Substantive Standards and NEPA: Mitigating Environmental Consequences with Consent Decrees

John V. Cardone
SUBSTANTIVE STANDARDS AND NEPA: MITIGATING ENVIRONMENTAL CONSEQUENCES WITH CONSENT DECREES

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I. INTRODUCTION

When Congress passed the National Environmental Policy Act (NEPA),¹ it established a policy of promoting the welfare of future generations by taking steps to insure that humans and nature exist in productive harmony.² NEPA broadly states that the federal government shall use all practicable means at its disposal to achieve a goal of environmental harmony within the limits of other essential national considerations.³ Congress recognized that activities aimed at raising the standard of living in a society often come at the expense of environmental harm.⁴ Given this reality, the goal of NEPA is to ensure that the federal government adequately considers the environmental consequences of its actions.⁵

In furtherance of its environmental goal, NEPA requires all federal agencies proposing an action that “significantly affect[s] the quality of the human environment” to submit an environmental impact statement (EIS).⁶ The EIS must include a discussion of the environmental impacts of the proposed action, alternatives to the action, and any commitment of resources necessary for the action’s

* Production Editor, 1990–1991, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

² Id. § 4321.
³ Id. § 4331(b).
⁶ Id.
implementation.\textsuperscript{7} EIS reporting ensures that an agency discloses all information used in making a decision, and that the general public has an opportunity to comment on the proposal.

During the reporting process, environmental groups and concerned citizens learn of the impact an action will have on the environment and often marshal opposition to the proposed action. Parties opposed to the project attempt to show that the agency has not adequately considered its proposal in light of resulting detrimental environmental effects. They challenge the scope of an EIS and the sufficiency of its analysis of environmental harms.\textsuperscript{8}

By attacking an EIS, plaintiffs attempt to appeal to public sentiment and to make agencies more responsive to substantive environmental concerns.\textsuperscript{9} Such litigation only has reinforced one judicial tenet: NEPA does not establish substantive environmental standards.\textsuperscript{10} NEPA states only the minimum procedural requirements an agency must follow in collecting, evaluating, and disclosing information on a proposed action. Through these requirements NEPA helps to ensure that the agency makes an informed decision.\textsuperscript{11} Because NEPA states only procedural requirements to disclose consequences and not substantive standards to weigh them, NEPA does not provide grounds for challenging an agency's action merely because of resulting environmental harm.

This Comment suggests that environmentalists could seek a consent decree, in conjunction with the EIS reporting process, to make agencies and third parties more responsive to substantive environmental concerns, and to provide grounds for a cause of action when guarding against environmental harm. Section II discusses the current limited scope of judicial review over NEPA and the inability of plaintiffs to gain a judgment that would do more than temporarily

\textsuperscript{7} Id.

\textsuperscript{8} See Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 319 (1975) (NEPA creates a right of action in adversely affected parties to require agencies to give written consideration of environmental issues).

\textsuperscript{9} See, e.g., Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 90 (1983) (respondents challenged assumption by Nuclear Regulatory Commission that permanent storage of nuclear waste would not have a significant environmental impact for purposes of NEPA); Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) (respondents challenged a determination by the Department of Housing and Urban Development that redesignation of a building site from mixed housing to exclusively low-income housing was environmentally acceptable under NEPA).


\textsuperscript{11} Id.
forestall detrimental environmental consequences. Section III examines the use of consent decrees as tools in providing a more flexible judgment in litigation. A consent decree allows a court to grant relief under a statute that may be beyond the court’s power if it acted alone, and such a decree allows for better enforcement of a judgment.

Section IV examines the possibility that the preclusion of detrimental environmental effects may be the appropriate subject matter for a consent decree. If such a decree is issued, the agency must identify those detrimental effects that cannot be precluded and discuss how they can be mitigated if the project is implemented.

Finally, section V examines a hypothetical situation, based upon a recent Supreme Court decision, that illustrates how parties could use a consent decree to preclude the occurrence of some adverse effects. This analysis also will show that the decree could enhance the NEPA disclosure function, by establishing supplemental reporting to environmentalists on agency activities. In this way, the decree could provide environmentalists with a better means of enforcing compliance with an EIS.

II. JUDICIAL REVIEW UNDER NEPA

Judicial review of an agency’s decisions under NEPA is governed by the Administrative Procedures Act (APA). Under the APA, a reviewing court will hold an agency action unlawful if it is found to be arbitrary or capricious. A court also may enjoin an action if the agency did not follow procedures prescribed by law. Courts will give greater deference to an agency, however, when the agency has

12 See infra notes 18–36 and accompanying text.
13 See infra notes 37–95 and accompanying text.
14 See infra notes 96–121 and accompanying text.
15 See infra notes 122–140 and accompanying text.
16 See infra notes 141–167 and accompanying text.
17 See infra notes 168–190 and accompanying text.
20 Id. § 706(2)(A); cf. City of Des Plaines v. Metropolitan Sanitary Dist., 552 F.2d 736, 737 (7th Cir. 1977) (EIS held adequate when EPA’s decision to approve of project was not arbitrary or capricious).
interpreted complex scientific or technical data to resolve an issue of fact.\textsuperscript{22}

The APA's arbitrary or capricious standard, combined with the courts' deference to agencies on matters of scientific fact, limits judicial review under NEPA.\textsuperscript{23} An environmental group attempting to stop a project has the burden of convincing the court that the agency acted arbitrarily, capriciously, or unreasonably in compiling the EIS.\textsuperscript{24} In certain circumstances, courts also have prevented an agency from acting because the agency failed to follow required EIS procedures.\textsuperscript{25} If an EIS adequately discloses the consequences of the project, however, a court will not second-guess the agency's decision to proceed.\textsuperscript{26}

Courts rarely review agencies' post-project compliance with an EIS.\textsuperscript{27} In many cases when plaintiffs have sought judicial review of whether an agency complied with an EIS in implementing a project, the courts have stated that plaintiffs should have brought their suit while the project was under way, not after the damage was done.\textsuperscript{28} As a result, some courts have declared cases moot because plaintiffs failed to halt a project while it was in progress.\textsuperscript{29} Once a project is

\textsuperscript{22} See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."); Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976) ("Resolving . . . [the issues in question] requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies.").


\textsuperscript{24} Section 706 of the APA requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (1988). While unreasonableness is not used in the APA, it has been equated with the arbitrary or capricious standard. See Marsh, 109 S. Ct. at 1861 n.23 (there is little practical difference between the "arbitrary or capricious" or "reasonableness" standards of review under NEPA).

\textsuperscript{25} See, e.g., Lathan v. Brinegar, 506 F.2d 677, 681–82, 693–94 (9th Cir. 1974) (court upheld injunction prohibiting acquisition of land for highway until a proper EIS was prepared and circulated).

