integrate other environmental laws, encourage and facilitate public involvement, and identify all reasonable alternatives. Id.
82 Id. § 1500.1(a); see supra text accompanying note 79.
84 Id. § 1501.3.
85 Id. § 1501.4(e).
86 Id. § 1501.4.
EIS. The Act leaves to the CEQ the task of providing the exact procedures one must follow when engaging in an activity that may potentially have an adverse effect on the environment. An EA is a brief document used to determine whether a further, more in-depth, study should be undertaken or whether the proposed change will have so little impact that no further study is necessary.

Section 1501.3 of the CEQ is not definite about when an agency should prepare an assessment. Though it appears on its face to allow agencies to form their own procedures regarding when an EA should be prepared, section 1507.3 provides that agency procedures are subject to CEQ and public review prior to publication. Although section 1508.9 states that a federal agency is responsible for the EA, case law maintains that it does not actually have to be performed by the agency. Any individ-

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88 Id. § 4332(2)(B).
89 40 C.F.R. § 1508.9. The section provides that:

'Environmental assessment': (a) Means a concise public document for which a Federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary. (3) Facilitate preparation of a statement when one is necessary. (b) Shall include brief discussions of the need for the proposal, of alternatives ... of the environmental impacts of the proposed action and alternatives, and a listing of the agencies and persons consulted.

Id.

90 Id. § 1501.3. This section provides that:

(a) Agencies shall prepare an environmental assessment ... when necessary under procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement. (b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

Id.

91 Id. § 1507.3. Section 1507.3 provides that: "[e]ach agency shall consult with the Council while developing its procedures and before publishing them ... for comment ... . The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations." Id.

92 Id. § 1508.9.
ual or organization desiring the change may hire a consulting firm to perform the assessment. Problems may arise, however, in a court action challenging the sufficiency of the EA if the agency has not conducted its own independent study. Based on the outcome of the EA, the agency will decide whether an EIS or a FONSI should be prepared.

B. THE ENVIRONMENTAL IMPACT STATEMENT

Though not discussing the requirement of an EA, the NEPA does mandate the necessity of an EIS. In short, the statute requires that the agency shall produce a statement concerning the environmental impact of the proposed action and the alternatives to the action.

1. Who Prepares an EIS?

An EIS must be prepared "directly by [the lead agency] or by a contractor selected by the lead agency or [possi-

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94 See, e.g., Citizens Against Burlington, 938 F.2d at 202 (court ordered FAA to determine if a conflict of interest existed when Port Authority hired consultants to prepare EA and draft EIS).


96 42 U.S.C. § 4332(2) (1988). This section provides that all federal government agencies shall:

(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.

Id.

97 Id.
bly] . . . a cooperating agency.”98 In this respect, the EA and EIS differ. In Citizens Against Burlington, Inc. v. Busey,99 for example, the city of Toledo decided to expand one of its airports. The Toledo-Lucas County Port Authority wanted to use Toledo as a cargo hub so it hired Coffman Associates, a consulting firm, to prepare the EA and then to transform it into an EIS. The FAA sent a draft of the EIS to the EPA and then made the draft public. The FAA later published the final EIS. The court held that the FAA violated CEQ regulations by failing to select the consultant that prepared the EIS, but ruled the violation was not significant enough to “compromise the ‘objectivity and integrity of the NEPA process.’”100

2. When Must an EIS Be Prepared?

Though section 4332(2) of the NEPA sets the general guidelines, the CEQ helps draw clearer lines as to when an EIS should be prepared. Section 1501.4 of the CEQ provides that an agency should rely on its procedures when determining whether a type of action requires an EIS.101 If it does, an EIS should be prepared. If the action is one

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98 40 C.F.R. § 1506.5(c) (1991).
99 938 F.2d at 190.
100 Id. at 202. See infra text accompanying notes 158-258 for a detailed discussion of agencies preparing the EISs and the bias that exists as a result.
101 40 C.F.R. § 1501.4 (1991). This section provides:

   In determining whether to prepare an environmental impact statement the Federal agency shall:
   (a) Determine under its procedures supplementing these regulations . . . whether the proposal is one which:
      (1) Normally requires an environmental impact statement, or
      (2) Normally does not require either an environmental impact statement or an environmental assessment
   (b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9).
   The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).
   (c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.
that does not normally require either an EIS or an EA, then none should be prepared. But, if it is not a typical proposal that is discussed in the procedures, an EA should automatically be prepared. The EA will be used to determine if an EIS or FONSI should be prepared. If the FAA issues a FONSI, the increase or expansion in airspace will be allowed to take place unless challenged in court.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.
(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review . . . for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

Id.

102 Id.

103 Id.; see also 40 C.F.R. § 1508.13 (1991). Section 1508.13 defines a Finding of No Significant Impact as:

a document by a Federal agency briefly presenting the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it.

Id. Human environment includes "natural and physical environment" but "economic and social effects are not intended by themselves to require preparation of an EIS." Id. § 1508.14.

3. What Alternatives Must Be Discussed?

The issue of alternatives is perhaps the most important in terms of sufficiency of an EIS. Confusion lies in the fact that the term "alternatives" is not self-defining.\textsuperscript{105} The courts have adopted the standard that only "feasible" and "reasonable" alternatives need be discussed, but these terms are not clear-cut either.\textsuperscript{106} The ultimate decision lies with the agency when deciding which alternatives to consider in an EIS.\textsuperscript{107} Therefore, the party responsible must define its objectives from the start.\textsuperscript{108} Once again, the same problems arise if an interested party is determining the alternatives. Will an interested party study the options devoutly if the goal is to have the change occur at the original site?\textsuperscript{109}

IV. JURISDICTION OF THE COURTS

If an entity wants to challenge the sufficiency of an EA or an EIS, it must do so in court.\textsuperscript{110} The question of which court, though seemingly possessing a clear answer, is not completely resolved. In City of Alexandria v. Helms,\textsuperscript{111} the United States Court of Appeals for the Fourth Circuit held that, pursuant to federal statute,\textsuperscript{112} review of FAA or-

\textsuperscript{106} Id. at 195; City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986) (per curiam) ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."); City of New York v. Department of Transp., 715 F.2d 732, 742-43 (2d Cir. 1983) (discussing alternatives in environmental assessments); Davison v. Department of Defense, 560 F. Supp. 1019, 1025 (S.D. Ohio 1982) (reviewing whether EIS contained sufficient information for reasonable choice among alternatives to be made).
\textsuperscript{107} Citizens Against Burlington, 938 F.2d at 195 (citing North Slope Borough v. Andrus, 642 F.2d 589, 601 (D.C. Cir. 1980)).
\textsuperscript{108} Id.
\textsuperscript{109} See infra notes 128-157 and accompanying text relating to the court's standard of review and guidelines for measuring the sufficiency of environmental statements.
\textsuperscript{110} 40 C.F.R. § 1500.3 (1991).
\textsuperscript{111} 728 F.2d 643 (4th Cir. 1984).
\textsuperscript{112} 49 U.S.C. § 1466(a) (1988). This section provides: "Any order, affirmative or negative, issued by the Board or Administrator under this chapter . . . shall be
The dispute in *Helms* arose when the Metropolitan Washington Council of Governments requested that the FAA temporarily alter take-off paths in hopes of distributing aircraft noise more evenly over a larger geographic area. If a temporary alteration was found satisfactory, it would be made permanent. The FAA prepared an EA which was then subject to public review. The agency then concluded that an EIS was unnecessary. The City of Alexandria and the County Board of Arlington County believed that an EIS should have been prepared and filed suit in district court to enjoin the FAA from conducting the temporary tests.

