December 4, 1981

DRAFT II

~~DRAFT~~
~~NOT TO BE RELEASED~~

MEMORANDUM FOR: Guy H. Cunningham, III
Director and Chief Counsel, Regulations Division
Office of the Executive Legal Director

FROM: Fredric D. Chanania
Attorney, Regulations Division
Office of the Executive Legal Director

SUBJECT: CLINCH RIVER BREEDER REACTOR EXEMPTION REQUEST

I. INTRODUCTION

A. Statement of the Issues

The issue addressed in this Memorandum is whether, in light of the standards for granting exemptions in 10 CFR § 50.12(b), the requested exemption[1/] for the Clinch River Breeder Reactor project ("CRBR") can be viewed as likely to entail a significant adverse impact on the environment under the National Environmental Policy Act of 1969 ("NEPA").[2/]

1/ This Memorandum does not purport to evaluate the Applicants' Memorandum in Support of Request to Conduct Site Preparation Activities, filed on November 30, 1981 (hereinafter "Applicants' Memorandum"). That filing addresses a wide range of issues, while this Memorandum is more limited in scope. Certain factual information submitted by the Applicants is, however, referenced in this Memorandum, and several of the points made by the Applicants are generally addressed herein.

2/ The other issues arising out of the second, third, and fourth criteria in § 50.12(b) are not discussed herein, except to the extent they bear upon the question of what is a "significant" adverse environmental impact under NEPA, particularly the second factor of redressability.

DRAFT

In particular, the three CRBR Applicants, the Project Management Corporation, the U.S. Department of Energy, and Tennessee Valley Authority (hereinafter "Applicants"), desire to begin various site preparation activities at the Clinch River site before the Applicants supplement the LMFBR Programmatic Environmental Impact Statement (ERDA-1535), before they submit their updated Environmental Report to the NRC pursuant to 10 CFR § 51.20, and also before the NRC completes its environmental review.[3/] The site preparation activities that are the subject of the exemption request consist of: clearing approximately 260 acres of trees (19 percent of the 1,364 acre project site); extending a railroad spur for 2.4 miles; extending an access road; grading; building a barge facility on the river; extending power lines; introducing water, electric, sewage, compressed air, and fire protection services; excavating the reactor area; and constructing other temporary facilities. In their exemption request, the Applicants estimate that the environmental impacts (except perhaps the barge facility) could be eliminated or redressed in 10 months at an expense of $8 million.[4/]

The overall question addressed by this Memorandum breaks down into two principal sub-issues. First is whether these site preparation activities

---

3/ See 10 CFR §§ 50.10, 50.50, 51.52. The Applicants have submitted a Site Preparation Activities Report ("SPAR") which presents their environmental analysis of the proposed site preparation activities, which I have not seen or reviewed.

4/ The Applicants are not committed, however, to returning the site to its former state; they suggest leaving some facilities in place in keeping with alternative, industrial development possibilities. See Applicants' Memorandum, at 31-35.

would be regarded as "significant" in the context of NEPA's phrase "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). If they are deemed significant in the NEPA sense, then the NRC, in order to comply with NEPA, must complete its environmental review (including issuing a new FES and completion of hearings, under 10 CFR §§ 50.10, 50.50, 51.52) before site preparation can begin. One assumption made in this Memorandum is that there would be no question whether this is a major federal action -- given the NRC approval that is required for any activities to begin at the CRBR site, and given the time spent and the extensive planning and financial commitment of the Applicants in the CRBR project. To answer the remaining question of whether the proposed site preparation activities are "significant," this Memorandum will examine prior NRC precedent, the current regulations of the Council of Environmental Quality (CEQ), and relevant judicial decisions.[5/]

The second sub-issue is whether the element of redressability can or should carry any weight insofar as the balancing determination for granting exemptions under § 50.12(b) is concerned. Because the basic overall issue is whether the activities sought to be exempted would "significantly affect" the environment under NEPA, and because NEPA itself does not include a statutory element of redressability within the term "significantly," one must consider if and how the courts have treated redressability or reversability

---

5/ There does not appear to be any applicable legislative history.

of environmental effects as part of the determination of whether an action is "significant."[6/]

B. Other Points Discussed

Several other matters are touched upon in this Memorandum. First, the standard for review is mentioned, along with recent judicial formulations of the relative burdens of proof and standards to be applied. Second, the Memorandum discusses the issue of whether the NRC, in deciding whether to grant the Applicants' exemption requests, can rely upon their environmental studies as to the impact of the site preparation activities or whether the NRC must do its own environmental assessment. Finally, the issue of injunctive relief for violations of NEPA is briefly mentioned.

C. Conclusions

While the case law, including NRC precedent, cannot be viewed as clearly pointing to a particular outcome for the CRBR exemption request, it is certainly appropriate to conclude that most of the site preparation

---

6/ 10 CFR § 50.12(b) does not specifically indicate that the element of redressability is part of the element of "significant adverse impact," since the two elements are treated as separate and coordinate factors (i.e., two equal subparagraphs in § 50.12). It would appear that each of the four factors in § 50.12(b) are to be weighed in the balance to determine whether, in the overall NEPA sense, the activities "significantly affect the environment" and, therefore, require the completion of an environmental review before they may be begun.

activities (with the possible exemption of the tree cutting and barge facility) fall within the bounds of judicial decisions finding certain kinds of activities insignificant under NEPA. The one caveat is that the decisions cited herein cannot be grouped into readily definable categories, thereby identifying significant versus insignificant activities with a good degree of certainty. In addition, the judicial attempts to define "significantly" under NEPA have led to general definitions, which the courts have applied in a manner which cannot be said to be consistent. Nonetheless, it is true that some of the activities that have been held by the courts to be insignificant would appear to be more substantial in impact than the intended site preparation activities at the Clinch River site.

The separate category for the tree cutting and barge facility seems appropriate because there are cases that hold tree cutting to be significant under NEPA, and because the barge facility would not appear to be immediately redressable, particularly since the Applicants have indicated that they do not intend to dismantle the barge facility should the construction permit for Clinch River not be granted.[7/] Even so, nothing in the case law suggests that the tree cutting and the barge facility would definitely be viewed as "significantly" affecting the environment.

7/ See note 4, supra.

DRAFT

The second conclusion relates to the element of redressability. Under decisions by both NRC (particularly Wolf Creek)[8] and the courts (particularly the recent Cabinet Mountains decision),[9] the elements of redressability and mitigation have played a significant role. Redressability, should it be adequately demonstrated by the Applicants, may well tip the balance in favor of granting the exemption under the standards of § 50.12. While this factor is not mentioned in NEPA nor in the CEQ definition of "significantly," 40 CFR § 1508.27, there are a number of cases citing mitigation factors as important in deciding whether an agency was correct in determining that the action under consideration was not significant.[10]

Third, to the extent that the NRC decides to grant the exemption, the decision is much more likely to be upheld on judicial review if the NRC bases its decision on a complete environmental record, with the NRC performing its own environmental assessment. The NRC is not entitled to rely entirely upon the Applicants' SPAR, but must exercise its own independent judgment

---

8/ Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 NRC 1 (1977).

9/ Cabinet Mountains Wilderness v. Peterson, 510 F.Supp. 1186 (D.D.C. 1981).

10/ As discussed infra, it may not be appropriate to equate redressability (return to the original state) with mitigation (lessening the impacts of the altered state).

DRAFT

on the environmental issues. The NRC may, however, take into account the environmental information submitted by the Applicants.[11/]

Finally, while some courts, particularly in the early days of NEPA, viewed a violation of NEPA as irreparable injury per se, it would not appear that an injunction would automatically issue should a court determine that the NRC abused its discretion granted the exemption. Rather, the issue of whether to grant an injunction for a NEPA violation would be resolved upon a more traditional balancing of factors, including the seriousness and nature of the agency's error, the environmental effects of an injunction, the stage of the project, irreparable injury, agency good faith, substantial harm to others, and the public interest. It is not clear at all that an injunction would be granted should a court find that the NRC was not entitled to authorize the site preparation activities at the Clinch River site prior to the completion of its environmental review, particularly since a significant portion of that review (the earlier Final Environmental Statement and Site Suitability Report) has been done, and since the NRC hopefully can develop a solid record on redressability of any impacts to the environment. In addition, the earlier FES and SSR had concluded that virtually the same site preparation activities were not "significant" in terms of granting a Limited Work Authorization. This factor will undoubtedly be important to any reviewing court. See Monarch Chemical Works, Inc. v. Exon, 466 F.Supp. 639 (D.Neb. 1979).

11/ Trinity Episcopal School Corp. v. Romney, 523 F. 2d 88, 94 (2d Cir. 1975), rev'd other grounds, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

DRAFT

II. ANALYSIS

A. "Significant" Activities And Impacts Under NEPA

1. 10 CFR § 50.12

Section 50.12 of the NRC's regulations states:

§ 50.12 Specific exemptions.

(a) The Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

(b) Any person may request an exemption permitting the conduct of activities prior to the issuance of a construction permit prohibited by § 50.10. The Commission may grant such an exemption upon considering and balancing the following factors:

(1) Whether conduct of the proposed activities will give rise to a significant adverse impact on the environment and the nature and extent of such impact, if any;

(2) Whether redress of any adverse environment impact from conduct of the proposed activities can reasonably be effected should such redress be necessary.

(3) Whether conduct of the proposed activities would foreclose subsequent adoption of alternatives; and

(4) The effect of delay in conducting such activities on the public interest, including the power needs to be used by the proposed facility, the availability of alternative sources, if any, to meet those needs on a timely basis and delay costs to the applicant and to consumers.

Issuance of such an exemption shall not be deemed to constitute a commitment to issue a construction permit. During the period of any exemption granted pursuant to this paragraph (b), any activities conducted shall be carried out in such a manner as will minimize or reduce their environmental impact.

In the statement of considerations for the proposed rule from which the present version of § 50.12 is derived, the Commission was clearly concerned with the environmental effects of site preparation. It indicated that site preparation was key, from the standpoint of environmental impact, in the construction of nuclear facilities. 36 FR 22848, 22849 (Dec. 1, 1972). Specifically, the Commission indicated:

> The Commision considers that the proposed amendments are consistent with the direction of the Congress, expressed in Section 102 of the National Environmental Policy Act of 1969 that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered with the policies set forth in that Act. Since site preparation constitutes a key point, from the standpoint of environmental impact, in connection with the licensing of nuclear facilities and materials, the proposed amendments would enable consideration and balancing of a broader range of realistic alternatives and provide for a more significant mechanism for protecting the environment during the earlier stages of a licensed project.

In that Federal Register notice, the Commission indicated that commencement of construction is defined as including any clearing of land, excavation, or other substantial action that would adversely effect the natural environment of the site, with certain limited exceptions not pertinent to the issues under consideration here.

In the final rule, 37 FR 5745 (March 21, 1972), the Commission repeated the above-quoted passage, and included two other pertinent thoughts. First, the Commission indicated that specific exemptions under § 50.12 were expected to be used only "sparingly." Second, activities conducted under any exemption

were to be "carried out in such a way as to minimize or reduce their environmental impact."