\textsuperscript{26} Compare Baltimore Gas & Elec., 462 U.S. at 97–98 ("The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.") with Town of Huntington v. Marsh, 859 F.2d 1134, 1143 (2d Cir. 1988) (lack of sufficient data in the EIS violated NEPA).

\textsuperscript{27} See Note, EIS Supplements for Improperly Completed Projects: A Logical Extension of Judicial Review Under NEPA, 81 MICH. L. REV. 221, 228 (1982).

\textsuperscript{28} See, e.g., City of Romulus v. County of Wayne, 634 F.2d 347, 348 (6th Cir. 1980) ("Plaintiffs did not file a motion in this court or in the District Court for an injunction pending appeal. During the time that this appeal has been pending, the runway in question has been completed.").

\textsuperscript{29} Neighbors Organized To Insure A Sound Environment, Inc. v. McArtor, 878 F.2d 174, 177–78 (6th Cir. 1989) (plaintiff's complaint about the inadequacy of the EIS was dismissed
completed, NEPA does not offer a remedy if an agency deviates from its proposed plan.\textsuperscript{30}

A court may enjoin agency action if the scope of an EIS is too narrow.\textsuperscript{31} To illustrate, if a proposed action ultimately will destroy a forest, an agency does not fulfill its NEPA obligations by disclosing in multiple EISs the limited effects of removing single trees. This type of narrow disclosure is known as "segmentation," and courts will halt any attempt to circumvent NEPA by segmenting the project.\textsuperscript{32}

An agency can defeat a charge of segmentation, however, by successfully showing that it could not reasonably have expected the size of an initial project to grow.\textsuperscript{33} Conflicting opinions exist in situations involving separate but logically related projects. Courts have ruled in some instances that the projects must be included in a single EIS and in other instances that an encompassing EIS was not required.\textsuperscript{34}

Because the Supreme Court established that NEPA states only procedural and not substantive environmental standards, the resulting narrow scope of review over the EIS reporting process has as moot after airport construction completed and plaintiffs failed to show the government capable of repeating the harm). For a case with parallel facts and holding, see City of Romulus, 634 F.2d at 347.

\textsuperscript{30} See, e.g., Ogunquit Village Corp. v. Davis, 553 F.2d 243, 246 (1st Cir. 1977) (absent "bad faith" on the part of the agency, the court would not fashion relief for a completed project that deviated from the final EIS); see also City of Blue Ash v. McLucas, 596 F.2d 709 (6th Cir. 1979). Blue Ash involved a dispute between neighboring municipalities and the Federal Aviation Administration (FAA). The city of Blue Ash initially opposed construction of a 4000-foot runway at an airport located within its city limits but owned by the city of Cincinnati. Id. at 710. By a resolution of its city council, Blue Ash eventually dropped opposition to the runway in exchange for assurances that jet aircraft would be prohibited from using the airport. Id. at 710–11. Subsequently, the Cincinnati city council and the regional airport authority adopted resolutions agreeing to follow Blue Ash's stipulation to prohibit jets. Id. at 711.

The FAA's final EIS for the airport project recognized the existence of these resolutions. Id. Upon completion of the runway, however, the FAA's regulations for the airport permitted the use of jet aircraft. Id. When the plaintiff tried to force the FAA to change its regulations to reflect the language in the EIS, the court upheld the dismissal of the suit for failure to state a claim upon which relief could be granted. Id. at 713.

\textsuperscript{31} Sierra Club v. Penfold, 857 F.2d 1307, 1322 (9th Cir. 1988).

\textsuperscript{32} Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988).

\textsuperscript{33} See, e.g., Aertsen v. Landrieu, 488 F. Supp. 314 (D. Mass. 1980), aff'd, 637 F.2d 12, 19 (1980) (an agency reasonably expected not to have further funding, and therefore, it was not acting in bad faith when it sought to demolish additional structures).

\textsuperscript{34} Compare Sylvester v. United States Army Corps of Eng'rs, 871 F.2d 817, 823 (9th Cir. 1989) (a golf course built on wetlands differed from an adjoining private resort and did not have to be included on the same EIS) with Thomas v. Peterson, 753 F.2d 754, 761 (9th Cir. 1985) (agency's EIS had to consider both a federal road and the federal timber sales that the road would facilitate).
provided limited opportunities for plaintiffs to prevent environmental harms. Unless plaintiffs can meet the heavy burden of showing capriciousness on the part of a federal agency, courts will defer to the agency's expertise on issues of fact. As their only remaining recourse under NEPA, plaintiffs temporarily halt projects with attacks on the thoroughness or scope of EISs, with the hope that the revised EISs will reveal environmental consequences too detrimental to permit implementation.

In light of this narrow scope of review, plaintiffs should explore alternative ways to use the EIS reporting process to prevent environmental harms. Instead of litigating to halt a project, plaintiffs should seek a judgment that permanently mitigates environmental consequences. Using a consent decree to fashion a judgment is one way of achieving this goal.

III. CONSENT DECREES AND FEDERAL AGENCIES

A consent decree gives parties greater autonomy in fashioning the outcome of litigation. Consent decrees are written by the parties, much like a contract, and are presented to the court for approval during the litigation. Unlike a contract, however, if a party should fail to abide by the terms of a consent decree, the injured party does not initiate a new lawsuit for breach. Instead, the injured party may move to have the violating party held in contempt.

This procedural difference allows faster relief. With a consent decree the court maintains jurisdiction over the case, allowing an aggrieved party to dispense with the pleading and notice requirements of a new suit. An immediate contempt citation, rather than the threat of a future lawsuit for breach of contract, gives greater incentive to a violating party to abide by the terms of the agreement.

The increasing number of lawsuits against federal agencies places pressure upon the government to settle claims and avoid litigation.

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35 See supra note 22 and accompanying text.
36 See supra notes 9, 20 and accompanying text.
38 See United States v. Ketchikan Pulp Co., 430 F. Supp. 83, 84 (D. Alaska 1977) (plaintiff simultaneously filed a complaint and a consent decree that had been negotiated with defendant).
Federal agencies have used consent decrees to settle civil rights litigation\(^{42}\) and antitrust actions.\(^{43}\) Other agencies have entered into consent decrees governing the use of land that have defined the bounds of subsequent NEPA litigation.\(^{44}\)

**A. Judicial Approval**

Generally, courts are faced with two questions when presented with a consent decree. The first is whether to approve of the decree, and the second is how to interpret the terms of the decree in a proceeding for enforcement.\(^{45}\) In *Local Number 93, International Association of Firefighters v. City of Cleveland*,\(^{46}\) the Supreme Court recently examined the ability of a district court to approve of a consent decree in the context of a Title VII anti-discrimination suit.\(^{47}\) In upholding the validity of the decree between a group of minority firefighters and the City of Cleveland, the Court discussed how a consent decree provided the parties greater flexibility in fashioning relief under a federal statute.\(^{48}\)

As a general requirement, a consent decree must be within the court's subject matter jurisdiction.\(^{49}\) Accordingly, the decree must not reach beyond the general scope of the pleadings, and it must "further the objectives of the law" cited in the complaint.\(^{50}\) A court

\(^{42}\) *See*, e.g., *Local No. 93*, 478 U.S. 501 (consent decree settling claims against the Cleveland fire department for race discrimination).