The district court granted the temporary injunction. The court of appeals held that a reviewable administrative record was the key factor in determining whether the FAA decision was an "order" for purposes of the Federal Aviation Act. The key to whether the order was final was whether the action could be executed without further investigation. The court concluded that the FAA decision in this case was a final order, and therefore the
district court lacked jurisdiction to issue the injunction.\textsuperscript{118}

In \textit{City of Southlake v. FAA},\textsuperscript{119} a local community brought suit in district court to enjoin the use of a new runway at DFW until a supplemental EIS was prepared to consider alternatives. Citing \textit{Helms} with approval, the court held that exclusive jurisdiction lay with the court of appeals.\textsuperscript{120} Under section 1486(a) of the Federal Aviation Act,\textsuperscript{121} the district court had “no jurisdiction to review an order of the FAA—even where the basic complaint is that the FAA has failed to require the preparation of an [EIS] under NEPA.”\textsuperscript{122}

In \textit{Township of Delhi v. McArtor},\textsuperscript{123} the district court, though citing \textit{Helms} and other cases,\textsuperscript{124} decided the merits of the case in the interest of judicial economy.\textsuperscript{125} It appears from the weight of authority that the district court in \textit{Township of Delhi} did not have jurisdiction and that exclusive jurisdiction of FAA final orders does in fact rest with the courts of appeals. Many other district courts have also exercised jurisdiction in similar matters despite the Federal Aviation Act.\textsuperscript{126} Yet, some of the district court cases may be distinguishable, and jurisdiction may

\begin{itemize}
\item \textsuperscript{118} Id.
\item \textsuperscript{119} 679 F. Supp. 618 (N.D. Tex. 1986).
\item \textsuperscript{120} Id. at 619.
\item \textsuperscript{121} Federal Aviation Act of 1958, 49 U.S.C. § 1486(a) (1988).
\item \textsuperscript{122} \textit{City of Southlake}, 679 F. Supp. at 621.
\item \textsuperscript{123} 696 F. Supp. 1157 (S.D. Ohio 1988).
\item \textsuperscript{124} Id. at 1160 (citing C.A.R.E. Now, Inc. v. FAA, 844 F.2d 1569, 1570 (11th Cir. 1988) (noting in note 1 that the court of appeals has jurisdiction); Suburban O’Hare Comm’n v. Dole, 787 F.2d 186, 192-93 (7th Cir.), cert. denied, 479 U.S. 847 (1986) (stating that if any ambiguity exists between which court, district or appellate, has jurisdiction, it must be resolved in favor of the appellate court); State of New York v. FAA, 712 F.2d 806 (2d Cir. 1983)). \textit{See also} City of Aurora v. Hunt, 749 F.2d 1457, 1464 (10th Cir. 1984) (court of appeals review of FAA decision is to ensure that the agency has not abused its discretion or acted arbitrarily or capriciously).
\item \textsuperscript{125} \textit{McArtor}, 696 F. Supp. at 1160-61.
\item \textsuperscript{126} \textit{See}, e.g., Davison v. Department of Defense, 560 F. Supp. 1019, 1033-37 (S.D. Ohio 1982) (holding that a supplemental EIS must be prepared addressing potential impact of action on sleeping habits); Steele Creek Community Ass’n Dep’t of Transp., 435 F. Supp. 196, 200 (W.D.N.C. 1977) (holding that EIS was statutorily sufficient).
\end{itemize}
actually exist because of the lack of an agency order.\textsuperscript{127} Jurisdiction may rest in the district court when agency action is a decision to do nothing rather than an order that something be done.

V. THE POWER OF THE COURTS: STANDARD OF REVIEW

Once jurisdiction is established, how does the court review an agency order for compliance with the NEPA? The circuit courts vary as to whether a decision by the agency will be upheld if (1) reasonable or (2) not arbitrary, capricious, or an abuse of discretion. In \textit{C.A.R.E. Now, Inc. v. FAA},\textsuperscript{128} the Eleventh Circuit summarized the state of the law in the different circuits.\textsuperscript{129} The court noted that under the Administrative Procedure Act (APA)\textsuperscript{130} a reviewing court may overturn agency action if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."\textsuperscript{131} The court, however, elected to review the agency decision \textit{not} to prepare an EIS (to do nothing) with a higher degree of scrutiny, using the standard of reasonableness.\textsuperscript{132} Other circuits using the standard of reasonableness when an agency decision is not to prepare an EIS are the Fifth, Eighth, Ninth, and Tenth Circuits.\textsuperscript{133} On the other hand, the First, Second, Fourth, Sixth, and Seventh Circuits follow the arbitrary and capri-

\textsuperscript{128} 844 F.2d 1569 (11th Cir. 1988).
\textsuperscript{129} Id. at 1572-73 n.3. See infra notes 133-34 and accompanying text.
\textsuperscript{131} \textit{C.A.R.E. Now, Inc.}, 844 F.2d at 1572 n.3.
\textsuperscript{132} Id. at 1572 (the agency's decision not to act must be a reasonable one in light of all the facts and circumstances).
\textsuperscript{133} See Save Our Ten Acres v. Kreger, 472 F.2d 463, 465 (5th Cir. 1973); Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980); Foundation for N. Am. Wild Sheep v. Department of Agric., 681 F.2d 1172, 1177 (9th Cir. 1982); Park County Resource Council, Inc. v. Department of Agric., 817 F.2d 609, 621 (10th Cir. 1987).
cious standard.\textsuperscript{134}

