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Supplemental Environmental Impact Statements: How Significant Should New Information Be?

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Supplemental Environmental Impact Statements: How Significant Should New Information Be?

I. Introduction

An Environmental Impact Statement (EIS) has been a requirement for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment"[1] since the passage of the National Environmental Policy Act of 1969 (NEPA).[2] The EIS is required to be supplemented if substantial changes in the federal action occur or significant new information or circumstances arise concerning the environment.[3]

In *Wisconsin v. Weinberger*,[4] the Court of Appeals for the Seventh Circuit defined the phrase "significant new information" under Council on Environmental Quality (CEQ) regulations[5] as that term relates to Supplemental Environmental Impact Statements (SEIS). The Court in *Weinberger* overturned the district court's order[6] directing the Navy to prepare an SEIS relative to a proposed extremely low frequency submarine communications project (Project ELF). In evaluating the significance of the new information,[7] the district court had used a four-part test which was similar to the test em-

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1. 42 U.S.C. § 4332(2)(c) (1982).
2. 42 U.S.C. §§ 4321 - 4370 (1982).
3. 40 C.F.R. § 1502.9(c)(1)(i), (ii) (1984). This section states in pertinent part: (c) Agencies:

> (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed actions that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

4. 745 F.2d 412 (7th Cir. 1984).
5. 40 C.F.R. § 1502.9(c)(1), (i)(ii) (1984). *See supra* note 3.
6. *Wisconsin v. Weinberger*, 578 F. Supp. 1327 (W.D. Wis. 1984).
7. *Id.* at 1361.

ployed by the Ninth Circuit Court of Appeals in *Warm Springs Dam Task Force v. Gribble*.[8] The district court concluded that the Navy had abused its discretion in not considering new information available to the Navy.[9] In reversing the district court, the majority rejected the Ninth Circuit's test and held that an agency's decision not to file an SEIS cannot be held to be "arbitrary or capricious"[10] "unless the new information provides a *seriously* different picture" of the environment.[11]

This note examines the definition used by *Weinberger* in determining the significance of new information relative to an SEIS. Part II briefly addresses the background of NEPA and the requirements of the SEIS. It also examines the standard of judicial review that should be afforded an agency's decision to issue an SEIS. Part III discusses the *Weinberger* decisions and Part IV compares the Seventh Circuit's new information standard to that used by the district court which was based on the Ninth Circuit's decision in *Warm Springs Dam*. This note concludes in Part V that the reasonableness standard enunciated by the district court in *Weinberger* and the Ninth Circuit in *Warm Springs Dam* advances the purposes of NEPA by encouraging a more rational decision by the agency.

II. Background

Procedural NEPA requirements continue throughout implementation of a proposed project.[12] Although an agency may have filed a final EIS, it is under "a continuing duty to gather and evaluate new information relevant to the environmental impact of its action."[13] An agency must be careful to monitor

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8. 621 F.2d 1017, 1024 (9th Cir. 1980).

9. 578 F. Supp. at 1364.

10. The court stated that the standard of review of agency action used by the Seventh Circuit was the Section 706(2)(A) standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (1982). This provides that an agency's action must be set aside if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 745 F.2d at 417.

11. 745 F.2d at 418.

12. 40 C.F.R. § 1502.9(c)(1)(i) (1984). *See supra* note 3.

13. California v. Watt, 683 F.2d 1253, 1267 (9th Cir. 1982), *rev'd on other*

relevant information as it becomes available when the proposed action includes a number of phases to be implemented over a substantial period of time.[14]

CEQ regulations[15] require an agency[16] to supplement an EIS if the "agency makes substantial changes in the proposed action that are relevant to environmental concerns"[17] or if "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"[18] comes to light. The SEIS must be prepared, circulated and filed in the same manner as an EIS.[19] The SEIS is utilized if the original EIS becomes inadequate during the life of the project.[20]

The EIS serves three purposes. "The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government."[21] Secondly, it acts to inform the public of the proposed action and make the public aware of agency decisions that may affect the environment.[22] Finally, the EIS provides a record for substantive review, which allows the agency and courts to determine whether the environmental concerns have been given adequate consideration.[23]

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grounds sub nom, Secretary of the Interior v. California, 104 S. Ct. 656 (1984)(citing Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023-24 (9th Cir. 1980). *See also* Society for Animal Rights, Inc. v. Schlesinger, 512 F.2d 915, 917-18 (D.C. Cir. 1975).

14. Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983).

15. *See infra* note 26. "CEQ's interpretation of NEPA is entitled to substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

16. Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981). The Navy is an agency under NEPA. It is required to comply with the CEQ and Department of Defense regulations that pertain to the issues being addressed. *See* 32 C.F.R. § 214.6(D)(4) (1984).

17. 40 C.F.R. § 1502.9(c)(1)(i) (1984). *See supra* note 3.

18. 40 C.F.R. § 1502.9(c)(1)(ii) (1984). *See supra* note 3.

19. 40 C.F.R. § 1502.9(c)(4) (1984).

20. *Weinberger,* 745 F.2d 412, 416-17 (7th Cir. 1984).

21. 40 C.F.R. § 1502.1 (1984). *See* Andrus v. Sierra Club, 442 U.S. at 350; Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

22. 454 U.S. at 143; California v. Block, 690 F.2d 753, 770-71 (9th Cir. 1982).

23. In Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d 1011, 1029-30

The purposes behind an EIS promote the policies of NEPA, which was enacted at a time of great concern for the environment.[24] Congress envisioned NEPA as a means to encourage "productive and enjoyable harmony between man and his environment" and to promote "efforts which will prevent or eliminate damage to the environment. . .and [to] stimulate the health and welfare of man."[25] Congress went on to declare that it was the responsiblity of the Federal Government to coordinate the policies set forth in NEPA with other national policies to attain the most beneficial use of the environment without imposing a safety or health risk on the people.[26]

(2d Cir. 1983), the court of appeals held that the agency must make an adequate compilation of relevant information so that a reviewing court can decide if NEPA requirements were satisfied. Friends of the River v. Federal Energy Regulatory Comm'n, 720 F.2d 93, 106 (D.C. Cir. 1983) held that "the EIS makes it possible for the public and reviewing courts to consider conveniently how and why the agency made its final choices." (Petitioners had asserted that the EIS prepared by the Federal Energy Regulatory Commission for the proposed hydroelectric plant was inadequate because it failed to account for a new energy consumption forecast. The court held that an SEIS was not necessary because this "new" information was of questionable value.)

24. "The symbolism of the timing of this law did not go unnoted by the President and other concerned Americans, who heralded the 1970's as a decade of environmental concern." R. Jain, G. Stacey, and L. Urban, Environmental Impact Analysis - A New Dimension in Decision Making 7 (1981).

25. 42 U.S.C. § 4321 (1982).

26. 42 U.S.C. § 4331(b) (1982). This section states:

> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may — (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

The implementation of NEPA's policies is accomplished by requiring each federal agency to prepare a detailed study of the environmental impact of "every recom-

As stated previously, one of the purposes of an EIS is to ensure that there is a record for review.[27] In general the scope of review that a court has in examining an agency's decision is narrow.[28] The agency decision will be upheld if the decision is based on a consideration of relevant factors[29] and made on a rational basis.[30] "The court is not empowered to substitute its judgment for that of the agency."[31]

The circuit courts are split on the standard of review to be given an agency's decision to issue an EIS or an SEIS.[32] A few courts hold the agency decision to the "arbitrary and capricious" standard.[33] Other courts have stated that the NEPA requirements under section 102 speak in mandatory terms and therefore the agency decision not to issue an EIS is not

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mendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c) (1982). The guidelines for preparing an EIS are set forth in regulations promulgated by the Council on Environment Quality (CEQ). The CEQ was established for research purposes and also to advise the President on matters concerning the environment. 42 U.S.C. §§ 4341-47 (1982). The EIS process includes a preliminary draft of an EIS, *see* 40 C.F.R. § 1502.9(a) (1984); circulation to other agencies and interested parties, *see* 40 C.F.R. § 1503.1 (1984); a revised EIS which addresses legitimate questions raised, *see* 40 C.F.R. § 1503.4 (1984); and finally, distribution of the final EIS to interested parties, *see* 40 C.F.R. § 1502.19 (1984).

27. *See supra* notes 22-23.

28. The standard of review is derived from the Administrative Procedure Act (APA). 5 U.S.C. §§ 551-706 (1982). Sections 701-706 concern judicial review. An agency action may be set aside if it is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706 (2)(A) (1982). *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

29. *Overton Park*, 401 U.S. at 416.