\(^{48}\) *Id.* at 514–15.

\(^{49}\) *Id.* at 518. "[T]here is no reason to think that voluntary, race-conscious affirmative action . . . is rendered impermissible by Title VII simply because it is incorporated into a consent decree." *Id.* at 525 (citations omitted).

\(^{50}\) *Id.*
cannot enter a consent decree unless both parties agree to be bound. In a multiple-party suit, with plaintiff or defendant intervenors, a court can enter a consent decree over the objections of the intervenors. Those opposed to the decree will be free to litigate their claims.

If a consent decree governs the use of land, however, successors in title may be bound by its terms even though they were not original parties to the decree. In *Cleveland Baptist Association v. Scovil*, owners of lots that were subject to a default proceeding entered into a consent decree that restricted the use of their land. By the terms of the decree, the lots were to be sold subject to the restrictions set forth in the consent decree. The court held that the decree was a valid mechanism for encumbering the land, and that by accepting a deed incorporating its terms, subsequent owners were bound by the decree.

One of the more significant aspects of the Supreme Court's ruling in *Local Number 93* is that a federal court can approve of a consent decree that provides for broader relief than the court normally would have the power to award. The Court approved a consent decree that gave promotions to individuals who had not been the actual victims of discriminatory practice. Although Title VII appears to prohibit such a remedy, the Court stated that it need not address the Title's prohibition in this case because the powers of the court were not coming from the law cited in the complaint, but from the "obligations embodied in a consent decree."

Writing separately, Justices White and Rehnquist argued that the Court could not enter the decree. Justice White believed that the

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51 Id. at 521-22.
52 Id. at 528-29.
53 Id. at 528-30.
54 107 Ohio St. 67, 140 N.E. 647 (1923).
55 Id. at 68-69, 140 N.E. at 648.
56 Id. at 69, 140 N.E. at 648.
57 Id. at 70, 140 N.E. at 649.
59 Id. at 525.
60 42 U.S.C. § 2000e-5(g) (1982). "No order of the court shall require . . . promotion of an individual . . . if such individual was refused . . . advancement . . . for any reason other than discrimination . . . ." Id. The Court held that for purposes of section 2000e-5(g), limitations placed on federal courts "do not apply when the obligations are created by a consent decree." *Local No. 93*, 478 U.S. at 522-23.
61 *Local No. 93*, 478 U.S. at 522-23. In a companion case, the Court decided that in some circumstances a court may provide relief to individuals who were not actual victims of discriminatory practices. *Local 20, of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421 (1986).
substantive terms of the decree, or any form of hiring quotas, violated Title VII, and therefore, a court could not approve of a settlement that violated the law.\textsuperscript{62} Justice Rehnquist, joined by Chief Justice Burger, argued that the local union, which did not enter into the decree, would be bound unjustly by its terms.\textsuperscript{63} Under the terms of the decree, non-minority union members would be passed over for promotions to which they might otherwise be entitled.\textsuperscript{64} After a review of the legislative history, Justice Rehnquist also concluded that, regardless of the parties' consent, entering a decree still fell within the prohibitive language of the act.\textsuperscript{65}

To settle lawsuits, federal agencies have limited some of their discretionary powers in consent decrees.\textsuperscript{66} Critics question to what extent a federal court, established under article three of the Constitution,\textsuperscript{67} can approve of self-imposed limits on executive powers\textsuperscript{68} contained in a consent decree.\textsuperscript{69} In \textit{Citizens For A Better Environment v. Gorsuch},\textsuperscript{70} the United States Court of Appeals for the District of Columbia held that an agency legitimately may exercise its broad powers by agreeing to limit some of its enforcement discretion through a consent decree.\textsuperscript{71}

In \textit{Citizens For A Better Environment}, the court held that EPA could settle a lawsuit with the Natural Resources Defense Council by promulgating additional regulations on the discharge of toxic pollutants not normally required under the Clean Water Act.\textsuperscript{72} Several companies, representing steel, chemical, and public utility interests, intervened and petitioned the court to vacate the decree.\textsuperscript{73} The intervenors claimed that the terms of the decree impermissibly

\begin{itemize}
  \item Local No. 93, 478 U.S. at 532 (White, J., dissenting).
  \item Id. at 537 (Rehnquist, J., dissenting).
  \item Id.
  \item Id. at 544 (Rehnquist, J., dissenting).
  \item See, e.g., Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1010 (7th Cir. 1984) (enforcement of an earlier consent decree in which the FBI agreed to limit its surveillance activities); National Audubon Soc'y v. Watt, 678 F.2d 299, 302–03 (D.C. Cir. 1982) (petitioners challenged the government's compliance with a consent decree in which the Interior Department agreed to halt construction until Congress reauthorized the project or an alternative plan).
  \item United States Constitution article three, section one states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
  \item United States Constitution article two, section one states: "The executive Power shall be vested in a President of the United States of America."
  \item See Rabkin & Devins, \textit{supra} note 41, at 228–46.
  \item Id. at 1129–30.
  \item Id. at 1120–21, 1127–29.
  \item Id. at 1120–21.
\end{itemize}
infringed on the EPA administrator's statutory discretion by shut­
ting out alternative courses of action allowed by the Clean Water
Act. The court rejected the companies' claim, however, and found
that the actions of EPA were a legitimate pursuit of its statutory
mandate. The court reiterated that the agency was free to adopt
more restrictive policies as long as it properly fulfilled its statutory
obligations.

Critics point out that this type of decree commits an agency to
spend money on projects devoted to parties bringing suit instead of
where it might be used most economically. They criticize these
decrees as binding successor administrations, and violating the sep­
aration of powers principle of governance by judicially consenting to
an intrusion on executive discretion. While cognizant of the consti­
tutional limitations of consent decrees, courts purposefully have
avoided constitutional questions by limiting decrees on other
grounds.

