9-1-1978

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OFFSHORE OIL DEVELOPMENT AND THE DEMISE OF NEPA

Matthew A. Kameron*

I. INTRODUCTION

The National Environmental Policy Act (NEPA)\(^1\) was enacted by Congress in 1969. As witnessed by its wording and the debates prior to the Act’s passage, NEPA was conceived as a strong statement by the government in support of environmental protection. As Senator Henry Jackson stated:

[NEPA is a] declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind; that we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth.\(^2\)

To effectuate this optimistic goal, NEPA requires that all federal agencies prepare and consider an Environmental Impact Statement (EIS) prior to taking action on any major program significantly affecting the “quality of the human environment.”\(^3\) The EIS must contain a detailed discussion of such factors as the environmental impact of, the reasonable alternatives to, and the economic costs and benefits of the proposed action.\(^4\) The EIS requirement ensures

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\(^4\) The EIS must be detailed and contain a discussion of:

1) the environmental impact of the proposed action;
2) any adverse environmental effects which cannot be avoided should the proposal be implemented;
3) alternatives to the proposed action;
4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and
that a federal agency will not undertake a major project without first considering its environmental consequences.

Despite the noble goals of NEPA, the stark economic realities of America’s energy needs, brought into focus by the Arab oil embargo, have resulted in a legislative and judicial response to NEPA that has severely weakened its intended effect. The most important legislative blow came when Congress exempted the huge Alaska pipeline project from NEPA scrutiny through the trans-Alaska Pipeline Authorization Act. Congress has also acted to derogate NEPA in the area of nuclear power; in 1972 it amended the Atomic Energy Act to allow plant operators to petition for temporary operating licenses for nuclear power plants prior to full NEPA compliance. In both of these instances, the legislative history shows that Congress was reacting to the use of NEPA by environmentalist groups to stall important energy projects.

Due to the inherent limitations on the powers of the judiciary, the courts have generally been less threatening to the intended goals of NEPA. In interpreting the Act the courts are limited to the wording of the statute and may not, at least explicitly, take cognizance of the problems brought on by the energy crisis in reaching a decision. Nevertheless, the courts are capable of derogating NEPA as witnessed by the recent case of County of Suffolk v. Secretary of the Interior. The Second Circuit, in holding that an EIS prepared for an offshore oil and gas development program satisfied NEPA, utilized an approach which may allow most, if not all, offshore oil and gas projects to circumvent NEPA standards. Although the court reasoned on statutory and precedential grounds, an undercurrent of

5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.


The actions taken pursuant to this chapter which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline’s operation shall be taken without further action under the National Environmental Policy Act of 1969 .


judicial recognition of the energy crisis is implicit in the court's decision.

The Second Circuit approach is based on two concepts: first, that an offshore oil project is easily divisible into component segments of exploration, production, and transportation; and second, that the Secretary of the Interior retains statutory control over the project's operation. Under this approach, to be referred to as "Divisibility," only those environmental issues directly related to the first stage, exploration, have to be dealt with in detail in the initial EIS. Environmental impact information on the production and transportation stages is, to a large extent, deferred until those stages are timely. Since the basic premise behind the detailed EIS requirement is to give those in a decision-making capacity enough information to make a well-reasoned decision based on consideration of all the environmental pros and cons of an entire project, the Second Circuit's approach arguably undermines the effectiveness of an EIS. Moreover, the Second Circuit justifies its approach by overstating the degree of control the Secretary retains and by disregarding precedent on the subject of whether deferral is proper.

This article will analyze the significance of the new approach to EIS evaluation set out in County of Suffolk v. Secretary of the Interior. First, the history of the case will be presented. Next, the Second Circuit's Divisibility approach will be examined in light of NEPA precedent. Finally, the potential application of Divisibility to other federal energy projects will be discussed.