It is likely that the circuits following the arbitrary and capricious standard in reviewing EIS cases will use the standard not only for cases where no EIS has been prepared, but also in cases challenging the sufficiency of the EIS. It would not seem logical that a circuit would shift to a stricter standard (one of reasonableness) when merely reviewing the sufficiency of an EIS, as opposed to deciding whether an EIS should have been prepared in the first place.\textsuperscript{135} On the other hand, the circuits adopting the stricter reasonableness standard when reviewing an agency’s decision not to prepare an EIS may well shift to the arbitrary and capricious standard outlined in the APA\textsuperscript{136} when deciding whether an EIS that has already been prepared is sufficient.\textsuperscript{137} The Eleventh Circuit in \textit{C.A.R.E. Now, Inc.} seems to indicate it would make such a shift in the standard.\textsuperscript{138} The court followed the reasonableness standard where no EIS was prepared but cited the

\begin{footnotesize}
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\item[a]\textsuperscript{134} Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980); Town of Rye, N.Y. v. Skinner, 907 F.2d 23, 24 (2d Cir. 1990); Hanly v. Kleindienst, 471 F.2d 828, 838-29 (2d Cir. 1972); Webb v. Gorsuch, 699 F.2d 157, 159 (4th Cir. 1983); Neighbors Organized to Insure a Sound Env’t, Inc. v. McArtor, 878 F.2d 174, 178 (6th Cir. 1989); Crounse Corp. v. Interstate Commerce Comm’n, 781 F.2d 1176, 1193 (6th Cir. 1986); Nucleus of Chicago Homowners Ass’n v. Lynn, 524 F.2d 225, 229 (7th Cir. 1975);
\item[b]\textsuperscript{135} See Valley Citizens for a Safe Env’t v. Aldridge, 886 F.2d 458 (1st Cir. 1989) (concerning adequacy of an EIS allowing the transfer of Air Force aircraft from one base to another). The First Circuit seemed to confuse the two standards and treat them as the same. The court stated that review of an EIS is measured under “a reasonableness standard . . . aimed at insuring a good faith effort by the Agency.” \textit{Id.} at 459 (quoting Conservation Law Found. of New England, Inc. v. Andrus, 623 F.2d 712, 719 (1st Cir. 1979)). Yet the court immediately cited to another First Circuit case referring to the arbitrary and capricious standard of the Administrative Procedure Act as the correct one to apply. \textit{Id.} (citing Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973)).
\item[c]\textsuperscript{136} 5 U.S.C. § 706(2)(a) (1988).
\item[d]\textsuperscript{137} See, e.g., Life of the Land v. Brinegar, 485 F.2d 460, 469 (9th Cir. 1973) (applying arbitrary and capricious standard when reviewing EIS discussing environmental effects of proposed runway at Honolulu airport); \textit{cf.} Westside Property Owners v. Schlesinger, 597 F.2d 1214, 1217 (9th Cir. 1979) (in case involving transfer of F-15 aircraft to a different base, court held that it is governed by the “rule of reason” when determining sufficiency of EIS) (citing County of Suffolk v. Secretary, 562 F.2d 1368, 1375 (2d Cir. 1977)).
\item[e]\textsuperscript{138} \textit{C.A.R.E. Now, Inc.}, 844 F.2d at 1572.
\end{itemize}
\end{footnotesize}
general rule of judicial review of agency action as being the arbitrary and capricious standard.\textsuperscript{139}

The D.C. Circuit follows the reasonableness standard in deciding the sufficiency of an EIS,\textsuperscript{140} but it is not certain which standard its courts would follow if reviewing a decision not to prepare an EIS. There is no indication that its courts would shift to the broader arbitrary and capricious standard in such an instance despite the APA.

A third standard has now been adopted by the Seventh Circuit for review of FAA decisions. In \textit{Suburban O'Hare Comm'n v. Dole},\textsuperscript{141} the court held that the APA, and hence the arbitrary and capricious standard, was "clearly not applicable" to FAA decisions made under the Federal Aviation Act.\textsuperscript{142} The court held, instead, that a substantial evidence test applied.\textsuperscript{143} Under this test, found in the Federal Aviation Act, fact findings by the FAA are conclusive if supported by substantial evidence.\textsuperscript{144} The court specifically rejected a prior Seventh Circuit case, which applied the abuse of discretion standard.\textsuperscript{145}

The Seventh Circuit cited Eighth Circuit and District of Columbia Circuit opinions in support of its reliance on the substantial evidence test.\textsuperscript{146} The court indicated that in this case, like the Eighth Circuit and D.C. Circuit cases, "no formal hearings were conducted by the agency. Instead, the FAA received written submissions and con-

\begin{itemize}
  \item \textsuperscript{139} Id. at 1572 n.3.
  \item \textsuperscript{140} See, e.g., Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-96 (D.C. Cir. 1991).
  \item \textsuperscript{141} 787 F.2d 186 (7th Cir. 1986).
  \item \textsuperscript{142} Id. at 194.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} 49 U.S.C.A. § 1486(e) (West Supp. 1991). The Federal Aviation Act provides that "'(t)he findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive.'" \textit{Id.}
  \item \textsuperscript{145} \textit{Dole}, 787 F.2d at 194 (rejecting \textit{Starr v. FAA}, 589 F.2d 307, 310 (7th Cir. 1978)).
  \item \textsuperscript{146} \textit{Id.} (citing South Dakota v. CAB, 740 F.2d 619, 621 (8th Cir. 1984) (Civil Aeronautics Board decision derived from informal record to be reviewed under a substantial evidence standard); Aircraft Owners & Pilots Ass'n v. FAA, 600 F.2d 965, 969-72 and n.28 (D.C. Cir. 1979)(informal FAA decision should not be rejected if supported by substantial evidence)).
\end{itemize}
ducted numerous non-adversary, informal proceedings." The court then stated that "Congress has indicated that the substantial evidence test is the proper standard for all FAA decisions under Section 1486 [of the Federal Aviation Act]." However, the court cited no authority for that statement. The court noted that the standard under the APA varies depending upon whether the agency has conducted a formal hearing. If a formal hearing has been conducted, the substantial evidence test is appropriate. If there is no record of an agency hearing, however, the appropriate question is whether the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The court then held that the APA does not apply to FAA decisions at all. "Congress has created a special review provision specifically designed to address precisely the type of case before the court. The specific review provisions of Section 1486 take precedence over the general provisions of the APA." The case that the court relied on for this statement, however, applied the arbitrary and capricious standard of review.

It appears that the Seventh Circuit was confused when deciding Suburban O'Hare Commission. In its earlier opinion, Starr v. FAA, the Seventh Circuit held that although

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147 Id.
148 Id.
149 Id.
151 Id. § 706(2)(A).
152 Dole, 787 F.2d at 194.
153 Id. (citing Rombough v. FAA, 594 F.2d 893, 895-96 (2d Cir. 1979)). The court continued, stating:

The arbitrary and capricious standard of the APA is designed to protect agency decisions made without the benefit of a complete record compiled in an adversarial or quasi-adversarial proceeding. The lengthy and elaborate decisionmaking procedures preceding the FAA's . . . decision in this case are not the sort of informal processes the drafters of the APA had in mind when they adopted the arbitrary and capricious standard of review.

Id. at 195.
154 See Rombough, 594 F.2d at 896.
155 589 F.2d 307 (7th Cir. 1978).
findings of fact are reviewed under the substantial evidence test, nonfactual analyses and agency conclusions drawn from facts are generally reviewed under the abuse of discretion standard of the APA. Though the Starr opinion preceded Suburban O'Hare Commission, its statement of which standard applies appears more logical: the substantial evidence test applies to facts, and the other standards apply to conclusions regarding those facts.

Setting the substantial evidence test aside and merely comparing the language of the arbitrary and capricious standard with the reasonableness standard, the former would seem to allow greater deference to agency decisions than the latter. Yet the results in most cases appear to be the same.

