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Judges' Bench Memorandum: Seventh Annual Pace National Environmental Moot Court Competition

Editorial Staff of the Pace Environmental Law Review
Pace University School of Law

JUDGES' BENCH MEMORANDUM*

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION	)	
	)	
v.	)	
	)	
U.S. DEPARTMENT OF THE INTERIOR	)	
	)	
and	)	
	)	Civ. No. 94-214
SUNPEACE	)	
	)	
v.	)	
	)	
U.S. DEPARTMENT OF THE INTERIOR	)	
	)	

QUESTIONS PRESENTED

1. May New Union assess civil penalties for CRACT's violations of the NUCAA occurring from September 30, 1989, through April 27, 1993, despite the United States' claim that CRACT has sovereign immunity?
2. Is CRACT subject to judicial review for NEPA compliance of the Environmental Impact Statement CRACT has prepared, despite its assertion that it has elected to follow NEPA voluntarily in this case rather than by statutory requirement?

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* This brief has been reprinted in its original form. No revisions have been made by the editorial staff of the Pace Environmental Law Review.

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THE DECISION BELOW

I. Administrative Civil Penalties

CRACT admits that if it were not a government facility, it would be liable for the penalties assessed by NUDEQ. However, CRACT asserts, in Clean Air Act section 118 Congress has not waived the federal government's sovereign immunity to punitive sanctions such as the $300,000 assessed here. Citing *Hancock v. Train,* 6 Envtl. L. Rep. (Envtl. L. Inst.) 20555 (U.S. 1976), CRACT asserts that waivers of sovereign immunity must be "clear and unambiguous." Citing to the Supreme Court's construction of the sovereign immunity waivers in the Clean Water Act and the Resource Conservation and Recovery Act (RCRA) in *United States Department of Energy v. Ohio,* 22 Envtl. L. Rep. (Envtl. L. Inst.) 20804 (1992), CRACT asserts that the Clean Air Act waiver does not reach punitive sanctions.

While it is clear that the Supreme Court found that the Clean Water Act and RCRA waivers are not sufficient, I nonetheless am persuaded by New Union's arguments, supported by Sunpeace as amicus, that sovereign immunity has been waived under the Clean Air Act. First, I note that federal agencies are "persons" under Clean Air Act section 302(e), and that they were not so defined under RCRA and the Clean Water Act at the time of the Supreme Court's 1992 decision. (Partially in response to the Supreme Court's 1992 decision, I note that Congress has since amended RCRA. Public Law 102-386, Oct. 6, 1992.) In this light, Clean Air Act section 118 must be read in conjunction with the citizen suit section, section 304. Second, I find the legislative history far clearer in the Clean Air Act than in the Clean Water Act or RCRA as those statutes were before the Court in 1992. Third, while the Clean Water Act required that civil penalties be "arising under Federal law or imposed by a State or local court to enforce an order or the process of such court," 33 U.S.C. 1323(a), I find no such limit in Clean Air Act section 118.

Consequently, while I acknowledge that the waiver of sovereign immunity must be "clear and unambiguous," and that thus doubts of statutory construction must be resolved in

CRACT's favor, in this case I conclude that New Union and Sunpeace have met this burden of construction and that CRACT is liable for the penalty assessed.

II. Adequacy of the Environmental Impact Statement

As Sunpeace identified in its comments on the draft EIS, and asserts again here, an EIS must analyze the "no action" alternative. CRACT's defense, which New Union endorses as an amicus, is that this is not an ordinary EIS. CRACT asserts that it promised to prepare an EIS voluntarily, rather than because CRACT was legally required to do so. CRACT points out that in June 1993 it published a FONSI, which Sunpeace concedes it did not timely challenge, finding that any operation of ICTE that complies with NUCAA standards has no significant impact on the human environment. Thus, CRACT says, neither of the two alternatives it identified nor the "no action" alternative suggested by Sunpeace meet the criteria for requiring an EIS. Consequently, CRACT argues, it satisfied NEPA requirements when it issued the June 1993 FONSI, and all work since then has been above and beyond the requirements of NEPA and thus not subject to judicial review.

Sunpeace answers that CRACT cannot have it both ways. CRACT cannot promise to undertake to prepare something it will call an "Environmental Impact Statement on the ICTE program" without also implicitly promising to make that EIS conform to NEPA. Basically, Sunpeace argues, if CRACT is to hold the document out as an EIS, it must meet all EIS requirements.

CRACT's and New Union's response is that CRACT's Federal Register announcement never promised NEPA compliance and to read that into the promise is circular reasoning. All CRACT promised, it is asserted, is to prepare an EIS, not to subject that EIS to judicial scrutiny.

Finally, and somewhat more troubling to me, CRACT and New Union point out that NEPA does not itself create a right of judicial review, and so judicial review of EISs is under the Administrative Procedure Act. Here, they say, "the

APA does not reach a claim that boils down to false advertising in describing a federal document rather than an underlying violation of a statute such as NEPA." The bottom line, they assert, is that this court lacks subject matter jurisdiction to hear Sunpeace's claim.

I find CRACT's and New Union's arguments just too creative for this court. If CRACT undertakes to prepare an EIS, I am going to hold it to the normal standards of judicial review for an EIS, and I conclude that Sunpeace has the better arguments here.

Orders consistent with this decision are issued herewith.

/s/
R. N. Remus
United States District Judge

STATEMENT OF THE CASE

The U.S. Department of the Interior (DOI) owns and operates the Coal Research Activity (CRACT) in the state of New Union. The facility is a research plant evaluating new methods and techniques of mining, burning, transporting, and packaging coal. (R.1). New Union is a major coal producing state and CRACT, which employs 800 persons, is the principal employer in Cathertown. (R.1).

In April 1985, CRACT began its "Improved Coal Transport Experiment" (ICTE), which tested packing more coal into containers by heating the coal to 400 degrees Fahrenheit and then shaking the coal, creating small granules and allowing denser packing of the coal. This allowed the coal to be economically shipped by truck. (R.3).

