Injunctions for NEPA Violations: Balancing the Equities

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The National Environmental Policy Act of 1969 (NEPA) reads like no other environmental statute. Its language is lofty and aspirational. Section 101 proclaims a national environmental policy "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."¹ It declares that the federal government has a "continuing responsibility" to act as trustee for future generations, and to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings."²

NEPA's actual requirements, however, are significantly less grand. The heart of NEPA's scheme, § 102, requires that federal agencies analyze the environmental effects of all major actions in a detailed environmental impact statement (EIS).³ NEPA has detailed paperwork requirements but no specific substantive requirements. Once the agency completes the EIS process, it may proceed with any course of action, environmentally harmful or not.

This gap between the vague, aspirational goals of § 101 and the EIS paper process of § 102 has left courts with a difficult remedial problem. What should they do when a federal agency fails to follow the prescribed procedures? Specifically, how should a court decide whether to enjoin a federal project when the agency has not thoroughly considered the project's environmental effects as NEPA requires?

An example will illustrate the problem. Imagine that the U.S. Army Corps of Engineers is planning to install a new electricity generating system at a dam. The system would use a new technique, pumped storage, that involves the pumping of water upstream during peak demand periods. The Corps has already pre-

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¹ NEPA § 101(a), 42 USC § 4331(a) (1988).

² NEPA § 102(b), 42 USC § 4331(b) (1988).

³ NEPA § 102(2)(c), 42 USC § 4332(2)(C) (1988). Though not discussed herein, agency proposals for legislation having a similar effect also trigger the EIS requirement.

pared an EIS and has decided to issue a construction contract. Environmental groups sue to halt the project, claiming that the Corps neglected to address some potentially severe environmental impacts that studies of pumped storage had revealed. The court finds that the Corps has violated NEPA by not evaluating the potential effects, and orders the Corps to prepare a supplemental EIS addressing the problems.⁴ In the new EIS, the agency must re-evaluate its decision in light of the environmental data. Plaintiffs ask for an injunction that would halt the contract award, generator construction, and generator testing and operation, pending the Corps's completion of the EIS supplement.⁵ Should the court issue an injunction, and if so, which activities should it enjoin?

Two lines of Supreme Court decisions, one interpreting NEPA, the other establishing the requirements for issuing injunctions under other environmental statutes, provide the background for answering the question.⁶ First, the Supreme Court has described the heart of NEPA's scheme—federal agency preparation of a detailed EIS for every major federal action significantly affecting the environment—as purely procedural, with no substantive requirements.⁷ Thus, the only NEPA issue a court may review is whether an agency has properly followed procedures, not whether the proposed federal action unduly harms the environment. Second, the Supreme Court has announced that violation of a procedural requirement in an environmental statute does not necessarily entitle a plaintiff to injunctive relief. In the absence of a contrary command from Congress, courts must balance the equities of

⁴ Note that in all cases discussed in this Comment, a court found that the federal agency involved violated NEPA, and ordered it to conduct the necessary studies to fulfill NEPA's requirements. (In preliminary injunction cases, the court found that the agency had likely violated NEPA.) The only question was whether an injunction should halt the project once it had already been determined that the agency was in violation of NEPA.

⁵ This scenario is based on *South Carolina Department of Wildlife and Marine Resources v Marsh*, 866 F2d 97 (4th Cir 1989). See text accompanying notes 100-102 for a discussion of this case.

⁶ While both lines of cases provide necessary background, only the cases dealing with injunctions under environmental statutes require significant discussion below. See Section II.

⁷ See text accompanying notes 25-28. This Comment does not argue that the Supreme Court's interpretation of NEPA is incorrect. Some commentators have argued that the Court's view of NEPA as procedural only is contrary to congressional intent. See, for example, Don J. Frost, Jr., *Amoco Production Co. v. Village of Gambell and Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.: Authority Warranting Reconsideration of the Substantive Goals of the National Environmental Policy Act*, 5 Alaska L Rev 15 (1988); Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 Envir L 534 (1990).

granting such relief. The factors a court must consider are: (1) Will the harm that results from not issuing an injunction be irreparable?; (2) Are the legal remedies inadequate?; (3) Which way does the balance of harms tilt?; and (4) What is in the public interest?⁸

These holdings—that only NEPA's procedures are enforceable, and that procedural violations do not necessarily warrant an injunction—pose an apparent conflict for courts considering whether to issue injunctions for NEPA violations. The result has been a confusing body of case law in the federal courts of appeals on how courts should balance the equities. The most important (and often outcome determinative) difference among the courts is the extent to which a NEPA procedural violation can result in irreparable harm to the environment sufficient to warrant an injunction.

This Comment interprets the Supreme Court opinions dealing with injunctions for procedural violations of environmental statutes to resolve this conflict. It argues that these opinions specifically focus on the scheme and purpose of the statute at issue and indicate that injunctions should issue when necessary to prevent frustration of substantive statutory goals. While NEPA may have no enforceable substantive requirements, it does have a substantive goal—preventing environmental damage by forcing agencies to consider the environmental effects of their actions before they act. This goal should guide courts in determining whether to issue an injunction. Indeed, only an approach that considers NEPA's goals will preserve NEPA as a meaningful statute.

Section I discusses NEPA's scheme as embodied in the statute, Council on Environmental Quality (CEQ) regulations, and Supreme Court opinions. It argues that NEPA seeks to minimize environmental damage resulting from major federal projects by forcing agencies publicly to consider their environmental effects. That NEPA may contain no *substantive requirements* against which to measure an agency's ultimate decision does not mean that it has no *substantive goals* to inform the decision whether to issue an injunction.

Section II considers the Supreme Court's decisions on injunctions for agencies' procedural violations of environmental statutes. It notes that both of the leading opinions focus on the scheme and purpose of the statutes at issue. While these cases clearly dictate that lower courts must use the equitable balancing test to deter-

⁸ See text accompanying notes 41-48.

mine whether an injunction should issue, they also require courts to consider the underlying substantive statutory goals when applying that test.

Section III describes the various approaches courts have taken in NEPA injunction cases. It focuses on the several ways courts have interpreted the traditional balancing test, particularly the irreparable harm factor. Section IV proposes that the proper approach to evaluating whether an injunction should issue—one that accounts for NEPA's goal of influencing agency decisionmaking to reduce the risk of environmental harm—would take a broad view of what constitutes irreparable harm. Such an approach recognizes that enforcing NEPA's procedures is in many cases the only means of enforcing NEPA's substantive goals. Ultimately, this Comment advocates a more liberal dispensation of injunctive relief in NEPA cases.

I. NEPA'S PURPOSE AND REQUIREMENTS

This Section argues that Congress intended NEPA to have a substantive effect, and that courts should consider this intention when deciding whether to issue an injunction for a NEPA violation. This may seem obvious—after all, why would Congress pass a statute if it did not intend it to have some effect? Nevertheless, it is an important point given the bare procedural mandate of the statute. This Section provides an overview of NEPA's requirements, and then discusses the substantive results Congress intended them to achieve.

A. Overview of NEPA's Scheme

NEPA requires all agencies of the federal government to "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 . . . (on) the environmental impact of the proposed action"⁹

Regulations promulgated by the CEQ implement NEPA's requirements.¹⁰ Under these regulations, agencies must "integrate

⁹ NEPA § 102(2)(c), 42 USC § 4332(2)(C).