II. THE SUFFOLK COUNTY CASE

A. Initial Developments

The Suffolk County controversy began when, in response to a presidential message to Congress requesting acceleration of leasing to private industry of the federally-owned Outer Continental Shelf (OCS) for oil and gas development, the Secretary of the Interior

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10 562 F.2d 1368, 1377 (2d Cir. 1977).
11 Id.
12 Id.
13 Id.
14 Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1113 (D.C. Cir. 1971).
16 President's Message to the Congress on the Energy Crisis (January 23, 1974), 10 WEEKLY COMP. OF PRES. DOC. 4, 72, 78 (January 28, 1974).

"Project Independence" was the name Richard Nixon gave to a major national effort to achieve self-sufficiency in energy. The ultimate aim of the project was to achieve independence from any significant reliance upon insecure foreign energy supplies by 1980. The Project
designated an area off the New Jersey-Delaware-Maryland coasts for consideration. After preliminary geological and environmental studies and after consultation with private industry and state and local governments, 154 tracts located off the New Jersey coast (the Sale 40 area) were chosen for final lease bidding contemplation.

The Secretary approved the project after studying the environmental impact statement (the Sale 40 EIS). Within a few days after the Secretary’s decision, Suffolk and Nassau Counties in New York brought suit to enjoin the lease-bidding on the ground of EIS insufficiency. On August 13, 1976, Judge Weinstein of the United States District Court for the Eastern District of New York granted a preliminary injunction, stating that the Sale 40 EIS failed to detail or consider the possible impact of state and local land use laws on the leasing program. The defendants applied to the Court of Appeals for the Second Circuit on August 16, 1976 for a stay of Weinstein’s order. The court granted a stay on the ground that the leasing, in and of itself, would not cause irreparable injury pending the outcome of the trial on the merits.

The United States Supreme Court, in an opinion by Mr. Justice Marshall, refused to vacate the stay, holding that the Sale 40 leases could always be voided in the event NEPA violations were ultimately found. The Secretary proceeded to lease the Sale 40 tracts, accepting bids from various oil companies on 93 out of 154

entailed three essential tasks: first, a rapid increase in energy supplies through a maximization of production of oil, gas, coal, and shale reserves or wells or through acceleration of the introduction of nuclear power; second, the conservation of energy through elimination of non-essential energy use; and third, the development of new technologies through new energy research and development programs.

18 562 F.2d 1368, 1373 (2d Cir. 1977).
19 Id.
20 Subsequently, the Natural Resources Defense Council, the State of New York, and a number of Long Island counties and towns joined in the action. The State of New York later withdrew. 562 F.2d 1368, 1373 (2d Cir. 1977).
22 Judge Weinstein’s order granting the preliminary injunction was not reported. Consequently, the information concerning the order was taken from the Second Circuit’s decision.
23 Id. Following the stay of the injunction, the Second Circuit reversed Judge Weinstein’s order granting the injunction on October 14, 1976. State of New York v. Kleppe, 551 F.2d 301 (2d Cir. 1976).
24 Id.
25 Id. at 1313.
tracts and executing leases to those tracts.26 The plaintiffs returned to the district court for a trial on the merits.

On the basis of further testimony and documentary evidence, Judge Weinstein held that the requirements of NEPA had not been met by the Sale 40 EIS.27 The Sale 40 EIS was found to be fatally deficient on the following grounds: (1) the Sale 40 EIS failed to project likely pipeline routes and the effects of state and local regulation on pipeline placement;28 (2) the economic costs and benefits of the project were grossly misrepresented;29 (3) the Sale 40 EIS failed to discuss adequately the alternatives of either allowing the government to determine the oil and gas potential of the Sale 40 area before leasing to private industry or leasing tracts other than those selected.30 Judge Weinstein held the leases void and enjoined

28 Judge Weinstein relied in part on 40 CFR § 1500.8(a)(2) (1976) which clearly seems to require discussion of state and local law by mandating the consideration of:
[t]he relationship of the proposed action to land use plans, policies, and controls for the affected area. This requires a discussion of how the proposed action may conform or conflict with the objectives and specific terms of approval or proposed Federal, State, and local land use plans, policies and controls . . . . Where a conflict or inconsistency exists, the statement should describe the extent to which the agency has reconciled its proposed action with the plan, policy or control, and the reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation.