B. Interpretation: Contract or Judicial Act

The Supreme Court has provided conflicting guidelines for inter­
pretation of consent decrees. In one case, the Court required that
any interpretation of a decree be limited to the "four corners" of the
consent decree itself. The Court strictly interpreted the decree as
a contract that could not be modified without mutual consent of the
parties. In a later case, however, the Supreme Court held that a
court could look to outside sources such as statutes, complaints, and
other documents in order to interpret a consent decree. Although

74 Id. at 1122.
75 Id. at 1129.
76 See id.
77 Id. at 1133–34 (Wilkey, J., dissenting). Cf. United States v. Board of Educ., 744 F.2d 1300, 1301, 1305–07 (7th Cir. 1984); cert. denied, 471 U.S. 1116 (1985) (court ruled that efforts by the United States government to secure over $14 million in desegregation funding on a "priority basis" fulfilled its obligation under an earlier consent decree). The earlier consent decree in Board of Educ. has been criticized as an effort by the Carter Administration to settle political disputes prior to the 1980 election. See Rabkin & Devins, supra note 41, at 270.
79 See, e.g., National Audubon Soc'y v. Watt, 678 F.2d 299, 306 (D.C. Cir. 1982) (instead of addressing constitutional questions, the court read into the decree an implied condition releasing the parties from their obligations).
the Court still called the decree a contract because the decree also represented a judicial act, the Court seemed more receptive to a broader interpretation. These differing interpretations give lower courts greater discretion when reviewing a consent decree in an action for enforcement. 82

In United States v. Armour & Co., 83 the Supreme Court interpreted a consent decree between meat packers and the federal government. 84 The decree strictly prohibited Armour from entering the retail food business. 85 The government's position was that the decree required a complete separation between Armour and the retail food market. 86 The Court disagreed and held that the terms of the decree expressly did not prohibit a corporation already in the retail food business from acquiring Armour as a subsidiary. 87

The Court stated that the government could petition the original court granting the decree and argue that unforeseen circumstances required modification to prevent the reoccurrence of old "evils." 88 Unilateral modification by the original court would be possible because a court is free to modify the terms of a consent decree to conform with changes in either the law or factual circumstances under which the decree originally was written. 89 Under the existing terms of the decree in Armour, however, the Court refused to enforce a broader interpretation of complete separation. 90

Contrary to its holding in Armour, in United States v. ITT Continental Baking Co., 91 the Supreme Court extended the terms of an antitrust consent decree, entered into by the Federal Trade Commission, with no prior change in the law or factual circumstances. The Court held that the penalty listed in the decree for acquiring a bakery company extended beyond the initial acquisition and repeat-

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82 See Mengler, supra note 45, at 299–305. Mengler argues that in regard to the interpretation of consent decrees, the Supreme Court has "charted all the possibilities and fixed its sights on none." Id. at 299–300.
84 The consent decree, dating back to 1920, was the result of a bill in equity filed by the United States against the country's five largest meat packers. The bill accused the packers of conspiring to monopolize the meat business and attempting to control other food markets through the use of exclusive output contracts and predatory pricing. Id. at 675.
85 Id. at 678.
86 Id.
87 Id. at 678–80.
88 Id. at 680–82.
edly was incurred by ITT for each day it held the company.\textsuperscript{92} The Court, justifying its interpretation, stated that it remained within the "four corners" of the decree because the decree itself authorized a broader interpretation.\textsuperscript{93} The decree stated that "[t]he complaint may be used in construing the terms of the [consent] order."\textsuperscript{94} The Court held that this clause allowed it to read the decree in light of the antitrust statute under which the case arose and interpret "acquisition" to have a broader meaning.\textsuperscript{95} Regardless of the justification, the Court readily adopted a broader interpretation of the decree to conform to statutory objectives.

Local No. 93, Armour, and ITT illustrate how a consent decree can provide flexibility in framing the judgment in a lawsuit. In addition, if a decree furthers the objective of the law, it can provide remedies to the consenting parties that the court could not award absent such a decree. A court may interpret a decree strictly or with greater deference to the policies or law on which it is based, but under either interpretation it retains jurisdiction to ensure compliance.

Consent decrees may offer an alternative in NEPA litigation. Concerned environmentalists still would be required to file a lawsuit attacking the EIS. Instead of litigating to halt the project temporarily, however, environmentalists could attempt to mitigate or preclude some adverse environmental consequences by making them the subject of a consent decree. In order to understand further how a consent decree might mitigate environmental effects, it is necessary to examine how such effects are treated in an EIS.

IV. ENVIRONMENTAL EFFECTS IN AN EIS

A. Preclusion of Environmental Consequences

An EIS must discuss ways to mitigate adverse environmental consequences.\textsuperscript{96} In doing so, the EIS must identify and discuss the

\begin{itemize}
  \item \textsuperscript{92} Id. at 240–43.
  \item \textsuperscript{93} Id. at 238.
  \item \textsuperscript{94} Id. (quoting the decree).
  \item \textsuperscript{95} Id. at 241–43. The Court read "complaint" to refer to the earlier charges of monopolistic practices by ITT. The history of these practices, detailed in a separate appendix, was incorporated into the decree by reference. Id. at 238. The Court further noted:
    Where parties in one agreement include both a consent order and an explanation of that order, and also provide that the complaint is to be used to construe the order, it seems logical to conclude that, at least as to interpretations not precluded by the words of the order itself, the collateral documents can and should be used to give meaning to the words of the order.
    \textit{Id.} at 238–39 n.12.
  \item \textsuperscript{96} 40 C.F.R. § 1502.14(f) (1989).
\end{itemize}
direct and indirect effects of the proposed action. There is little dispute that mitigation of these effects must be discussed in an EIS. NEPA’s “reasonableness” standard of judicial review, however, has resulted in conflicting answers to the question of whether a discussion of indirect effects in an EIS is sufficient in scope.

In contrast to the question of sufficiency in scope, the Court of Appeals for the Ninth Circuit consistently has stated that possible environmental effects do not require preparation of an EIS if an agency can preclude their occurrence by withholding development rights. In addition to preclusive measures taken by an agency, existing legislation or a prior consent decree also can prevent the occurrence of detrimental effects and obviate some of the need for an EIS.

1. Agency Preclusion

By withholding certain development permits, an agency was able to avoid preparation of an EIS in Conner v. Burford. In Conner, the plaintiffs challenged the sale of oil and gas exploration leases by the Bureau of Land Management. The leases were for land within the Gallatin and Flathead National Forests of Montana. The United States Forest Service concluded that sale of exploration leases would have no significant impact on the human environment and thus did not require an EIS. Plaintiffs contended that sale of the exploration leases would lead to future mining activities that required discussion in an EIS.