This process caused escape of large quantities of particulate matter (PM). On September 30, 1989, CRACT was cited by New Union's Department of Environmental Quality (NUDEQ) for violations of its PM standards under the New Union Clean Air Act (NUCAA) and its SIP authority. The Administrator notified CRACT of its violations.

The facts in this paragraph are stipulated to by both parties. Nothing materially changed from September 30, 1989, until April 27, 1993, when NUDEQ again inspected the facil-

ity and found the identical process continuing, at which time the inspectors assessed $300,000 in civil penalties. (R.3). CRACT contacted NUDEQ claiming sovereign immunity from such penalties but acknowledged its duty to comply with NUCAA substantively. CRACT assured NUDEQ it would come into compliance with NUCAA by building a $3,000,000 hangar and baghouse around ICTE. (R.3).

Sunpeace, a non-profit citizens group, publicly criticized the plan and CRACT generally, demanding CRACT be closed. (R.3). CRACT responded on June 23, 1993 by publishing notice in the Federal Register stating CRACT would prepare an Environmental Impact Statement (EIS) on the ICTE program even though the hangar and baghouse will not significantly affect the human environment. The hangar and baghouse were deferred until the decision on the EIS and the ICTE program was reduced to conform with NUCAA in the interim. A Finding of No Significance (FONSI) accompanied the document. (R.4).

The DEIS was published in December 1993 listing two alternatives, one with high volume operations with a hangar and baghouse, and the other at reduced volume and no hangar and baghouse. Both would comply with NUCAA. (R.4). Sunpeace submitted comments stating a "no action" alternative, i.e. the cessation of ICTE, was required. CRACT responded that inclusion of this alternative was not required by "this EIS". A Final EIS has been published and a decision opting for the high volume operation with the hangar and baghouse has been reached. (R.4).

Sunpeace timely filed suit in this court under the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA), claiming that the EIS is inadequate and properly basing Sunpeace's standing on the interests of its members who live in the vicinity of CRACT and are affected by its impacts on the environment. Soon thereafter, New Union filed suit against CRACT to enforce and collect its $300,000 civil penalty. The two cases have been consolidated for decision, and by consent of the parties Sunpeace and New Union are amici on the suits to which they are not plaintiff.

DISCUSSION

I. MAY NEW UNION ASSESS CIVIL PENALTIES FOR CRACT'S VIOLATIONS OF THE NUCAA OCCURRING FROM SEPTEMBER 30, 1989, THROUGH APRIL 27, 1993, DESPITE THE UNITED STATES' CLAIM THAT CRACT HAS SOVEREIGN IMMUNITY?

[New Union and, as amicus, Sunpeace answer in the affirmative, and the United States, on behalf of the DOI's CRACT, answers in the negative.]

A. The Background of the Clean Air Act and the Authority of States to Enforce Regulations.

The Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. II 1990), was enacted to protect and improve the air quality of the nation, and was one of the first environmental statutes created by Congress. It was initially enacted in 1963 and significantly amended in 1970, 1977 and again in 1990. As much as any other environmental statute, the Clean Air Act envisioned a significant role for the states in controlling and preventing air pollution both within and across their borders. *see* 42 U.S.C. §§ 7401(c), 7402(a), 7407(a) (1988 & Supp. II 1990).

Each state is authorized under the Clean Air Act to adopt an implementation plan (SIP) to provide for the "implementation, maintenance, and enforcement" of the national primary and secondary ambient air quality standards. 42 U.S.C. § 7410 (1988 & Supp. II 1990). In order to enforce such standards, states are given the authority to assess and collect penalties for the noncompliance with an authorized program. 42 U.S.C. § 7420 (1988 & Supp. II 1990). This authority extends to the "person who owns or operates" any stationary source not in compliance. *Id.* A "person" under the Clean Air Act is defined to include "any agency, department, or instrumentality of the United States." 42 U.S.C. § 7602(e) (1988 & Supp. II 1990). However, section 7420 only applies to any noncompliance by a "major stationary source" (emission of more than 100 tons per year of any pollutant), or to any other stationary source in violation of specific sections of the Act.

For the State of New Union to enforce under section 7420, argument would have to be made that CRACT's noncompliance with the New Union particulate matter standards is in violation of one of these specific sections: new source performance standards, 42 U.S.C. § 7411; hazardous air pollutants, 42 U.S.C. § 7412; sources causing significant deterioration, 42 U.S.C. § 7477; standard established under emergency powers, 42 U.S.C. § 7603; or any requirement under the subchapters covering acid deposition, 42 U.S.C. §§ 7651-7651o, permitting, 42 U.S.C. §§ 7661-7661f, or ozone protection, 42 U.S.C. §§ 7671-7671q.

Alternative enforcement for the State of New Union may be found in the citizen suit provision of the Act. This section provides for the commencement of a suit by any person (a state is also defined as a person under the Act, 42 U.S.C. § 7602(e) (1988 & Supp. II 1990)) and the imposition of civil penalties. 42 U.S.C. § 7604 (1988 & Supp. II 1990). The only prerequisite applicable to the case at bar is the necessity of notification prior to commencement of the action. This notification of the violation must be made more than sixty days prior to commencement and must be given to the Administrator (of the EPA), to the state in which the violation occurs, *and* to the violator. 42 U.S.C. § 7604(b) (1988 & Supp. II 1990). As to notification in this case of all applicable parties, i.e. the Administrator, the issue was not raised below by the Department of the Interior and is not preserved on appeal.

B. Does Section 118 of the Clean Air Act Waive Sovereign Immunity for a Federal Facility?

1. The language of the statute.

The federal government, its agencies and related appendages, enjoy immunity from state claims and actions unless this protection is specifically relinquished by statute. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). It is presumed that Congress has not waived this privilege unless the intent of Congress is clear and unambiguous. *Hancock v. Train*, 426 U.S. 167, 178-79 (1976). In this case the question

of a waiver of sovereign immunity arises in connection with section 7418 of the Clean Air Act. That section reads:

> (a) Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to , and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

42 U.S.C. § 7418(a) (1988 & Supp. II 1990).

The precise clarity and ambiguity associated with section 118 of the Clean Air Act should be the main point of any argument as to the unequivocal intent of Congress. Initially, the language of the statute should be exclusively assessed to determine its meaning. If the language is unambiguous, the clear meaning of the statute is applied and "judicial inquiry is complete." *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). This language is ordinarily conclusive, and only in the most unusual cases where the intent of Con-

gress is so obviously opposite to the literal interpretation of the statute will further study of the legislative history be suffered. *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989).