2. NRC Cases on § 50.12 Exemptions

The NRC has dealt with exemptions under § 50.12 in three major Commission decisions -- Shearon Harris, Wolf Creek, and WPPSS.[12/] In Shearon Harris, the applicant sought an exemption for road construction, clearing, grading, foundation excavation for the plant area, railroad relocation, the building of temporary facilities, (warehouse and concrete construction shop), timber cutting on a reservoir site, and installation of telephone lines. Of particular importance to the CRBR situation, the Commission in Shearon Harris was able to rely upon an earlier final environmental statement and a revised draft environmental statement in granting the exemption.[13/] Even so, the Commission stressed that exemptions were to be "sparingly granted" only in the most compelling circumstances after a careful weighing and balancing of the factors.[14/] The Commission also based its decision to grant the exemption on the substantial delay which would be required to comply with NEPA, and because the six-month acceleration of the completion time would

---

12/ Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-22, 7 AEC 939 (1974); Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1) CLI-77-1, 5 NRC 1 (1977); Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977).

13/ 7 AEC at 941, 945.

14/ Id. at 940.

DRAFT

result in about $110 million of savings to the ratepayers.[15/] Shearon Harris, therefore, provides strong authority for the notion that the CRBR request is within the scope of Commission precedent for granting exemptions under § 50.12.

In Wolf Creek, the decision focussed on primarily two offsite activities: building a railroad spur and the plant access road. The Commission first agreed that, in light of NEPA, NRC regulations apply to environmentally significant construction activities associated with nuclear power plant construction, including those beyond the fence boundaries of the site.[16/] This latter point might be of some importance in discussing the CRBR barge facility since the details of that facility are not known. Most important is that Wolf Creek is also a strong case for supporting the CRBR exemption. At one point, the Commission termed the road construction and site clearing activities as "insignificant", although it appears that the Commision was speaking of the relationship of those activities to the cost and size of the overall project.[17/] However, the Commission did stress the element of redressability as key[18/] and agreed with the formulation of the Appeal Board as to the applicable legal standard:

> The Appeal Board majority found that building the proposed railroad spur would have an adverse impact upon the environment of the site sufficient that such

---

15/ Id. at 941, n.4.

16/ 5 NRC at 7.

17/ Id. at 10.

18/ Id. at 12.

> activities should not be allowed in advance of receipt of a limited work authorization. As a majority of the Board viewed it, the question was "whether the spur can be built with so trivial an impact that it can safely be said that no conceivable harm would have been done to any of the interests sought to be protected by NEPA should the eventual outcome of this proceeding be a denial of the Wolf Creek application."
>
> . . .
>
> We wish to qualify our endorsement of the Board's legal standard with reference to the question of redressability. The dissenting member in ALAB-331 argued persuasively that redressability should be carefully considered in the present setting. He pointed out that while railroad tracks and gradings can have significant environmental impacts, they are impacts that can be largely reversed later, if necessary. It is impossible to restore a virgin stand of timber; but one can, with some expense, pick up railroad tracks and ties and restore land to agricultural production. We think that there will be instances in which it will be possible to correct damage to the environment which is caused by site preparation or other preconstruction activities, should the Commission eventually deny an applicant a construction permit. In those instances in which damage is believed redressable, and the applicant is willing to obligate itself to undertake such activities as are necessary to restore the site, a licensing board might in its discretion allow the applicant to proceed accordingly.19/

It is clear under Wolf Creek that site clearing and some construction activities were envisaged by the Commission as being entirely appropriate for exemption requests, and that the element of redressability would be crucial in the balancing required by § 50.12(b). One problem with the language in the Wolf Creek decision insofar as the CRBR request is

---

19/ Id. (emphasis added).

concerned is the isolation by the Commission of tree cutting, particularly of "virgin trees," as a factor which might not be redressable.[20/]

Finally, in WPPSS, the applicant sought an exemption to construct four laydown areas for equipment, replace a bridge crossing, upgrade an existing road, clear and grub parts of the site, and excavate for erosion control (ditches, ponds, and outfall structures). The Commission again stressed the extraordinary nature of the exemption request, as applicable in situations where time is of the essence and relief from a Licensing Board is impossible or highly unlikely.[21/] In the context of that case, the WPPSS petition was dismissed, leaving to the Licensing Board the determination of whether to grant the exemption. However, in that case, there was an application for limited work authorization already pending before the Board, and a decision by the Board had already been made on some of the elements in the aplicant's request but not on others.

There has been only one judicial construction of the NRC's granting of exemptions under § 50.12. That came in the early days of NEPA when the issue was whether to suspend ongoing construction permit proceedings pending the completion of environmental impact statements. In Coalition for Safe Nuclear Power v. AEC, 463 F.2d 954 (D.C.Cir. 1972), the court held that the factors relevant to the possible suspension had to include an element showing that the

---

20/ Id.

21/ 5 NRC at 722, 723.

irretrievable commitment of substantial resources from continued construction would not affect the eventual licensing decision for the project.[22/] However, in its review, the D.C. Circuit had before it § 50.12, which included the elements of significance and redressability. In this sense, the Coalition for Safe Nuclear Power decision at least tacitly approves the element of redressability as legitimate in considering whether to require a full NEPA analysis prior to Commission approval of any site preparation activities.

This authority, taken together with NRC precedents on exemption requests, suggest that the CRBR situation is not far beyond the circumstances in other cases where exemptions were granted. Shearon Harris and Wolf Creek, in particular, tend to favor the CRBR request.

3. The CEQ Regulations

Insofar as CEQ regulations are pertinent to assessing the meaning of "significantly" as applied to the site preparation activities at CRBR, several points should be mentioned. First, while the NRC has been considered as being subject to the procedural but not necessarily to the substantive elements in the CEQ regulations, the Department of Energy (and perhaps TVA) would be subject to CEQ regulations in the preparation of its (or their) own environmental analyses. Even if one assumes that the NRC could define "significant" unilaterally, without any controlling effect being given to the CEQ regulations, for the purposes of the CRBR exemption request, it is not unreasonable to

---

22/ This element seems to be included in § 50.12(b)(3) and in the final paragraph of that section.

assume that the CEQ definition of "significantly" under NEPA would be given weight by the courts.[23/]

The major CEQ regulation worth noting is 40 CFR § 1508.27, which defines the word "significantly" as used in NEPA. Because of its breadth and definitive impact in some circumstances, the regulation is quoted in its entirety (emphasis added):

> "Significantly" as used in NEPA requires considerations of both context and intensity:
>
> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
> (2) The degree to which the proposed action affects public health or safety.
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

23/ Among the more general provisions which are worth noting in passing are the following: 40 CFR § 1501.2(b) requires that agencies shall identify environmental effects and values in detail; § 1501.4 indicates the procedures to be used by the agencies in determining whether to do an environmental impact statement or assessment; and § 1508.9 requires that an environmental assessment must show that the NRC would have a basis for its decision as to significance, impacts, and possible alternatives. Noteworthy in these general provisions of the CEQ regulations is that the element of mitigation or redressability is not specifically included as part of the threshold determination of whether to prepare an EIS.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Two elements should be highlighted. First, the setting in which the project is to occur is crucial, in accord with case law interpreting NEPA. The Applicants' SPAR should be carefully scrutinized on this point. Second, there is no mention of the element of redressability or mitigation as part of identifying what is a "significant" impact as used in NEPA. The only reference, in a negative way, is to the point that a temporary action can still be significant. Whether this would bear upon redressing the site preparation activities at CRBR is unclear. There is some conflict, then, between the approach in the CEQ regulations, and that which is contained in § 50.12 of the NRC regulations (i.e., the explicit inclusion of redressability). However, given the precedential support found in Coalition For Safe Nuclear Power, the use of mitigation as a factor in some court decisions, and, arguably, a basic reasonableness of such a factor, it would not appear

that this difference in this regulatory approach would be fatal to the NRC regulations or to their use in determining the CRBR exemption request.

4. Court Decisions

(a) Cases Defining "Significantly"

One major definition of "significantly" is found in Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) ("Hanly II"). In Hanly II the court stated:

> In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will "significantly" effect the quality of the human environment, the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area effected by it, (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that result from its contribution to existing adverse conditions and uses in the affected area. Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change.

471 F.2d at 830-31.

The Fifth Circuit has discussed the meaning of "significantly" as a determination of whether "the project may cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all)". Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973). The Ninth Circuit also stressed the "possibility" aspect of this definition in holding that an EIS must be prepared whenever a project "may cause a significant degradation of some

human environmental factor." City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975). And, in Natural Resources Defense Council, Inc. v. Grant, 341 F.Supp. 356 (E.D.N.C. 1972), the court stated that:

> The standard "significantly affecting the quality of the human environment" can be construed as having an important or meaningful effect direct or indirect, upon a broad range of aspects upon the human environment. The cumulative impact of other projects must be considered. Any action that substantially affects, beneficially or detrimentally, the depth or course of streams, plant life, wildlife habitats, fish and wildlife, and the soil and air "significantly affects the quality of human environment."

341 F. Supp. at 367.

In Joseph v. Adams, 467 F.Supp. 141 (E.D. Mich. 1978), the various judicial defininitions of "significantly" were reviewed, and the court concluded with the following test (which it found supportable under the analysis in City of Davis v. Coleman, supra):

> This court, therefore, holds that proposed federal action which will significantly affect the quality of the human environment is that whose reasonably expected environmental consequences would, in order to comply with the substantive policies of NEPA, affect a decision concerning the need for, or the proposed location or design of the federal proposal. The application of this test will require an analysis of the need for the project, the environmental consequences which it can reasonably be expected to generate, and the availability of location and design alternatives which will achieve the objectives of the proposed project.

Id. at 154.

In a leading and often-cited case, Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973), the D.C. Circuit noted that the question of significance took on a "distinctive cast in the context of land use planning. We think that

much may turn on whether the Federal government conforms to or deviates from local or regional regulations of land use."[24/]

The Maryland-National Capital decision is also important in several other respects. It drew a distinction between truly insignificant cases and those in which it was more difficult to make a determination of insignificance:

> We believe that an "assessment" statement must provide convincing reasons why a construction project with "arguably" potentially significant environmental impact does not require a detailed impact statement. In this sense we agree with both the majority and the dissent in Hanly II, supra. We agree with Judge Friendly's dissent that in cases of "true insignificance" an inpact statement is not required, and, thus when there are "arguably" cases of true significance, an impact statement is required. 471 F.2d at 837. On the other hand, we can rely on a review of the record, here consisting of the "assessment" as supplemented by other submissions to NCPC, to determine whether the agency has supplied convincing reasons why potential impacts are truly insignificant. See Hanly II, Opinion of Mansfield, J., at 832-33.[25/]

The D.C. Circuit then went on to describe the nature of its "convincing reasons" review, prescribing four criteria to be applied. The four part inquiry is as follows: (1) Did the agency take a hard look at the problem as opposed to bald conclusions, unaided by preliminary investigation? (2) Did the agency identify the relevant areas of environmental concern?

24/ 487 F.2d at 1036. A number of cases indicate that in order to be significant, the proposed activities must change the status quo. Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979); Sierra Club v. Hassell, 11 ELR 20227 (5th Cir. Feb. 13, 1980); Burbank Anti-Noise Group v. Goldschmidt, 10 ELR 20681 (9th Cir., July 14, 1980); Cobble Hill Association v. Adams, 470 F. Supp. 1077 (E.D.N.Y. 1979).

25/ Id. at 1938-39 (emphasis added).