97 Id. § 1502.16(a)-(b). Direct effects occur at the same time and place as the proposed action. Id. § 1508.8(a). Indirect effects, however, are removed farther in time or distance from the proposed action, but are still “reasonably foreseeable.” Id. § 1508.8(b).

98 See Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1846 (1989) (“To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.”).

99 See supra note 24 and accompanying text.

100 See, e.g., Duck River Preservation Ass'n v. Tennessee Valley Auth., 410 F. Supp 758, 763–65 (E.D. Tenn. 1974), aff'd, 529 F.2d 524 (6th Cir. 1976) (the court found that the EIS for a dam project adequately disclosed the effects on water quality and wildlife, but did not sufficiently disclose the effects on agriculture and the costs of relocating displaced families).


102 Kilroy v. Ruckelshaus, 738 F.2d 1448, 1454 (9th Cir. 1984).

103 848 F.2d 1441 (9th Cir. 1988), cert. denied, 109 S. Ct. 1121 (1989).

104 Id. at 1443.

105 Id.

106 See id. at 1444.
The plaintiffs prevailed in district court,107 but on appeal the Court of Appeals for the Ninth Circuit ruled that an EIS was not required in every instance where a lease was sold.108 The court noted that some of the leases were sold with "No Surface Occupancy" (NSO) stipulations. These stipulations prevented the lessee from occupying or using the surface of the land without further government approval.109 The court interpreted NEPA to require an EIS only when the government "irretrievably" commits to a use of resources.110 The court further said that if the government should modify the leases or remove the NSO stipulations, then it would have to prepare an EIS.111

In Northern Plains Resource Council v. Lujan,112 the Court of Appeals for the Ninth Circuit followed Conner and held that an EIS was not required to analyze the effects of the possibility of a future fuel plant because issuance of a coal lease created no right to construct the plant.113 If a plant was authorized later, then the need for an EIS would be considered at that date.114 The Court of Appeals for the District of Columbia has used an identical test to determine whether preclusion of environmental consequences by an agency obviates the need for an EIS. The court held that the Department of the Interior could delay preparation of an EIS as long as it retained the authority to preclude all activities until submission of specific proposals, and to prevent any activities with unacceptable environmental consequences.115

2. Legislative or Consent Decree Preclusion

The Court of Appeals for the Ninth Circuit also has held that existing legislation and a prior consent decree can obviate the need

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108 Conner, 848 F.2d at 1447-51.
109 Id. at 1444.
110 Id. at 1446.
111 [A]ll 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 ... (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C)(v) (1982).
112 Conner, 848 F.2d at 1447-48.
113 874 F.2d 661 (9th Cir. 1989).
114 Id. at 666.
115 Id.
for discussion of consequences in an EIS.116 In holding that an EIS need not discuss the continued effects of sewage discharge into marine waters, the court noted that congressional amendments to the Clean Water Act prohibited renewal of the permit under which the current discharge was occurring.117 The court weighed the likelihood of changes occurring in the prohibitive legislation and conceded that the congressional act was more likely to change than laws "as impregnable as the antitrust laws."118 Nevertheless, it found that the Act made renewed discharge a remote possibility.119 To buttress its argument, the court noted that the city discharging the waste had entered into a consent decree in which it agreed to stop the discharge by a certain date.120

An agency cannot permanently withhold permits authorizing action that might harm the environment in every project and expect to accomplish its goals. Nor will legislation always be able to preclude detrimental environmental effects.121 At some point, detrimental effects must be addressed in an EIS. A key component in an EIS is the discussion of how these effects are to be mitigated.

B. Mitigation of Environmental Effects

In Robertson v. Methow Valley Citizens Council,122 the Supreme Court recently reaffirmed that an EIS must discuss ways to mitigate adverse environmental consequences in order to comply with NEPA.123 The Court read this requirement from the language of the Act124 and the regulations promulgated thereunder.125 The Court stated, however, that the requirement to discuss mitigating measures did not mean that the agency had to implement and adopt a mitigation plan.126

116 Kilroy v. Ruckelshaus, 738 F.2d 1448, 1453–54 (9th Cir. 1984).
117 Id.
118 Id. at 1454.
119 Id.
120 Id. at 1453–54.
123 Id. at 1846.
124 "[A]ll agencies of the Federal Government shall . . . (C) include in every recommendation . . . a detailed statement by the responsible official on . . . (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented . . . ." 42 U.S.C. § 4332(2)(C)(ii) (1982).
125 "[T]he EIS shall include discussions of . . . (h) Means to mitigate adverse environmental impacts . . . ." 40 C.F.R. § 1502.16 (1989).
The dispute in *Robertson* arose when the Forest Service decided to issue a permit authorizing the development of a ski resort on federal lands in Washington.\textsuperscript{127} Prior to issuing the permit, the Forest Service, in cooperation with state and local officials, compiled an EIS.\textsuperscript{128} In the EIS, the Forest Service extensively discussed the proposed project's adverse environmental impacts on air quality and wildlife.\textsuperscript{129} The study paid particular attention to the cumulative impacts of development on private and other non-federal lands surrounding the ski resort.\textsuperscript{130}

The Forest Service concluded that the off-site cumulative impacts of private development could affect the environment significantly and detrimentally.\textsuperscript{131} To mitigate these impacts, the EIS recommended that the surrounding county adopt an air-quality management plan.\textsuperscript{132} The Forest Service also recommended ways to limit interference with mule deer migration routes and ways to minimize the expected reduction in herd.\textsuperscript{133} Federal, state, and county officials entered into a memorandum of understanding assigning responsibilities for these various mitigation tasks.\textsuperscript{134} The study emphasized, however, that an accurate assessment of off-site effects would be difficult to determine due to the uncertain consequences of private development.\textsuperscript{135}

Plaintiffs unsuccessfully argued that the mitigation steps discussed in the EIS were insufficient to comply adequately with NEPA.\textsuperscript{136}