All parties may argue for the acceptance of the statutory language as is stands, the key portions being the meaning of "process and sanction" and the applicability of the statute "notwithstanding any immunity". 42 U.S.C. § 7418(a). The question arises as to whether "sanction" includes punitive penalties, as found in this case, as well as coercive penalties. Sanction, in its ordinary meaning, is a "penalty or other mechanism of enforcement used to provide incentives for obedience with the law" and "part of a law which is designed to secure enforcement by imposing a penalty for its violation." Black's Law Dictionary 1341 (6th ed. 1990).

Also considered must be the pairing of the terms "process and sanction". Is the conjunctive such that there must be some form of "process" prior to the implementation of a "sanction"? If so, discussion should be made as to the nature of such a process, whether the process New Union has followed here is sufficient or does the term refer to a type of formal judicial process.

Finally, the intent of Congress in incorporating the phrase "notwithstanding any immunity" must be discussed. If the sanctions mentioned previously are applicable to the case here, this phrase would seem to confirm the waiver of sovereign immunity. If, however, question remains as to the applicability of punitive damages as assessed here, does this clause stand on its own as a waiver of CRACT's sovereign immunity?

2. Previous court decisions regarding waiver of sovereign immunity in the Clean Air Act. *Hancock v. Train*, et al.

The primary source cited for authority on the waiver of sovereign immunity in section 118 of the Clean Air Act is *Hancock v. Train*, 426 U.S. 167 (1976). The debate does not end with the Court's interpretation of the waiver clause in

Hancock, but begins here, as the 1977 amendments changing the wording of section 118 were passed after, and some will argue as a result of, the *Hancock* decision. Under the 1970 version of the Clean Air Act, section 118 read, "Each department, agency, and instrumentality . . . shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." *Hancock* at 171-72, quoting 42 U.S.C. § 1857f. The case revolved around Kentucky's requirement that federal facilities secure a state operating permit if the facility released any air emissions. The various agencies' refusal to do so precipitated Kentucky's suit to force compliance.

The Court in determining the clarity of a possible waiver of sovereign immunity in section 118 focused on the omissions from the language of the statute. Specifically, the Court noted that though section 118 required federal facilities to comply with state regulations, it failed to specify that the facilities should comply with *all* requirements. *Hancock* at 182. In the absence of this all-encompassing language the Court stated that the requirement of a state permit as applied to a federal facility would subject that facility to state control, or a waiver of sovereign immunity, and such intention of Congress was not unambiguously stated.

Few courts have addressed the waiver in section 118 since the enactment of the 1977 amendments. In the case most nearly on point to the instant case, a district court in Alabama found that sovereign immunity had been waived in section 118 and civil penalties could be assessed against the federal facility. *Alabama ex rel. Graddick v. Veterans Admin.*, 648 F. Supp. 1208 (M.D. Ala. 1986). The court in *Alabama* found that the statute clearly provided for federal facilities to submit to "all state regulations" and to subject themselves to "all state sanctions." *Id.* at 1211.

In *United States v. South Coast Air Quality Management Dist.*, 748 F. Supp. 732 (C.D. Cal. 1990), the court found a waiver of sovereign immunity in section 118 which extended to the assessment of certain state imposed fees. Though the question of availability of civil penalties was adjourned to a

later date, the court in determining the waiver of sovereign immunity noted from the language of the statute that "Congress intended a waiver of all immunity absent any exclusions." *Id.* at 738.

3. Court decisions in waiver of sovereign immunity in other statutes. *United States Dep't of Energy v. Ohio*, et al.

The clarity of waiver provisions in other statutes as decided by various courts may be instructive as to the interpretation given to the Clean Air Act provisions here. The prime case, and the one heavily relied upon by the appellant in the court below, is *United States Dep't of Energy v. Ohio*, 112 S.Ct. 1627 (1992). In *Dep't of Energy v. Ohio* the Supreme Court addressed the issues of sovereign immunity waivers within both the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). Ohio, under both statutes, attempted to assess civil penalties for past violations of the CWA and RCRA by a federal facility operated by the Department of Energy.

The terminology of the applicable federal facilities section of the CWA was nearly identical to section 118 of the Clean Air Act at issue here. The only significant change was the addition of the following phrase in the CWA: "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." 33 U.S.C. § 1323(a) (1988).

The Court first distinguished between coercive and punitive fines, defining coercive as those "fines imposed to induce [federal facilities] to comply with injunctions or other judicial orders designed to modify behavior prospectively", and punitive as those fines "imposed to punish past violations of those statutes or state laws supplanting them." *Dep't of Energy v. Ohio* at 1632. The term "sanction" as used in the CWA § 1323 was identified by the Court to incorporate civil penalties. The question raised by the Court was whether this term necessarily included punitive fines, the sort at issue in *Dep't of Energy v. Ohio* as well as the case at bar. The Court found initially

that the term "sanction" could incorporate *both* coercive and punitive fines and proceeded to look at the context of its usage to determine if the intent of Congress could be clarified. *Id.* at 1636-37. The Court noted that sanction was paired with the term "process" in both instances of its usage in the CWA section, and that "process" normally referred to an adjudicatory procedure. Although "substantive" requirements was also included in this section, which would apply to statutory requirements such as the permit process at issue and its penalties for past violations, the "sanctions" had been teamed with "process" which the Court deemed to be "forward-looking orders" enforced by coercive fines. *Id.* at 1637. The Court concluded that Congress' intent was to use the term sanction in its coercive sense and, thus, there was no waiver of sovereign immunity as it applied to punitive penalties of the sort Ohio wished to assess in that case.