(3) As to the problem studied and identified, does the agency make a convincing case that the impact is insignificant? and (4) If there is impact of true "significance," has the agency convincingly established changes in the project have sufficiently minimized it?[26/]

The cases mentioned above are generally the authorities most often used for the definitions of "significantly." Other cases are Sierra Club v. Alexander, 484 F.Supp. 455 (N.D.N.Y. 1980); Mont Vernon Preservation Society v. Clements, 415 F.Supp. 141 (D.N.H. 1976); Township of Ridley v. Blanchette, 421 F.Supp. 435 (E.D.Pa. 1976); Alabama v. U.S. Forest Service, 11 ELR 20779 (N.D. Ala. Feb. 27, 1981); Columbia Basin Land Protection Assoc. v. Schlesinger, 11 ELR 20537 (9th Cir. April 20, 1981) (stressing that the test is whether the proposed project "may significantly degrade some human environmental factor"); City and County of San Francisco v. United States, 615 F.2d 498, 500 (9th Cir. 1980); Simmans v. Grant, 370 F.Supp. 5 (S.D. Texas 1974).

From the full list of cases annexed as Appendix A hereto,[27/] it is evident that it is difficult to predict how a court will decide the issue of what

---

26/ Id. at 1040.

27/ An attempt was made in Appendix A to separate the cases dealing with questions on "significantly" from those on "major federal action," but sometimes the decisions are not so neatly categorized. See also, 40 CFR § 1508.18, discussing the relationship between these two statutory phrases. In addition, since the cases tend to support extremely varied and, at times, conflicting results under NEPA, they have not been grouped into possible categories - transmission line cases, road construction cases, etc.

is significant versus insignificant. Recent CEQ regulations may help to sharpen the inquiry and the results, but it is not possible to assert with certainty that the recent definition in 40 CFR § 1508.27 will change the ultimate outcome of future cases. A few cases should be highlighted, however, in light of the nature of the CRBR exemption request.

In Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973), clearcutting of trees and road building in connection with two contracts for the sale of timber from areas in the Teton National Forest in Wyoming was found to be significant, with the court using the "reasonableness" standard of review. The timber sale contracts involved mature and overmature lodgepole and similar pine species. The area covered was 670 acres, dispersed through a gross sale area of 10,700 acres. The Forest Service had prepared environmental assessments, and concluded that there was no significance as far as effect on the human environment. The court, without finding irreparable injury to wildlife or permanent destruction of the forest by performance of the contracts, nonetheless found that there was "an overriding public interest in preservation of the undeveloped character of the area recognized by the statute." 484 F.2d at 1250. The court concluded "the clearcutting of the timber planned obviously will have a significant effect on the environment for many years. Thus the threat of environmental injury without compliance with the statute's

procedures justifies equitable relief." Id. (emphasis added). The court also cited other cases requiring the preparation of an impact statement.[28/]

To the contrary is Kettle Range Conservation Group v. Berglund, 480 F.Supp. 1199 (E.D. Wash. 1979), where the Forest Service had done a programmatic EIS on the timber harvesting, as well as an environmental assessment for the specific area in the Colville National Forest. The timber "harvesting" in Kettle may differ from the site clearing, probably clearcutting, that is intended at the CRBR site. Support for the view expressed in Wyoming Outdoor Coordinating Council seems inherent in Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971), vacated other grds. 409 U.S. 1021 (1972), and is more directly evident in Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1322-23 (8th Cir. 1974).

In American Public Transit Association v. Goldschmidt, 485 F.Supp. 811 (D.D.C. 1980), the standard for negative environmental declarations was at issue. DOT regulations under which mass transit facilities were required to assure accessability to the handicapped were found to require a nationwide

---

28/ National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971) (Interior Department's cancellation of contracts to buy helium) later opinion 486 F.2d 995 (10th Cir. 1973); Davis v. Morton; 469 F.2d 593 (10th Cir. 1972) (administrative approval by Bureau of Indian Affairs of a lease agreement involving a potential area of 5,400 acres of restricted lands); Goose Hollow Foothills League v. Romney, 334 F.Supp. 877 (D. Oregon 1971) (construction of high rise apartment building in Portland, Oregon); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972) (converting 2 lane highway to 4-lane freeway for addition of 12 miles); but see, Kisner v. Butz, 350 F.Supp. 310 (N.D.W.Va. 1972) (the building of 4.3 miles of forest roadway near black bear habitat was not a "major federal action").

Environmental Impact Statement in light of the cumulative nationwide effect. The site-specific, local Environmental Impact Statements were not a sufficient basis to be able to ignore the nationwide effects. DOT had conceded that the local actions may well be significant, and the six-page DOT assessment was not found to constitute the "hard look" required of federal agencies. The court indicated that the standard for determining that an Environmental Impact Statement need not be prepared was that: "a negative declaration must include documentation sufficient to support the determination that the proposed activity does not have a significant impact on the environment." 485 F.Supp. at 835. However, the court refused to issue an injunction after discussing the usual equitable elements and other factors suggested by Kleppe v. Sierra Club, 427 U.S. 390 (1976).

Finally, as mentioned earlier, this Memorandum assumes that this is a major federal action since the cost involved, the time necessary, the thought and planning which are required for the project, and the overall size of the CRBR Project are all quite extensive.[29/] In addition, since the site preparation activities sought to be exempted are themselves fairly extensive and

---

29/ For authorities which discuss the definitions of major federal action, see e.g., 40 CFR § 1508.18; Hanly v. Mitchell, 460 F.2d 640 (2nd Cir. 1972) (Hanly I); NRDC v. Grant, supra, Alabama v. U.S. Forest Service, supra, Township of Ridley v. Blanchette, supra; Aertsen v. Landrieu, 637 F.2d 12 (1st Cir. 1980); Barcelo v. Brown, 478 F.Supp. 646 (D.P.R. 1979) aff'd in part, vacated in part 643 F.2d 835 (1st Cir. 1981); Como-Falcon Coalition v. Department of Labor, 465 F.Supp. 850 (D. Minn. 1978) aff'd 609 F.2d 342 (8th Cir. 1979); Rysavy v. Harris, 457 F.Supp. 796 (D. S.Dak. 1978); Southwest Neighborhood Assembly v. Eckard, 445 F.Supp. 1195 (D.D.C. 1978); Mont Vernon Preservation Society v. Clements, supra.

would cost at least $8 million (at least to undo), it seems these activities would also be major federal actions, even if one could segment the NRC decision on that activity from its approval decision over the entire project.

In sum, it is difficult to predict whether the CRBR site preparation activities would be viewed as "significantly affecting" the environment under NEPA. The general nature of the definitions used, the contrary elements in the CEQ and NRC regulations, and the differing results in the cases contribute to this difficulty. The Applicants' SPAR must be examined carefully in light of the criteria that have been highlighted.

(b) Other Pertinent Cases

What follows now is a discussion of cases which bear upon the various issues connected with the CRBR exemption request.

(1) Standard of Review

One case which is important is the Supreme Court's recent per curiam decision in Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980). The Court discussed the appropriate review standards as follows:

> In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978), we stated that NEPA, while establishing "significant substantive goals for the Nation," imposes upon agencies duties that are "essentially procedural." As we stressed in that case, NEPA was designed "to insure a fully informed and well-considered decision," but not necessarily "a decision the judges of the Court of

> Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency." Ibid. Vermont Yankee cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" Kleppe v. Sierra Club, 427 U.S. 390, 410, n. 21 (1976). See also FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976).
>
> In the present case there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more.30/

The Court also suggested that the standard for review for an agency decision not to conduct a full-scale environmental impact statement is the arbitrary and capricious standard, as opposed to the reasonableness standard. See 444 U.S at 228, n.2. Strycker's Bay, though brief, helped to resolve the split among the circuits as to whether the reasonableness or the arbitrary and capricious standard should be used by the courts. This also reaffirms the Supreme Court's deference to agency decisions that are procedurally correct and are not arbitrary or capricious. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

Two other aspects of judicial review standards are that the agency is responsible for making the threshold determination on whether to prepare an EIS, and that the plaintiffs then have the burden to raise a significant

---

30/ 444 U.S. at 227-28.

environmental issue contrary to the agency's determination.[31] In Mt. Airy Refining Code v. Schlesinger, 481 F.Supp. 257 (D.D.C. 1979), the Department of Energy environmental analysis was found insufficient in connection with its amendment to the domestic crude oil allocation plan designed to automatically phase out the small refiner bias, in accord with a presidential announcement. The court noted that the agencies have the right and duty make the threshold determination as to whether the proposed action would meet NEPA requirements to prepare an Environmental Impact Statement. The court actually held that it was an "issue of law" as to whether DOE was correct in concluding not to prepare an Environmental Impact Statement on the basis that there was no significant environmental impact. Citing Maryland National Capital Park and Planning Commission, supra, the court used the D.C. Circuit's four-part test to review DOE's action, and also used that decision's formulation in deciding whether potential impacts were truly insignificant or "arguably" significant. The court refused to accept DOE's conclusory statement that the particular phaseout formula chosen would not significantly affect the quality of the human environment, and found that the conclusion was both unreasonable and arbitrary and capricious. The court then found that "a clear basis for irreparable harm, however, does result from DOE's failure to conform to the procedural requirements of NEPA." Id. at 284. Citing Jones v. District of Columbia Redevelopment Land Agency, 499

31/ E.g., Asphalt Roofing Manufacturing Ass'n v. ICC, 567 F.2d 994 (D.C. Cir. 1977); Cabinet Mountains Wilderness v. Peterson, 510 F.Supp. 1186 (D.D.C. 1981); Peshlakai v. Duncan, 476 F. Supp. 1247 (D.D.C. 1979); Joseph v. Adams, 467 F.Supp. 141 (E.D. Mich. 1978).

F.2d 502, 512-13 (D.C.Cir. 1974), the court issued an injunction, finding that the irreparable harm outweighed the harm to other parties and the public interest, factors important in deciding whether to issue an injunction.

(2) Reliance on Applicants' Environmental Analysis (SPAR)

The issue of whether the NRC can rely upon the Applicants' environmental submission (SPAR) has been pretty clearly resolved by the courts in similar cases. Their holdings support the conclusion that the NRC can use the Applicants' work, provided the NRC makes its own independent judgment on the matter. This would indicate that we cannot rely totally on the Applicants' submission, but probably should perform our own assessment of it and of other factors as much as possible. This would follow from Sierra Club v. Alexander and East 63rd Street Association v. Coleman, infra.

In Sierra Club v. Alexander, 484 F.Supp. 455 (N.D.N.Y. 1980) aff'd 633 F.2d 206 (2d Cir. 1980), the court denied an injunction even though it found that there was insufficient consideration by the agency of the environmental effects to a 115-acre site for a shopping mall, on which 60 acres of buildings were to be built. An assessment had been made by the Corps of Engineers and New York State authorities, with mitigation efforts being discussed in their environmental assessments. Upon finding no significant impacts, the Corps of Engineers permit was issued over a Fish and Wildlife Service objection. Using the arbitrary and capricious standard for review, the court held that the agency decision "has to be based on substantial

relevant evidence, fairly ascertained with no clear error of judgment," citing Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 730 (2nd Cir. 1978); Hanly II, supra. Of particular importance to the present situation is that the court found that the Corps could not rely upon studies or decisions by others, including local agencies, but could only use the material in exercising their own independent judgment. The injunction was denied with a lengthy discussion of the purposes of NEPA, the effects of the injunction on the environment, and the other injunction standards. Id. at 471-74.

In another decision, East 63rd St. Association v. Coleman, 414 F.Supp. 1318 (S.D.N.Y. 1976), the Environmental Impact Statement was upheld as sufficient. The court restated the law -- that a federal agency "should avoid accepting without question the self-serving statements or assumptions of local agencies" in connection with preparation of an Environmental Impact Statement (414 F.Supp. at 1328), citing Trinity Episcopal School v. Romney, 523 F.2d 88, 94 (2d Cir. 1975), rev'd other grounds, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980). The court also held that an agency can use the work of state or local agencies if the federal officials exercise their own independent judgment, citing Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974), cert denied, 421 U.S. 994 (1975).