VI. RUBBERSTAMPING BY THE COURTS

Whichever standard of review is used by the courts, the arbitrary and capricious standard or the stricter reasonableness standard, the government agency almost always wins. Whether an EIS or a FONSI is prepared, it will be found sufficient and satisfactory. The NEPA is merely a procedural requirement, lacking the substance to make any real difference. All that is accomplished is a greater awareness because the agency must reveal its plans before it completes them. Yet, this awareness does not allow the public to change the inevitable progress.

156 Id. at 310.
157 Id. See also, Albert v. Chafee, 571 F.2d 1063, 1065 (9th Cir. 1978) (agency’s factual determinations to remove employee reviewed under substantial evidence test; overall action reviewed under arbitrary and capricious test); Munoz-Mendoza v. Pierce, 520 F. Supp. 180, 186 (D. Mass. 1981) (review of HUD funding was not done on a substantial evidence basis but rather under the arbitrary and capricious standard).
158 See infra note 162 for a list of opinions resulting in favorable outcomes for the government agencies.
159 Id.
The case law track record provides an interesting statistic. From a sample consisting of most of the cases concerning airport and airspace expansion, the opinions resulting in favorable outcomes for the agencies outnumber those opposed by more than four to one.\(^{162}\) Granted, not all of the cases agreeing that the NEPA has been complied with are incorrectly decided. However, some of the cases tend to evidence the courts’ reluctance to overturn an agency decision even if it seems unfair not to do so.\(^{163}\)

In 1973, the Ninth Circuit decided *Life of the Land v. Brinegar*.\(^{164}\) In the early 1960s, the public became concerned with noise and safety problems which would result from the introduction of jet aircraft at the Honolulu, Hawaii Airport. In 1967, a Task Force committee, consisting of federal, state, and local officials, and members of the public, began meeting to discuss runway construction proposals, alternatives, and the probable environmental effects. In June 1968, the Task Force recommended that a new runway to be constructed on filled reefland. The committee hoped the runway would increase safety and reduce noise since it would be located farther from heavily populated areas. In September 1968, airline representatives to the Task Force performed their own study and concluded that the noise problem could be solved by

\(^{162}\) Those decisions which ratify the decision to expand are the following: *Citizens Against Burlington*, 938 F.2d at 190; *Allison v. Department of Transp.*, 908 F.2d 1024 (D.C. Cir. 1990); *Town of Rye, N.Y. v. Skinner*, 907 F.2d 23 (2d Cir. 1990); *Valley Citizens for a Safe Env’t v. Aldridge*, 886 F.2d 458 (1st Cir. 1989); *Neighbors Organized To Insure a Sound Env’t, Inc. v. McArtor*, 878 F.2d 174 (6th Cir. 1989); *C.A.R.E. Now, Inc. v. FAA*, 844 F.2d 1569 (11th Cir. 1988); *Suburban O’Hare Comm’n v. Dole*, 787 F.2d 186 (7th Cir. 1986); *City of Romulus v. County of Wayne*, 634 F.2d 347 (6th Cir. 1980); *Westside Property Owners v. Schlesinger*, 597 F.2d 1214 (9th Cir. 1979); *Matsumoto v. Brinegar*, 568 F.2d 1289 (9th Cir. 1977); *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973); *Township of Delhi v. McArtor*, 696 F. Supp. 1157 (S.D. Ohio 1988); *Steele Creek Community Ass’n v. Department of Transp.*, 435 F. Supp. 196 (W.D.N.C. 1977).


\(^{163}\) See *infra* notes 164-258 and accompanying text.

\(^{164}\) 485 F.2d 460 (9th Cir. 1973).
simply extending the current runway. In January of 1970, the Task Force found that this extension would not provide the same benefits as the reef runway.

On January 1, 1970, the NEPA came into effect. Compliance began in December 1970, and a draft EIS was complete in September 1971. Those drafting the EIS were not only federal and state officials, but also the Ralph M. Parsons Company (Parsons), a private consulting firm. Previously, in June 1968, the state had hired Parsons to perform "management consultant services for the engineering, design and construction of the Reef Runway project." Though Parsons had a financial interest in the outcome of the EIS, the court found that nothing in the NEPA prevented "a firm with a financial interest in the project [from] assist[ing] with the draft of the EIS." How could the decision process not be tainted if the EIS was prepared by parties who desire the project's completion and have a pecuniary interest in its approval? The court noted that compliance with the NEPA is contingent upon "good faith objectivity rather than subjective impartiality." It seems that Parsons would be subjectively partial and that its interest in the outcome could color its good faith objectivity. For that matter, the state of Hawaii is partial as well since it desires the new runway and has an interest in greater future tourism profits.

The court upheld the EIS as sufficient after discussing all the alternatives, even the alternative of taking no action. The court concluded that the alternatives did not alleviate the noise and safety problems as well as the reef runway project would. The EIS did discuss the project's only adverse effect on the environment; up to 100 endangered birds would be affected on account of the dis-

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165 Id. at 465.
166 Id. at 467.
167 Id.
168 Id. (citing Environmental Defense Fund v. Corps of Eng'rs, 470 F.2d 289, 296 (8th Cir. 1972)).
169 Brinegar, 485 F.2d at 471 n.11, 472.
170 Id. at 472.
placement of 186 acres of silted coral mudflats. The court found that the EIS's discussion of this effect was adequate and therefore satisfied the NEPA.\textsuperscript{171}

On November 7, 1973, Justice Douglas of the United States Supreme Court entered a stay of the Ninth Circuit court ruling and an injunction to prevent the project from continuing until the Supreme Court could hear the case.\textsuperscript{172} Upon review by the Supreme Court, the stay and the injunction were vacated.\textsuperscript{173} Justice Douglas issued a vehement dissent.\textsuperscript{174} Douglas could not see how the NEPA could be complied with when one of the authors of the EIS had a stake in its outcome.\textsuperscript{175} He stated:

It seems to me a total frustration of the entire purpose of NEPA to entrust evaluation of the environmental factors to a firm with a multimillion dollar stake in the approval of the project. NEPA embodies the belated national recognition that we have been 'brought to the brink' by myopic pursuit of the technological progress and by a decision-making mechanism resting largely on the advice of the vested interest groups. A long standing policy of listening only to those with enough money to be heard has left our country scarred with a continuum of environmental abcesses. The oil-auto-concrete interests have long urged the necessity of paving over the countryside with highways. . . . NEPA was designed to correct in part the information void underlying our national decision-making mechanism.\textsuperscript{176}

Douglas pointed out that Congress intended the process to be untainted: "An independent review of the interrelated problems of environmental quality is of critical importance if we are to reverse what seems to be a clear and intensifying trend toward environmental degradation."\textsuperscript{177}

\textsuperscript{171} Id. at 473.
\textsuperscript{173} Id. at 1053.
\textsuperscript{174} Id. at 1053-57 (Douglas, J., dissenting).
\textsuperscript{175} Id. at 1053.
\textsuperscript{176} Id. at 1053-56.
In the several instances in which the military has been the agency preparing the paperwork in satisfaction of the NEPA, the court's blind approval is even more absurd.178 In each case, the ruling court held satisfactory the environmental studies made by the military. *Westside Property Owners v. Schlesinger*179 involved the Air Force as the reviewing agency. Property owners near Luke Air Force Base in Arizona challenged the sufficiency of an EIS prepared by the Air Force concerning the proposed location of F-15 aircraft at the base. The plaintiffs claimed that the EIS should take into account the pollution effects of the base prior to the addition of the F-15s in order to determine the cumulative effect after the addition. In determining whether the EIS was sufficient, the court held that it is governed by the "rule of reason," under which an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.180