In reviewing the language of RCRA's federal facilities section, 42 U.S.C. § 6961 (1988), the Court again found that only coercive, and not punitive, fines were included in the waiver created in the statute. In addition to analysis similar to its reasoning regarding the CWA statute, the Court determined that RCRA's language, "waiving immunity 'from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief,' " specifically included only coercive sanctions, and the absence of specific mention of punitive sanctions excluded them from the waiver. *Dep't of Energy v. Ohio* at 1639-40.

Subsequent to the decision in *Dep't of Energy v. Ohio*, Congress amended RCRA to incorporate a waiver of sovereign immunity for both coercive and punitive type sanctions. The amended statute reads:

> [t]he Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are *punitive or coercive in nature* . . . The United States hereby expressly waives any immunity otherwise applicable . . . with respect to any such administrative or procedural requirement (including

> . . . any . . . civil or administrative fine referred to in the preceding sentence . . .).

42 U.S.C. § 6961 (1988 & Supp. IV 1992) (emphasis added).

Argument could be made by the appellant that Congress knows how to clearly waive sovereign immunity as to punitive fines when it sees the need, as it has done in the RCRA amendments, and that it has not done so within the Clean Air Act. Appellant may also suggest that though the Court ruled that the CWA, whose language is nearly identical to the CAA, also failed to waive sovereign immunity, Congress took no action to amend the CAA thereby implying that the Court was correctly interpreted Congress' intent and section 1323 of the CWA does not waive sovereign immunity for punitive fines. The appellee must distinguish between the CWA and RCRA statutes and the Clean Air Act or, in the alternative, must find grounds to dispute the Court's findings in regards to the two statutes.

C. Does Section 304 of the Clean Air Act Waive Sovereign Immunity for a Federal Facility?

As with section 118, if the Citizen's Suit section of the Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. V 1993), is to independently waive sovereign immunity as it relates to the imposition by the state of punitive fines, it must do so clearly and unambiguously. *Hancock v. Train*, 426 U.S. 167, 178-79 (1976). Under section 304, any person (including a State as defined in section 302) may bring a civil action "against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . . alleged to have violated . . . an emission standard or limitation" 42 U.S.C. § 7604(a) (1988 & Supp. V 1993). The section further defines "emission standard or limitation" as "any requirement to obtain a permit as a condition of operation." *Id.* § 7604(f)(4). The only mention of penalties authorizes the district court to "apply any appropriate civil penalties." *Id.* § 7604(a).

Does the language of section 304 clearly establish a waiver of sovereign immunity regarding punitive penalties? If the section could be read to include either coercive or puni-

tive penalties, or both, the Court's interpretation would seem to indicate that the meaning is not unambiguous. If the section is not unambiguous standing alone, could it be read in conjunction with section 118 to validate a waiver? Section 304(e) in stipulating other rights available states, "[n]othing in this section or in any other law of the United States shall be construed to prohibit . . . any State . . . from . . . obtaining any judicial remedy or sanction . . . against the United States, any department, agency, or instrumentality . . . . For provisions requiring compliance by the United States . . . see section 7418 . . . ." *Id.* § 7604(e). This refers the party back to section 118 if compliance is sought by the State, indicating the waiver must be contained either in section 118 alone or in a conjunctive reading between the two sections.

D. Is it the Intent of Congress to Waive Sovereign Immunity Under the Clean Air Act?

1. The use of legislative history to determine Congressional intent.

If the statute is clear and unambiguous on its face the court's inquiry is at an end. The question arises as to the necessity or propriety of further examination by the court if the statute is ambiguous or unclear on its face. The appellant will argue that Congress' intent was at best ambiguous regarding the waiver of sovereign immunity in the CAA, and that the inquiry should end with this finding. The appellee will argue that the waiver is clear and unambiguous, as is further evidenced by the legislative history of the act. If the court should find that the statute does not sufficiently evince the intent of Congress, the appellee will argue for the use of the legislative history as a clear indication of its intent.

The Court has both utilized and denied at various times the use of legislative history to determine the unequivocal waiver of sovereign immunity clauses. In *Hancock v. Train* the Court examined the legislative history of section 118 of the CAA to aid in its determination as to the exact meaning Congress wished to impart with its phraseology. *Hancock v. Train*, 426 U.S. 167, 188-90 (1976).

In contrast to *Hancock* the Court in *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011 (1992), in determining if certain sections of the Bankruptcy Code waived sovereign immunity as it applied to a demand by the bankruptcy trustee for return of funds held by the Internal Revenue Service, refused to consider the legislative history of these Bankruptcy Code sections. The Court was able to read several possible meanings into the pertinent sections, which would have precluded any effective waiver of immunity and barred recovery by the trustee. The various possible interpretations of the statute, in the Court's eyes, clearly meant the statute was not "unambiguous" on this point. And where the statute was not unambiguous on its face, "legislative history has no bearing on the ambiguity point. . . . [An] 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." *Nordic Village* at 1016. Under this reasoning, a statute is either ambiguous or unambiguous on its face, and no need is found to explore the legislative history to supply an otherwise unclear Congressional intent.

2. Legislative history of section 118.

Section 118 of the Clean Air Act as originally passed and amended in 1970 called for compliance by federal facilities with all "Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. 15 (1970). No other reference was made as to the duties of federal facilities to comply with state requirements, and no direct reference was made as to a waiver of sovereign immunity by the federal government.

It was this language which was present before the Court when it determined in *Hancock v. Train* that section 118 did not incorporate a waiver of sovereign immunity regarding the necessity of a federal facility to secure a state issued permit. The Act was again amended immediately subsequent to the *Hancock* decision. Section 118 of the Act was amended in

1977 to include language generally identical to the language of today's statute. In determining the appropriate language for section 118, Congressional committees noted several intentions of the new statute. First, committees from both houses noted the intention of Congress as it related to several court decisions. In a Senate committee report, the committee remarked that one federal court had correctly construed Congressional intent in its decision of *Alabama v. Seeber*, 502 F.2d 1238 (1974). S. Rep. No. 127, 95th Cong., 1st Sess. 18 (1977). In that case Alabama sought injunctive and declaratory relief to require a federal facility to obtain a permit for operation. The court found that section 118 authorized suits against federal facilities for violations of permit requirements. *Seeber*, 502 F.2d at 1248. Though finding the Act waived sovereign immunity in this case, the court did not mention punitive sanctions specifically.