(3) Redressability

As mentioned earlier, the element of redressability (a specific factor to be weighed in the § 50.12(b) balance) is an important aspect of any decision on the CRBR exemption request. Thus, it is worthwhile to note some recent decisions on whether or not to prepare an EIS that, in varying degrees, have apparently been influenced by the presence of measures to mitigate environmental impacts. The Commission has itself already spoken on the element of redressability in Wolf Creek, as discussed earlier.

In Cabinet Mountains Wilderness v. Peterson, 510 F.Supp. 1186 (D.D.C. 1981), the court upheld the U.S. Forest Service approval of a mineral exploration program in the Cabinet Mountains Wilderness area of Northwest Montana. In the face of allegations about harm to grizzly bears (listed as a threatened species), the court relied heavily upon the Forest Service environmental assessment, which incorporated mitigation measures suggested by the Fish and Wildlife Service. These measures included closing certain roads, regulating timber sales, restricting travel, and controlling drilling activities. Id. at 1188, 1190.

In Maryland-National Capital Park and Planning Commission, supra, the D.C. Circuit specifically cited, as the fourth factor in their review, the test of whether changes in the project have "sufficiently minimized" otherwise significant impacts. 487 F.2d at 1040. The court's attention focussed on changes in the project itself that rendered the impact insignificant, thereby

not triggering the NEPA requirement for an EIS. In the CRBR situation, however, it is not minimizing changes in the project that are being highlighted. Rather, it is redressability aspects, should the project not ultimately go forward, a subject which differs from the minimization concept in Cabinet Mountains and Maryland-National Capital Park and Planning Commission. No judicial decisions have been found that specifically use redressability (i.e. return to the pre-project state) as a part of the determination of significant impact under NEPA. Thus, one must be somewhat reserved in using the "minimization" cases to support the legitimacy and weightiness of the redressability factor. See also, Simmans v. Grant, 370 F.Supp. 5, 18 (S.D. Texas 1974).

Another point to consider is whether the time element will bear upon the NRC's ability to rely heavily on redressability, as proposed by the Applicants. While they assert that the timber cutting is of trees that do not have marketable value, this assertion begs the question of whether the cutting of the trees will have other impacts on the biosphere. The SPAR may shed some light on this point. In addition, replacement of grown trees ostensibly with seedlings or saplings will require time to pass in order to return the trees to their present size and the forests to their present configuration. To the extent that the time element and change in forestation are found to influence the gravity of any impacts on the environment, the element of redressability must be examined with care and restraint. The sense of the NEPA cases is that if there is a significant impact reasonably to be expected, the project cannot go forward until an EIS is completed;

there is no mention in the cases of the theory that causing an impact, followed by reversing the impact, can suspend the otherwise applicable EIS requirement for that period of time.

For other cases in which courts discuss and rely upon mitigation in upholding an agency's decision not to perform an EIS, see, e.g. Rhone-Poulenc, Inc., Hess & Clark Division v. FDA, 636 F.2d 750 (D.C. Cir. 1980) (ban on DES as animal drug upheld, citing FDA's identification, in its environmental analysis, of other chemicals that could be used); Sierra Club v. Alexander, 484 F.Supp. 455 (N.D.N.Y. 1980) aff'd 633 F.2d 206 (2d Cir. 1980) (even though NEPA violation found, injunction denied in part because of extensive mitigation efforts); Higgins v. U.S. Postal Service, 449 F.Supp. 1001, 1003 (D. Mass. 1978).

As discussed earlier, the issue of the tree cutting and the construction of the barge facility would appear to have more potential for "significantly" affecting the environment even with the Applicants' assertions concerning redressability. First of all, finding the tree cutting to be insignificant could be seen as contrary to Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973). The court found specifically that cutting trees in a national forest was a significant action from an environmental standpoint:

> Our case must be decided under the exacting standards of § 102. While we accept the findings that the harvest of timber would have no adverse effect on the livelihood of the elk, that the area did not contain a pristine forest, that it was traversed by numerous jeep roads, and the

other evidentiary findings, nevertheless the undisputed facts remaining present a compelling case invoking the protective procedures of NEPA. As noted there will be 46 clearcut areas with removal of all timber from them, involving some 15.7 million board feet of timber. The clearcuts will covery 670 acres, dispersed through a gross sale area of 10,700 acres. The area is one traversed only by the jeep raods and is basically undeveloped. It is described in the findings as an area now "uninhabited except for various species of wildlife, four outfitter camps, and a number of elk . . ." located in the setting of the Teton National Forest.

Under the high standards set by the statute, we cannot agree that the procedural protection of the statute does not apply. We are convinced that a major federal action significantly affecting the human environment is involved, within the meaning of the statute. To this effect Sierra Club v. Butz, 3 ELR 20071 (N.D.Cal.), and other cases are persuasive. In Sierra Club the Court issued a preliminary injunction, concluding that any contracts made by the Forest Service after July 1, 1972, that would change the wilderness character of any inventoried "roadless" or undeveloped area should not be made, and that no timber cutting, road building or acts that would change the wilderness character of such areas should be permitted under such contracts, until an impact statement was filed and acted on.

. . .

Without deciding whether there would be irreparable injury to any of the wildlife or permanent destruction of the forests by performance of the contracts, we feel there is an overriding public interest in preservation of the undeveloped character of the area recognized by the statute. This public interest in preserving the character of the environment is one that the plaintiffs may seek to protect by obtaining equitable relief. See National Helium Corp. v. Morton, 455 F.2d 650, 654 (10th Cir.); Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir.); Parker v. United States, 309 F.Supp. 593, 601 (D.Colo.), aff'd, 448 F.2d 793 (10th Cir.), cert. denied sub nom. Kaibab Industries v. Parker, 405 U.S. 989, 92 S. Ct. 1252, 31 L.Ed.2d 455. The clearcutting of the timber planned obviously will have a significant effect on the environment for many years. Thus the threat of

> environmental injury without compliance with the statute's procedures justifies equitable relief.32/

It is possible to distinguish this holding on the grounds of the character of the area involved -- the industrial zoning at the CRBR site versus the national forest setting in issue in Wyoming Outdoor Coordinating Council.33/ Nonetheless, it must be pointed out that the Tenth Circuit decision specifically mentions the "public interest" in the undeveloped character (i.e. present state) of the area (not its potential, future uses) and the long-term effects of cutting trees by clearcutting, i.e., the impact on the forestation and the growth period for replacement seedlings or saplings. Another side question which is suggested is whether local zoning really controls land use on a government installation.

The barge facility will ostensibly remain for use by the Applicants regardless what happens to the CRBR Project. This kind of "permanence" may lead a reviewing court to determine that the barge facility is in a separate category from temporary construction buildings, and may thereby be more environmentally significant. In addition, the construction of a non-temporary facility would seem to differ from the temporary excavation and construction-related activities and facilities usually associated with site

---

32/ 484 F.2d at 1249-50 (emphasis added). See also cases cited on p. 22, supra.

33/ See also 40 CFR § 1508.27(a),(b)(3); Maryland-National Capital Park and Planning Commission v. Postal Service, supra; Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973); Julis v. Cedar Rapids. 349 F.Supp. 88 (N.D. Iowa 1972); but see Groton v. Laird, 353 F.Supp. 344, 350 (D. Conn. 1972).

clearing for a nuclear power plant. This should also be evaluated, particularly in view of the Commission's opinions in Shearon Harris and Wolf Creek, supra. Accordingly, the status of the barge facility tends to weaken the argument of complete redressability of any significant environmental impacts resulting from the site preparation activities to be conducted under the exemption.

(e) Injunctive Relief

Finally, a short discussion of injunctive relief is appropriate because it the Applicants are interested in beginning construction as soon as possible. Assessing the possibility of injunctive relief is important not only because it bears upon whether any site preparation activities at CRBR would be halted, but also because injunctions are not automatically granted as a remedy even though a NEPA violation might is found.[34/]

The cases are extremely varied on injunctive relief for NEPA violations, with some courts holding that a violation of the statute alone is enough to

---

34/ See, e.g., Alaska v. Andrus, 580 F.2d. 465 (D.C. Cir. 1978), vacated in part 439 U.S. 922 (1978); Concern About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1976); Barcelo v. Brown, 478 F.Supp. 646 (D.P.R. 1979) aff'd in part, vacated in part 643 F.2d 835 (1st Cir. 1981); Peshlakai v. Duncan, 476 F.Supp. 1247 (D.D.C. 1979); American Public Transit Ass'n v. Goldschmidt, 485 F.Supp. 811 (D.D.C. 1980); Sierra Club v. Alexander, 484 F.Supp. 455 (N.D.N.Y. 1980) aff'd 633 F.2d 206 (2d Cir. 1980).

justify an injunction,[35] while other courts require a demonstration of the more traditional equitable grounds for such relief.[36] Among these traditional factors are a balancing of the equities, including irreparable injury, likelihood of success on the merits, the immediacy of the harm to the environment, substantial harm to others (including additional environmental harm caused by stopping a project already underway, i.e., erosion), and the public interest.[37] As has been stated by one commentator:

> In context, the balancing of equities in NEPA cases means nothing more than that the courts will consider all the circumstances in fashioning appropriate relief. Thus broad injunctions bringing work to a halt are more likely if the project is in its early stages not yet beyond the point of no return, if alternatives are clearly viable, if serious economic, social, or environmental harm is threatened, if defendants have been unusually recalcitrant or stubborn, or if the damage threatened is irreparable. On the other hand, injunctions more narrowly drawn or no relief at all may be forthcoming if the alleged environmental harm is nonexistent or minimal, if the resources at stake are not environmentally unique, if the EIS contains only "relatively minor defects," if project delay could result in safety hazards, if sizeable costs would be incurred for little apparent reason, if the project is in

---

35/ Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033 (8th Cir. 1973) (dictum); Environmental Defense Fund v. TVA, 468 F.2d 1164, 1184 (6th Cir. 1972); Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir. 1972); Lathan v. Volpe, 455 F.2d 1111, 1116 (9th Cir. 1971); Sierra Club v. Coleman, 405 F.Supp. 53 (D.D.C. 1975); Atchison, Topeka & Santa Fe Ry. v. Callaway, 382 F.Supp. 610, 623 (D.D.C. 1974).

36/ Alaska v. Andrus, supra note 34; Shiffler v. Schlesinger, 548 F.2d 96 (3rd Cir. 1977); New York v. NRC, 550 F.2d 745 (2d Cir. 1977); NORML v. United States, 452 F.Supp. 1226 (D.D.C. 1978); Canal Authority of Florida v. Callaway, 489 F.2d 567, 578 (5th Cir. 1974); Ohio v. Callaway, 497 F.2d 1235, 1240 (6th Cir. 1974) vacated 431 F.Supp. 722 (D.D.C. 1977).

37/ See cases cited in note 36, supra; Highland Cooperative v. City of Lansing, 492 F.Supp. 1372 (W.D. Mich. 1980).