The plaintiffs argued that the decision to place the F-15s at the base had already been made before the EIS was prepared. The Government countered that "as long as the EIS satisfies the technical requirements of the NEPA, the attention paid to it by the decision-maker is irrelevant."181 The court merely assumed *arguendo* that the

178 See, e.g., Valley Citizens for a Safe Env't, 886 F.2d 458 (1st Cir. 1989); Sierra Club v. Lehman, 825 F.2d 1366 (9th Cir. 1987); Westside Property Owners v. Schlesinger, 597 F.2d 1214 (9th Cir. 1979); Davison v. Department of Defense, 560 F. Supp. 1019 (S.D. Ohio 1982).

179 597 F.2d at 1214.

180 Id. at 1217 (quoting County of Suffolk v. Secretary, 562 F.2d 1368, 1375 (2d Cir. 1977)).

181 Id. at 1218 n.4.
NEPA required the decision-maker to carefully consider the EIS.\textsuperscript{182} If the government approaches its duties under the NEPA as it did in this case, satisfying the statute procedurally rather than using the opportunity to explore its effects, how much bite can the NEPA have? The agency studying the environmental impact on the proposed site and the alternative sites will naturally favor the original site chosen if that is where the agency desires the planes to be. Allowing interested agencies to conduct their own studies and then to allow only a minimal review of its substantiality by the courts does not accomplish the goals outlined in the NEPA and does not serve to better the environment. The Air Force, though an agency, has an interest in an affirmative decision allowing the beddown of the F-15s. This interest is parallel to Parsons monetary interest in a positive decision in \textit{Life of the Land}. Yet, despite these clear interests, both studies were held sufficient.

In \textit{Valley Citizens for a Safe Environment v. Aldridge},\textsuperscript{183} the First Circuit ruled just as the Ninth Circuit in \textit{Westside Property Owners} regarding an Air Force decision to transfer noisier planes to Westover Air Force Base.\textsuperscript{184} The Air Force prepared the draft EIS, released it for public comments, altered it in response to the comments, and then published a final EIS, approving the transfer. The Air Force knew it wanted the planes at Westover so it drafted the EIS in a manner that would make Westover the only logical and plausible location. The Air Force discussed several non-environmental factors in the EIS, and it is because of these that the alternative sites were unsuitable.\textsuperscript{185} In reality, the Air Force had no restrictions on what it desired to do if it narrowly tailored its objectives and utilized

\textsuperscript{182} \textit{Id.}.

\textsuperscript{183} 886 F.2d 458 (1st Cir. 1989).

\textsuperscript{184} \textit{Id.} at 459.

\textsuperscript{185} \textit{Id.} at 461. The non-environmental criteria included "(1) the adequacy of physical facilities, such as runways, ramps, etc.; (2) the recruiting potential for reservists in the base area; (3) the costs of additional needed construction; (4) the relationship to existing base uses; and (5) the adequacy of fuel systems."\textit{Id.}
costs and other non-environmental factors to rebut and counter the environmental consequences.\textsuperscript{186}

The court noted that the EIS discussed the definite future noise pollution increase in detail.\textsuperscript{187} "It draws map contours showing the places and the number of people that the sorties will expose to noise levels above 65 decibels . . . and above 75 decibels . . . ."\textsuperscript{188} The EIS stated that in one five-hour operation, more than 25,500 people will be exposed to noise pollution in the range of 65 to 70 decibels, almost 15,000 in the range of 70-75 decibels, almost 6000 in the range of 75-80 decibels, and nearly 1000 people to levels above 80 decibels.\textsuperscript{189} The EIS stated that over 3500 citizens would be exposed to an average noise level of 65 decibels and that 22 percent of them will be "highly annoyed."\textsuperscript{190}

Simply because the EIS points out the extent of the noise pollution, it was sufficient under the NEPA.\textsuperscript{191} The court held that "the EIS . . . shows a clear awareness that the individual sorties, in and of themselves, create a noise problem . . . . The EIS describes the number of sorties, their frequency, and their noise levels. It thereby fully discloses the problem."\textsuperscript{192} Apparently, no matter how great the disturbance, no matter how many people are affected, as long as the EIS "fully discloses the problem" the Air Force, an interested party, will be allowed to proceed as it always wanted because it is the government agency drafting the EIS. A court challenge is available to those who oppose the action, but such a challenge is nearly futile.

\textit{Davison v. Department of Defense}\textsuperscript{193} also supports the the-

\textsuperscript{186} See \textit{id.} at 462.
\textsuperscript{187} \textit{Id.} at 467.
\textsuperscript{188} \textit{Id.} at 467-68. The National Academy of Sciences Guidelines state that at the 65 decibel level, outdoor speech is significantly disturbed. At the 75 decibel level, there is a very significant disturbance. \textit{Id.}
\textsuperscript{189} \textit{Id.} at 468.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.} at 469.
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} 560 F. Supp. 1019 (S.D. Ohio 1982).
ory that interests of the military will be accomplished if the military conducts the studies. In Davison, Rickenbacker Air National Guard Base in Ohio was scheduled to be converted into a dual civilian and military facility. The Assistant Secretary of the Air Force approved the plan to share the base, noting

the joint use proposal was an ideal solution from the Secretary’s point of view, because it allowed the government to preserve an airfield complex that quickly could be reconverted to a military base if necessary. It also enabled the Air Force to maintain reserve forces at the base at a relatively low cost.\(^{194}\)

The Air Force commissioned a private consulting firm to prepare the EIS. It noted several potential environmental effects of the proposed change but concluded that an increase in noise was the only effect of significance. The final EIS stated that 800 residents in the summer and 485 in the winter would be awakened from sleep an average of one and one-half days per week on account of increased flight activity during the night and early morning hours. In addition, teaching in five area schools would be disturbed for an average of three hours per week. The EIS noted that mitigation measures could be implemented to reduce, but not to eliminate, these effects. The Air Force noted that it would implement the plans.

Regarding the purpose of the NEPA, the court noted that although it “establishes ‘significant substantive goals for the Nation,’ . . . it does not wrest from administrative agencies their traditional decisionmaking power.”\(^{195}\) The court reviewing the sufficiency of an EIS is limited to the discussion of three issues:

(1) whether the EIS discusses all five of the factors listed in 42 U.S.C. § 4332(2)(C) and otherwise meets the procedural requirements set forth therein; (2) whether the EIS as a whole evidences a good faith effort on the part of the

\(^{194}\) *Id.* at 1023.