The House, in reports from committee, referred to *Hancock v. Train* and its intention of overriding the Court's decision in that case. "The new section 113 of the bill is intended to overturn the *Hancock* case and to express, with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State, and local requirements - procedural, substantive, or otherwise - process, and sanctions." H.R. Rep. No. 294, 95th Cong., 1st Sess. 199 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1278. The committee also expressed its belief regarding that federal facilities would be subject to certain types of sanctions. "The amendment is also intended to resolve any question about the sanctions to which noncomplying Federal agencies, facilities . . . may be subject. . . . This means that Federal facilities and agencies may be subject to injunctive relief . . . to civil or criminal penalties, and to delayed compliance penalties." H.R. Rep. No. 294, 95th Cong., 1st Sess. 200 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1279.

Appellees will argue that the congressional reports make it clear that Congress intended there to be a waiver of sovereign immunity even for punitive fines. If there is any question from the language of the statute itself, these reports illuminate the true intent. The appellant will argue that

these reports made by committee are not reflected in the final bill. If the language was intended to produce "with sufficient clarity" the waiver of *all* sovereign immunity, the drafters would have expressly stated this, which was not done.

II. IS CRACT SUBJECT TO JUDICIAL REVIEW FOR NEPA COMPLIANCE OF THE ENVIRONMENTAL IMPACT STATEMENT CRACT HAS PREPARED, DESPITE ITS ASSERTION THAT IT HAS ELECTED TO FOLLOW NEPA VOLUNTARILY IN THIS CASE RATHER THAN BY STATUTORY REQUIREMENT?

[Sunpeace answers in the affirmative; The United States, on behalf of CRACT, and New Union, as amicus, answer in the negative.]

A. Is CRACT's Voluntary Preparation of an Environmental Impact Statement Reviewable?

1. Federal question jurisdiction

Federal courts are courts of limited jurisdiction. Federal courts may only adjudicate cases over which they have express authority to exercise subject matter jurisdiction. Persons seeking to invoke federal jurisdiction have the burden of proving at the outset that the court has authority to hear the case. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). In other words, the presumption is against finding jurisdiction. Consent to jurisdiction does not result in jurisdiction where it would not otherwise exist. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). The challenge to jurisdiction can be raised at any time by either party. *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804). A challenge to jurisdiction may be raised for the first time on appeal. *McCormick v. Sullivant*, 23 U.S. (10 Wheat) 192 (1825). Also, the court may at any time object to subject matter jurisdiction. *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908).

A federal court may only adjudicate a case if there exists both statutory and constitutional authority for federal jurisdiction. The United States Constitution provides for the jurisdiction of the federal courts in Article III. The language

specifically relevant to this case, which is now referred to as "federal question" jurisdiction, reads "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;" U.S. Const. art. III, § 2, cl. 1.

The leading case interpreting the scope of the Constitution's grant of authority is *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In this case the Supreme Court determined that because the Bank of the United States was created by federal law, any law suit initiated by the Bank would fall within federal jurisdiction. *Id.* at 828. Therefore, following *Osborn*, any case in which federal law forms an ingredient, whether or not the decision turns upon that federal law, comes within federal jurisdiction. Because the present case comes from a federal statute, federal courts have constitutional authority to exercise jurisdiction.

However, the constitution's broad description of judicial power reaching all cases "arising under" the laws of the United States has been narrowed by the federal judiciary seeking to limit the number of cases they must hear. The "federal question" jurisdictional statute declares that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. 1331 (1988). The language is unchanged from its enactment in 1875, 18 Stat. 470, ch. 137, except for the elimination of a jurisdictional amount in 1980. The scant legislative history accompanying the 1875 statute appears clear, "This bill gives precisely the power which the Constitution confers—nothing more, nothing less." 2 Cong. Rec. 4986-87 (1874) *quoted in* Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 Hastings L.J. 597, 602, (1987). Yet, decisional law consistently reads the statutory grant of authority more narrowly than the nearly identical language in the constitution.

The current rule to be gleaned from the cases interpreting the federal question jurisdictional statute is as follows: a

dispute "arises under" federal law if it is clear from within the four corners of the plaintiff's complaint that either the plaintiff's cause of action is founded in federal law or, if the complaint is founded in state law, a federal law capable of creating a cause of action itself, is itself a necessary ingredient of the plaintiff's claim. *Merrell Dow Pharmaceutical, Inc. v. Thompson*, 478 U.S. 804 (1986) (ruling that the federal law forming the federal ingredient must be capable of creating a cause of action); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) (stating that if the federal element exists only as a defense to the plaintiff's claim, then federal jurisdiction is lacking); *Gully v. First Nat. Bank*, 299 U.S. 109 (1936) (explaining that the federal element, to be essential must be of the nature that its interpretation or construction determines the outcome of the action); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (stating that when a law creates the cause of action in the case, the suit "arises under" that law); *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908) (establishing the well-pleaded complaint rule).

Application of this rule to the instant question squarely places the action within federal jurisdiction. However arguments opposing jurisdiction, which would likely be raised by New Union and the United States, should focus on the points raised in the preceding paragraphs. Sunpeace may include in its counter to these arguments an assertion of subject matter jurisdiction based on ancillary, or supplemental jurisdiction. 28 U.S.C. § 1367 (1988 & Supp. V 1993).