30. Bowman Transportation, Inc. v. Arkansas - Best Freight System, Inc., 419 U.S. 281, 285 (1974), *citing* Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

31. *Overton Park*, 401 U.S. at 416.

32. For an overview of the federal circuit's standards, *see* Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. Envtl. Aff. L. Rev. 63 (1980).

33. For the standard used by the Seventh Circuit, *see supra* note 10. *See* Hanley v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972). This view is also supported by at least one commentator. Shea, *supra* note 32, at 99-101. *But cf.* Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d at 1029 (the adequacy of an EIS will be reviewed to see "if the agency has made an adequate compilation of relevant information" and "has analyzed it reasonably.")

within the agency's discretion.[34] These and other circuit courts have gone on to hold that an agency decision not to issue an EIS or not to supplement an EIS will be upheld as long as the agency decision was reasonable.[35]

The reviewing court must make certain that the EIS's form, content and preparation foster both decision-making and informed public participation.[36] This will ensure that the agency has taken the required "hard look" at the alternatives.[37] Determining that the agency has taken a hard look is the reviewing court's only role.[38]

III. Wisconsin v. Weinberger

A. *The Facts and the District Court Decision*

In 1969, the Navy began operation of an extremely low frequency (ELF) submarine communications test facility in the Chequamegan National Forest near the town of Clam Lake in northern Wisconsin.[39] The purpose of the ELF system was, through the use of extremely low frequency electromagnetic radiation, to enable the Navy to communicate with a submarine without requiring the submarine to come to the surface. This test facility was part of Project Sanguine, which never entered full-scale development.[40]

The Navy substituted Project Sanguine with Project Seafarer in 1977, which was to include the test facility at Clam

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34. Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1248-49 (10th Cir. 1973).

35. Friends of the River v. F.E.R.C., 720 F.2d at 109 (decision not to supplement an EIS was reasonable); Massachusetts v. Watt, 716 F.2d 946, 948 (1st Cir. 1983)(failure to supplement an EIS was unreasonable because it failed to reflect a downward revision in oil estimates); *Warm Springs Dam*, 621 F.2d at 1024; Monarch Chemical Works, Inc. v. Thone, 604 F.2d 1083, 1088 (8th Cir. 1979) (changes in energy supply and demand occassioned by a federal project may be cognizable under NEPA); *Wyoming Outdoor Coordinating Council*, 484 F.2d at 1249 (EIS must be prepared in connection with timber cutting contract).

36. Trout Unlimited, Inc. v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974).

37. Kleppe v. Sierra Club, 427 U.S. at 410 n. 21.

38. *Id.*

39. Wisconsin v. Weinberger, 578 F. Supp. 1327, 1334-35 (W.D. Wis. 1984).

40. *Id.* at 1335.

Lake and one additional transmitter in the upper peninsula of Michigan. An EIS was finalized in December, 1977 with the Navy concluding that it did not appear that any adverse biological effects would be felt due to the electromagnetic radiation.[41]

President Carter terminated Project Seafarer in February 1978[42] and it remained inactive until President Reagan approved Secretary of Defense Weinberger's recommendation to go forward with the ELF system in October 1981.[43] At that time, Director of Naval Admiral Communications William D. Smith, in the Office of Chief of Naval Operations, decided against the preparation of another EIS.[44]

The State of Wisconsin and the County of Marquette, Michigan moved for a preliminary and permanent injunction of any additional work on the ELF project until an SEIS was prepared. The motion for preliminary injunction was denied,[45] but the district court held that the Navy abused its discretion in not evaluating and analyzing significant new information that had come to light[46] and ordered a permanent injunction until an SEIS was prepared.[47]

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41. In its final EIS, "the Navy summarized the state of knowledge concerning biological effects of electromagnetic radiation: 'Totally acceptable scientific knowledge in this regard is not available now to either prove or disprove many important issues, and is unlikely to be in the very near future despite constantly increasing interest and research.' " *Id.* at 1338.

42. *Id.* at 1335.

43. *Id.* at 1340.

44. Admiral Smith made this decision based on (1) Navy legal counsel's advice that NEPA did not require that the EIS be supplemented and (2) his conclusion that the 1981 proposal was basically similar to the 1977 proposal and, in fact, had a lesser impact on the environment. *Id.* at 1351.