On the issue of pipeline projection feasibility, Judge Weinstein lent great weight to the testimony of a Shell Oil Company employee, Mr. Frank Brunjes, who had undertaken an economic feasibility study which required the projection of likely pipeline routes:

Had the Secretary been at least as conscientious as Shell Oil in exploring specific pipeline locations from an environmental perspective, he certainly would have considered the route into the Delaware Bay and up the Delaware River to Philadelphia, which was studied by Mr. Brunjes and considered a feasible and likely corridor.

29 Judge Weinstein used data compiled by petitioner's witness, Mr. George Donkin, which demonstrated to the district court's satisfaction that the Secretary's data was grossly inaccurate. The Second Circuit disagreed, stating that the evidence would have value only if it showed that the agency's research was clearly inadequate or that the agency improperly failed to set forth widely held opposing views. 7 ENV. L. RPTR. 20230, 20239 (1977). In the Circuit Court's opinion the Donkin testimony fell far short of demonstrating either consideration.
County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1385 (2d Cir. 1977).

It has been held in evaluating the sufficiency of a cost-benefit analysis that conflicting data should be presented to the appropriate agency prior to the preparation of a final EIS. See Environmental Defense Fund, Inc. v. Froehlke, 368 F. Supp. 231, 241 (W.D. Mo.1973).

Because the issue of cost-benefit analysis is not germane to the issue of Divisibility it will not be discussed further in this article.

30 Judge Weinstein found the Sale 40 EIS discussion of alternatives woefully inadequate in light of the requirements set forth in the Federal Register:

A rigorous exploration and objective evaluation of alternative actions that might avoid
the parties from exercising any rights granted by them. 31

B. The Second Circuit Opinion—Divisibility

On appeal, the Second Circuit used the conventional “rule of reason” standard of review to evaluate the Sale 40 EIS. This standard looks at “whether the EIS was completed with in (sic) objective good faith and whether the resulting statement would permit a decision maker to fully consider and balance the environmental factors.” 32 The Second Circuit found the Sale 40 EIS adequate and reversed the lower court. 33 The significance of the Second Circuit’s opinion lies not in the court’s use of the lenient “rule of reason” standard, but rather in the court’s articulation of Divisibility as part of this standard. The court utilized this unique approach in addressing the issues of whether the Sale 40 EIS should have projected likely pipeline routes 34 and whether it adequately considered the effects of state and local regulation on the transportation of the oil and gas to be extracted. 35

The Second Circuit based its Divisibility theory on two premises. First, the Sale 40 program is an easily divisible, multistage project. 36 The initial stage, exploration, is followed by the later stages of production and transportation. Second, there is continuing governmental control over the program. This control is based primarily on language in the Outer Continental Shelf Land Act (OCSLA) 37 under which the Secretary retains the power to stipulate operating proce-

32. County of Suffolk v. Secretary of the Interior, 7 ENVIR. L. RPTR. 20230, 20242 (1977). In enforcing the alternative discussion requirement the courts have been very inconsistent. This is because the number of available alternatives is usually great, and to relieve the EIS drafters of an impossible burden, the courts have only required discussion of “reasonable” alternatives. This by necessity involves a large amount of value judgments. See, e.g., Natural Resources Defense Council, Inc. v. Morton, 524 F.2d 79, 93 (2d Cir. 1975); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).

As with the issue of cost-benefit analysis, the issue of alternatives is not relevant to Divisibility and will not be mentioned further.

32. Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975).
34. 562 F.2d 1368, 1375-82 (2d Cir. 1977).
35. Id.
36. Id. at 1377.
dures and to require environmental safeguards during the course of all OCS projects. In summarizing Divisibility, the court stated:

[W]here a multi-stage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as the result of information that will not become available until the future, and the Government reserves the power to make such a modification or change after the information is available and incorporated in a further EIS, it cannot be said that deferment violates the "rule of reason." Indeed, in considering a project of such flexibility, it might be both unwise and unfair not to postpone the decision regarding the next stage until more accurate data is at hand.