\(^{195}\) *Id.* at 1024 (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978)).
Preparer to comply with the demands of NEPA; and (3) whether the EIS contains sufficient information to enable the agency to make a reasonable and independent choice among the available alternatives.\(^{196}\)

Though the EIS must discuss the potential environmental consequences of a proposal, this requirement is subject to reasonableness, feasibility, and practicality.\(^{197}\) An EIS will not be rejected unless an error contained therein "has fundamentally impaired the decisionmaker's ability to take a 'hard look' at the relevant environmental issues."\(^{198}\)

The district court found that the EIS did discuss all five factors listed in 42 U.S.C. § 4332(2)(C) and was evidence of a good faith effort of the Air Force, satisfying two of the criteria mentioned above.\(^{199}\) However, after an eleven page discussion of the sufficiency of the EIS, the court found that the EIS did not take a hard look at the issue of sleep disturbance and it ordered that a supplemental EIS be prepared, discussing the probable impact on the sleep habits of residents living near the base.\(^{200}\)

Indeed, this decision by the court is one of the few that seems to tell the agency that it must do more. The government argued that the preparation of a supplemental EIS would be a waste of time and money, since the outcome most likely will be unchanged. The court, though realizing its role was limited, quoted Judge Friendly:

To permit an agency to ignore its duties under the NEPA with impunity because we have serious doubts that its ultimate decision will be affected by compliance would subvert the very purpose of the Act and encourage further administrative laxity in this area. The systematic investigation . . . which NEPA requires may well reveal substantial

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\(^{196}\) *Id.* at 1025 (citing Minnesota Public Interest Research Group *v.* Butz, 541 F.2d 1292, 1299 (8th Cir. 1976); Save Our Invaluable Land, Inc. *v.* Needham, 542 F.2d 539, 542-43 (10th Cir. 1976); Sierra Club *v.* Morton, 510 F.2d 813, 819-20 (5th Cir. 1975); National Helium Corp. *v.* Morton, 486 F.2d 995, 1001-03 (10th Cir. 1973); Evans *v.* Train, 460 F. Supp. 237, 241-42 (S.D. Ohio 1978)).

\(^{197}\) *Id.*

\(^{198}\) *Id.* at 1024.

\(^{199}\) *Id.* at 1025-26.

\(^{200}\) *Id.* at 1037-38.
environmental consequences and... may possibly provide an economic alternative to [the proposed project, or] compel further consideration of its propriety and necessity. Though this type of statement seems to carry weight, the agency really is just doing more busy-work. It is unlikely the Air Force would find a suitable alternative site, since its reasons for allowing civilian use of the base are so base-specific.

The court concluded that the “final decision on how best to use the facilities at Rickenbacker rests exclusively with the Secretary of the Air Force, not this Court.” This statement still would be true if the body performing the EIS or the EA were completely unbiased. The court then perhaps could assure itself that all relevant factors are weighed and not simply the factors a biased agency would provide.

In the Fourth Circuit, North Carolina presently is claiming that the FAA cannot rely on the Navy’s assessment, but rather must perform an independent environmental review of a proposed expansion of Navy airspace over eastern North Carolina. The state argued that the FAA declined to conduct its own environmental review and that this inaction violated NEPA procedural requirements and mandatory CEQ regulations. Based on the cases previously discussed, however, North Carolina’s argument appears weak regardless of how valid, rational, or logical it is in reality. The FAA disputes the allegation that it failed to conduct its own review. Relying on the cases above, the agency likewise should claim that the Navy’s review is sufficient in its own right since the Navy is a federal agency.

201 Id. at 1038 (quoting City of New York v. United States, 337 F. Supp. 150, 160 (E.D.N.Y. 1972)).
202 Id. at 1024.
204 Id. at 13174.
205 See supra notes 158-202 and accompanying text.
206 FAA Defends Navy Airspace Expansion, supra note 203, at 13174.
AIRSPACE EXPANSION

In Steele Creek Community Ass'n v. Department of Transportation,\(^{207}\) the court evidenced its reluctance to overturn an FAA decision. In 1968, plans were made to improve the Charlotte, North Carolina airport. The NEPA, though passed in 1969, applied to the proposals.\(^{208}\) The court commented,

The original environmental statement of 1971 was grossly inadequate in its evaluation of noise and other necessary elements. It dealt hardly at all with the inevitable de facto condemnation of at least one school and possibly some others. It did not reveal in any fashion understandable to laymen what effect the new runway would have upon homes and schools and churches, and it left serious doubt whether the necessary exploration of alternatives had been made.\(^{209}\)

As a result of the inadequacies of the original environmental statement, the proponents of the expansion were restricted from adding the runway until 1975, when a proper EIS was prepared.\(^{210}\)

Now concerned with the new EIS and its sufficiency, the court weighed the positives and negatives of allowing the expansion.\(^{211}\) On the negative side, the runway was not currently necessary and would not be so for many years; all aircraft with fewer than four engines could already use the existing runway whose length was comparable to runways at Washington National Airport; the amount of excess traffic anticipated seven years from the date of the decision, 1977, could be accommodated in a less expensive manner, which also would cause less injury to the environment; the current delays averaged less than one minute per flight, far less than at other major airports; some churches and communities would suffer damage from the increased noise issuing from flights on the new runway; the new runway would have serious adverse ef-

\(^{208}\) Id. at 197.
\(^{209}\) Id. at 197-98.
\(^{210}\) Id. at 198.
\(^{211}\) Id.
fects on nearby school grounds; and the alternatives of using other available airports were not fully discussed.212

The reasons for expansion, on the other hand, were that the new runway could accommodate all commercial planes; the runway “probably” would be safer; the noise could be dispersed throughout a larger area; a noise abatement program of coordinating routes was currently being introduced; and the runway “might” lessen air pollution by preventing delays.213 The negatives in this case were clearly real and substantiated, whereas the positives were mere conjecture and hypothesis. The court maintained that the runway probably would be safer, but had stated earlier in the opinion that the runway would not be needed either for “capacity or safety” reasons.214 The court said that the runway “might” reduce, rather than increase, air pollution, because delays would be reduced,215 but found earlier that delays were currently less than one minute per flight.216 Instituting a noise abatement program does not mean that the negatives will be deleted, it merely means that they might be lessened.