\begin{footnotes}
\textsuperscript{127} *Id.* at 1839.
\textsuperscript{128} *Id.*
\textsuperscript{129} *Id.* at 1840.
\textsuperscript{130} "The burning of wood for space heat ... would constitute the primary cause of diminished air quality. ... [W]ithout efforts to mitigate these effects ... the increase in automobile, fireplace, and wood stove use would reduce air quality below state standards ... ." *Id.* (citing the EIS). "The ultimate impact on the Methow deer herd could exceed a 50 percent reduction in numbers." *Id.* at 1841 (quoting a comment to the draft EIS by the Washington State Department of Game).
\textsuperscript{131} *Id.* at 1840, 1842.
\textsuperscript{132} *Id.* at 1841. Some of the recommendations included: "Develop[ing] land use codes specifically addressing side development and project design directed at energy efficiency and air pollution control ... [r]estricting the number of fireplaces and wood stoves ... [e]ncouraging the use of alternative, non-polluting energy sources ... ." *Id.* at 1841 n.5 (quoting the EIS).
\textsuperscript{133} *Id.* at 1842–43. Options for minimizing the impact on the Methow mule deer herd discussed in the EIS included: "the use of zoning and tax incentives to limit development on deer winter range and migration routes, encouragement of conservation easements, and acquisition and management by local government of critical tracts of land." *Id.* at 1842 (citing the EIS).
\textsuperscript{134} *Id.* at 1847 n.16.
\textsuperscript{135} *Id.* at 1842.
\textsuperscript{136} *Id.* at 1843–44, 1847.
\end{footnotes}
While the Supreme Court conceded that "omission of a reasonably complete discussion of possible mitigation measures [would] undermine the 'action-forcing' function of NEPA,"137 the Court stated that a requirement to discuss mitigation of environmental consequences did not extend to implementation of a formal mitigation plan.138 The Court also stated that it would be incongruous to require the Forest Service to proceed any further in a mitigation plan because most of the territories in question were outside the Forest Service's control.139 Because many federal projects spur off-site development that creates effects beyond the agency's control, disputes will continue to arise as to the reasonableness of EIS mitigation discussions.140

V. PRECLUSION OF ADVERSE EFFECTS AND SUPPLEMENTAL REPORTING THROUGH CONSENT DECRREE

A. Proposed Model or Scenario

In many of the NEPA cases there are three types of interested parties, not all of which may be named in the suit: a federal agency proposing an action; an environmental plaintiff opposing the proposed action; and a private party, state agency, or municipal corporation backing the action.141 The Robertson142 case fits such a scenario. In Robertson, the agency was the Forest Service, which had proposed to issue a permit for the development of ski areas on federal lands.143 The environmental plaintiffs opposed to issuance of the

137 Id. at 1846–47.
138 Id. at 1847.
139 Id.
140 See, e.g., Port of Astoria v. Hodel, 595 F.2d 467, 480 (9th Cir. 1979) (agency's EIS had to consider the supply of federal power and the construction of an aluminum reduction plant that used the power); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1433–34 (C.D. Cal. 1985) (river bank stabilization project and private housing built as a result had to be considered in the same EIS).
141 See, e.g., Missouri Coalition for the Env't v. Corps of Eng'rs, 866 F.2d 1025, 1027–29 (8th Cir.), cert. denied, 110 S. Ct. 76 (1989) (environmentalists challenged a decision by the U.S. Army Corps of Engineers to forego preparation of an EIS before granting a permit to a private developer to fill a wetland); National Resources Defense Council v. Hodel, 866 F.2d 288, 293 (D.C. Cir. 1988) (petitioners claimed that the Interior Department, which was supported by the American Petroleum Institute as intervenors, did not adequately consider the effects of its continental shelf leasing program on migratory species); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1224–26 (9th Cir. 1988), cert. denied, 109 S. Ct. 1350 (1989) (environmentalists sued the Forest Service and lessees over the issuance of oil and gas exploration leases without preparation of an EIS).
143 Id. at 1839.
permit under the current EIS were composed of citizens groups concerned about the proposed development's effects on air quality and wildlife.144 The private party that supported the government action was Methow Recreation, Inc., an applicant for the development permit.145 The state of Washington and the local county, though not parties to the suit, cooperated in preparing the EIS.146 This scenario will help to explain how a consent decree could reduce some of the NEPA litigation arising under similar circumstances, and how a decree could help to mitigate adverse environmental consequences.

A consent decree would serve two major functions: precluding harmful effects of the proposed action, and establishing supplemental reporting requirements for the federal agency to prevent deviation from the terms of the EIS. Preclusion of harmful effects could be achieved if developers would submit to land use restrictions or if municipalities would pass legislation taking preemptive action.147 Once these effects are precluded, the federal agency would not have to discuss ways to mitigate them in an EIS.148 With fewer effects to consider, the resources spent writing a broad EIS could be focused on developing mitigation alternatives for other effects that cannot be precluded.

In return for submitting to restrictions, pro-development parties would be rewarded with a more streamlined NEPA process and faster completion of the project. In the consent decree, environmentalists would forgo their right to sue, but could continue to monitor the sufficiency of the EIS and progress of the project under the EIS through supplemental reporting.149

The consent decree should include all involved parties. If major litigants do not wish to sign a consent decree, then the option is not viable. Their absence would undermine the decree's effectiveness in mitigating environmental harm and limiting future litigation. Absent parties would not be bound by the terms of the decree and would

144 Id. at 1843 n.11.
145 Id. at 1839.
146 Id.
147 See supra notes 116–120 and accompanying text.
148 See supra notes 116–120 and accompanying text.
149 See Huffman, The Opportunities for Environmentalists in the Settlement of NEPA Suits, 4 Envtl. L. Rep. (Envtl L. Inst.) 50,001 (1974). The author examined a settlement reached in a NEPA lawsuit with a municipal agency in which plaintiffs were permitted to appoint members to a committee charged with overseeing preparation of an EIS. Id. at 50,005. Plaintiffs, however, did not waive their right to bring a new action based upon alleged insufficiency in the final EIS. Id. at 50,006.
be free to litigate independent claims. If third parties who are merely ancillary to the litigation are opposed to the decree, however, then the major parties may wish to sign a consent decree without them. If the major parties equitably resolve significant environmental issues in a consent decree, they could be reasonably assured that a court would rule that outstanding complaints of minor parties were without merit.

B. Preclusion of Indirect Consequences

To illustrate preclusion of indirect consequences by consent decree, it is helpful to examine one concern of the parties in *Robertson*. There, the cumulative impacts on air quality of increased private development around the ski resort were at issue. The EIS examined the adverse environmental impact on air quality at each of five levels of development and proposed a variety of alternatives for mitigating these effects. One proposal restricted the number of wood-burning fireplaces for tourist use. The study recommended implementation of this restriction and many others through development of a countywide Air Quality Control Authority.

Environmental groups believed that they could not rely on implementation of these recommendations to mitigate air pollution and brought suit challenging the sufficiency of the EIS. The Supreme Court held that the EIS need only list mitigating programs and that the EIS provided no cause of action to force program implementation, especially when most of the programs were in the control of third parties.