45. *Id.* at 1333.

46. Among the information that the district court considered were (a) a study that found birth defects and effects on animal behavior and neurophysiology caused by electromagnetic radiation; (b) articles on Navy-supported slime mold research which reported alterations in basic cell functions and oxygen consumption due to electromagnetic radiation; (c) studies on primates at UCLA and at the Pensacola Naval Aerospace Medical Research Laboratory which showed effects upon growth rate and behavior from being exposed to electromagnetic radiation; and (d) epidemiology studies raising the possible correlation between the incidence of cancer and magnetic fields in electric power lines which involves the same electromagnetic radiation as in Project ELF. *Id.* at 1361-62.

47. *Id.* at 1365.

The district court held that an SEIS was necessary based on the significant new information provisions.[48] Finding that neither Congress nor CEQ gave a clear definition of "significant," the court used a four-part test in evaluating the significance of the new information. This test included (1) whether the information is new (rather than a mere affirmation of old information); (2) whether the information is meritorious; (3) whether the information is accessible; and (4) whether a rational decisionmaker would want to consider the new information in making a decision to proceed or not to proceed with the project.[49]

The Defense Department's motion for reconsideration was granted but their motion to vacate the injunction was denied, as was their motion for a stay of the injunction pending appeal.[50] However, the district court's injunction was amended to allow the Navy to operate the existing Project ELF facility at Clam Lake.[51] The Court of Appeals for the Seventh Circuit entered an order reversing the district court's decision and vacated the injunction.[52]

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48. *Id.*

49. *Id.* at 1361. The four-part test used by the district court was very similar to the test used in *Warm Springs Dam*, 621 F.2d 1017, 1024 (9th Cir. 1980). *Warm Springs Dam* involved the issue of whether the Army Corps of Engineers needed to prepare an SEIS on a dam being built in Northern California. New information had come to light that the Maacama Fault might have beencapable of generating an earthquake larger than the dam had been designed to withstand. The Court of Appeals for the Ninth Circuit held that a decision not to issue an SEIS would be upheld if the decision not to supplement, despite new information, was based on a reasoned determination of the new information's significance. In deciding if there was a reasoned determination, the court looked at (1) the probable accuracy of the information; (2) the degree of care with which it was considered and evaluated by the agency; (3) the environmental significance of the new information; and (4) the degree to which the agency supported its decision not to supplement with a statement of explanation. *Id.* at 1024.

50. 582 F. Supp. 1489, 1497 (W.D. Wis. 1984).

51. *Id.*

52. Wisconsin v. Weinberger, 736 F.2d 438 (7th Cir. 1984). The Court of Appeals issued this order to lift the injunction and rendered its opinion at a later date. *See infra* note 53.

B. *The Court of Appeals' Decision*

1. *The Majority*

The court in *Weinberger*[53] began with a general discussion of the NEPA requirements.[54] It held that the standard of review for an agency's decision not to supplement an EIS was the arbitrary and capricious standard under the Administrative Procedure Act.[55]

The majority commented that the CEQ regulations did not define the term "significant" and reasoned that "the Council on Environmental Quality was willing to rely on the good faith assessments of the various federal agencies and allow them to determine what information would be sufficiently serious to require the preparation of a full-scale supplement to the original EIS."[56] It then decided to give a more precise meaning to the term "significant" as it pertained to the case at hand.[57]

The Seventh Circuit saw the difference between the decision to file an initial EIS and the decision to supplement an EIS, as centering on the fact that the decision to issue an SEIS is made in light of the already existing research of the environmental consequences contained in the EIS.[58] The agency should decide the extent to which the new information shows environmental consequences not envisioned by the original EIS and whether that information "raises new concerns of sufficient gravity."[59] Finally, the court held that an agency has not "acted arbitrarily or capriciously in deciding not to file an SEIS unless new information provides a *seriously* different picture of the environmental landscape such that another hard look is necessary."[60]

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53. Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984). Judge Wood wrote for the majority and was joined by Judge Cummings. Judge Cudahy filed an opinion concurring in part and dissenting in part.

54. *Id.* at 416-17.

55. *Id. See supra* note 10.

56. 745 F.2d at 417.