2. Supplemental jurisdiction

Supplemental jurisdiction, 28 U.S.C. § 1367 (1988 & Supp. V 1993), is essentially the codification of common law ancillary jurisdiction. Ancillary jurisdiction is the authority of federal court to hear claims that would not otherwise come within federal jurisdiction but are part of the same set of circumstances or "common nucleus of operative facts," from which the federal claim arises. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The constitutional authority for ancillary jurisdiction, and now supplemental jurisdiction, is based in the Article III grant of power to decide "cases" and

"controversies." U.S. Const. art. III, § 2, cl. 1; *see also*, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824) (stating Congress has the power to grant federal jurisdiction over non-federal claims arising from the same set of circumstances as the federal "ingredient").

In light of the authorization of supplemental jurisdiction, if New Union or the United States argue against federal jurisdiction over the question of CRACT's violation of the National Environmental Policy Act in it's EIS preparation, Sunpeace should argue that it arises out of the same set of facts as the Clean Air Act claim. The Clean Air Act claim is expressly authorized by the citizen suit provision of the Clean Air Act. 42 U.S.C. § 7604(a)(3) (Supp. V 1993). The NEPA claim arises out of the same set of facts, namely the ICTE program and hangar and baghouse construction. Therefore, the federal court should have jurisdiction to decide both the Clean Air Act claim and the NEPA claim together in the same action.

3. Jurisdiction under the Administrative Procedure Act

Section 701(b)(1) of the Administrative Procedure Act (APA) defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include [exceptions]. . . ." 5 U.S.C. § 701(b)(1) (1988). Section 701(a) excludes from judicial review "(1) [agency actions pursuant to] statutes [that] preclude judicial review; or (2) agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a) (1988). Thus, the APA applies to all agencies of the federal government except for those agencies expressly excluded in the APA. Judicial review is available in all instances except where the APA or the particular organic statute at issue excludes review, or where the agency action is committed to agency discretion.

a. Preclusion

New Union and the United States may argue that either of exceptions codified in APA section 701(a) apply to CRACT's environmental impact statement preparation. However, in doing so, face an uphill battle against a strong presumption in favor of review. *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402 (1971) (restricting the agency discretion exception to only those situations where the court finds no "law to apply"); *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967) (granting pre-enforcement review of rules enacted by the Food and Drug and Cosmetic Act); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the power of the federal judiciary to review the actions of the executive branch of the federal government).

The statutory preclusion exception declared in APA section 701(a)(1) is rarely allowed and language barring review completely is uncommon since this could deny due process to some claimants. In such a situation, when a party challenging agency action challenges the enabling act on constitutional grounds, the bar to review does not apply. *Johnson v. Robison*, 415 U.S. 361 (1974). Decisions upholding statutory preclusion have only applied it to challenges of agency action where the validity of the statute is not questioned. *Oestereich v. Selective Serv. Sys. Bd. No. 11*, 393 U.S. 233 (1968). More recent decisions have used "preclusion" as a way of denying standing to certain classes of plaintiffs. *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (prohibiting consumers from challenging orders by the Secretary of Agriculture setting minimum price supports for milk). Another related argument is that where the enabling statute expressly provides for one judicial review procedure, it impliedly precludes all other review procedures. In either situation, the statutory language will indicate the presence of the preclusion issue. There is no such language in either the APA or National Environmental Policy Act, hence statutory preclusion should not bar review.

The exception described in APA section 701(a)(2), shielding from judicial review those decisions committed to agency

discretion, is also narrow. The leading case on this issue is *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402 (1971). Here the Supreme Court held that where some statutory standards are present for a reviewing court to apply in its analysis of the questioned agency action, then the agency action is not completely committed to agency discretion. *Id.* In other words, if there is some law for the reviewing court to apply to the agency action, the action is not exempt from judicial review.

The only major exception to this general presumption in favor of review is in situations of agency decisions refusing enforcement of a statute or regulation within its authority. In such cases, the refusal to take enforcement measures is presumptively unreviewable. *Heckler v. Chaney*, 470 U.S. 821 (1985) (denying review of Food and Drug Administration refusal to act on prisoners' challenge that drugs used in lethal injections had not been approved for use in executions). The Department of Interior and CRACT are not the agencies empowered to enforce the National Environmental Policy Act, therefore the *Overton Park* standard applies.

The National Environmental Policy Act gives the reviewing court ample law and standards to apply. The purposes of the act is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation." 42 U.S.C. § 4321 (1988). Therefore, CRACT's environmental impact statement will not be deemed committed to agency discretion. Hence, the agency discretion exception will not bar review.

b. Standing

APA Section 702 grants the right of review to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1988). This raises the questions of constitutional standing and standing to challenge agency action.

The doctrine of "standing" emanates from the "cases" and "controversies" language of Article III of the United States Constitution. U.S. Const. art III, § 2, cl. 1. "The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Supreme Court has specified three basic constitutional standing requirements.

The plaintiff must allege actual or imminent injury that is neither conjectural nor hypothetical. *Id.* at 499-501. This requires that at the "irreducible minimum" the plaintiff "show he personally has suffered some actual or threatened injury." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

The plaintiff must also allege that the injury is "fairly traceable to the defendant's allegedly unlawful conduct and [is] likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Thus the plaintiff must also establish the two requirements, causation between the alleged injury and the challenged act, and redressabilty by the court.

In addition to satisfying the constitutional standing requirements, plaintiffs seeking to challenge federal agency action must also satisfy the test announced in *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). This two-pronged test requires (1) personal injury in fact, economic or otherwise to the plaintiff, caused by the defendant's acts; and (2) the presence of the plaintiff arguably within the zone of interests to be protected by the statute or constitutional provision at issue. *Id.* In this area a few important decisions dealing with the National Environmental Policy Act and environmental interest group standing are often cited.

In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the plaintiffs refused to allege injury to any of its members personally. The Sierra Club instead sought creation of a new standing test for the environment, sometimes referred to as "tree

standing." The Supreme Court denied standing and held that at least one member must allege personal injury. *Id.*

In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), a group of law students succeeded in establishing standing to sue based on an allegation of injury to their "sense of aesthetics" caused by litter in public parks. (The National Environmental Policy Act lists as one of its goals "[to] assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings". 42 U.S.C. § 4331(b) (1988).) The cause of the litter was alleged to be excessively high freight rates for recycling materials. This case marks the outer limit of the Court's standing generosity. Subsequent decisions have tightened the requirements.