¹⁰ NEPA established CEQ. NEPA § 202, 42 USC § 4342. NEPA charged CEQ with the responsibility of assisting preparation of the President's annual environmental quality report and advising the President on environmental policy, NEPA §§ 201-209, 42 USC §§ 4341-4347, and an executive order authorized CEQ to promulgate EIS regulations. Exec Order No 11,991, 3 CFR 123 (1977).

the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values”¹¹ Accordingly, most federal agencies have adopted their own regulations or guidelines to fulfill NEPA’s mandates.¹²

Agencies must prepare an Environmental Assessment (EA) for each project that, according to their own regulations, may be subject to the NEPA EIS requirements. In EAs, agencies determine whether to prepare an EIS or make a finding of no significant impact (the agency’s formal statement that no EIS is needed).¹³ Agencies must prepare EISs to accompany proposals for all “major Federal actions significantly affecting the quality of the human environment.”¹⁴ Of course, what constitutes “major,” “federal,” and a “significant effect” are difficult issues that have been litigated extensively.¹⁵

The EIS process is public and resembles rulemaking. Once an agency has decided to prepare an EIS, it must publish a notice of intent to prepare it in the Federal Register.¹⁶ An agency must prepare a draft of its study and circulate the draft among the appropriate federal, state, and local agencies for comment. CEQ and the public must have notice of and access to the draft.¹⁷ Once the agency has received comments on the draft, it must prepare a final EIS that embodies the agency’s ultimate decision on the project.

An EIS must discuss the environmental impact of the proposal, all reasonable alternatives (including those beyond the power of the agency and the alternative of no action), and appropriate mitigating measures.¹⁸ It must identify which alternative the agency has chosen.

The statute specifically requires that agencies balance “environmental amenities and values” with “economic and technical considerations.”¹⁹ Thus, the EIS must contain some form of cost-

¹¹ 40 CFR § 1501.2 (1991). See *Andrus v Sierra Club*, 442 US 347, 351 (1979) (federal agencies need not prepare an EIS to accompany an appropriation request).

¹² See notes accompanying 42 USCA § 4332(2)(C) (1977 & Supp 1991) for citations to the regulations of several agencies.

¹³ 40 CFR § 1508.9(a)(1).

¹⁴ NEPA § 102(2)(c), 42 USC § 4332(2)(C).

¹⁵ See Valerie M. Fogleman, *Guide to the National Environmental Policy Act* 56-64 (Quorum, 1990); Daniel R. Mandelker, *NEPA Law and Litigation* (Callaghan, 1984 & Cum Supp 1991).

¹⁶ 40 CFR § 1501.7.

¹⁷ NEPA § 102(2)(c), 42 USC § 4332(2)(C); 40 CFR §§ 1502.9 (draft required), 1506.10 (notice necessary upon filing of draft).

¹⁸ 40 CFR §§ 1502.14, 1502.16.

¹⁹ NEPA § 102(2)(c), 42 USC § 4332(2)(C).

benefit analysis and explain why the agency balanced the factors as it did. The agency must state whether it has taken "all practicable means to avoid or minimize environmental harm" that may result from the selected alternative.²⁰

NEPA demands that agencies study more than just physical environmental effects. The statute requires EISs for actions affecting "the quality of the human environment."²¹ CEQ regulations and various cases have required agencies to study the quality of urban life, socioeconomic factors, historic and cultural resources, and aesthetic values.²²

CEQ regulations make clear that an agency should not allocate resources to a project until it has completed a final evaluation of the environmental impacts.²³ Early preparation of an EIS ensures that it serves as an important contribution to the decisionmaking process rather than a post hoc rationalization of decisions already made.²⁴

While NEPA requires consideration of a variety of issues, it does not mandate particular outcomes.²⁵ It provides no substantive requirements a court can use to evaluate whether an agency has made the proper decision. Thus, the Supreme Court has stated that if an agency has complied with NEPA's procedural requirements, a court can only "insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of action to be taken.'"²⁶ Beyond forcing an agency to take a "hard look" at environmental alternatives, a court cannot stop a federal decisionmaker from deciding to cause environmental damage.²⁷ "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."²⁸

²⁰ 40 CFR § 1505.2(c).

²¹ NEPA § 102(2)(c), 42 USC § 4332(2)(C).

²² See Fogleman, *Guide* at 62-63 (cited in note 15).

²³ 40 CFR §§ 1502.2(f), 1506.1.

²⁴ 40 CFR § 1502.5.

²⁵ *Strycker's Bay Neighborhood Council, Inc. v Karlen*, 444 US 223, 227-28 (1980) (per curiam).

²⁶ *Id.*, quoting *Kleppe v Sierra Club*, 427 US 390, 410 n 21 (1976). See *Robertson v Methow Valley Citizens Council*, 490 US 332 (1989) (NEPA does not impose substantive duties mandating particular results, but simply prescribes the necessary process).

²⁷ *Kleppe*, 427 US at 410 n 21.

²⁸ *Methow Valley*, 490 US at 350.

Private parties may sue to enforce NEPA's provisions.²⁹ Individuals, citizen groups, states, municipalities, and environmental organizations file scores of NEPA suits against federal agencies every year.³⁰ Litigants can bring suit only after an agency has made its "proposal" for the federal action, as described in the completed EIS.³¹ Groups who may have provided comments on the draft EIS and who feel that the agency did not adequately address their comments, or who did not participate in the initial EIS process but now bring new information to light, typically demand that the agency amend its EIS to consider the additional factors.³² Victory for the plaintiffs means only that the agency must reconsider its decision to go forward with a project.

This Comment addresses what a court should do while the agency is "reconsidering." Neither NEPA nor its regulations specifies the appropriate remedy when an agency has failed to study adequately the effects of a project, but nevertheless continues to carry out the project. Remedy formulation has been left to the courts. All circuits issue injunctions under some circumstances, but they differ as to what those circumstances are.³³

B. The Substantive Goals of NEPA's Procedures

Many commentators have discussed NEPA's meaning.³⁴ This Comment does not attempt to discuss the theoretical or philosophical foundations of the Act. Rather, it points out what Congress must, at a minimum, have intended by requiring NEPA proce-

²⁹ *Sierra Club v. Morton*, 405 US 727 (1972). The Supreme Court clarified standing requirements in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3189 (1990) (when alleging aesthetic or recreational injury, persons must identify specific areas used or enjoyed).

³⁰ According to the most recent CEQ summary of NEPA litigation, the following numbers of NEPA suits have been filed in recent years: 57 suits in 1989; 91 suits in 1988; 69 suits in 1987; and 71 suits in 1986. The most frequently sued agencies are the Department of Transportation, the Department of Agriculture, the Department of the Interior, and the U.S. Army Corps of Engineers. Council on Environmental Quality, *Environmental Quality: The Twenty-First Annual Report of the Council on Environmental Quality* 232-35 (1991).

³¹ *Kleppe*, 427 US at 406 n. 15.

³² In reviewing an agency's decision not to supplement an EIS, courts apply deferential "arbitrary and capricious" review. *Marsh v. Oregon Natural Resources Council*, 490 US 360, 385 (1989).

³³ For a more detailed summary of NEPA requirements, see generally Fogleman, *Guide* (cited in note 15); Mandelker, *NEPA Law* (cited in note 15).

³⁴ See, for example, Frost, 5 Alaska L. Rev. 15 (cited in note 7) (NEPA as "duty-based environmentalism"); Paul J. Culhane, *NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated*, 20 Envir. L. 681 (1990) (NEPA as a "garbage can," due to the efforts of policy entrepreneurs with disparate ideas about environmental reform; NEPA thus has different meaning for all participants).

dures. This Comment asserts that Congress intended the procedures themselves to achieve increased environmental protection, even though the statute does not directly mandate protection in any specific case. Ignoring procedural infirmities, or condoning them by letting agency action proceed notwithstanding, undermines NEPA's goals.