57. *Id.* at 418.

58. *Id.*

59. *Id.*

60. *Id.*

The Seventh Circuit continued by stating that circumstances may arise when an accumulation of new information would trigger the agency's duty to supplement its EIS.[61] But it suggested that this would be considered in light of the reasonableness of the amount of time the agency had to review the new information.[62] The court then considered the evidence presented in the lower court to determine if the new information met its "seriously different picture" standard.[63] After this review of the evidence, the majority concluded that the information did not rise to the level of significance required and reversed the lower court.[64]

2. *The Dissenting Opinion*

The dissent in the Seventh Circuit's decision concluded that the majority had overstepped the limits of appellate review and undercut the role of NEPA when long-term projects, faced with uncertain environmental effects, are involved.[65] It went on to state that the standard set by the majority was too high for the relevant information to reach the majority's requisite "significance" level and therefore allowed the majority to glide over the problems associated with the uncertain environmental consequences.[66]

The dissent opined that the approach taken by the district court was the correct one[67] and this approach was in agreement with the Ninth Circuit's holdings in *Warm Springs Dam*.[68] It further stated that besides the agency's continuing duty to monitor any relevant new information, "it must act reasonably to gather and evaluate that information. A decision not to undertake a supplemental EIS must be rationally

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61. In a footnote, the majority stated that the continuing duty to supplement is practically limited by the nature and life cycle of the project or action and the kind of new information involved. *Id.* at 418 n.6.

62. *Id.* at 419.

63. *See generally id.* at 420-424.

64. *Id.* at 424. The court, including Judge Cudahy, also vacated the injunction.

65. *Id.* at 428.

66. *Id.* at 429.

67. *Id.*

68. 621 F.2d 1017. *See supra* note 49.

based on a careful review of the new information."[69]

In conclusion, the dissenting opinion noted that under NEPA the "standard of review is not an exacting one."[70] "An agency need only take reasonable steps, in light of the potential for significant new information, to ensure that it will consider relevant new information concerning the environmental impacts of the agency's actions."[71] The dissent agreed with the district court that the Navy did not take these reasonable steps and was therefore correct in ordering the SEIS.[72]

IV. Analysis

Both the district court[73] and the Seventh Circuit[74] recognized that the CEQ regulations do not define the term "significant."[75] Both courts also attempted to cure this inadequacy by providing their own standard for the term.[76] The courts were in agreement that an agency has a continuing duty to monitor information relevant to the environment and the project being developed.[77] "Indeed, an agency cannot fulfill its

69. 745 F.2d at 430.

70. *Id.* at 432.

71. *Id.*

72. *Id.*

73. Wisconsin v. Weinberger, 578 F. Supp. 1327, 1361 (W.D. Wis. 1984).

74. Wisconsin v. Weinberger, 745 F.2d 412, 417 (7th Cir. 1984).

75. *See also* Hanley v. Kleindienst, 471 F.2d 823, 830 (2nd Cir. 1972)(noting the absence of any legislative or administrative interpretation of the term "significant" as it relates to "major federal action" under 42 U.S.C. § 4332(2)(c) (1982)).

76. "The adequacy of an agency's response to significant new information is a point on which authority is scarce, and the question will assume ever greater importance as the life cycle of projects requiring NEPA compliance lengthen." *Warm Springs Dam*, 621 F.2d 1017, 1027 (9th Cir. 1980)(Kennedy, J., concurring). *See also* Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d 1011, 1037 (2d. Cir. 1983), wherein the court stated "we have had no prior occasion to interpret these guidelines with respect to where lies the responsibility for a determination that new information is so 'significant' as to mandate an SEIS." (The Court of Appeals affirmed a district court order that the Army Corps of Engineers prepare an SEIS with regard to fishery issues: and it reversed the district court's order that an SEIS be prepared with regard to non-fishery issues, such as costs and alternatives.)