The substantive result of the Divisibility concept was utilization of a two-part test to determine adequacy of the Sale 40 EIS regarding pipeline placement and the effect of state and local law on that placement. The court considered:

1) whether obtaining more information on production and transportation at the initial stage of exploration was "meaningfully possible"; and
2) whether such information would be "important" in determining whether to proceed with the project.

Applying this two-part test to the Sale 40 EIS's discussion of pipeline placement, the Second Circuit found that more detailed information would be of no practical use to the Secretary since it would be the result of pure speculation. The court stated that although pipeline placement projection has value for economic feasibility purposes, it "would be virtually useless speculation for environmental impact purposes." Moreover, it found that pipeline

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38 The relevant portion of the Act reads: The Secretary may at any time prescribe and amend such rules and regulations . . . and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter.

38 County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1378 (2d Cir. 1977).
38 Id.
38 Id.
38 Id.
38 Id. at 1379.
38 Id. at 1380. In response to the testimony of Frank Brunjes, which concerned a pipeline feasibility study done for Shell Oil, see note 27, supra, the Second Circuit stated:
Judge Weinstein's reliance on the testimony of Franklin Brunjes and the pipeline feasibility study made by him for Shell Oil Company, moreover, is misplaced. That study did not purport to project probable or "likely" pipeline routes. It merely hypothesized some lines from arbitrarily-selected points in the ocean to similar points on shore, in order to
route projection was not essential to an environmental assessment of this stage of the project because "[the Secretary's] decision does not preclude him from requiring in the future that pipeline routes be modified or altered or from imposing additional conditions and safeguards on pipelining that will in effect permit its use only if it is environmentally acceptable." In addressing whether the Sale 40 EIS adequately discussed the impact of state and local regulation on the transportation of the oil and gas, the court found that since the projection of pipeline routes was not necessary at this stage, since neither was a discussion of the laws which would regulate such pipelines. The court stated further that the states and municipalities affected could change their regulations between the time of the publication of the EIS and the date, possibly three years or more later, when application would have to be made to local authorities for land use authorizations.

III. A CRITIQUE OF DIVISIBILITY

The significance of the Second Circuit's Divisibility approach in EIS sufficiency cases extends beyond the facts of Suffolk County. Offshore oil and gas are likely to become two of America's primary energy sources, and as a result it can be presumed that litigation in this area will increase. Because other courts in other fact situations may utilize the Second Circuit's approach, it is necessary to closely examine the Divisibility concept.

show that pipelines could be used economically over long and circuitous routes. It demonstrated that routes might be shifted as much as a dozen miles north or south without substantially altering the cost of pipelining oil to shore. As Brunjes conceded, in order to make his analysis he was forced to assume not only that oil would be discovered but such basic facts as the location of the discovery, the "timing, quantity, quality, destination, what the cost for various routes and modes of transportation are." He further agreed that changes could occur in some or all of these key variables which would materially change his estimates . . . . In fact, Mr. Brunjes himself testified that it was "very premature at this time to speculate as to exact routing involved."

Id. at 1379.

* Id. at 1380.

* Id. at 1378.

* Id. at 1379.


The Divisibility concept first begin to crystalize in Sierra Club v. Morton, 510 F.2d 813, 827 (5th Cir. 1975) where the court held that the Secretary's right to monitor a multi-stage project was a factor to consider in weighing the sufficiency of an EIS. However, the Fifth Circuit did not expand the concept or apply it in the broad manner that the Second Circuit has.

A. Control

The Second Circuit relied on the language of OCSLA and the regulations promulgated thereunder by the Secretary of the Interior to establish the control necessary for Divisibility. First, the court noted that under OCSLA the Secretary has the power to prescribe “rules and regulations as may be necessary” to protect the environment from hazards posed by exploration of continental shelf resources. All OCS oil and gas development leases, including the Sale leases, provide that the lessees must, in their operations, comply with the regulations as they may be revised or supplemented. However, because the leases are considered vested property interests by the courts, it has been held that the Secretary may only void a lease if it violates pre-existing rules and regulations. Since environmental problems may arise after the leases are

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43 U.S.C. § 1334(a) (1970). The relevant portions of OCSLA read:

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter.