The recent tightening of the standing requirement for challenging agency actions is exemplified in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990). In this case the National Wildlife Federation alleged that two of its members had visited areas near to the portions of land which the Department of the Interior had recently reclassified. The alleged imminent injury was an adverse affect to the member's aesthetic enjoyment caused by the reclassification. On these facts the Supreme Court denied standing. *Id.* The Court's change in approach to the issue in these two similar factual scenarios may be due more to differences in its composition than differences in the cases.

In the present problem, Sunpeace has members which live in the vicinity of CRACT's ICTE operation. The ICTE process results in large quantities of particulate matter discharged into the air. When these fall they inevitably land on the property of belonging some of Sunpeace's members. The particles are breathed in by some of Sunpeace's members. The operation affects property values of some of Sunpeace's members' homes. Thus, Sunpeace satisfies the first prong of the *Data Processing* test by properly alleging injury in fact personally occurring to its members caused by the defendant CRACT (United States).

The zone of interests protected by the National Environmental Policy Act is furtherance of environmental protection,

generally. 40 C.F.R. § 1500.1 (1994). More specifically, section 2 of the act includes in the "Congressional declaration of purpose" the purpose of the act is ". . .to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . ." 42 U.S.C. § 4321 (1988).

The basic mechanism by which the act seeks to promote its goals is by requiring preparation of environmental impact statements, which by mandate must include discussion of alternatives to the proposed action. 42 U.S.C. § 4332(2)(C) (1988). The regulations require that agencies "involve the public in preparing and implementing" their environmental impact statements. 40 C.F.R. § 1506.6 (1994). Thus, CRACT's preparation of the environmental impact statement and the ICTE program will fall within the zone of interests protected by the National Environmental Policy Act. Having satisfied both prongs of the *Data Processing* test, Sunpeace should be able to successfully argue that it does have standing.

c. Ripeness

APA Section 704 adds the requirement that the action causing the alleged injury or legal wrong be a "final agency action." "Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (1988).

As an initial requirement, there must be some agency action. In this case, Sunpeace will argue that both CRACT's preparation of an environmental impact statement and its failure to include the no action alternative in the statement are "agency actions" causing injury.

The statute explains "preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review [only] on the review of the final agency action." 5 U.S.C. § 704 (1988). This requires that aggrieved persons wait until the agency has reached a "final action" before they may have review of any part of the process resulting in that final action. This "final agency action" require-

ment of section 701 raises the questions of ripeness and exhaustion.

The ripeness inquiry seeks to determine whether the dispute has reached a threshold level of adversity sufficiently forming a dispute upon which the court can act. The legal test for determining whether a dispute is ripe for review is stated in *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967). The two part test asks: (1) is the legal issue presented fit for review?; and (2) would withholding review impose a substantial hardship on the parties seeking review. *Id.* at 149.

The key to satisfying the first requirement of "legal fitness" is in the framing of the issue. The issue will be fit for review if it does not require the type of technical factual analysis generally associated within agency supervision. The more the question is formed as requiring purely legal analysis, the more likely it will be fit for review. Sunpeace should be able to sufficiently state the question in legal terms in order to satisfy this prong of the *Abbott Laboratories* test.

Arguments by New Union and the United States should focus on rooting the question in factual foundation and technical analysis. New Union and the United States would do so with the goal of convincing the court that the matter is at present best left within agency supervision. They should argue that the matter remain unfit for review until such future time when a more clearly defined legal question, capable of deciding the matter, arises.

The "substantial hardship" requirement looks for a clear demonstration of hardship rather than mere speculative or uncertain harm. On this point Sunpeace should propose various ways in which CRACT's failure to include the no action alternative in the environmental impact statement has caused actual hardship. Further, Sunpeace should also argue how delaying review will exacerbate or perpetuate the harm.

New Union and the United States should logically respond by stressing the speculative nature of Sunpeace's allegations in light of CRACT's finding of no significant impact to the environment resulting from the ICTE operation. In the

absence of significant impact, failure to consider termination of the project is arguably harmless. Therefore, Sunpeace's claimed hardship is made to appear more theoretical, and hence less urgent.

d. Exhaustion

Also arising out of the APA section 704 "final order" requirement is the exhaustion requirement. Out of this language flows a presumption that a dispute should remain within an agency until all decision making channels have been followed. *McKart v. United States*, 395 U.S. 185 (1969), lists a group of factors both in favor of and against exhaustion. In favor of leaving the dispute in the agency supervision are: (1) the benefit of agency expertise; (2) agency autonomy; (3) formation of a more complete record at the agency level; and (4) preservation of judicial resources. In favor of finding agency channels exhausted are: (1) lack of agency authority to grant needed remedy; (2) evidence that the agency has reached a decision that it will not change; (3) irreparable injury to the person seeking review; and (4) challenges to the constitutionality of the agency structure. *Id.*

While exhaustion does not form a major issue in the problem, the competitors may address some of the points above. New Union and the United States would logically argue in favor of leaving the dispute in agency supervision. Sunpeace will argue in favor of finding agency exhaustion.

e. Standard of Review

Section 706 of the APA briefly states the standards of available for review of different agency actions. The leading case for interpreting section 706 is *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The first direction prior to choosing the appropriate standard is to make a "searching and careful" inquiry into the facts to determine the agency action. *Id.* at 416. This requires an examination of both sides of the record.

In reviewing an agency's factual determinations, three standards are available: *de novo* review; substantial evi-

dence; and, arbitrary and capricious or abuse of agency discretion. 5 U.S.C. § 706 (1988). *De novo* review is used only when a statute specifically authorizes it, or "when the action is adjudicatory in nature and the agency's fact-finding procedures are inadequate," or when "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Overton Park* at 415.