So how could the court resolve the conflict in favor of expansion? “[U]nder the standard of review . . . the defendants have [not] failed to give the . . . situation the kind of study and analysis required by the statute and therefore concludes that there is no violation . . . .”217 The court noted that its only function was to ensure statutory compliance, and it followed the arbitrary and capricious standard in fulfilling this function.218

The review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of the environmental factors made under the standards set forth in . . . [the] NEPA; and

212 Id.
213 Id. at 198-99.
214 Id. at 198.
215 Id. at 199.
216 Id. at 198.
217 Id. at 199.
218 Id. at 199-200.
whether the actual balance of costs and benefits struck by
the agency . . . was arbitrary or clearly gave insufficient
weight to environmental factors.219

Despite the plaintiffs' strong case that the runway was
unnecessary and environmentally hazardous, the court
lifted its previous injunction.220 In effect, the court said
that, because its role was limited, it must allow the runway
extension.221 The court, though allowing the extension, felt the suit was worthwhile:

It should . . . be noted that the suit has fully accomplished
the purposes of the Environmental Protection Act by call-
ing attention to the shortcomings in the original study; by
identifying and presenting to the community the harm
which the project will cause and thereby showing that the
true cost must be measured in terms of destruction or al-
terations in the character of communities, over and above
the mere cost of grading, equipment, paving and naviga-
tional aids. Specifically, it appears quite unlikely that the
current noise abatement procedures would be under way
but for this suit.222

In other words, the plaintiffs made the situation better for
themselves because they raised such a fuss and spent a lot
of money, even though their ultimate goal was not
achieved.223

In City of Romulus v. County of Wayne,224 the city, the
school board, and a citizen brought an action against the
government to enjoin construction of an additional run-
way at the Detroit Metropolitan Airport. Prior to the ap-
peal, the district court, like the court in Steele Creek,

219 Id. at 199 (quoting Environmental Defense Fund v. Froehlke, 473 F.2d 346
(8th Cir. 1972)).
220 Id. at 197.
221 Id.
222 Id. at 200.
223 Shouldn't the NEPA accomplish this on its own without the aid of a lawsuit?
Recall that the goals of the NEPA are to prevent environmental damage and to
educate the nation on the importance of ecological systems and natural resources.
42 U.S.C. § 4321 (1988). A lawsuit should not be a prerequisite to the fulfillment
of the goals.
224 634 F.2d 347 (6th Cir. 1980).
enjoined construction because the original EIS was inadequate based on "the lack of statistical traffic information showing a need for another runway, the lack of adequate information about traffic congestion and delays in landing, and the lack of information about the effect of noise on nearby homes and schools." After the government prepared and attached the supplemental paperwork to the original EIS, the district court dissolved the injunction. While the appeal to the Sixth Circuit was pending, the runway was constructed, and the court held the plaintiffs' claims moot. The importance of *City of Romulus* revolves not around the fact that the complaint was moot but rather that all the government had to do was prepare an additional lengthy document. There is no indication that the government had to study the results and reevaluate its decision to add the runway. The government was simply required to do more paperwork, but this extra work accomplished nothing. By making the NEPA merely procedural and by combining it with the government's attitude that it does not have to consider the EIS carefully, the NEPA has not brought this country as far as it should in protecting the environment, and it is not fulfilling its goals.

In *Suburban O'Hare Commission v. Dole*, a very thorough study of the effects, costs, needs, and environmental impacts of expansion of the Chicago O'Hare Airport was prepared. The preparer of the preliminary draft of the EIS was, however, the city of Chicago, a proponent of the expansion. The FAA did prepare the final EIS, but used statistics and data compiled by the city. Regardless of how truthful and unbiased the preliminary EIS and the data may have been, an appearance of impropriety is cre-

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225 *Id.* at 348 (citing *City of Romulus v. County of Wayne*, 392 F. Supp. 578, 586-91 (E.D. Mich. 1975)).  
226 *Id.*  
227 *Id.*  
228 See, e.g., *Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1218 n.4 (9th Cir. 1979).  
229 787 F.2d 186 (7th Cir. 1986).
ated when the proponent of expansion determines its environmental effects.

The clearest and most recent statement concerning the power of the courts to review agency decisions regarding NEPA compliance appeared in *Citizens Against Burlington, Inc. v. Busey.* The dispute arose when the city of Toledo, Ohio decided to expand one of its airports and the FAA approved the expansion. Residents near the airport asked the court of appeals to review the FAA’s decision, claiming that the FAA violated the NEPA and other federal environmental statutes and regulations. Judge (now Justice) Clarence Thomas discussed the purpose of the NEPA in depth and stated that the NEPA was a procedural mandate and did not command particular results. The federal judges’ task in reviewing was thereby very limited.

Because the statute directs agencies to look hard at the environmental effects of their decisions and not to take one type of action or another, federal judges enforce the statute by ensuring that agencies comply with the NEPA’s procedures, not by trying to coax agency decisionmakers to reach certain results.

Judge Thomas continued, stating that “the only role for a court is to insure that the agency has considered the environmental consequences [and satisfied the statute procedurally]; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’” As long as the objectives of the project chosen by the agency are reasonable and reasonable alternatives are considered discussed in detail, the decision of

230 938 F.2d 190 (D.C. Cir. 1991).
231 Id. at 193-94.
232 Id. at 194.
234 Id. (quoting Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-228 (1980)). See also Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) ("Neither [NEPA] 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.")
the agency will be affirmed. Judge Thomas maintained that this rule of reason and the broad discretion to define the goals of the project do not provide agencies with a "license to fulfill their own prophecies." The objectives of a proposal must not be so narrowly drawn that only one alternative, the desired one, would achieve those objectives. The court held that if this were the case, the EIS would be a "foreordained formality." On the other hand, if the agency drafted its goals too broadly, too many alternatives would arise and the project would "collapse under the weight of the possibilities." For this reason, the court maintained that an agency's decision is subject only to the restraint of reasonableness.

Judge Thomas found that the FAA had "complied with all of the [environmental] statutes and all but one of the regulations." The regulations command that the EIS "be prepared directly by or by a contractor selected by the lead agency or [possibly] a cooperating agency." Yet, the FAA did not choose the contractor. Instead, the Toledo-Lucas County Port Authority which wanted to make the city of Toledo its cargo hub selected the consultant, Coffman Associates. The court admitted that "[b]y failing to select the consultant that prepared the [EIS], the FAA violated CEQ regulations." Yet "[t]his particular error did not compromise the 'objectivity and integrity of

235 Citizens Against Burlington, 938 F.2d at 196.
236 Id.
237 Id. But see Valley Citizens for a Safe Env't v. Aldridge, 886 F.2d 485 (1st Cir. 1989); Sierra Club v. Lehman, 825 F.2d 1386 (9th Cir. 1987); Westside Property Owners v. Schlesinger, 597 F.2d 1214 (9th Cir. 1979); Davison v. Department of Defense, 560 F. Supp. 1019 (S.D. Ohio 1982).
238 Citizens Against Burlington, 938 F.2d at 196.
239 Id.
240 Id.
241 Id. at 191-92.
242 40 C.F.R. § 1506.5(c).
243 Citizens Against Burlington, 938 F.2d at 202.
244 Id. at 192.
245 Id. at 202.
the NEPA process.’” 246

How can the court know if the objectivity was compromised when it has declared and recognized its ignorance by stating, “[i]n examining the impacts of noise on the environment, the FAA relies on wisdom and experience peculiar to the agency and alien to the judges of this court[?]” 247 Also, the CEQ regulations are “designed . . . to minimize the conflict of interest inherent in the situation of those outside the government coming to the government for money, leases or permits while attempting impartially to analyze the environmental consequences of their getting it.” 248 This type of conflict is clear in Life of the Land, all military cases, and in Citizens Against Burlington. The court, however, relied on another regulation which stated that “any trivial violation of these regulations [does] not give rise to any independent cause of action.” 249 The court concluded that the EIS was sufficient in all respects except one and remanded for the FAA to determine if, by utilizing Coffman, there was a conflict of interest. 250 However, though that determination still had to be made, the court declined “to enjoin the continuing development of Toledo Express or to grant any other of the equitable relief that the petitioners have asked for.” 251 The court essentially predetermined the conflict of interest question by allowing the expansion to continue. The reluctance to overturn an agency decision, or even to delay it for a short time, is clearly manifest in Citizens Against Burlington.