> an advanced stage of completion, if the outcome is virtually preordained, or if maximum mitigation efforts have been undertaken. Most cases involve a mix of considerations that are weighed in drafting a particular decree; compromises in result are common.[38/]

In light of these observations, it is difficult to predict the likelihood of injunctive relief should the CRBR exemption request be granted for two reasons: some of the facts in the CRBR situation cut both in favor of and against an injunction, and also because the D.C. and Sixth Circuits usually apply the traditional balancing of the equities approach. Competing factors--such as the estimated $120-240 million cost savings resulting from the possible 1-2 year delays (disfavoring an injunction)[39/] versus the early stage of the project (favoring an injunction)--contribute to the difficulty in assessing a likely future scenario. However, since the element of redressability should be fully developed and considered by the NRC as part of the § 50.12(b) balancing, that factor will undoubtedly contribute heavily to the question of whether irreparable harm might result from granting the exemption. Depending on the court's particular view of tree cutting and the NRC's ability to rely upon a convincing record for its findings, the redressability factor may well be the most influential on the potential for injunctive relief.

38/ Rodgers, Environmental Law, 800-01 (1977) (footnotes omitted).

39/ Applicants' Memorandum, at 35.

III. CONCLUSION

This Memorandum has attempted to outline how the term "significantly affecting the environment" will or should be involved in the NRC decision on the CRBR exemption request for site preparation activities. Again, this Memorandum is not intended to be a reply to the Applicants' filed request, but to provide some useful information in connection with any consideration of that request.

DRAFT

APPENDIX A

This Appendix is intended to provide a list of cases that are related to the issue of what is a "significant" impact under NEPA. The outcome of a court's determination of that issue, in the context of whether an agency must prepare a full EIS, is not only based on application of a definition, explicit or implicit, of "significant" that exists in the court's mind, but often is influenced by procedural questions, the equities between the parties, and the terms of the Act other than the threshold question of whether the evidence establishes a "major federal action significantly affecting the quality of the human environment." Subject to the caveat that any decision may contain a mesh of some of these factors, the following cases found the asserted environmental impacts to be significant enough to require the preparation of an EIS:

City of New York v. United States, 337 F.Supp. 150 (E.D. N.Y. 1972): An ICC railroad abandonment authorization affecting service in New York and New Jersey.

Upper Pecos Ass'n v. United States, 328 F.Supp. 332 (D.N.M. 1971), aff'd 452 F.2d 1233 (10th Cir.), vacated 409 U.S. 1021 (1972), later opinion 500 F.2d 17 (10th Cir. 1974): An Economic Development Administration grant for construction of a 26 mile highway (7.5 miles of it upgrading an existing road) traversing the Santa Fe National Forest.

DRAFT

Students Challenging Regulatory Agency Procedures v. United States (SCRAP II), 353 F.Supp. 317 (D.D.C.) (three-judge court), rev'd on other grounds 412 U.S. 669 (1973), later opinion 414 U.S. 1035 (1975): An ICC decision not to declare unlawful a surcharge applied to virgin and some recyclable commodities.

Tierrasanta Community Council v. Richardson, 4 ELR 20309 (S.D.Cal. 1973): Contruction by the General Services Administration of a $4.5 million juvenile facility on a 206.43 acre site in a planned low density residential area within the City of San Diego.

Regenstein v. Anderson, Civil No. 2193-73 (D.D.C. 1974) (by stipulation): Administration of the National Park Service's grizzly bear management program in Yellowstone Park.

San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973): HUD's changing the status of a 20-block urban renewal area from an industrial park project to a neighborhood development program.

Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D.Ore. 1971): A HUD loan of $3.5 million for construction of a 16-story high rise apartment building in a Portland, Oregon area containing no high rise projects.

DRAFT

Brotherhood Blocks Ass'n of Sunset Park v. Secretary of Housing & Urban Dev., 3 ELR 20351 (E.D. N.Y. 1973) (denying motion for preliminary injunction while agreeing that plaintiffs rasie substantial questions concerning NEPA's application): HUD's acquisition and holding of foreclosed properties and removal of occupants in Brooklyn, New York.

Minnesota Public Interest Research Group v. Butz (I), 498 F.2d 1314 (8th Cir. 1974) (en banc): The Forest Service's modification and extension of contracts, and supervision of day to day timber cutting operations over an area of 29,000 acres within a national forest.

Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973): Two proposed timber sales by the Forest Service which would result in the clearcutting of 670 acres in an area traversed only by jeep roads and inhabitated by elk.

American Horse Protection Ass'n v. Kleppe, 6 ELR 20801 (D.D.C. 1976); but see American Horse Protection Ass'n v. Frizzell, 403 F. Supp. 1206 (D.Nev. 1975) (no EIS required for roundup of some 400 horses by BLM): A proposal by the Bureau of Land Management to round up and exterminate between 130 and 260 wild horses on public grazing lands near Challis, Idaho.

DRAFT

Fort Story - Its Future? v. Schlesinger, 5 ELR 20038 (E.D.Va. 1974): The Navy's initiatives to construct 600 row-type, multi-family, four and five bedroom housing units on approximately 81 acres of land in an ecologically sensitive area.

Maryland-Nat'l Capital Park & Planning Comm'n v. Postal Serv.. 487 F.2d 1029 (D.C. Cir. 1973) (affirming denial of preliminary injunction but suggesting that some equitable relief would be appropriate): The construction by the U.S. Postal Service of a bulk mail facility on a 63 acre tract in partial contravention of local zoning requirements.

Dry Color Mfr's Ass'n v. Dep't of Labor, 486 F.2d 98 (3d Cir. 1973) (dictum) (vacating emergency temporary OSHA standards on other grounds): NEPA applies to ordinary standards promulgated under the Occupational Safety and Health Act.

United States v. 247.37 Acres of Land, 1 ELR 20513 (S.D. Ohio 1971), 2 ELR 20154 (S.D. Ohio 1972): The Corps of Engineers' condemnation of 247.37 acres of grazing land for a flood control project.

Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) on remand, 363 F.Supp. 277 (E.D.Va. 1973), rev'd 497 F.2d 252 (4th Cir. 1974): A federal block grant of $775,000 for a prison medical facility and prisoner reception center in a rural, historic area of Virginia.

DRAFT

Kalur v. Resor, 335 F.Supp. 1 (D.D.C. 1971); cf. Conservation Council of North Carolina v. Costanzo (II), 398 F.Supp. 653 (E.D.N.C. 1975) aff'd 528 F.2d 250 (4th Cir. 1975) (issuance by the Corps of Engineers of a permit to construct a marina): Issuance of a permit to a water discharger by the Corps of Engineers under the Refuse Act Permit Program.

Sierra Club v. Laird, 1 ELR 20085 (D. Arizona 1970): A Corps of Engineers' project to clear 3000 acres of oxygen-consuming vegetation from 55 miles of the Gila River.

Texas Comm. on Natural Resources v. United States, 2 ELR 20574 (W.D. Tex.), vacated as moot 430 F.2d 1315 (5th Cir. 1970): A loan by the Federal Housing Administration for the construction of a golf course and park.

Nat'l Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973): The exchange of 10,200 acres of national forest land for 20,500 acres of land privately held by Big Sky of Montana, Inc., in anticipation of construction of a recreational development.

Berkson v. Morton, 2 ELR 20659 (D. Md. 1971): The U.S. Park Service's repair and expansion of the towpath along the C&O Barge Canal, an historic, recreational area in Washington, D.C.

DRAFT

Sierra Club v. Morton, 395 F.Supp. 1187 (D.D.C. 1975): An annual budget proposal of the Department of the Interior for financing the National Wildlife Refuge System.

Sierra Club v. Coleman, 405 F.Supp. 53 (D.D.C. 1975): Initial steps of construction by the Federal Highway Administration of the "Darien Gap Highway" through Panama and Columbia, South America.

Illinois ex rel. Scott v. Butterfield, 396 F.Supp. 632 (N.D. Ill. 1975): Issuance of air carrier certificates by the Civil Aeronautics Board for commercial air carriers into O'Hare Airport, in pursuit of a policy to establish O'Hare as a central airport for national and international commerce.

Thompson v. Fugate, 347 F.Supp. 120 (E.D.Va. 1972): Final segment of a circumferential urban highway that adversely affected a national historic landmark.

San Antonio Conservation Society v. Texas Highway Dept., 446 F.2d 1013 (5th Cir. 1971), later appeal 496 F.2d 1017 (5th Cir. 1974): Six-eight lane expressway costing $18 million dollars.

Investment Syndicates, Inc. v. Richmond, 318 F.Supp. 1038 (D.Oregon 1970): Federal funding of transmission line running along side existing power transmission lines for 52 miles.

Environmental Defense Fund v. Corps of Engineers (Tennessee-TomBigbee), 492 F.2d 1123 (5th Cir. 1974): Construction of a waterway project to convert a free flowing river into a channelized slack water system, which involved an impoundment of 40,000 acres of water, a variety of locks, and a deep cut of 27 miles in length.

Sansome Committee v. Lynn, 7 ERC 1461 (E.D. Pa. 1974): Termination of residential leases preparatory to effectuating a redevelopment plan.

Virginians for Dulles v. Volpe, 541 F.2d 442 (4th Cir. 1976): Changes in Dulles/National airport usage to expand such usage was viewed as having a significant effect on environment.

Environmental Defense Fund, Inc. v. Andrus, 596 F.2d 848 (9th Cir. 1979): 17 water supply contracts in Yellow Tail/Boysen Reservoir area in Northern Great Plains were held to require Environmental Impact Statement, where water was scarce and where it was farming and ranching area. Rich coal deposits made water options key to development. The court held that the Environmental Impact Statement must be done on the project as well as each contract, since it found that each contract had an additional impact not studied under the programmatic inquiry.

Citizens for Responsbile Area Growth v. Adams, 477 F.Supp. 994 (D.N.H. 1979): The court issued an injunction against the local authorities and the FAA for certain construction and improvements at an existing

regional airport, where the construction and expansion related to a development plan and involved a 200 acre airpark and industrial area. Mitigation factors were discussed in this opinion.

Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C.Cir. 1977): It was agreed by all the parties, and noted by the court, that the 225 million office building in Jackson, Miss., was a major federal action significantly affecting the environment. The case turned on the issue of when to file the Environmental Impact Statement, which had been done.

Peshlakai v. Duncan, 476 F.Supp. 1247 (D.D.C. 1979): Federal approval of uranium milling and mining in the San Juan Basin required an Environmental Impact Statement, with the court taking a "hard look" at the claimed environmental effects, as to which the plaintiff had the burden of showing inadequate consideration.

Davis v. Morton, 469 F.2d 593 (10th Cir. 1972): 99 year Indian land lease, with development plan, requires an Environmental Impact Statement. Approving leases on federal land was found to be major federal action, and there was at least a sub silentio finding of significance by the court.

National Association for Reform of Marijuana Laws (NORML) v. United States, 452 F.Supp. 1226 (D.D.C. 1978): U.S. participation in herbicide spraying of marijuana and poppies in Mexico was found to be

a major federal action significantly affecting the environment. The court cited two spraying cases, Wisconsin v. Butz, 389 F. Supp. 1065 (E.D. Wis. 1975) and Lee v. Resor, 348 F. Supp. 389 (M.D.Fla. 1972).

City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975): A highway interchange was to replace temporary access with a new improved and widened access to stimulate future industrial development in an agricultural area. The court found that there was a need for an Environmental Impact Statement since it was in an agricultural area where no road now existed, and the proposal had growth-inducing aspects.

Highland Cooperative v. The City of Lansing, 492 F.Supp. 1372 (W.D. Mich. 1980): Using the four-part inquiry in Maryland National Capital Park and Planning Commission, the court determined that the negative declaration was insufficient where a 4 lane boulevard was to be put through a residential neighborhood, and granted an injunction.