The substantial evidence standard is used only in when reviewing an agency decision falling within sections 556, and 557 referring to formal agency rulemaking and formal agency adjudication. 5 U.S.C. § 706 (1988). The "arbitrary and capricious or abuse of agency discretion" standard of review is the default standard. Thus, if the case is subject to review and neither the *de novo* standard, nor the substantial evidence standard apply, then the reviewing court should look to determine if the agency decision at issue was arbitrary, capricious or an abuse of agency discretion.

CRACT's environmental impact statement preparation cannot be characterized as formal rulemaking or formal adjudication, therefore, the substantial evidence standard will not apply. Sunpeace should argue for *de novo* review since this provides the reviewing court the widest discretion. New Union and the United States will characteristically seek the arbitrary and capricious standard because this gives the underlying agency action the greatest deference.

B. Should CRACT Be Held To Comply With the National Environmental Policy Act for Its Voluntary Preparation of an Environmental Impact Statement?

1. Statutory requirements

a. Purpose and goals

The National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4331-70 (1988), was the first statute to require comprehensive environmental analysis of federal administrative operations by the federal courts. NEPA section 2, the "Congressional declaration of purpose" clause states that:

> The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321 (1988).

NEPA section 101(b) creates a "Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal Plans, functions, programs, and resources." This section lists six goals that the act aspires to achieve:

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and aesthetically 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.

42 U.S.C. § 4331(b) (1988). Therefore under NEPA all branches of the federal government are required to comply with both the substantive obligations and "use all practicable means" to achieve its policy goals. As a facility operated of the Department of the Interior, CRACT is subject to NEPA requirements.

b. Substantive obligations on federal agencies

NEPA lists the substantive obligations it requires of federal agencies beginning in section 102. These obligations include the preparation of an Environmental Impact Statement (EIS) for certain federal actions. The EIS requirement and public information mandate are the major mechanisms by which NEPA promotes its objectives.

> The Congress authorizes and directs that, to the fullest extent possible:. . .(2)all agencies of the Federal Government shall. . .(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action. . .

42 U.S.C. § 4332(2)(C) (1988). Under the statutory language, EIS preparation, which includes coverage of alternatives to the proposed action, is only required for major federal actions which significantly affect the quality of the environment.

In addition to the requirements of 102(2)(C)(iii), section 102(2)(E) requires that all agencies of the Federal Government shall "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1988). This language of section 102(2)(E) is not limited to "major federal actions." *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972). Furthermore, section 102(2)(E) requires more than mere discussion of alternatives as mandated by 102(2)(C)(iii). *See Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749 (E.D.Ark. 1971). The language of section 102(2)(E) states that the agency must study and develop alternatives, in addition to discussion in the EIS. Moreover, section 102(2)(E) may apply even where an EIS is not required.

Further emphasis on public information comes from NEPA section 102(2)(G) which requires all agencies to "make

available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment." 42 U.S.C. § 4332(2)(G) (1988). This section further solidifies the federal agency's obligation to "lay their cards on the table in full public view." *Wisconsin v. Callaway*, 371 F. Supp. 807, 811 (W.D.Wis. 1974). This obligation has also been interpreted to extend to require supplemental impact statements to accommodate recent information. *See*, *Sierra Club v. Mason*, 365 F. Supp. 47, 49 (D.C.Conn. 1973).

2. NEPA compliance

a. FONSI

New Union and the United States will argue that they have met the substantive and policy goals of NEPA. They will argue that the hangar and baghouse project did not require EIS preparation because it did not result in a significant impact to the environment. Instead, CRACT was only required to issue the finding of no significant impact (FONSI). CRACT did issue the FONSI, and therefore has complied with the statute. CRACT may also argue that it also complied with the public information mandate of NEPA section 102(2)(G). By voluntarily supplying an EIS, CRACT provided additional information to the public.

In response Sunpeace will argue that CRACT's simultaneously issuing a FONSI and publishing a notice that it would prepare an EIS voluntarily is contradictory. Sunpeace will argue that CRACT's participation in the NEPA process is mandatory since CRACT is part of the federal government. Sunpeace will argue that CRACT was required by NEPA section 102(2)(E) to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1988). Thus, any public information supplied voluntarily is incomplete without discussion of the no action alternative. Also, Sunpeace should argue that supply of public information con-

cerning the no action alternative is required by NEPA section 102(2)(G).

b. Scope of the EIS

The United States and New Union will state that the proper scope of the EIS was the hangar and baghouse construction. The ICTE program was discussed in the EIS only to clarify the purpose of the baghouse and hangar proposal. The scope of the EIS was not the entire ICTE program, therefore it did not need to include discussion of the alternative of eliminating the ICTE program.

The hangar and baghouse proposal EIS included consideration of an alternative that would continue operation without the hangar and baghouse at a level of production that would comply with the Clean Air Act. This alternative addresses the no action alternative by describing a course of action that would not require the proposed construction. United States and New Union will assert that this "continued operation" alternative satisfies the "no action" alternative required by both NEPA sections 102(2)(C) and 102(2)(E).

3. Policy arguments

Sunpeace will rely on the purpose and goals of NEPA, asserting that federal agencies must comply with all of the statute's provisions. New Union and the United States will maintain that CRACT has complied with NEPA goals and requirements. They will also propose that CRACT should not be forced to submit to more rigorous compliance merely because CRACT went beyond its required duty under NEPA. New Union and the United States will state that CRACT's voluntary generation of an EIS was actually in furtherance of NEPA public information goals. Therefore, to punish CRACT for failure to satisfy one of NEPA's requirements, which is a disputed point in itself, would actually work in contradiction to the purpose of the act as a whole.

Sunpeace's response should logically follow that once an agency submits itself to a regulatory scheme involving public notice and information, the agency has an obligation to com-

ply with that scheme in the procedures provided. CRACT's publication if its plan to issue an EIS lead SUNPEACE to believe that full NEPA compliance would follow. This belief persuaded SUNPEACE to forgo challenging the FONSI. To exempt CRACT from full NEPA compliance would frustrate the public information goal of NEPA by allowing CRACT to publish misinformation.