The environmentalists' goals of mitigating harmful effects could better be accomplished in a similar situation with a consent decree. In a decree, the county could consent to passing land use codes

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150 See supra notes 51–57 and accompanying text.
151 See United States v. Ketchikan Pulp Co., 430 F. Supp. 83 (D. Alaska 1977). The court approved of a consent decree, governing effluent discharge under the Federal Water Pollution Control Act, over the objections of environmentalist intervenors. *Id.* at 85. After reviewing the intervenors' objections and finding them without merit, the court noted that "the decree precludes further suits for the specific violations alleged herein." *Id.* at 87. The court further stated, however, that "[the decree] does not . . . preclude citizens suits for different violations nor does it attempt to preclude citizens suits to force EPA to enforce the decree." *Id.*
153 *Id.* at 1841 n.5.
154 See supra note 132 and accompanying text.
155 *Robertson*, 109 S. Ct. at 1847.
significantly restricting fireplaces for tourist use. Private parties could impose these restrictions on their land voluntarily with the intention of binding subsequent purchasers. As a result, the agency involved would not have to analyze the effects of fireplaces at each of five levels of development because the consequences would have been precluded. In return, the environmentalists would not contest the absence of this provision in the EIS or other provisions they found less objectionable. Environmentalists could rely on the contractual provisions of a consent decree, instead of non-binding statements in an EIS, to ensure that the third parties implemented these mitigating measures.

A consent decree also could help to ensure mitigation of adverse environmental consequences within an agency's control. For example, the development and construction of airports frequently becomes the subject of NEPA litigation. Although airport construction may seem different from ski resort development, the parties in the litigation play similar roles. One case that typifies NEPA litigation and is suitable for resolution by consent decree is *City of Blue Ash v. McLucas*. In *Blue Ash*, an agreement consisting of joint resolutions of two municipalities prohibiting jet aircraft from using a runway was incorporated into an EIS. The court held, however, that the agreement did not prevent an action by the federal agency that deviated from its terms because the federal agency was not a party to the agreement.

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156 See supra notes 54–57 and accompanying text. Without economic incentive, private parties voluntarily will not impose restrictions upon their land. For a discussion of the economic incentive for developers, see infra notes 166–167 and accompanying text.

157 See supra notes 103–121 and accompanying text. See also Huffman, supra note 149, at 50,007 (plaintiffs waived NEPA challenges when a utility company agreed to install a "closed-cycle" cooling system rather than a system that would have discharged heated water into the Mississippi).

158 See Environmental Defense Fund v. Alexander, 554 F. Supp. 451 (N.D. Miss. 1981) (in a consent decree, the U.S. Army Corps of Engineers agreed to halt construction on certain projects until 60 days after filing a supplementary EIS with the court).

159 See, e.g., Neighbors Organized to Insure a Sound Environment v. McArtor, 878 F.2d 174 (6th Cir. 1989) (plaintiffs challenged the sufficiency of an EIS prepared for new airport terminal); City of Romulus v. County of Wayne, 634 F.2d 347 (6th Cir. 1980) (city sued to halt construction of a runway); City of Blue Ash v. McLucas, 596 F.2d 709 (6th Cir. 1979) (city brought action against FAA to enforce municipalities' commitments incorporated in an EIS for airport project); Runway 27 Coalition v. Engen, 679 F. Supp. 95 (D. Mass. 1987) (residents sought preparation of an EIS before airport instituted changes in runway flight patterns).

160 596 F.2d 709 (6th Cir. 1979). For a discussion of the facts of this case, see supra note 30.

161 Id. at 712. The court suggested that there may be a cause of action under state law against the city of Cleveland as the proprietor of the airport. Id.
If the municipalities in this suit had entered into a consent decree with the FAA to limit the use of the airport, then they probably would have succeeded in enforcing the stipulations mentioned in the EIS. With a consent decree, the city of Blue Ash would have been in a situation similar to that of the plaintiffs in *Citizens For A Better Environment v. Gorsuch*, in which EPA consented to promulgating additional regulations not required under the Clean Water Act.\(^{162}\) Like the EPA in *Citizens For A Better Environment*, the FAA could agree to promulgate regulations within its authority that reflect the prohibitions of the consent decree.\(^{163}\) As a party to a consent decree, the FAA could not later issue contradictory regulations without court approval.\(^{164}\) A decree in this type of situation would give environmentalists a better opportunity to enforce mitigating measures because they could request that a court use its broad remedial powers to enforce the decree.\(^{165}\)

The viability of using a consent decree to preclude harmful environmental effects will hinge on the economic importance of the development rights being limited under the decree. Private parties are not likely to consent to limiting their development rights if the resulting restrictions will render their land less profitable. Likewise, legislators may find it politically impossible to pass legislation that restricts development excessively. When given the option of signing a consent decree, the parties will have to weigh the value of the rights they may wish to protect against the cost of litigation and the increased cost of the project due to delay.\(^{166}\) Developers may find, however, that agreeing to limitations in a consent decree is more cost-effective than continuing the litigation.\(^{167}\)

162 See supra notes 70–76 and accompanying text.
163 See supra note 71 and accompanying text.
164 See supra notes 88–90 and accompanying text.
165 See Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 678 F.2d 470, 478 (3d Cir.), cert. denied, 459 U.S. 969 (1982) (a district court has wide discretion in fashioning a remedy for civil contempt). In *Delaware Valley*, the Court of Appeals for the Third Circuit upheld an order by the district court directing the United States Secretary of Transportation to refrain from approving any projects or awarding any grants of federal highway funds until Pennsylvania complied with the terms of a consent decree arising under the Clean Air Act. *Id.* at 478–79.
166 See Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) (litigation over a housing project spanned nine years); Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989) (litigation over an interstate highway project spanned 16 years).
167 See, e.g., Huffman, supra note 149, at 50,007. While commenting on a NEPA settlement between environmentalists and a public utility company, the author stated: "According to the utilities, a closed-cycle system [stipulated in the settlement] cost $19 million more than a diffuser discharge pipe system, but, . . . the delay in operation between the injunction and
C. Supplemental Reporting

Supplemental reporting requirements could help environmental groups to prevent agencies from deviating from the terms of an EIS. While a federal agency may not be able to control development on surrounding lands, it can control the level of development within the proposed project site. The agency, however, may be less willing to commit to future restrictions on development in a consent decree. Unlike private parties,168 a federal agency would not be as heavily influenced by the economic pressures of litigation.169 In addition, the agency could argue that permits authorizing development at the current stage of a project require only a limited EIS.170 Given that an agency might be reluctant to preclude environmental consequences that have not been authorized, plaintiffs could use a consent decree to monitor agency activities more effectively to ensure that they remain within the scope of a limited EIS.

Instead of being forced into litigation at each stage in the permit process, the agency could consent to reporting specific information to environmental groups, such as construction plans, before issuing any further development permits. Supplemental reporting at critical stages of the project may seem redundant given that the goal of NEPA is public disclosure and reporting.171 But NEPA represents only a statutory minimum of disclosure requirements.172 In exercising its discretion on how best to comply with the Act,173 an agency could decide that enhanced reporting would save litigation resources.174

the date of the agreement had cost them $50 million in lost revenues.” See also Davis, A NEPA Settlement: Conservation Council of North Carolina v. Froehlke, 5 Env'tl. L. Rep. (Env'tl. L. Inst.) 50,079, 50,085 (1975) (the author argues that the financial burden of continuing litigation was a factor in the parties’ decision to settle).