NEPA states that its purpose is:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.³⁵

While this language is far from specific, it indicates that Congress believed it was creating a system that would have far-reaching effects. As one commentator has observed, "NEPA's aspirational language conveyed the hope of embarking on a formidable task: reversing a national environmental decline, caused in disproportionate amount by the federal government itself."³⁶

NEPA's legislative history does not add very much beyond the general and vague language of the statute's purpose provision.³⁷ The remarks that are often cited indicate that Congress saw NEPA as "action-forcing,"³⁸ effectively amending agencies' enabling legislation so as to include environmental goals among the other goals the agencies promote.³⁹ While NEPA's legislative history is far from concrete, it does appear that Congress intended to accomplish something significant. One of its drafters hailed NEPA as "the most important and far-reaching environmental and conservation measure ever enacted by the Congress."⁴⁰

The EIS process reduces the risk that any particular decision will cause environmental harm. Agencies must articulate the anticipated impact of their plans, and must subject those plans to public scrutiny. They must act within a publicly justifiable framework. In addition, a structured consideration of environmental effects

³⁵ NEPA § 101, 42 USC § 4321.

³⁶ Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 *Envir L* 447, 448 (1990).

³⁷ Fogleman, *Guide* at 2-3 (cited in note 15).

³⁸ 115 Cong Rec 40,416 (Dec 20, 1969) (remarks of Senator Jackson).

³⁹ National Environmental Policy Act of 1969, S Rep No 91-296, 91st Cong, 1st Sess 19 (1969).

⁴⁰ 115 Cong Rec 40,416 (Dec 20, 1969) (remarks of Senator Jackson).

and alternatives simply provides agencies with information they would not otherwise have had or considered. The requirement that consideration occur *before* the agency makes its decision and starts the project indicates an expectation that the decision will be more protective of the environment if the agency faithfully carries out the process. NEPA logically assumes that increased study, articulation, and public discussion of environmental effects will result in fewer federal decisions that cause harm to the environment.

II. INJUNCTIONS FOR PROCEDURAL VIOLATIONS OF ENVIRONMENTAL STATUTES: THE ROLE OF STATUTORY SCHEME AND PURPOSE

This Section outlines the law on issuing injunctions for procedural violations of environmental statutes and analyzes the implications of that law for NEPA. The cases force courts to use an equitable balancing test when considering whether to issue an injunction in response to a procedural violation of an environmental statute. This Section argues that the cases also indicate that courts must apply the test with an eye to the substantive goals of the statute in question.

A. Equitable Balancing for Procedural Violations

Federal courts have developed a four-part balancing test governing the issuance of injunctions. The bases for granting an injunction are: first, that not granting the injunction would result in irreparable injury;⁴¹ second, that legal remedies are inadequate;⁴² third, that the balance of effects on each party of granting or not granting the relief weigh in favor of the movant;⁴³ and fourth, that the injunction be in the public interest.⁴⁴ In addition, for preliminary injunctions, the plaintiff must show sufficient likelihood of success on the merits. For a permanent injunction, the plaintiff must have already succeeded on the merits.⁴⁵ These factors are not self-defining, as the variety of approaches lower courts have taken attests.

Congress may preclude a balancing of the equities for violations of a particular statute. A court must evaluate whether the

⁴¹ *Amoco Production Co. v Village of Gambell*, 480 US 531, 542 (1987) (denying injunctive relief for the violation of the Alaska National Interest Lands Conservation Act).

⁴² *Id.* at 542.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 546 n 12, citing *University of Texas v Camenisch*, 451 US 390, 392 (1981). This Comment addresses both preliminary and permanent injunctions.

statute at issue limits its equitable discretion.⁴⁶ Statutes preclude such discretion by courts only in the face of a clear legislative command⁴⁷—where the statute “in so many words, or by a necessary and inescapable reference, restricts the court’s jurisdiction in equity.”⁴⁸

The Supreme Court has applied the balancing standard in two cases dealing with procedural violations of environmental statutes. In the first case, *Weinberger v Romero-Barcelo*, the Court analyzed equitable discretion under the Federal Water Pollution Control Act (FWPCA).⁴⁹ Six years later, in *Amoco Production Co. v Village of Gambell*, the Court revisited the issue, this time interpreting the Alaska National Interest Lands Conservation Act (ANILCA).⁵⁰

1. *Weinberger v Romero-Barcelo*.

In *Romero-Barcelo*,⁵¹ the Governor and other citizens of Puerto Rico sued to halt U.S. Navy weapons training on a small island off the coast of Puerto Rico, claiming that the operations violated FWPCA.⁵² The Navy had not obtained from the Environmental Protection Agency the required national pollution discharge elimination system (NPDES) permit. The First Circuit held that there was an “absolute statutory obligation” to stop discharges until the permit was granted.⁵³

The Supreme Court held that the FWPCA did not foreclose the exercise of equitable discretion.⁵⁴ Courts must apply the bal-

⁴⁶ Id at 542.

⁴⁷ See, for example, *Tennessee Valley Authority v Hill*, 437 US 153, 187, 194 (1978) (Congress stated in the Endangered Species Act that the value of an endangered species is “incalculable.” Courts are thus precluded from balancing other costs against harm to endangered species.).

⁴⁸ *Amoco Production*, 480 US at 542 (citations omitted). This Comment, following appellate courts that have addressed the issue, assumes that injunctive relief is discretionary under NEPA, as it is generally. See, for example, *Wisconsin v Weinberger*, 745 F2d 412, 426 (7th Cir 1984); *Save the Yaak Committee v Block*, 840 F2d 714, 722 (9th Cir 1988). But see Michael D. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 Harv Envir L Rev 1, 44-57 (1988) (arguing that in some environmental contexts, the traditional balancing test is not the appropriate way to determine whether to grant equitable relief).

⁴⁹ 456 US 305 (1982).

⁵⁰ 480 US 531 (1987).

⁵¹ 456 US 305 (1982).

⁵² 33 USC §§ 1251 et seq (1988).

⁵³ *Romero-Barcelo v Brown*, 643 F2d 835, 861 (1st Cir 1981), discussed in *Romero-Barcelo*, 456 US at 310-11.

⁵⁴ 456 US at 316.

ancing test to determine whether to issue an injunction for a FWPCA violation. Thus, the First Circuit erred in *presuming* that an injunction should issue for a procedural violation.

The Court stressed the importance of considering the statute's scheme and purpose for determining whether equitable discretion was foreclosed. Citing the statute's preamble, the Court emphasized that "[t]he integrity of the Nation's waters, [] not the permit process, is the purpose of the FWPCA."⁵⁵ Further, injunctions were only one means to achieve compliance with the Act. Requiring compliance with the NPDES permit standards, or imposing fines or criminal penalties could also achieve the purpose.⁵⁶ A firm presumption of injunctive relief was not necessary to accomplish the purposes of the Act.

The Court's emphasis on statutory purpose also carried over into its discussion on how the equities should be balanced. The Court noted that because the district court had found that the Navy's "technical violations" were not causing any "appreciable harm" to the environment,⁵⁷ issuing an injunction would not further the statute's goals of protecting the integrity of the nation's waters. Further, the Court stated:

The district court did not face a situation in which a permit would very likely not issue, and the requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue. Should it become clear that no permit will be issued and that compliance with the FWPCA will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck.⁵⁸

Thus, *Romero-Barcelo* explained that the "statutory scheme and purpose" dictate whether a court should apply the equitable balancing test, as well as inform how the court shall apply it.

2. *Amoco Production Co. v Village of Gambell.*

Amoco Production involved similar issues under ANILCA, which protects natural resources on which native Alaskans rely for

⁵⁵ Id at 314, citing 33 USC § 1251(a) (the objective of the FWPCA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters").

⁵⁶ Id.

⁵⁷ Id at 310, quoting *Romero-Barcelo v Brown*, 478 F Supp 646, 706 (D PR 1979).