Barcelo v. Brown, 478 F.Supp. 646 (D.P.R. 1979), aff'd in part and vacated in part, 643 F.2d 835 (1st Cir. 1981): The Navy was found to have violated NEPA in not preparing an Environmental Impact Statement for its training activities in and around the islands near Puerto Rico. The environmental impact was found to be significant, and the action was found to be major, given the money and the overall nature of the activities.

DRAFT

NRDC v. Administrator, ERDA, 451 F.Supp. 1245 (D.D.C. 1978): ERDA construction of 22 high level waste storage tanks at Hanford and Savannah River installations were conceded by ERDA to be significant in their impact, and the court agreed (451 F. Supp. at 1256, n. 12). The court also held that ERDA could not rely upon its programmatic Environmental Impact Statement.

Southwest Neighborhood Assembly v. Eckard, 445 F.Supp. 1195 (D.D.C. 1978): The building lease for Buzzard's Point was found to have arguably significant impacts on traffic and air quality, with the GSA environmental assessment (50 pages and short preparation time) being found insufficient.

Morgan v. U.S. Postal Service, 405 F.Supp. 413 (W.D. Mo. 1975): The court granted an injunction against an expansion of seven blocks, acquisition of residences, and building of parking facilities at Westport Postal Station, finding that it was unreasonable not to do an Environmental Impact Statement under the CEQ guidelines.

McDowell v. Schlesinger, 404 F.Supp. 221 (W.D. Mo. 1975), but see Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976) and Image of Greater San Antonio v. Brown, 570 F.2d 517 (5th Cir. 1978): The court held that it was unreasonable to conclude that the transfer of an Air Force unit (approximately 10,000 persons) was not significant in light of the socioeconomic, law enforcement, and growth pattern

impacts. The court found the negative declaration had insufficient information upon which to base such a decision.

Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F.Supp. 696 (S.D.N.Y. 1972): The water intake and discharge facility for cooling an 800 megawatt, fossil-fueled New York City power plant was found to have significant impact. The grant of a construction permit without an EIS was held invalid and an injunction issued.

An impact statement was required for the Trans Alaska Oil Pipeline to the Cross-Florida Barge canal, the denotation of a 5 megaton nuclear war head under Amchitka Island, Alaska, the leasing of 380,000 acres of submerged lands for oil development in the Gulf of Mexico, the cancellation of a national program to purchase irreplacable helium, and a nine-state program for spraying colonies of fire ants. See Anderson, NEPA In The Courts, A Legal Analysis of the National Environmental Policy Act, 76-77 (1973).

Cases where no "significant" impact was found:

Massachusetts Air Pollution & Noise Abatement Comm. v. Brinegar, 499 F.2d 125 (1st Cir. 1974) (per curiam) (dismissing appeal from denial of request for a temporary restraining order): FAA approval of three flights into and out of Boston by the supersonic Concorde without a showing of possible future flights.

Simmans v. Grant, 370 F.Supp. 5 (S.D. Texas 1974) (No significant impact if mitigation measures implemented): A small Soil Conservation Service Project deepening the natural channel in Big Creek Slough over a total length of approximately 11 miles at a cost of more than $275,000.

Durnford v. Ruckelshaus, 3 ELR 20175 (N.D.Cal. 1972): EPA funding of a combination sewer outfall and fishing pier project extending some 1200 feet into the ocean and costing close to $4 million that would upgrade a location without changing existing uses.

Citizens Organized to Defend the Environment, Inc. v. Volpe, 353 F.Supp. 520 (S.D. Ohio 1972) (the court indicates the original approval of the project agreement permitting the use of the highway to facilitate strip mining operations would have been covered by NEPA): Approval by the Secretary of Transporation of the crossing of an interstate highway by a huge strip mining shovel.

Julis v. Cedar Rapids, 349 F.Supp. 88 (N.D. Iowa 1972): A $300,000 plus federal contribution to a project in Cedar Rapids, Iowa widening portions of an existing street from two to four lanes over a fourteen block area, installing traffic signals and a pedestrian overpass.

Hiram Clarke Civic Club, Inc., v. Lynn, 476 F.2d 421 (5th Cir. 1973): A HUD insured loan of $3.7 million for construction of a 272-unit apartment complex on a fifteen acre tract in Houston, Texas.

Groton v. Laird, 353 F.Supp. 344 (D.Conn. 1972): The Navy's construction of a 300 unit housing project involving essentially the same use as that envisaged by the town.

Union Mechling Corp. v. United States, 390 F.Supp. 411, 432-33 (W.D.Pa. 1974) (3-judge court): The granting of a certificate of public convenience and necessity by the ICC to a barge line to operate as a common carrier on the same waterways that it served before becoming a regulated carrier.

Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973); contra, Conservation Council of North Carolina v. Costanzo (II), 398 F.Supp. 653 (E.D.N.C. 1975), aff'd 528 F.2d 250 (4th Cir. 1975): Issuance of Corps of Engineers' permit for construction of a boating and fishing marina and pier extending 1000 feet into the Atlantic Ocean.

First Nat'l Bank v. Watson, 363 F.Supp. 466, 3 ELR 20612 (D.D.C. 1973); contra, Billings v. Camp, 2 ELR 20687 (D.D.C. 1972); Country Club Bank v. Smith, 399 F.Supp. 1097 (W.D. Mo. 1975) (Comptroller of the currency must develop a reviewable environmental record): Preliminary approval by the Comptroller of the Currency of the chartering of a national bank in Dade County, Florida.

Mowry v. Central Elec. Power Coop., 3 ELR 20843 (D.S.C. 1973): A Rural Electrification Administration loan of $293,000 for construction of a

44 Kv transmission line approximately 12.2 miles in length crossing residential woodlands, a swamp, and farmland.

Metropolitan Washington Coalition for Clean Air v. Dep't of Economic Dev., 373 F.Supp. 1096, 1098 (D.D.C. 1973) ("([T]he thrust of this provision applies to federal action, and not mere recommendations regarding actions by state or local government"): A recommendation of the Maryland-National Capital Park & Planning Commission to the District of Columbia City Council to close part of a public alley.

Duke City Lumber Co. v. Butz, 382 F.Supp. 362 (D.D.C. 1974); aff'd in part 539 F.2d 220 (D.C. Cir. 1976): The Forest Service's set-aside program reserving timber sales for small businesses without changing either the manner or volume of timber harvested each year.

Citizens for Reid State Park v. Laird, 336 F.Supp. 783 (D.Me. 1972): The Navy's plan to conduct a mock amphibious assault of 900 marines and to bivouac for 3 or 4 days in an ocean-foot state park in Maine.

Echo Park Residents Comm. v. Romney, 2 ELR 20337 (C.D.Cal. 1971): HUD insurance for a proposed 66-unit apartment building in Los Angeles.

Transcontinental Gas Pipeline Corp., v. Hackensack Meadowlands Dev. Comm'n., 464 F.2d 1358 (3rd Cir. 1972): Issuance of a permit from the Federal Power Commission for a 7-acre addition to an existing

17-acre liquid natural gas facility on the company's privately owned 500 acres parcel in the New Jersey meadowland.

Biderman v. Morton, 507 F.2d 396 (2d Cir. 1974) (relying in part on defendent's assurance that an EIS would accompany a master plan being prepared for the area): The Department of Interior's issuance of a small number of permits for private automobiles to travel on the Fire Island National Seashore.

Molokai Homesteaders Coop. Ass'n v. Morton, 506 F.2d 572 (9th Cir. 1974): A refusal by the Department of the Interior to object, under the terms of the Small Reclamation Projects Act of 1956, to a lease arrangement allowing a private corporation to use water pipeline facilities for non-irrigation purposes (the transport of well water to a proposed resort complex);

Coupland v. Morton, 5 ELR 20504, 20506 (E.D.Va. 1975) (dictum) (impact statement was prepared although court was "unconvinced that such a statement is necessary"): The Department of the Interior's imposition of restrictions on the use of motor vehicles within Backbay National Wildlife Refuge.

Gifford-Hill & Co. v. Federal Trade Comm'n, 523 F.2d 730 (D.C. Cir. 1975) (per curiam): Initiation by the Federal Trade Commission of

an adjudicatory proceeding under the antitrust laws challenging the acquisition by a cement manufacturer of a sand and gravel subsidiary.

Morrisville v. Delaware River Basin Comm'n, 399 F.Supp. 469 (E.D.Pa. 1975); cf. Cartwright Van Lines Inc. v. United States, 400 F.Supp 795 (W.D.Mo. 1975) (dictum) (no significant effect from application of ICC gateway rules), aff'd 423 U.S. 1083 (1976): Adoption by the Delaware River Basin Commission of charges for the use of surface waters where water demand is price in-elastic.

Friends of the Earth, Inc. v. Butz, 406 F.Supp. 742 (D.Mont. 1975) remanded 576 F.2d 1377 (9th Cir. 1978): Forest Service approval of exploratory mining operations involving construction of a bridge, road improvements, drilling, and storage of 4000 cubic yards of rock extracted from the site.

Nader v. Schlesinger, 609 F.2d 494 (TECA 1979): DOE Regulations permitting refiners to add additional costs to price of motor gas to spur investment and to cause refineries to be expanded and modified, where DOE had a draft environmental impact statement supporting conclusion.

Westinghouse Electric Corp. v. United States, 598 F.2d 759 (3rd Cir. 1979): NRC determination to suspend GESMO, since GESMO was the EIS

and federal action was only to halt decision making process and not whether to grant applications.

Shiffler v. Schlesinger, 548 F.2d 96 (3rd Cir. 1977): Transfer of signal corp groups in realignment of major military installations.

State of Louisiana v. FPC, 503 F.2d 844 (5th Cir. 1974): FPC Natural Gas Curtailment Plan, where no one disputed (which the court noted) the significance of the action (503 F.2d at 874).

Asphalt Roofing Manufacturing Association v. ICC, 567 F.2d 994 (D.C. Cir. 1977): ICC railroad rate increases, where draft environmental assessment and final environmental assessment done by ICC and its consultant.

Concord Township v. United States, 625 F.2d 1068 (3rd Cir. 1980): ICC grant of certificate of necessity and public convenience to railroad for freight service over 41.7 mile line, where ICC had done an environmental assessment supporting conclusion.

Pokorny v. Costle, 464 F.Supp. 1273 (D. Neb. 1979): New waste water treatment plant, where EPA had done a study on potential environmental effects.

Monarch Chemical Works Inc. v. Exon, 466 F.Supp. 639 (D. Neb. 1979): City condemnation of property for correctional facility and industrial park, where city had previously done an environmental impact statement, and had been also previously enjoined pending completion of a updated environmental impact statement (which also concluded no significant impact).

Bosco v. Beck, 475 F.Supp. 1029 (D.N.J. 1979): Water treatment and sewerage projects, where EPA had investigated each area of concern raised by plaintiffs.

Como-Falcon Coalition v. Department of Labor, 465 F.Supp. 850 (D. Minn. 1978), aff'd 609 F.2d 342 (8th Cir. 1979): Establishment of Job Corps center on former college campus in city area, where impact was from influx of low income people.

Higgins v. U.S. Postal Service, 449 F.Supp. 1001 (D. Mass. 1978): Construction of mechanized mail processing facility in Woburn, Massachusetts, where environmental assessment had been performed, including identification of means to lessen environmental impact.

Joseph v. Adams, 467 F.Supp. 141 (E.D. Mich. 1978): Five lane, 2.5 mile highway extension in undeveloped area, although courts specifically held it had inadequate information to be able to review the issue.