77. 745 F.2d at 418; 578 F. Supp. at 1360. *See also* 745 F.2d at 430 (Cudahy, J., dissenting)(*citing Warm Springs Dam*, 621 F.2d at 1023-26). *See also* Massachusetts v. Watt, 716 F.2d 946, 948-49 (1st Cir. 1983); Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d at 1034-37; Society for Animal Rights, Inc. v. Schlesinger, 512 F.2d 915, 917-18 (D.C. Cir. 1975).

duty to supplement an EIS without continuing to monitor sources of new and relevant information."[78]

The Seventh Circuit held that the new information must provide a seriously different picture of the environmental consequences of the federal action before an SEIS must be prepared.[79] They recognized that the duties imposed under NEPA are "essentially procedural" and include a weighing of the substantive goals of NEPA.[80]

Yet, while acknowledging the procedural aspects of NEPA, the Court of Appeals has tried to give substance to the CEQ regulation involved.[81] The majority attempts to define "significant" by using the phrase "seriously different picture." It succeeds in substituting its phrase for the CEQ term, yet it never tries to give meaning to the phrase "seriously different picture." Therefore, the Seventh Circuit's attempt to clarify the regulation suffers from the same problem of vagueness as the regulation itself.[82] The majority does not establish guidelines that an agency may use for future projects, but rather, replaces one uncertain term with an equally ambigious phrase.[83]

There is the possibility that, under the majority's standard, a piece of information may not be considered "serious," yet when considered with other "non-serious" information, the aggregate may reach the seriously different picture standard. However, the majority does not explain what the necessary accumulation of information would be in this situation. The Seventh Circuit disposes of this issue quickly in a footnote by attempting to use power consumption forecasts as a

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78. 745 F.2d at 431 (Cudahy, J., dissenting).

79. *See supra* notes 51-62 and accompanying text.

80. 745 F.2d at 416, *citing* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

81. 40 C.F.R. § 1502.9(c)(1)(ii) (1984).

82. In general, the language of NEPA has been seen as "woefully ambigious." Voight, H. *The National Environmental Policy Act and the Independent Regulatory Agency*, 5 Nat. Resources Law. 13 (1972). Specifically, the term "significant", as it relates to § 102(2)(c) of NEPA has been described as "amorphous." Hanley v. Kleindienst, 471 F.2d at 830.

83. At best, the majority states in the present case what is *not* information that presents a seriously different picture. *See generally* 745 F.2d at 418-24.

comparison.[84] This is a weak argument since energy consumption forecasts can be developed through the use of relatively stable information (e.g. peak demand statistics).[85] The case at hand, however, presents scientific data which the Navy admitted was neither fully explored nor fully understood at the time of the 1977 EIS.[86] The dissent also questions the "quality" of new information which is needed to sound the alarm for an SEIS. [87]

Another problem connected with the seriously different picture definition enunciated in *Weinberger* is that the standard was set so high that it may hinder the goals of NEPA.[88] By setting the standard of significance for new information at such a high level and requiring the reviewing court to look at the substance of the new information, the majority's ruling may have the practical effect of reducing the number of SEIS's that are prepared.[89] By requiring that the significance of new information be "serious," the Seventh Circuit is limiting the number of instances that an agency's information will reach the necessary level to require an SEIS.[90] This would

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84. *Id.* at 418-19 n.6. The majority relied on Friends of the River v. Federal Energy Regulatory Comm'n., 720 F.2d 93 (D.C. Cir. 1983), which involved the issuance of a license for the construction of a hydroelectric plant. While it is true that *Friends of the River* held that it was not necessary to issue an SEIS every time new forecasts were released, it also stated that a reasonableness standard governs the preparation of an SEIS. 720 F.2d at 109.

85. 720 F.2d at 96 n.3, 98-99 nn.6 & 7.

86. *Id.*

87. "Especially when the new information is a steady trickle of scientific studies of uncertain validity and import, it would be virtually impossible to identify a moment at which new information becomes 'significant' enough to require a supplemental EIS." 745 F.2d at 432 (Cudahy, J., dissenting).

88. *See supra* notes 20-22 and accompanying text.

89. *See, e.g.*, the Second Circuit's analysis of significance in relation to the initial preparation of an EIS. "Since an agency in making a threshold determination as to the 'significance' of an action, is called upon to review in a general fashion the same factors that would be studied in depth for preparation of a detailed environmental impact statement, § 102(2)(B) requires that some rudimentary procedures be designed to assure a fair and informed preliminary decision. Otherwise the agency, lacking essential information, might frustrate the purpose of NEPA by a threshold determination that an impact statement is unnecessary." Hanley v. Kleindienst, 741 F.2d at 835. *See supra* note 47 and accompanying text.