⁵⁸ Id at 320.

subsistence.⁵⁹ Alaskan native villages brought an action to enjoin the Secretary of the Interior's sale of oil and gas leases for federally-owned lands in the outer continental shelf of Alaska, claiming that the Secretary had failed to comply with ANILCA.⁶⁰

The district court found that the Secretary had likely failed to comply with ANILCA because "he did not have the policy precepts of ANILCA in mind at the time of evaluation."⁶¹ Nevertheless, the court denied the injunction because the balance of harms did not favor the movant.⁶² The Ninth Circuit reversed, holding that the district court had not properly weighed irreparable harm or evaluated the public interest: "Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action . . . injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances."⁶³ Relying on *Romero-Barcelo*, the Supreme Court overturned the Ninth Circuit's decision. The Court held that ANILCA did not contain a clear indication that Congress intended to deny federal district courts their traditional equitable discretion, and thus a presumption of irreparable harm was impermissible.⁶⁴

As in *Romero-Barcelo*, the Court focused on the statute's purpose to determine whether a presumption of injunctive relief was appropriate. The Court commented that the Ninth Circuit had concentrated on the statutory procedure rather than on the underlying substantive policy—the preservation of subsistence resources.⁶⁵ Again, the Court also discussed how the equities would balance in this case. The Court noted that the district court had expressly found that exploration "would not significantly restrict subsistence activities."⁶⁶ Because the Secretary's action did not un-

⁵⁹ 480 US 531 (1987). ANILCA is codified at 16 USC §§ 3101 et seq (1988).

⁶⁰ 480 US at 535. Specifically, the villages alleged noncompliance with § 810(a), 16 USC § 3120(o), requiring notice and public hearing before leasing lands covered by ANILCA.

⁶¹ *Amoco Production*, 480 US at 540, quoting Appendix to oil companies' Petition for Certiorari.

⁶² *Id.*

⁶³ *Id.* at 541, quoting *Gambell v Hodel*, 774 F2d 1414, 1423 (9th Cir 1985). The Ninth Circuit relied on its earlier decision, *Save Our Ecosystems v Clark*, 747 F2d 1240 (9th Cir 1984), a NEPA case. See discussion of *Save Our Ecosystems* in text accompanying notes 74-77.

⁶⁴ 480 US at 544. Note that the Court's ruling on whether the Ninth Circuit applied the proper standard in determining the availability of injunctive relief was unnecessary, given that it also held that ANILCA did not apply to the outer continental shelf. *Id.* at 555-56 (Stevens concurring in part and concurring in the judgment).

⁶⁵ *Id.* at 544.

⁶⁶ *Id.*

dermine ANILCA's substantive policies, the equities indicated that injunctive relief was not warranted.⁶⁷ Thus, as in *Romero-Barcelo*, the Court indicated that statutory purpose properly informs equitable balancing.

The *Amoco Production* Court also offered guidance on how courts should treat the irreparable harm factor of the balancing test. While the Court clearly rejected the *presumption* of irreparable harm, it did not indicate that a *finding* of irreparable harm based on the facts of the case would have been objectionable. Indeed, the court noted:

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.⁶⁸

While it is unclear what the Court meant by "sufficiently likely," the statement suggests a willingness to find irreparable harm in environmental cases.

B. Implications for NEPA: Focus on Statutory Purpose

Amoco Production and *Romero-Barcelo* require courts considering issuing injunctions under NEPA to use the equitable balancing test unless foreclosed by the environmental statutes. However, these cases leave open the issue of how the balancing test should work in the context of NEPA violations. While the cases make clear that no hardwiring of the test would be tolerated, such as a presumption of irreparable harm, both indicate that statutory purpose is important in executing the balancing test. The Supreme Court has thus provided guidance for lower courts fashioning relief for NEPA violations: courts should consider NEPA's unique purpose when determining whether to issue an injunction for a NEPA violation.

A comparison of the schemes and purposes of the statutes at issue in *Romero-Barcelo* and *Amoco Production* with those of NEPA shows that NEPA's scheme and purpose demand a somewhat different approach to the equitable balancing test than the one the Court took in those cases. Both FWPCA and ANILCA

⁶⁷ *Id.*

⁶⁸ *Id.* at 545.

have significant substantive requirements. FWPCA sets forth discharge limitations in its scheme to protect the integrity of the waters.⁶⁹ The NPDES permit is essentially a paperwork requirement that enforces substantive standards.⁷⁰ ANILCA protects natural resources used for subsistence in Alaska through a process of evaluation and public comment. Subsistence resources may not be restricted unless an agency head determines that the restriction is necessary and is designed to affect a minimal amount of land and to minimize adverse impacts.⁷¹

On the surface, the schemes of FWPCA, ANILCA, and NEPA—in terms of their significant paperwork requirements—may look similar. However, unlike either FWPCA or ANILCA, NEPA has no explicit substantive requirements. Only NEPA sets no standards for the outcome of its paper process. NEPA reduces risk to the environment by requiring informed decisionmaking; it does not protect specific resources with specific standards. This difference suggests that the test should apply differently to NEPA violations.

In both *Romero-Barcelo* and *Amoco Production* the Court considered the type of harm the statute targeted. In *Romero-Barcelo*, the Court evaluated whether the discharge actually threatened the waters. Similarly, in *Amoco Production*, the Court inquired whether there was any significant harm to subsistence resources. NEPA targets the increased risk of harm to the environment that results from uninformed decisionmaking. Thus, the harm that an injunction under NEPA should target is the risk that the agency will make a decision to damage the environment.⁷²

III. VARIETIES OF BALANCING TESTS IN NEPA CASES

Approaches to evaluating whether an injunction should issue under NEPA have varied over time and across circuit courts. The main differences arise in how courts have used the equitable balancing test. Specifically, courts have differed widely in how they determine whether failure to grant an injunction will result in ir-

⁶⁹ See 33 USC §§ 1311 et seq (FWPCA's discharge requirements).

⁷⁰ See 33 USC §§ 1341 et seq (regarding the NPDES).

⁷¹ ANILCA § 810(a), 16 USC § 3120(a). See also *Amoco Production*, 480 US at 536; *Sierra Club v Marsh*, 872 F2d 497, 502-03 (1st Cir 1989) (ANILCA is substantive because the minimum land and minimum adverse impacts requirements curtail the range of permissible choices available to the agency).

⁷² See *Sierra Club*, 872 F2d at 502-03 (increased bureaucratic commitment to a project that results from allowing an agency to pursue the project in the face of a NEPA violation may be an irreparable harm).

reparable harm. This Section discusses how courts have interpreted the equitable balancing standard in the NEPA context.

The NEPA injunction cases roughly fit into four general categories. Some courts maintain a presumption that an injunction should issue whenever an agency has failed to comply with the NEPA process. These courts "balance the equities" only at the margin, when important factors would make granting the injunction contrary to NEPA's purpose. Most courts have adopted the traditional equitable balancing test, but have not specifically considered NEPA's substantive goals when crafting the remedy. Of these, some construe the test very narrowly, and some take a wider view of what constitutes irreparable harm. Finally, other courts have applied the balancing test focusing on NEPA's policies, though without maintaining any presumptions.