Hiatt Grain and Feed Inc. v. Bergland, 446 F.Supp 457 (D. Kansas 1978), aff'd 602 F.2d 929 (10th Cir. 1979): Expansion of list of commodities for which approved co-ops could get price support for members, where environmental assessment done.

Mont Vernon Preservation Society v. Clements, 415 F.Supp. 141 (D. N.H. 1976): .85 mile highway extension in New England Village with increased width of roadway, where negative declaration sufficiently identified the environmental factors.

First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973): Federal parking garage and detention center in Chicago, where GSA had done a full scale environmental assessment and where blighted area (non-residential) site was specifically noted.

Cabinet Mountains Wilderness v. Peterson, 510 F.Supp. 1186 (D.D.C. 1981): U.S. Forest Service approval of mineral exploration in Cabinet Mountains Wilderness area of Montana, where environmental assessment done which incorporated recommendations for mitigation factors.

Birmingham Realty Co. v. General Services Administration, 497 F.Supp. 1377 (N.D. Ala. 1980): GSA lease on 17,000 sq.ft. in Birmingham business area, where building substantially completed and only socio-economic effects were involved.

Sierra Club v. Hassell, 11 ELR 20227 (5th Cir. Feb. 13, 1980): Reconstruction of Dauphin Island Bridge destroyed by hurricane, where repair work was not any significant alteration of status quo even though a wider road bed was involved.

Township of Parsippany-Troy Hills v. Costle, 503 F.Supp. 314 (D.N.J. 1979): Upgrading of existing water treatment plant, where EPA had done extensive and studies to support its negative declaration.

Rhone-Poulenc, Inc., Hess & Clark Division v. FDA, 636 F.2d 750 (D.C. Cir. 1980): Banning of DES as animal drug, where FDA staff prepared an Environmental Impact Analysis, including a section on mitigation caused by the ban (other chemicals could be used).

New Hope Community Association v. HUD, 509 F.Supp. 525 (E.D.N.C. 1981): 60 units of low rent housing, where HUD environmental clearance regulations indicated that a brief evaluation for units up to 200 was sufficient, and where HUD had done a study which showed mitigation measures to be taken for project (runoff remedied through proper site engineering).

Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973): Leasing of 120 acres of mining adjacent to 1961 mining lease (covering 4,912 acres), where Secretary made a good faith effort to weigh factors and did not have to await an overall general study on the project.

Columbia Basin Land Protection Association v. Schlesinger, 11 ELR 20537 (9th Cir. April 20, 1981): Memorandum of Understanding on rights of way, since Memorandum of Understanding had no additional significant impact not identified in the overall Environmental Impact Statement.

Alabama v. U.S. Forest Service, 11 ELR 20779 (Northern District Alabama, Feb. 27, 1981): Rerouting of 3 mile section of hiking trail in Talladaga National Forest, where old trail was to be screened and new directional signs were to be added.

Northwest Airlines , Inc. v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981): DOT rule on allocating takeoff and landing slots at Washington National Airport, where overall limitations stayed the same but allocations and allocation methodology changed.

Norfolk Noise Abatement Movement, Inc. v. Bond, 11 ELR 20726 (4th Cir. 1981): Extension of two runways and construction of a third, where environmental assessment was prepared by contractor for Norfolk County Industrial Development Authority.

Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980): 345 KV transmission lines spanning Missouri River, where Corps of Engineers performed an environmental assessment supporting its conclusions.

City and County of San Francisco v. United States, 10 ELR 20346 (9th Cir. March 14, 1980): Five year renewable lease of shipyard to private ship repair company, where shipyard had been previously used in that capacity and Navy had a 68-page Environmental Assessment to support its conclusions.

Kettle Range Conservation Group v. Berglund, 480 F.Supp. 1199 (E.D. Wash. 1979): Timber sales in national forest, where Forest Service prepared Environmental Assessment and an earlier Environmental Impact Statement had been prepared for overall management policy in area.

Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115 (9th Cir. 1980): Purchase of Lockheed Airport facility by local authorities, where no change in status quo was evident.

Cobble Hill Association v. Adams, 470 F.Supp. 1077 (E.D.N.Y. 1979): Highway repair and renovation project for the Brooklyn-Queens Expressway, where there was no departure from present use and no long term environmental consequences in the court's view.

Get Oil Out!, Inc. v. Andrus, 477 F.Supp. 40 (C.D.Cal. 1979), earlier opinion 468 F.Supp. 82 (C.D.Cal. 1979): Installation of two oil drilling rigs in Santa Barbara Channel, where previous Environmental Impact Statement done on oil and gas development in Santa Barbara

Channel and a DOI Environmental Assessment had been prepared on the specific rigs in question.

Stephens v. Adams, 469 F.Supp. 1222 (E.D. Wis. 1979): 4.33 mile widening of secondary highway.

South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980), aff'g 462 F.Supp. 905 (D.S.Dak. 1978): Mineral patents for twelve 20-acre claims in Black Hills National Forest, where private party could begin mining without a mineral patent and DOI had no discretion to exercise.

Lake Berryessa Tenants Council v. United States, 588 F.2d 267 (9th Cir. 1978): USBR order for removal of certain private docks and restricting use of house boats.

Committee for Auto Responsbility v. Solomon, 603 F.2d 992 (D.C.Cir. 1979): GSA leasing of Federal Triangle area for parking facilities, since there was no change in status quo and environmental assessment prepared supporting conclusion.

Delta Airlines, Inc. v. CAB, 561 F.2d 293 (D.C.Cir. 1977): Non-competitive carrier certifications between Miami and Los Angeles, where court recognized that this was an uncontested point (p. 1297, n. 3).

Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976): Order suspending coal prospecting permits, where subsequent post-order full environmental consideration had cured any problems.

Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976): U.S. Army reduction of jobs and transfer personnel from Lexington-Bluegrass army depot to California and Pennsylvania depots, where only effects were socio-economic.

Aertsen v. Landrieu, 637 F.2d 12 (1st Cir. 1980), affirming 488 F.Supp. 314: Boston South End Renewal Plan for 207-unit housing project, where court said not a major action since it was not reasonable to expect funds at the time it was approved.

American Trucking, Ass'n. v. United States, 642 F.2d 916 (5th Cir. 1981): Agency rulemaking on simplified licensing procedure for motor transport of governmental contract materials, where there was a staff study to support environmental conclusions.

February , 1983

Note to: Larry Chandler

From: Elaine Chan

SUBJECT: WHETHER WITHDRAWAL OF A CONSTRUCTION PERMIT REQUIRES AN ENVIRONMENTAL IMPACT STATEMENT

I. Introduction

You have asked me to research the question of whether the withdrawal of a construction permit such as that proposed for Hartsville Nuclear Plant B and Phipps Bend Nuclear Plant constitutes a major federal action or Commission action significantly affecting the quality of the human environment and thus requires the preparation of an environmental impact statement.

II. Background

On August 25, 1982 the Tennesse Valley Authority (TVA) decided to cancel the Hartsville Nuclear Plant B and the Phipps Bend Nuclear Plant.

A. Plans for the Site

The TVA plans to retain both sites in TVA's inventory for potential use as generating facility sites.[1/] It is proposed that both sites will be

---

1/ Background information, presented below, was offered to NRC in a preliminary draft by TVA dated October 1982, entitled "TVA Cancellation of the Hartsville Nuclear Plant B and Phipps Bend Nuclear Plant and Request for Construction Permit Extensions of the Hartsville Nuclear Plant A and the Yellow Creek Nuclear Plant."

environmentally stabilized as necessary, including grading and grassing, to prevent erosion and to provide drainage away from the existing structures. Existing, partially completed permanent plant structures will be secured by barricades, fences, and locked gates to prevent unauthorized entry and to limit conditions that could constitute a hazard to TVA employees or to the public. In the case of the Hartsville Plant B site, TVA will permit use of the site as required for materials storage, laydown areas, transmission facilities and other work in support of Hartsville Plant A. For the Phipps Bend site, TVA will allow interim uses of the site properties and facilities under arrangements compatible with the potential future use of the site for a power generating facility. At the end of the interim use period, areas and structures could be retained and incorporated into construction for some permanent site facility or removed and the area environmentally stabilized. The construction holding pond will be retained and used to collect and treat construction runoff for the duration of site stabilization.

B. Environmental Monitoring and Mitigation Programs

Environmental monitoring and mitigation programs were developed and maintained as single programs for the Hartsville Plants A and B. The waterfowl/wetlands wildlife program will be discontinued after the fall/winter cycle (April 1983). The collection of the past ten years of data will be analyzed and the results summarized. The threatened bird species monitoring program will be discontinued after the May 1983 census. The five years of census data will be analyzed and the results summarized. The preconstruction/construction radiological monitoring

program will be discontinued subject to possible reestablishment of this program if future site activities warrant. Ground water monitoring will be discontinued.

All terrestrial monitoring programs at the Phipps Bend site will be terminated although TVA has committed to perform technical reviews of site stabilization plans and land use proposals. The meteorological tower and associated hardware will either be maintained in an inoperative mode or removed from the site.

C. Socioeconomics

A deferral/cancellation impact mitigation program was developed and is being implemented as a single program for the Hartsville, Phipps Bend, and Yellow Creek projects. In August 1981, TVA authorized $150,000 at each project for the implementation of a deferral economic mitigation program. The purpose of the program was to help offset the impacts of sudden unexpected unemployment in the areas around the nuclear plants. The program, which provides loans to create new permanent private sector jobs, will continue to evaluate requests until September 30, 1983 when this activity will terminate and all unexpended funds will be retained by TVA.

D. Transmission Line Systems

Work on the transmission lines for the Hartsville Plants A and B has halted and those portions of line which have been completed will be maintained in a normal manner. Due to transmission system needs, the

Phipps Bend switchyard will be completed and will serve TVA as a 500-KV substation. Construction of Phipps Bend transmission line connections is also continuing and is scheduled to be completed by September 30, 1983.

III. Discussion

A. Governing Statutes

The question as to whether an environmental impact statement (EIS) must accompany the withdrawal of a construction permit for a nuclear power plant by TVA is governed primarily by two Federal statutes, the National Environmental Policy Act of 1969 (NEPA) (42 USC 4321 et seq.) and the Atomic Energy Act of 1954 (as amended 42 USC 2011 et seq.). In this regard, "the two statutes and the regulations promulgated under each must be viewed in pari materia." 2/

NEPA requires that, inter alia, all federal agencies must file a detailed statement of the environmental impact (EIS) of all major federal actions taken by them which may significantly affect the quality of the human

---

2/ Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2) ALAB-506, 8 NRC 533, 539 (1978).

environment.[3/] Similarly, NRC regulations require that an EIS be prepared and circulated prior to "any . . . action which the Commission determines is a major Commission action significantly affecting the quality of the human environment."[4/]

The jurisdiction of the NRC to impose environmental conditions on applicants and licensees is discussed in Phipps Bend.[5/] The Licensing Board in that case held that the NRC may impose such conditions on other federal agencies, such as TVA, which seek NRC licenses, despite the language of Section 271 of the Atomic Energy Act (42 U.S.C. § 2018) which states in part that nothing in the act "shall be construed to affect the authority of any Federal, State or local agency with respect to the

---

3/ NEPA provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (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 enviromental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 USC § 4332.