90. The dissent felt that the "majority's approach. . .unduly restricts NEPA in a situation where the government acts in the face of uncertain potential environmental

eliminate consideration of any information that, while it may raise questions that a rational person would wish to further investigate, does not present a picture serious enough to warrant further consideration under the Seventh Circuit's standard.[91] This may lead to the ignoring of potentially valuable information.[92]

The problem which arises from the majority's standard is that, by waiting for either (1) information to accumulate to the requisite seriously different picture level or (2) information itself that presents a seriously different picture, it may be too late for any necessary corrective action. The problems that might be encountered at this point may be considerably more harmful and costly than the costs associated with preparing an SEIS in the early stages of a project.[93] Minimization of these potential problems by giving adequate consideration to the environmental concerns early on in a project is one of the policies established under NEPA.[94]

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consequences." 745 F.2d at 429 (Cudahy, J., dissenting).

91. "It is not readily conceivable that Congress meant to allow agencies to avoid this central requirement [the use of formalized procedures for the preparation of impact statements] by reading 'significant' to mean only 'important,' 'momentous,' or the like. One of the purposes of the impact statement was to insure that the relevant environmental data are before the agency and considered by it. . ." Hanley v. Kleindienst, 471 F.2d at 837 (Friendly, J., dissenting).

92. "There has been increasing recognition that man and all other life on this earth may be significantly affected by actions which on the surface appear insignificant." Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1322 (8th Cir. 1974)(affirming district court order instructing the U.S. Forest Service to prepare an EIS with regard to the cutting and selling of timber).

93.

> The Love Canal disaster developed over several decades, as the impact of leaching chemicals is uncertain and slow in developing. The visible effects are limited, and some may be attributed to other causes. When today's uninformed visitor to the Love Canal neighborhood feels a chill, it is from the sight of abandoned homes, with boarded up windows and doors and overgrown yards, all surrounded by a high chain-link fence. What the visitor sees are signs of the reactions to things that lie essentially hidden, detectable only by special procedures. Chemicals are present under the ground, in the yards and houses, and in the air, in people's bodies; but Love Canal is a conceptual event, for the physical manifestations can be readily overlooked, ignored, denied, and minimized.

A. Levine, *Love Canal: Science, Politics, and People* 1 (1982).

94. *See supra* note 20. "The 'detailed statement' it [NEPA] requires is the out-

It would appear then that the burden on the reviewing court is not eased by the majority's standard for new information. The courts are now required to possess greater knowledge concerning any relevant environmental and/or scientific matters than they were required to in the past. However, courts are not equipped to, nor should they[95] become experts in the areas of science and the environment so that they may be in a position to decide if information is serious enough to warrant an SEIS.[96] Rather, remembering that NEPA is "essentially procedural,"[97] courts should ensure that all relevant information is considered, and a reasoned determination is made.[98]

The better method for determining the significance of new information, and at the same time limiting the reviewing court's involvement to a review of the procedure used, is that adopted by the district court, which was based on the *Warm Springs Dam* analysis.[99] This method of review, based on the

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ward sign that environmental values and consequences have been considered. . ." Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).

95. "The district court does not sit as a super-agency empowered to substitute its scientific expertise. . .for the evidence received and considered by the agency which prepared the EIS." Sierra Club v. United States Army Corps of Eng'rs., 701 F.2d at 1029 (citing Environmental Defense Fund v. Froehike, 368 F. Supp. 231, 240 (W.D. Mo. 1973) *aff'd*, 497 F.2d 1340 (8th Cir. 1974).

96. "Courts, with their overloaded dockets and limited expertise in environmental matters, should be the last resort in the process to achieve NEPA compliance, not the only one." Note, *Environmental Impact Statements: Instruments for Environmental Protection or Endless Litigation?*, 11 Fordham Urb. L.J. 527, 566 (1983)(advocating that the powers of CEQ be broadened to include review of agency actions).

97. *See supra*, note 78 and accompanying text.