A. Presumption Plus Balancing at the Edges

For the first decade or so of NEPA's history, most courts presumed that an injunction should issue to halt a federal action proceeding in the face of a NEPA violation.⁷³ Typically, these cases focused on the irreparable harm element of the balancing test, presumptively finding irreparable harm when NEPA was violated.⁷⁴ The government could rebut the presumption by showing that halting the project would not further NEPA's goals,⁷⁵ but only in rare circumstances would the court fail to issue an injunction.⁷⁶

⁷³ See *Jones v District of Columbia Redevelopment Land Agency*, 499 F2d 502, 512 (DC Cir 1974); *Environmental Defense Fund v Tennessee Valley Authority*, 468 F2d 1164, 1184 (6th Cir 1972); *Scherr v Volpe*, 466 F2d 1027, 1034 (7th Cir 1972). As one commentator noted, "[i]t does not appear that any lower court, much less the Supreme Court has ever found in a proceeding on the merits that federal actions violating NEPA could continue in opposition to the statutory mandates." Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Cal L Rev 524, 575 (1982).

⁷⁴ *Save Our Ecosystems*, 747 F2d at 1250 (irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action); *American Motorcyclist Association v Watt*, 714 F2d 962, 965-66 (9th Cir 1983). *Save Our Ecosystems* is no longer applied because it is the precedent on which the Ninth Circuit based the decision overruled in *Amoco Production*. See Section III.C.

⁷⁵ *Realty Income Trust v Eckerd*, 564 F2d 447, 457 (DC Cir 1977) (presumption rebutted because, although the EIS had been filed late, it was fully adequate, and was prepared before any construction had begun on the site).

⁷⁶ *Save Our Ecosystems*, 747 F2d at 1250. For some rare circumstances, see *American Motorcyclist Association*, 714 F2d at 966 (motorcyclists' request for preliminary injunction to prevent federal government from implementing the California Desert Conservation Area Plan denied because allowing plan to proceed was better for environment than allowing motorcycle use to continue); *Alpine Lakes Protection Society v Schlapper*, 518 F2d 1089, 1090 (9th Cir 1975) (per curiam) (harvesting of infested trees could proceed without completed EIS because infestation might otherwise spread); *Richland Park Homeowners Ass'n*,

Courts taking this approach emphasized NEPA's requirement of study and comment before a project begins. They granted a project-halting injunction whenever an agency failed to evaluate all the necessary alternatives, because otherwise the study and comment would be pointless.⁷⁷ The momentum of additional work and investment would, in practice, bind the agency to its initial decision.⁷⁸ These courts deemed injunctions the proper remedy because all the alternatives an agency had to consider during preparation of the revised EIS remained open so long as an injunction was in effect.⁷⁹ If a court prohibited an agency from investing further in a project, the agency would be more likely to change its approach, and make a decision more protective of the environment.

The presumption of injunctive relief may still be alive, particularly in the Fifth Circuit.⁸⁰ These cases tend to analyze in-depth neither the balancing test, nor the recent Supreme Court cases on procedural violations of environmental statutes. While this approach may advance NEPA's policies, it is probably insupportable after *Amoco Production*, because it limits a court's equitable discretion, without finding congressional intent in NEPA to do so.⁸¹

B. Traditional Balancing Test, with a Narrow View of Irreparable Harm

In the wake of *Romero-Barcelo* and *Amoco Production*, most circuits have announced that courts must use the equitable balancing test with no presumptions when considering whether to issue an injunction for a NEPA violation. *How* the test is used, however, varies widely. This Section will focus on cases from the Second and

Inc. v Pierce, 671 F2d 935, 945 (5th Cir 1982) (no environmental benefit from excluding low income tenants from already completed housing project).

⁷⁷ *Save Our Ecosystems*, 747 F2d at 1250 (policies underlying NEPA favor those seeking the suspension of all action until NEPA's requirements are met).

⁷⁸ *Realty Income Trust*, 564 F2d at 457. See also *EDF v TVA*, 468 F2d 1164, 1183-84 (6th Cir 1972).

⁷⁹ *Realty Income Trust*, 564 F2d at 456 (injunction preserves for agency the widest freedom of choice when it reconsiders its action after coming into compliance with NEPA).

⁸⁰ *Citizen Advocates for Responsible Expansion, Inc. v Dole*, 770 F2d 423, 443 (5th Cir 1985) (injunction deemed "the normal and proper remedy for an agency's failure to comply with NEPA"); *Richland Park Homeowners Association*, 671 F2d at 941 (same); *Association Concerned About Tomorrow, Inc. v Dole*, 610 F Supp 1101, 1119 (N D Tex 1985) (presumption of irreparable harm for NEPA violation). See also *Natural Resources Defense Council v Lujan*, 768 F Supp 870, 890 (D DC 1991) ("NEPA presumes injury where participation in the NEPA process is denied."). But see *Texas v U.S. Forest Service*, 654 F Supp 296, 298 (S D Tex 1987); *Guste v Lee*, 635 F Supp 1107, 1124 (E D La 1986).

⁸¹ See text accompanying notes 51-72.

Fourth Circuits, which use the traditional balancing factors without referring to NEPA's purpose or goals.⁸² The Ninth Circuit's somewhat broader approach to applying the equitable balancing test is discussed separately below.⁸³

The cases discussed in this Section have applied the equitable balancing test in a manner that threatens to make NEPA meaningless. Specifically, the cases require that the irreparable harm necessary to warrant an injunction must be immediate and physical. They consider only the currently impending stage of the federal action when evaluating irreparable harm, but not whether that stage will lead into other potentially environmentally harmful stages. Further, the cases assume that the agency will change its decision about whether to proceed with the project based on information revealed in the new EIS process, even though the agency has continued to pursue the project.

1. Requirement that irreparable harm be immediate and physical.

The Second Circuit has consistently applied the equitable balancing test, with special emphasis on limiting what qualifies as irreparable harm.⁸⁴ The Second Circuit will grant a preliminary injunction only if alleged threats of irreparable harm are not "remote or speculative, but are actual and imminent."⁸⁵ The Circuit tends to consider only direct physical environmental harms as irreparable, and requires that the harm be specifically proven.

For example, in its most recent NEPA case, *Town of Huntington v Marsh*, the Second Circuit held that a plaintiff must meet the burden of establishing some actual or threatened physical, chemical, or biological injury to the environment to demonstrate irreparable harm.⁸⁶ In *Town of Huntington*, the district court had

⁸² While other circuits have deemed the equitable balancing test the proper standard for determining whether to issue an injunction for a NEPA violation, most have not applied the test in a way that indicates how courts should analyze the factors. See *Lakeshore Terminal and Pipeline Co. v Defense Fuel Supply Center*, 777 F2d 1171 (6th Cir 1985); *Wisconsin v Weinberger* 745 F2d 412 (7th Cir 1984); *Sierra Club v US Army Corps of Engineers*, 771 F2d 409 (8th Cir 1985).

⁸³ See Section III.C.

⁸⁴ See *Conservation Society of Southern Vermont, Inc. v Secretary of Transportation*, 508 F2d 927, 933-34 (2d Cir 1974), vacated on other grounds and remanded, 423 US 809 (1975); and *NRDC v Callaway*, 524 F2d 79 (2d Cir 1975).

⁸⁵ *New York v Nuclear Regulatory Commission*, 550 F2d 745, 753-57 (2d Cir 1977) (injunction denied where NRC had not considered that aircraft carrying nuclear materials might crash or be subject to terrorist action).

⁸⁶ 884 F2d 648, 653 (2d Cir 1989).

permanently enjoined the Army Corps of Engineers from dumping dredged materials or issuing permits to dump dredged materials at a disposal site in the Long Island Sound because it had failed to consider the environmental effects of the materials in its EIS.⁸⁷ The Second Circuit overturned the decision and remanded because, although the lower court had found irreparable damage, it had not provided "sufficient support" for that conclusion.⁸⁸ Thus, not only does the Second Circuit have a narrow interpretation of what constitutes irreparable harm, but it also has a high burden of proof for that harm.