Id.

OCSLA further provides:

The issuance and continuance in effect of any lease, or of any extension, renewal, or replacement of any lease under the provisions of this subchapter shall be conditioned upon compliance with the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease.


30 C.F.R. § 250.12 (1976). The relevant portions include:

Emergency suspensions. The supervisor is authorized, either in writing or orally with written confirmation, to suspend any operation, including production, which in his judgment threatens immediate, serious, or irreparable harm or damage to life, including aquatic life, to property, to the leased deposits, to other valuable mineral deposits or to the environment. Such emergency suspension shall continue until in his judgment the threat or danger has terminated.

30 C.F.R. § 250.12(c) (1970).

The supervisor is authorized by written notice to the lessee to suspend any operation, including production, for failure to comply with applicable law, the lease terms, the regulations in this part, OCS orders, or any other written order or rule including orders for filing of reports and well records or logs within the time specified.


Union Oil Company of California v. Morton, 512 F.2d 743, 747-48 (9th Cir. 1975).

Id.
executed and before rules covering such problems are promulgated, any reliance on the Secretary's ability to void the leases is overemphasized. Accordingly, the Second Circuit did note that willful violations of subsequently enacted rules could result in injunctive relief. However, although leases can be temporarily suspended for such violations, the suspension can last only as long as necessary to give Congress a chance to take action on whether to void the lease. If Congress fails to act within a reasonable time the suspension must be lifted. Again, the degree of reliance placed on the statute by the court is unjustified.

The Second Circuit's reliance on the Secretary of the Interior's regulations is similarly undermined. The regulations do authorize the Secretary to "suspend any operation, including production, which in his judgment threatens immediate, serious or irreparable injury to the environment until "in his judgment the threat or danger has terminated." However, subsequent judicial enforcement has limited the length of time the suspension may last. The Ninth Circuit has held that such regulatory suspensions, like statutory suspensions, cannot be indefinite, and may last only so long as necessary to permit Congress to consider termination of the leases for environmental reasons. Under this rule the Secretary's power is not to void but merely to suspend the leases for a reasonable period. Final voidance can only come, therefore, through Congress.

The Secretary of the Interior does retain some control over the progress of an OCS energy development project. He does not, however, retain the degree of control implicit in the Second Circuit's reasoning. The actual control over such a project clearly lies with Congress. Two factors must be considered in determining whether Congress will exercise its power to void OCS leases. First, Congress has refused to take such action in the past, and its actions with respect to the trans-Alaska pipeline connote a clear preference for energy production over environmental concerns. Second, because

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* County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1381 (2d Cir. 1977).
* See note 50, supra. It appears that injunctive relief is appropriate only when the lease violates pre-existing rules and regulations. 43 U.S.C. § 1334(a)(2) (1970). This interpretation is consistent with the "vested property interest" approach the courts have taken on emergency suspensions. See text at note 63, infra.
* Gulf Oil Corp. v. Morton, 493 F.2d 141, 149 (9th Cir. 1973) (on petition for hearing).
* 30 C.F.R. § 250.12(c) (1976).
* Id.
* Union Oil Company of California v. Morton, 512 F.2d 743, 750 (9th Cir. 1975).
* Id.
* See text and notes at note 5, supra.
the leases are vested property interests, the lessees must be compensated. Since billions of dollars are at stake, the economic consequences of voiding an OCS lease would be extreme. Therefore, reliance on congressional voidance is misplaced.