4/ 10 C.F.R. § 51.5(a)(12).

generation, sale, or transmission of electrical power through the use of nuclear facilities licensed by the Commission...."[6/]

In the instant situation, in order to terminate the adjudicatory proceedings upon the applications which are being withdrawn, the TVA must file the appropriate motions with the Licensing Boards.[7/] Pursuant to 10 C.F.R. § 2.107(a), a Board may attach conditions to the allowance of the motion to withdraw.[8/] However, the regulations do not specify whether an EIS is required upon the withdrawal of an application. Neither have the courts nor the boards determined in prior decisions whether an EIS is required in the above circumstances. Therefore, an inquiry of whether an EIS is required must begin with an analysis of the statutory language.

The relevant provisions of NEPA and the NRC regulations require an EIS for "major federal actions" and "major Commission actions" which "significantly [affect] the quality of the human environment." The statute and the regulations present two separate tests, both of which must be satisfied before an EIS can be required. First, the federal

---

5/ Phipps Bend, supra, 8 NRC at 539 (1978).

6/ Id. at 541-544

7/ Motion to withdraw application and terminate proceeding. See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-668, 15 NRC 450, 451 (1982);The Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 669 (1980).

8/ See Puerto Rico Electric Power Auth. (North Coast Nuclear Plant, Unit 1, ALAB-662, 14 NRC 1125, 1133 (1981);Davis-Besse, supra, at 669.

action or the Commission action must be "major." Second, the action must "significantly affect the quality of the human environment.[9/]

A. Major Federal or Commission Actions

"Federal action" within the meaning of the statute includes not only actions undertaken by the agency itself but also any actions permitted or approved by the agency which allows action by other parties which will affect the quality of the environment.[10/]

An environmental impact statement is not required every time a federal agency does anything; but rather it is limited to those actions requiring "substantial planning, time, resources or expenditure."[11/]

The term "major" is generally limited to those federal actions of superior, larger and considerable importance involving substantial expenditures, planning, time and resources.[12/] The action must be assessed with a view to the overall, cumulative impact of the action proposed, the amount of federal funds expended, number of people

---

9/ See National Ass'n for the Advancement of Colored People v. Wilmington Medical Center, Inc., 436 F. Supp. 1194, 1199 (D.C. Del. 1977), affirmed, 584 F.2d 619 (3d Cir. 1978).

10/ Sierra Club v. Morton, 514 F.2d 856 (1975), rev'd on other grounds 427 U.S. 390 (1976). Scientists' Institute for Public Information, Inc. (SIPI) v. Atomic Energy Commission, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

11/ NRDC v. Grant, 1972 341 F. Supp. 356 (E.D.N.C. 1972). See also Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971).

12/ See Julis v. City of Cedar Rapids 349 F. Supp. 88 (N.D. Iowa 1972); NRDC v. Grant, supra.

affected, length of time consumed, related federal action and projects in the area, and further actions contemplated.[13/]

Approving leases to private parties and granting licenses or permits to private parties are well-established examples of major federal actions.[14/] Under NRC regulations, the issuance of a construction permit to build a nuclear power reactor is construed to be a major federal action which automatically requires the preparation of an EIS. 10 CFR § 51.5(a)(1). Similarly the NRC regulations provide that an amendment to or modification of a construction permit to build a nuclear power reactor may require a separate EIS. 10 C.F.R. § 51.5(b)(2) and (4). While the NRC regulations do not specify whether an EIS is or may be required for the withdrawal of an application, the regulations do provide that withdrawal does require the permission of the Board and is subject to any conditions the Board may prescribe. 10 C.F.R. § 2.107. While "major" actions are usually considered to be positive, i.e. where an agency has

---

13/ See Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor, 465 F. Supp. 850 (D. Minn. 1978), aff'd 609 F.2d 342 (8th Cir. 1979) cert. denied, 446 U.S. 936 (1980); City of Rochester v. U.S. Postal Service, 541 F.2d 967 2d Cir. 1976).

14/ See, e.g., Davis v. Morton, 469 F.2d 593 (10th Cir. 1972); Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972). Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971); Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

affirmatively determined to license or permit an activity, the subsequent withdrawal of the federal sanction may also be considered an "major" action, especially where a significant portion of the sanctioned activity has already commenced or has been substantially relied upon.

In the instant case, substantial construction appears to have been completed with respect to both the Hartsville Plant B and Phipps Bend nuclear reactors. Second, with both plants scheduled to come on line in between 1982 and 1984, a certain measure of reliance on the completion of the projects may have already been achieved. Under these circumstances, it is reasonable to conclude that the withdrawal of the construction permits for Hartsville Plant B and Phipps Bend constitutes a major federal or Commission action. Whether withdrawal also satisfies the second part of the test for requiring an EIS, however, must still be determined.

B. Significantly Affects the Quality of the Human Environment

The determination as to whether the withdrawal of the Hartsville Plant B and the Phipps Bend Nuclear Plant construction permits significantly affects the human environment requires an analysis of the available facts in light of guidance offered by governing statutes and regulations and court or Board decisions. Before an EIS can be required, it must first be shown that there is or will be a significant impact on the physical environment as a result of the withdrawal. Second, it must be shown that any such impact has not been adequately addressed in the EIS accompanying the issuance of the construction permit.

The significance of the impact of an action is in large part an evidentiary matter. In City and County of San Francisco v. U.S., the court held that an EIS must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor.15/

A review of the preliminary draft of "TVA Cancellation of Hartsville Nuclear Plant Band Phipps Bend . . ." does not appear to present any significant environmental impacts which were not addressed in the EIS accompanying the issuance of the construction permits. No radiological health and safety problems exist since cancellation at this stage is prior to fuel-loading. Hence, a termination of the radiological monitoring program would have no environmental impact since its primary purpose is to provide a baseline for comparison with operational releases.

TVA has committed, at least preliminarily, to the establishment of an environmental stabilization program to minimize erosion and contain construction runoff. Under these circumstances, the termination of groundwater monitoring and an end of construction induced site impacts would not appear to result in any significant environmental effects. Even if the cessation of construction did result in such impacts, the

---

15/ City and County of San Francisco v. U.S., 615 F.2d 498 (9th Cir. 1980). See also, Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) (EIS required if plaintiff alleges facts which, if true, show that the project may significantly degrade some human environmental factor).

entire range of construction effects have been adequately addressed in an earlier EIS and it would appear unnecessary to repeat the analysis at the withdrawal stage. Similarly, any impacts attributable to the construction of the Phipps Bend transmission lines and switchyard or termination of other transmission line construction even if they may be considered significant, have already been adequately addressed in the earlier EIS. NEPA requires an anyalysis of the environmental impact of major federal actions significantly affecting the quality of the human environment. It does not, however, require that such analyses be repeated, merely for the sake of repetition once such analyses have already been substantially performed.

In Monarch Chemical Works, Inc. v. Exxon[16/] where private property was condemned for the construction of a correctional facility, the court found that requiring an EIS would be unreasonable since the amount of time that the preparation of a full-blown impact statement entailed was out of proportion to the environmental risks involved, and environmental protection would not be served by requiring an EIS where a major federal action was insignificant within the meaning of NEPA.[17/] In the instant case, effects on the physical environment related to withdrawal of the

---

16/ 466 F. Supp. 639 (D. Neb. 1979).

17/ Id. at 648.

application would appear to be minimal, particularly since termination of construction is planned well before the fuel loading stage. Even where there may be physical impacts, these appear to have already been adequately addressed in the EIS accompanying the original construction permits.

An analysis of the environmental impacts of the withdrawal of the Hartsville B and Phipps Bend construction permits may also require analysis of any socio-economic effects associated with the withdrawal. According to Council of Environmental Quality (CEQ) regulations which govern the interpretation of NEPA, the term "human environment" embraces

> "the natural and physical environment and the relationship of people with that environment. . . This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment. (Emphasis added).[18/]

The CEQ regulations do not require an analysis of non-environmentally grounded socio-economic effects of federal action. Thus, social and economic effects of federal action need not be canvassed unless they are proximately traceable to natural or physical environmental effects of the action. The consideration of any socioeconomic impacts attendant to the cancellation and CP withdrawal of the Hartsville B and Phipps Bend plants, therefore, must be related to a significant impact on the physical environnment.

18/ 40 C.F.R. 1508.14.

Since no details concerning socioeconomic impacts of withdrawal are provided, it is assumed for the purpose of this analysis, based on the on-going deferral/cancellation mitigation program, that the areas around the cancelled plants will experience unanticipated unemployment. However, the courts have held that mere unemployment caused by federal actions without other significant effects on the physical environment does not require an EIS.

In Breckenridge v. Rumsfeld[19/] the court rejected the claim that unemployment caused by the closing of a military base was an environmental impact cognizable under NEPA. The court explained that, although "NEPA goes beyond ...the 'physical environment'... factors other than the physical environment [are to be considered] ...only when there exist[s] a primary impact on the physical environment.[20/] The court found that where "no permanent commitment of a national resource and no degradation of a traditional environmental asset was involved, but rather only short term personal inconvenience and short term economic disruptions," such action did not affect the "human environment" within the meaning of NEPA and thus no environmental impact statement was required.[21/]

19/ 537 F.2d 864, (6th Cir. 1976), cert. denied, 429 U.S. 1061 (1977). (Army eliminated 18 military and 2630 civilian jobs)

20/ Id. at 865-866. Accord. Image of Greater San Antonio, Texas v. Brown, 570 F.2d 517, 522 (5th Cir. 1978).

21/ Id.

Socio-economic impacts independent of impacts to the physical environment have been held by the courts not to be cognizable under NEPA in other contexts. Possible effects on police and fire protection caused by the closing of an arsenal as part of the government's restructuring of the armaments community were not construed to be a significant impact on the human environment because the concerns were not environmental, but rather, exclusively socio-economic.[22/] The decision of the Bureau of Reclamation in the Department of the Interior to withdraw federal hydro-electric power from a preference customer was held not to be a major federal action requiring an EIS.[23/]

In the instant case, TVA has already instituted a deferral/cancellation mitigation program which is projected to continue until September 30, 1983. However, since it does not appear that the withdrawal of the construction permits for the Hartsville B and Phipps Bend Nuclear Plants will significantly affect the physical environment, no additional

---

22/ National Ass'n. of Government Emp. v. Rumsfeld, 418 F. Supp. 1302 (E.D. Pa. 1976). But see McDowell v. Schlesinger, 404 F. Supp. 221 (W.D. Mo. 1975) (Relocation of an Air Force unit from Missouri to Illinois involving the transfer of approximately 7500 persons). The court heldin McDowell that since the planned transfer might result in, inter alia, significant impacts on the areas social and economic activities, law enforcement, fire prevention, public utilities, growth and development patterns, housing, land-use patterns, neighborhood character and cohesiveness, and aesthetic nature. Accordingly, the court held that an EIS was required under the circumstances.

23/ City of Santa Clara v. Kleppe, 418 F. Supp. 1243 (N.D. Cal. 1976).

analysis of unemployment or other socioeconomic impacts need be performed.

IV. Conclusion

For the reasons discussed above, the withdrawal of the construction permits for the Hartsville Nuclear Plant B and the Phipps Bend Nuclear Plant does not require the preparation of an environmental impact statement. While such withdrawal may be considered a "major federal action," it does not appear to satisfy the second part of the test for an EIS. The proposed withdrawal would probably not be construed as "significantly affecting the quality of the human environment." Since termination is planned well before the critical fuel loading stage, there does not appear to be any significant threats to the physical environment that have not already been considered in the EIS accompanying the issuance of the construction permits. While there may be unanticipated unemployment consequences as a result of the cancellation of the plants, these and other socioeconomic impacts are not cognizable where they are not related to substantial physical impacts.