Lower court opinions from the Second Circuit illustrate the consequences of such a strict interpretation of irreparable harm. Courts in several cases have refused to enjoin agencies from taking major steps toward completing their projects in the face of NEPA violations. For example, courts in the Second Circuit do not consider condemnation of land to be irreparable harm, because no persons are physically hurt by the "mere taking of title," where the agency does not intend "immediate eviction, dispossession, or demolition."⁸⁹ In refusing to enjoin demolition of a building, one court acknowledged that the demolition necessarily brought defendants closer to construction of a project that might cause environmental harm. Nevertheless, the court found that the demolition itself would not physically harm the plaintiffs.⁹⁰

While *Town of Huntington* chose not to address the issue,⁹¹ lower court cases have squarely rejected the idea that mere commitment of resources can constitute irreparable harm.⁹² For example, in *United States v 27.09 Acres of Land*, the court held that condemnation is not necessarily a commitment to a course of action, or an irretrievable commitment of resources, sufficient to warrant an injunction.⁹³ It is irrelevant under this approach that the

⁸⁷ Id at 649.

⁸⁸ Id at 654.

⁸⁹ *Stand Together Against Neighborhood Decay, Inc. v Board of Estimate of the City of New York*, 690 F Supp 1192, 1196-1200 (E D NY 1988); *United States v 27.09 Acres of Land*, 737 F Supp 277, 283-84 (S D NY 1990). But see *United States v 18.2 Acres of Land*, 442 F Supp 800, 807 (E D Cal 1977) (a condemnation action, by its very nature, is a decision to put land to a certain public use, which may have a significant effect on the environment).

⁹⁰ *Atlantic Terminal Urban Renewal Area Coalition v New York City Department of Environmental Protection*, 740 F Supp 989, 991-92 (S D NY 1990).

⁹¹ 884 F2d at 652-53 n 1 (whatever the merits of a bureaucratic commitment argument, it would not lead to a different result in this case).

⁹² See *Vine Street Concerned Citizens, Inc. v Dole*, 604 F Supp 509 (E D Pa 1985) (injuries in terms of money, time, and energy necessarily expended in the absence of a stay do not constitute irreparable harm).

⁹³ 737 F Supp at 283-84.

commitment makes the future potential environmental harm more likely to occur.⁹⁴

The Fourth Circuit differs somewhat from the Second Circuit on this issue. Though the Fourth Circuit has recognized that allowing an agency to begin preliminary work on a project before completing the EIS would necessarily influence the agency's decision whether to approve the project,⁹⁵ more recent cases have taken a narrower view of agency inertia. For example, in *North Carolina v Virginia Beach*, the court held that because the cost of construction to be undertaken while the agency was preparing its EIS was only \$8.4 million, compared to the project's total cost of \$218.9 million, the construction did not have a "direct and substantial probability of influencing FERC's decision."⁹⁶ The court ignored the district court's finding that the construction itself would cause environmental harm, and that it would limit the choice of reasonable alternatives left to the agency.⁹⁷

2. Consideration of only imminent stages.

The Second Circuit looks at projects in terms of stages, and considers the effects of only the immediately impending stage, rather than the effects of the project as a whole, when deciding whether to grant an injunction.⁹⁸ In *Stand Together, 27.09 Acres of Land*, and *Atlantic Terminal*, the courts looked only at the current stages of the project, and not at whether environmentally damaging stages were likely to follow.⁹⁹

The Fourth Circuit has also followed an approach in which it evaluates projects by stages, analyzing the environmental impact of

⁹⁴ *Stand Together Against Neighborhood Decay*, 690 F Supp at 1197 n 6 (condemnation does not itself cause irreparable harm, though it may be preliminary to a decision to put land to a public use with significant effect on the environment); *Atlantic Terminal*, 740 F Supp at 991-92 (commitment of resources does not physically harm plaintiffs).

⁹⁵ *Maryland Conservation Council v Gilchrist*, 808 F2d 1039, 1042 (4th Cir 1986) (Secretary "would inevitably be influenced" if major segments of highway were constructed. "It is precisely this sort of influence on federal decision-making that NEPA is designed to prevent.") (citations omitted).

⁹⁶ 951 F2d 596, 602-03 (4th Cir 1991).

⁹⁷ *Id* at 611-12 (Murnaghan dissenting). See also discussion of *South Carolina Department of Wildlife and Marine Resources v Marsh* in text accompanying notes 100-02.

⁹⁸ *County of Suffolk v Secretary of Interior*, 562 F2d 1368, 1378 (2d Cir 1977) (EIS evaluating development of first offshore field in the Atlantic coastal area failed to deal with important issues of oil transportation; because Secretary would have to prepare another EIS at a later stage of the multistage project, issue could be addressed then). This case does not address the timing of injunctions so much as their scope.

⁹⁹ *Stand Together*, 690 F Supp at 1197; *27.09 Acres of Land*, 737 F Supp at 283-84; *Atlantic Terminal*, 740 F Supp at 991.

each stage independently of the rest of the project. A rather extreme example is *South Carolina Department of Wildlife and Marine Resources v Marsh*.¹⁰⁰ In that case, the Army Corps of Engineers, poised to begin constructing pumped storage generators, had failed to analyze the effect of pumped storage on fish and fish eggs. The Fourth Circuit held that an injunction should only prohibit the Corps from operating or testing the generators once installed.¹⁰¹ The court wanted to tailor the injunction "to restrain no more than what is reasonably required to accomplish its ends"; only *operating* the generators in pumped storage mode would cause the damage, the court reasoned.¹⁰² The court seems to have ignored the reality that installing the generators was only the first step in a larger project.

3. Assumption that the agency will change its decision if environmental harm is revealed.

Courts in the Second and Fourth Circuits assume that an agency found in violation of NEPA will fully consider the environmental harms and alternatives for avoiding those harms, even if it is allowed to continue with the project while it revises the EIS. For example, in *Stand Together*, while the court acknowledged that condemnation, by definition, is a decision to put land to a certain public use, it noted that if the EIS revealed that the proposed office buildings would cause environmental harm, the city could decide to use the site as a park.¹⁰³ Similarly, in *27.09 Acres of Land*, the court stated that, if the supplemental EIS revealed environmental problems, the Postal Service could resell the condemned land or use it for a different type of postal facility.¹⁰⁴

It does not take a leap of logic to conclude that the city in *Stand Together* and the Postal Service in *27.09 Acres of Land* would not have condemned the lands in question if they did not fully intend to use them for the proposed projects, regardless of the outcome of the EIS process. Nevertheless, the court ignored this likelihood, and instead assumed that the agencies would

¹⁰⁰ 866 F2d 97 (4th Cir 1989). See also *Virginia Beach*, 951 F2d at 602-03 (injunction should be tailored to restrain no more than what is reasonably required to accomplish its ends).

¹⁰¹ 866 F2d at 100.

¹⁰² *Id.* See *Vine Street Concerned Citizens*, 604 F Supp 509 (early road construction activities will not themselves pose the environmental harms to be studied in the supplemental EIS, and therefore should not be enjoined).

¹⁰³ 690 F Supp at 1197 n 6.