98. *Warm Springs Dam*, 621 F.2d at 1024. *See also* Massachusetts v. Watt, 716 F.2d at 948 (lawfulness of the Department of the Interior's decison not to supplement an EIS reviewed in light of reasonableness of the decision); Friends of the River v. FERC, 720 F.2d at 109; Sierra Club v. U.S. Army Corps. of Eng'rs, 701 F.2d at 1034 ("Enforcement of NEPA requires that the responsible agencies be compelled to prepare a new SEIS. . .based on adequately compiled information, analyzed in a reasonable fashion.") "The information generated in fulfillment of NEPA's 'procedural' duties may affect substantive decision making in two other ways by providing grounds for enforcing the substantive duties of other environmental statutes and by providing information and time." Murchison, *Does NEPA Matter? -An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. Rich. L. Rev. 557, 614 (1984).

99. *See supra* note 49 and accompanying text. Judge Cudahy in his dissent also

reasonableness of the agency's decision, is supported by other circuits[100] and entails a four-part test to be employed by a court in deciding the significance of new information.[101]

The first question to be asked is whether the information is new.[102] While this may seem to be obvious, the district court held that it must be more than just a confirmation of "earlier-known information."[103] Therefore, it should be information that was not known at the time of the EIS and should be able to add to the discussion of the environmental consequences.[104]

Next is the question of whether the information is meritorious; that is, have experts in the particular field assessed it as valid and important or worthy of further inquiry.[105] This prong of the test lends considerable credence to the information in terms of its significance. If an expert in that field has recognized this information as being noteworthy and/or as being valid, it would seem that an agency should at least consider its possible effects on the project. Recognition by an expert could be a signal to an agency that the information is worthy of further investigation and this signal could aid in the agency's monitoring of new information.[106]

The third part of the test is whether the information is accessible.[107] The information should be published or some-

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agreed that this was the correct approach to this problem. 745 F.2d at 429-31 (Cudahy, J., dissenting).

100. *See supra* note 35.

101. *See supra* note 49 and accompanying text.

102. 578 F. Supp. at 1361.

103. *Id.*

104. The Court of Appeals for the Ninth Circuit held that an SEIS "is not essential every time new information comes to light after an EIS is prepared. Were we to hold otherwise, the threshold decison not to supplement an EIS would become as burdensome as preparing the supplemental EIS itself." California v. Watt, 683 F.2d 1253, 1268 (9th Cir. 1982) (affirming district court's decision that an SEIS was not required to incorporate the latest estimates of oil and gas reserve in the outer continential shelf off the coast of California).

105. 578 F. Supp. at 1361.

106. As the majority stated, it is not enough that the information be new. Indeed, an agency need not review all new information that comes to light. 745 F.2d at 418.

107. 578 F. Supp. at 1361.

how made available to the agency. If it has been published, then it is probable that the information has been subject to review by peers in that field. Publication can lend credence to the information (if the publication has been widely accepted) and possibly open doors to additional new information. This additional new information may either criticize or support the information in question. This would lead to greater input into the agency decison resulting in a more informed decision, which is one of the goals of NEPA.[108]

The district court's fourth test is to decide if the new information is relevant to the environmental concerns about the proposed action and "[w]hether it is the kind of information a rational decision-maker would want to consider" in deciding to proceed or not with the project.[109] Even if the information is not conclusive, if it raises enough questions that a rational person would like to inquire further into the issues involved, then it would seem that it should be considered. This is a more realistic, sensible approach to the problem, as opposed to deciding the seriousness of the information.

Finally, the *Warm Springs Dam* analysis offered another factor that should be added to the test used by the district court. The reviewing court should look at the degree to which the agency supported its decision to supplement or not, with a statement of explanation or additional data.[110] The inclusion of this factor would help promote the NEPA policies of (1) showing consideration for the environmental concerns involved; (2) informing the public; and (3) providing a record for judicial review.[111]

V. Conclusion

The question of how significant new information is in relation to a federal project is one that is open to many interpretations. Possibly, one interpretation for each person that reviews the information. In light of this, it seems rather harsh

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108. *See supra* notes 20-22 and accompanying text.
109. 578 F. Supp. at 1361.
110. *Warm Springs Dam*, 621 F.2d at 1024.
111. *See supra* notes 20-22 and accompanying text.decision by the agency.

to hold an agency to the "seriously different picture" standard set by the Seventh Circuit. Rather, the four-part test that evaluates the consideration given to the information by the agency, as discussed by the district court, would seem to be the better standard. Indeed, it is based on a rational scrutiny of the evidence and should lead to a more careful and reasoned decision by the agency.

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