168 Because the federal agency is usually the named defendant in a NEPA suit, private parties that support development can avoid litigation costs by not intervening. Unless private parties join the suit as intervenors, however, their interests may not be represented to their satisfaction in a settlement or possible consent decree.

169 See Huffman, supra note 149, at 50,010 (while a project delay means increased cost to the government, the agency receives “interest-free” funds from Congress, and risks congressional “wrath” if it voluntarily halts a project).

170 The Forest Service in Robertson argued that the action in dispute only involved a general development permit, and that further authorization would be required to construct any ski resort. Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1843 (1989). The Forest Service further argued that mitigation of air pollution could be addressed later in the development process and that the current EIS was adequate. Id.


173 See supra notes 70–76 and accompanying text.

174 Airline Stewards & Stewardesses Ass’n, Local 550 v. American Airlines, Inc., 573 F.2d
If a consent decree required supplemental progress reports, an environmental group would have a better chance of preventing an agency from undertaking actions beyond the scope of an existing EIS. Courts have imposed similar requirements on federal agencies when retaining jurisdiction in NEPA lawsuits. This compliance monitoring decreases the likelihood of a case becoming moot because environmental challenges could be more timely.

If an agency failed to comply with the reporting requirements or any other provisions of the decree, then the courts could provide remedial relief. A court would not be reviewing the agency's actions under the narrow reasonableness standard of the Administrative Procedures Act. Instead, it would be judging compliance to a judicial decree. The court justifiably could grant the agency less discretion as it operated under the decree.

D. Judicial Approval

By following the precedent of Local Number 93, International Association of Firefighters, a district court could approve a consent decree precluding indirect effects and establishing supplemental reporting. A consent decree resolving a dispute under NEPA, a federal statute, is within a federal court's subject matter jurisdiction. In addition, a decree encouraging disclosure through supplemental reporting would further the objectives of NEPA. Preclu-
sion of adverse environmental impacts is one method of disclosing their existence and ensuring that their consequences are weighed in relation to the benefits of the project. A decree would not attempt to bind individuals who are not signatories, nor would it grant signatories special benefits at the expense of others.

Although a decree might require reporting that goes beyond NEPA's statutory minimum, the increased reporting would be applicable only to the site in question. The increased reporting requirements would not apply to other federal projects. Narrowing the scope of a decree in this way limits abrogation of executive discretion. A narrower decree could be seen by courts as representing a decision by an agency to adopt a more restrictive policy in a particular situation.

E. Judicial Interpretation

In addition to approval, courts would have to interpret NEPA consent decrees in actions for enforcement. Regardless of whether a court interpreted a consent decree as a contract or as a judicial act, it would provide the court with greater enforcement powers over an agency or a third party by giving the court the ability to hold a party in contempt if it failed to abide by the terms of the decree.

Either interpretation also would insure that an agency's activities do not exceed the bounds of an existing EIS. To modify a decree under a strict contract interpretation, the agency would have to argue, against a signatory environmentalist's rebuttal, that unforeseen circumstances required modification. Under the less restrictive interpretation of viewing a decree as a judicial act in light of NEPA's procedural goals, a court may alter the supplemental reporting requirements to accommodate the needs of the parties in the future. A court, however, probably would not permit an agency to undertake further development activities without increasing the

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184 See id. § 4331(b)(5).
185 This rationale supports judicial approval because it answers one of the arguments for not approving a consent decree made by the dissent in Local No. 93. See supra notes 62–65 and accompanying text.
186 See supra notes 67–79 and accompanying text.
187 See supra notes 39, 164 and accompanying text. See also United States v. Kirkland, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20,104 (S.D. Fla. 1981) (court found that defendants violated a consent decree by conducting dredge and fill operations, and ordered them to pay a $1000 fine and to restore the land).
188 See supra notes 88–90 and accompanying text.
scope of the existing EIS. At its discretion, the agency initially limited development to narrow the scope of EIS reporting. Therefore, a court still would be fulfilling NEPA's procedural goals by enjoining development until completion of a broader EIS.\textsuperscript{189}

Environmental groups have a greater assurance that a decree would enforce commitments of non-federal parties effectively because a federal court constitutionally is not bound to respect the discretionary acts of non-federal parties.\textsuperscript{190} The consent decree would operate more like a contract with modification by mutual consent. Third parties would have to convince the court that potential environmental consequences would still be precluded if the decree was modified to permit greater development. Environmentalists would then have an opportunity to challenge these arguments in favor of development. Third parties would have the difficult burden of showing why an agreement, which they entered into voluntarily, should be modified over the objections of the other signatories.

VI. CONCLUSION

As a procedural statute, NEPA does not provide a substantive basis upon which a party can challenge the environmental consequences of major federal actions. The Act's goal is to ensure that the federal government reasonably discloses all the environmental consequences of a proposed action so that the value of a proposal can be weighed against its environmental costs. An EIS provides no cause of action for environmentalists or other concerned citizens, however, if an agency deviates from the EIS as it implements a proposal. As their only means of recourse, environmental plaintiffs attack the adequacy of an EIS in an effort to raise public sentiment and to make agencies more responsive to environmental concerns.

The narrow scope of the arbitrary, capricious, or reasonableness standards of judicial review under NEPA limits the chances environmentalists may have of protecting environmental concerns by ensuring compliance with an EIS. As an alternative to judgment granted within a court's limited discretion, parties to NEPA litigation could write a consent decree that would be subject to court approval. The consent decree provides greater flexibility because the parties may be able to fashion remedies that would not be possible if the court were acting alone.

\textsuperscript{189} See supra notes 31–34, 91–95 and accompanying text.
\textsuperscript{190} See supra notes 66–69 and accompanying text.
A consent decree could be used to mitigate the adverse environmental impacts of proposed federal action. If private parties agree to limit some of their development rights in a consent decree, there would be fewer adverse effects to identify and mitigate in an EIS. In exchange for limiting development and reporting activities to environmental groups, environmentalists would forgo their right to challenge the sufficiency of the EIS. Environmentalists could use the NEPA reporting requirements to monitor the progress of the project and agency compliance with NEPA. Through use of the contempt power, a consent decree would provide courts with greater enforcement powers over an agency if the agency failed to abide by the terms of the decree. In addition, environmental groups can be assured that the decree effectively would enforce the mitigating commitments of private parties.