¹⁰⁴ 737 F Supp at 283-84.

meaningfully reconsider their decisions in revised EISs as NEPA requires. Similarly, the narrow injunction tailored in *South Carolina Department of Wildlife* suggests that the court trusted the Corps of Engineers to make the best environmental decision even once the generators were installed. The court assumed that even though the project would be completed, the Corps would choose not to operate it if the Corps learned that it was not "environmentally sound."¹⁰⁵ The court simply ignored the possibility that installing the generators would create bureaucratic momentum in favor of turning them on.¹⁰⁶

C. Traditional Balancing Test, with a Broad View of Irreparable Harm: The Ninth Circuit Approach

The Ninth Circuit formerly presumed irreparable damage when an agency failed to evaluate thoroughly the environmental impacts of a proposed action.¹⁰⁷ Since *Amoco Production* specifically rejected the use of a presumption, the Ninth Circuit has used the traditional balancing test. However, the Ninth Circuit seems to use a broader definition of irreparable harm than the Second and Fourth Circuits. In addition, Ninth Circuit decisions focus more on the project as a whole when evaluating the harm, rather than focusing on merely the next impending stage. The Ninth Circuit also takes a more realistic view of the inevitability of agency inertia. As a result, the Ninth Circuit grants NEPA injunctions more readily than the Second and Fourth Circuits.¹⁰⁸

While the Ninth Circuit has held that a litigant seeking an injunction must show "imminent and irreparable harm,"¹⁰⁹ it does not require that the harm be a threatened physical, chemical, or biological injury, the types the Second Circuit demanded in *Town of Huntington*. For example, in *Northern Cheyenne Tribe v Ho-*

¹⁰⁵ 866 F2d at 100.

¹⁰⁶ But see *Maryland Conservation Council v Gilchrist*, 808 F2d 1039, 1042 (4th Cir 1986) (recognizing agency inertia).

¹⁰⁷ *Save Our Ecosystems*, 747 F2d at 1250.

¹⁰⁸ This could also be the result of the different types of cases heard in the Ninth Circuit. The Ninth Circuit faces more cases concerning timber harvesting, damming wild rivers, or mining of wilderness areas than the Second Circuit. Perhaps in such cases irreparable harms are more likely than in the urban/suburban areas often at issue in the Second Circuit. Also, such actions may have fewer stages, and it may be clearer at what point irreparable harm may occur. For example, where litigants seek an injunction to stop construction of a structure that could harm a potentially endangered species, most courts in any circuit using the equitable balancing test would grant the injunction. See *Morgan v Walter*, 728 F Supp 1483 (D Idaho 1989).

¹⁰⁹ *Sierra Club v Nuclear Regulatory Commission*, 862 F2d 222, 231 (9th Cir 1988).

del, the court considered cultural, economic, and social harms to be potentially irreparable.¹¹⁰ Also, when the environmental injury is physical, the Ninth Circuit may have a lower burden of proof than what the Second Circuit demands. The Ninth Circuit seems to treat environmental injury as almost necessarily irreparable, and does not appear to require detailed analysis of the specific environmental harms.¹¹¹

The Ninth Circuit does not use a stage approach to analyzing irreparable harm, nor does it tailor injunctions as narrowly as possible. While the circuit draws some injunctions more broadly than others, a stage approach does not persist as a limiting theme in the case law, unlike the Second and Fourth Circuits. For example, in *Save the Yaak Committee v Block*¹¹² the plaintiffs sought an injunction to protect the Yaak River from the effects of timber harvesting and road construction. The court enjoined the timber sales and roadwork with no analysis of whether only the harvesting (which came after the sales and roadwork) should be stopped. By contrast, the Second and Fourth Circuits would likely have allowed the agency to sell the leases, build the roads, and bring in the lumberjacks, and would draw the line only at the actual harvesting.

The Ninth Circuit also has expressed concern about bureaucratic commitment to a project, which would interfere with an agency thoroughly revisiting (in its revised EIS) a decision to pursue an action.¹¹³ While the circuit has not specifically held that resource expenditure can constitute irreparable harm, it has taken account of the bureaucratic commitment problem. In *Northern Cheyenne Tribe v Hodel*, plaintiffs requested that leases be voided, rather than suspended, to avoid the bureaucratic commitment problem. The court noted that "[b]ureaucratic rationalization and bureaucratic momentum are real dangers . . .," but disagreed that suspension would render the agency more committed to the project.¹¹⁴ The court noted that because the financial interests of the lessee could not be considered by the agency as a cost of not going

¹¹⁰ 851 F2d 1152, 1158 (9th Cir 1988) (cultural, social, and economic cost to Native American tribe relevant). Such harms are clearly within NEPA's ambit. See text accompanying notes 21-22.

¹¹¹ See *Sierra Club v United States Forest Service*, 843 F2d 1190, 1195 (9th Cir 1988) (irreparable injury where logging completed without benefit of an EIS). Note that this is consistent with *Amoco Production*, which noted that environmental injury usually points in favor of granting an injunction. See text accompanying note 68.

¹¹² 840 F2d 714 (9th Cir 1988).

¹¹³ *Northern Cheyenne*, 851 F2d at 1157 ("[b]ureaucratic rationalization and bureaucratic momentum are real dangers").

¹¹⁴ *Id* at 228-29.

forward with the leases,¹¹⁵ there was little danger that momentum would be greater under the suspension.¹¹⁶

D. Balancing, with a NEPA Focus

The First Circuit also uses the traditional balancing test for issuing injunctions for NEPA violations. However, the Circuit analyzes the factors in light of the statute's purpose. In two opinions by Judge Breyer, the First Circuit developed a test that accounts both for NEPA's lack of substantive requirements and for NEPA's goal of making government officials consider environmental factors in decisionmaking.¹¹⁷ Specifically, the court held in these cases that an increased risk that environmental harm will result from poorly informed decisionmaking can constitute irreparable injury.

In *Massachusetts v Watt*, the Commonwealth of Massachusetts and the Conservation Law Foundation sought to enjoin an Interior Department oil lease sale.¹¹⁸ The government argued that allowing the sale would cause no irreparable harm, because leases alone do not hurt the environment, and many steps stand between the lease sale and the start of oil exploration.¹¹⁹ The Secretary thus advanced a narrow, physical definition of irreparable harm, and advocated a staged approach to determining the point at which an injunction is warranted. The First Circuit rejected this approach, however, as contrary to NEPA's purpose.

The court understood that NEPA's function is to present official decisionmakers with relevant environmental data *before* they commit themselves to a course of action.¹²⁰ When such a decision is made without benefit of the EIS process, "the harm that NEPA intends to prevent has been suffered."¹²¹ Allowing an agency to proceed without satisfying NEPA's requirements in effect allows it to decide what policy to pursue before it has fully weighed the costs and benefits. As Judge Breyer explained, "a new EIS [] may bring about a *new* decision, but it is that much less likely to bring about a *different* one. It is far easier to influence an initial choice than to change a mind already made up."¹²²

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Massachusetts v Watt*, 716 F2d 946 (1st Cir 1983); *Sierra Club v Marsh*, 872 F2d 497 (1st Cir 1989).

¹¹⁸ 716 F2d at 946.

¹¹⁹ *Id.* at 951-52.

¹²⁰ *Id.* at 952.

¹²¹ *Id.*

¹²² *Id.*

The court emphasized that recognizing bureaucratic commitment as a harm does not create a presumption that a NEPA violation automatically calls for an injunction. A court must still determine whether the harm may indeed be irreparable and must otherwise balance the equities.¹²³

In *Sierra Club v Marsh*, Judge Breyer clarified the definition of irreparable harm.¹²⁴ The Sierra Club sought to halt all work on a marine dry terminal while the agency amended its final EIS. The district court denied a preliminary injunction, holding that *Amoco Production's* requirement of "irreparable environmental injury" meant only physical environmental harm that could not later be repaired.¹²⁵ The court held that the plaintiffs failed to demonstrate that after work began, environmental restoration would be impracticable.¹²⁶ The First Circuit reversed the district court's analysis of "irreparable environmental injury" and issued the injunction. Reaffirming *Massachusetts v Watt*, Judge Breyer explained that an increased risk of harm to the environment can constitute irreparable environmental injury. A harm that results from not following procedure can be an environmental harm.