The fact that the NEPA is perceived as merely a procedural requirement is even more apparent in the case of

247 Id. at 201 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989)).
248 Id. at 202 (quoting Sierra Club v. Sigler, 695 F.2d 957, 963 n.3 (5th Cir. 1983)).
249 Id. (quoting 40 C.F.R. § 1500.3 (1991)).
250 Id. at 206.
251 Id.
the Dallas-Fort Worth International Airport (DFW) expansion. On April 7, 1992, the FAA approved the airport’s final EIS, allowing DFW to receive federal money and begin runway expansions. The cities in which the airport lies plan on challenging the EIS as others have tried in the past, believing “the final EIS is a sham, is a fraud.” FAA spokesman Roger Myers said that the approval was “a fine example of the federal process at work. We feel like we’ve done it correctly.” The city ordinances discussed earlier are still an issue, however. The cities think they must be complied with as a result of the state district judge’s order. DFW spokesman Joe Dealey, Jr., however, does not see the ordinances as a problem. As for the challenge to the EIS, Dealey is confident the airport will prevail. “We think that their challenge will be no more successful than the nearly 10 challenges that have emerged in the last 10 years.” Bert Williams, vice chairman of the airport board, summed up the true reason the airport will likely win: “You can’t stop change. You can’t stop progress. There’s just no way to do it.” The way the system currently operates, he is absolutely correct. Yet, a change in the system would allow the courts to reach a fairer result, one based on unbiased and independent data.

VII. CONCLUSION

Perhaps the courts are correct in deciding not to upset an agency decision since it is reasonable, or at least not arbitrary, and since procedurally the NEPA has been satisfied. After all, the courts readily admit that they are not well-informed of noise abatement methods and environ-

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252 Stacey Freedenthal, FAA Clears D/FW for Runway in Irving, DALLAS MORNING NEWS, Apr. 8, 1991, at 1A, 25A.
253 Id.
254 Id. (quoting Grapevine Mayor William D. Tate).
255 Id.
256 Id.
257 Id.
258 Id.
mental studies.\textsuperscript{259} Though logical for a court to admit its ignorance and defer to the judgment of those better versed, the choice of whom the courts turn to is illogical. The FAA, though a government agency, has somewhat of an interest in a proposed project being affirmed. The agency exists because there is air travel. The more air travel, the more the FAA is needed. The more the FAA is needed, the more the employees of the FAA are secure in their jobs. Even if not interested in the outcome of the studies, the FAA is more likely subject to political pressure and influence from high-dollar airlines and airports looking to expand.\textsuperscript{260}

A more logical choice in reviewing the environmental effects of a proposed action is an agency that will be less subject to influence by those in the aviation industry but yet uniquely capable of studying the probable environmental outcome. This agency is the Environmental Protection Agency (EPA). By having a neutral third party conduct the studies, the NEPA may remain procedural, but perhaps this mere procedure will result in a decision not to proceed. Even if the decision is to proceed, at least the communities and especially the courts can feel a little more secure about the decision and know it was not influenced by those desiring the expansion. Rather, the public and the courts will know that the environmental effects have been looked at independently of the costs. A fairer result will emerge because the balancing process will be blessed with all of the relevant information.

The EPA and the FAA have bumped heads before re-

\textsuperscript{259} See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976))); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 200-01 (D.C. Cir. 1991) (relying on unique wisdom and experience of the FAA which was beyond the capacity of the judges).

garding suggestions and solutions to certain problems. \(^{261}\)

The Federal Aviation Act of 1958 \(^{262}\) authorized the FAA to promote air safety, establish navigation facilities, and certify commercial aircraft. In 1968, the Noise Certification Amendment \(^{263}\) provided a commission for the regulation of aircraft noise. \(^{264}\)

In 1972, Congress passed the Noise Control Act. \(^{265}\)

The conflict between the FAA and the EPA also appeared in *Citizens Against Burlington.* \(^{268}\) The court noted that Congress desires EPA participation when another agency prepares an EIS. \(^{269}\) Yet, the court maintained that the FAA was primarily responsible for the decision. \(^{270}\)

Though the EPA participated here, "the FAA, not the EPA, bore the ultimate statutory responsibility for actually preparing the [EIS], and under the rule of reason, a lead agency does not have to follow the EPA's comments slavishly — it just has to take them seriously." \(^{271}\) The FAA concluded that the consequences of the action had been

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\(^{264}\) Dolley & Carroll, *supra* note 261, at 631.


\(^{266}\) Dolley & Carroll, *supra* note 261, at 632.


\(^{268}\) 938 F.2d at 201.

\(^{269}\) *Id.* (citing 42 U.S.C. § 7609(a)).

\(^{270}\) *Id.*

\(^{271}\) *Id.* (citing Alaska v. Andrus, 580 F.2d 465, 474 (D.C. Cir.), vacated in part as moot sub nom., Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978)).
analyzed enough after considering the EPA's criticisms.\(^2\)

What is the use of having an EPA if it is not allowed to protect the environment? If agencies are allowed to utilize business judgment and balance it against probable environmental effects, then the environment is not being protected. Rather, the environment is merely looked upon as a factor to be considered, one that can be sacrificed if the real costs to the pro-expansionist would be too great otherwise.

At some point the environment should not be looked upon as an outweighable factor. The true business purpose of the proposed expansion should not loom largely in the EIS when the purpose of the NEPA is to reveal the probable environmental effects of an action. The increased awareness of environmental effects should not be the product of a suit to test whether the NEPA has been complied with, as it was in Steele Creek Community Ass'n v. Department of Transportation,\(^2\) but rather the EIS should provide this increased awareness on its own, as in Matsumoto v. Brinegar.\(^2\) In Matsumoto, farmers whose land was being acquired to build an airport brought suit to prevent the acquisition. The court held the purpose of an EIS is to increase awareness and to educate rather than to determine whether an action should be taken.\(^2\)

\[\text{[A]n EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information.}\(^2\)

\(^2\) Id.
\(^2\) 568 F.2d 1289, 1290 (9th Cir. 1978).
\(^2\) Id. at 1290-91.
\(^2\) Id. at 1291 (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).
To insure an increased awareness of environmental effects, the preparer of the EIS should be a party that is truly independent of the proceedings and has no stake in the outcome. The EPA will be sure to study the problem fully and not simply take it for granted as a foregone conclusion that the increase will be allowed.

As it stands now, the residents nearby all airports seem to be powerless to stop proposed actions. At most, they can affect the outcome only slightly by causing the agency to do what it can to reduce the impact. Yet, the residents can never reject the project and negate the impact altogether. Shame on them for not comporting with the traditional American ideals of "progress."