We did not (and would not) characterize the harm described as a "procedural" harm, as if it were a harm to *procedure* . . . Rather, the harm at stake is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis . . . of the likely effects of their decision upon the environment.¹²⁷

In considering whether to grant an injunction for a NEPA violation, other courts also have acknowledged the importance of NEPA's goal of influencing decisionmaking.¹²⁸ The next Section asserts that the First Circuit correctly relied on the substantive scheme and purpose of NEPA to effectuate its policy mandates.

¹²³ Id at 952-53.

¹²⁴ 872 F2d 497 (1st Cir 1989).

¹²⁵ Id at 499.

¹²⁶ Id.

¹²⁷ Id at 500-01 (citations omitted) (emphasis in original).

¹²⁸ *Sierra Club v Hodel*, 848 F2d 1068, 1097 (10th Cir 1988) (court used traditional principles of equity, as applied in the NEPA context; risk of harm impossible to assess before NEPA studies are completed; injunction granted). See also *Wisconsin v Weinberger*, 745 F2d 412, 426-27 (7th Cir 1984) (bureaucratic commitment concern recognized but discounted where project is already ongoing and is important to national defense; injunction denied).

IV. PROPOSAL: A BALANCING TEST THAT CONSIDERS NEPA'S SCHEME AND PURPOSE

Amoco Production and *Romero-Barcelo* emphasize that courts must consider statutory scheme and purpose when they design remedies for procedural violations of environmental statutes. These cases indicate that courts should grant injunctions to prevent the harm that a statute was designed to combat. This Section proposes three considerations that should guide courts in incorporating NEPA's scheme and purpose in the balancing process. Under this approach, courts would be more likely to provide injunctive relief that would avert the decisionmaking inertia NEPA seeks to prevent. Courts should recognize: 1) that irreparable harm should be defined broadly in the NEPA context, and should include the increased risk that an agency action will cause environmental harm; 2) that the relevant harm is that which will result from the project as a whole, and not just the harm from the immediately impending stage; and 3) that courts should look skeptically at whether agencies will change their decisions about projects when permitted to continue in the face of NEPA violations. This proposal draws heavily from Judge Breyer's opinions in *Sierra Club v Marsh* and *Massachusetts v Watt*,¹²⁹ but also is tailored to address the specific problems of the Second and Fourth Circuits' approach.¹³⁰

Unlike other environmental statutes, which contain substantive standards, NEPA does not identify specific harms it seeks to prevent. NEPA targets the *risk* of environmental harm that uninformed decisionmaking causes. For statutes that specify the targeted harm, a narrow interpretation of irreparable harm makes sense. A court can simply determine whether continuing with the action will cause irreparable harm of the sort the statute was designed to prevent. Yet, for NEPA, where there is no specified harm, courts must define irreparable harm more broadly. Courts must construe irreparable harm to include the increased risk to the environment of allowing a project to continue.

An approach that would acknowledge NEPA's substantive goal of reducing risk through informed decisionmaking would not require irreparable harm to be imminent, because NEPA seeks to diminish the chance of *future* harm. It would not require that the environmental harm be chemical, biological, or physical. NEPA

¹²⁹ See text accompanying notes 117-127.

¹³⁰ See text accompanying notes 82-106.

recognizes other harms¹³¹ and requires agencies to consider other harms before deciding to proceed with a project. Thus, courts should recognize that in some cases such harms may indeed be irreparable. Further, such an approach would not require proof that the environmental harm could not be repaired later or would be particularly severe. Under NEPA, the issue should not be whether environmental damage could be "fixed" at some later date (though it could almost never be fixed),¹³² but rather whether going ahead with the project would increase the chance that the agency would decide to injure the environment.

Courts should view certain agency activities as indicators of increased likelihood of future harm. For example, an agency's condemning land, entering into contracts or leases, or otherwise committing resources to a project should be considered activities capable of causing irreparable harm. Such "bureaucratic commitment" to a project increases the risk that an agency will "decide" in its revised EIS to continue with the project even in the face of new environmental information. That the commitment itself might be reversible may not be relevant. The pertinent question is not whether an agency can retrieve its investment, but whether an agency's investment, retrievable or not, will increase the risk that it will make a decision causing environmental harm.

This approach comports with the Supreme Court's dictum regarding irreparable harm in *Amoco Production*, where the Court indicated that irreparable harm in the environmental context should not be difficult to prove, and that it should usually result in an injunction.¹³³ The Court in *Amoco Production* said, "[i]f such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."¹³⁴ In the NEPA context the threshold for "sufficient likelihood" should be lower than it may be in other areas to account for NEPA's goal of reducing risk rather than preventing specific harms to the environment.

In order to be faithful to NEPA's goals, courts should view the relevant harm broadly. They should evaluate the harm that could result not only from the imminent stage of a project, but also from any later stages covered in the initial EIS. Courts should disregard

¹³¹ See text accompanying notes 21-22.

¹³² See text accompanying note 68.

¹³³ *Id.*

¹³⁴ 480 US at 545.

future stages only when the current stage does not make later potentially damaging stages more likely.

An analysis of future stages does not require a technical assessment of probabilities. It demands only that a court ask whether an agency would want to undertake the imminent stage whether or not it was planning to pursue later stages. If the court, applying common sense, decides that the agency would not, then it should consider the later stages in deciding whether to issue an injunction. For example, if an agency would not condemn a parcel of land unless it intended to build a potentially harmful project on that land, then the court should enjoin the condemnation until the EIS process is complete.

Courts should look skeptically at whether an agency will truly "reconsider" its project if allowed to pursue it in the face of a NEPA violation. Courts must remember that in many cases allowing an agency to proceed makes a mockery of the EIS process, converting it from analysis to rationalization. If an agency has been allowed to spend more resources on the project it is more likely to go forward with the previously selected options so as not to waste its investment. The agency will be more likely to overvalue the benefits of the project in its EIS.¹³⁵

NEPA embodies a skeptical view of the adequacy of federal agency decisionmaking. It requires certain procedures to counteract agency discounting of environmental effects in decisionmaking. A court that enforces only the paperwork requirement, without issuing an injunction to create an atmosphere in which the paperwork will have an effect, runs the risk that the paperwork will serve no purpose.¹³⁶ Injunctive relief preserves an agency's ability and propensity to change its course, thus implementing NEPA's mandate that agencies fully consider all environmental impacts before making decisions.

¹³⁵ Current economic theories support this conclusion. There is a tendency to remain at the status quo because the disadvantages of leaving it loom larger than the advantages. According to these theories, a status quo of no project is more likely to result in a decision to abandon or alter the project to account for environmental concerns than a status quo where the project is ongoing. See Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J Econ Perspectives 193 (1991).

¹³⁶ In addition, when agencies know that courts will issue project-halting injunctions, they may be more likely to follow procedures properly during the project planning stages. A credible threat of injunction could make timely environmental planning more likely, thus promoting NEPA's purpose.

CONCLUSION

Romero-Barcelo and *Amoco Production* require courts to use some form of the traditional equitable balancing test when deciding whether to issue an injunction to halt a federal project pursued in the face of a NEPA violation. That test is far from self-defining, however. Fortunately, the Court has provided guidance by indicating that statutory policy should figure prominently in the balance.

This Comment argues that NEPA's underlying policy should inform the balancing test. An approach to applying the balancing test that would most fully comport with Supreme Court precedent and with NEPA's scheme and purpose would recognize that NEPA's substantive goal is to reduce the risk of environmental harm through thorough consideration of environmental impact. NEPA's limitation—that it has no substantive standards by which a court can review an agency's final decision—makes enforcement of the procedures a court's only opportunity to prevent the irreparable harm to the environment the statute seeks to prevent. Compliance with NEPA procedures will only be meaningful if courts enjoin agencies from proceeding with actions while revisiting their decisions to act.