B. NEPA and the Concept of Deferral

The Second Circuit's opinion not only overstates the government's control over OCS projects, but also uses this overstatement to develop a test of EIS sufficiency which virtually ignores the requirements of NEPA and substantially weakens the effect NEPA may have on future OCS energy development projects. This result is accomplished by allowing an EIS to defer treatment of matters not of immediate concern. The test inquires whether presently obtaining information on these matters is "meaningfully possible" and whether such information would be "important" in determining whether to proceed with the project. On the surface, that inquiry seems reasonable: why demand information which cannot be obtained and which is not important? However, by broadly defining the words "meaningfully possible" and "important" the Second Circuit has allowed the Sale 40 EIS to skirt issues which it is required to discuss in detail by either the applicable statutes and regulations or the case law.

The court states that "if the additional information would at best amount to speculation as to future event or events, it obviously would not be of much use as input in deciding whether to proceed." The court, in effect, is holding that speculation at an early stage of a divisible project is not required. This conclusion, however, is not warranted. Although NEPA does not require "crystal ball inquiry," an EIS must furnish information which is reasonably necessary to enable those in a decision-making capacity to make a well-reasoned evaluation of the environmental consequences of a proposed project. Thus, the preparation of an EIS requires speculation. As the Circuit Court for the District of Columbia has stated:

In this project, more than $1.1 billion was paid by the oil companies for the leases. County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1387 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3518 (1978).
See text and notes at note 28, supra.
Id.
See text and notes at note 14, supra.
It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry." 72

Moreover, under Council on Environmental Quality (CEQ) guidelines, which were promulgated to flesh out the requirements of NEPA and are to be accorded "great weight," 73 the EIS must speculate about future laws which might affect the project. 74 The CEQ guidelines also require EIS speculation in other areas. For example, one CEQ guideline states that an EIS must discuss "related Federal actions and projects in the area, and further actions contemplated." 75

The Suffolk County 78 case itself provides a good example of the importance of reasonable speculation in an EIS. Although the exact future location of the pipelines could not have been established, general areas of placement could have been predicted. 77 The Secretary and others involved in the decision-making process could then have been advised of the types of environmental problems likely to arise with respect to each general area. 78 Moreover, the Sale 40 EIS, by not providing an in-depth discussion of state and local law, glossed over the possibility that pipelines would not be allowed. 79 The result of pipeline illegality would be that tankers would have to be used to transport the oil and gas produced from the Sale 40 area. This would, of course, raise a whole new series of environmental questions which the Sale 40 EIS, under the Second Circuit's approach, was able to avoid. 80

C. Jurisprudential Considerations

Perhaps the greatest problem with Divisibility is that it represents an attempt by the judiciary to act in a legislative capacity. NEPA was enacted by Congress for the purpose of making sure that

74 See note 28, supra.
75 40 C.F.R. § 1500.6(a) (1976) (emphasis added).
77 See text and notes at note 28, supra.
78 Id.
79 562 F.2d 1368, 1377 (2d Cir. 1977).
80 Id.
federal decision-makers knew the environmental consequences of their actions. To effectuate this purpose the Act contains specific requirements with which federal agencies must comply. It is the courts’ role to enforce NEPA, not to rewrite it, and in substance Divisibility represents a rewriting of NEPA.

Congress has recognized that NEPA should be enforced by the courts, and that the proper body to render NEPA ineffective is Congress itself. This is implicit in the trans-Alaska Pipeline Authorization Act. Had Congress wanted to repeal NEPA or alter it on a larger scale it would have done so. Instead Congress specifically exempted one project from NEPA scrutiny. As to other projects, NEPA still applies. It is unquestionably in the hands of Congress to act in the area of offshore oil development, and if it decides that this development is vital to the United States and should not be subject to meaningful NEPA review, then it can take the proper action. Rather than waiting for Congress to act, the Second Circuit has taken upon itself to render meaningful NEPA review of offshore oil projects impossible.

IV. CONSEQUENCES OF Suffolk County

Whether or not the Second Circuit’s Divisibility approach will be utilized by other courts hearing similar cases has yet to be determined. The Supreme Court, by denying certiorari, has declined to rule on the appropriateness of Divisibility as a standard of review. However, because of the attractiveness of Divisibility to oil companies and the Department of the Interior, it is almost certain that they will contend that Divisibility is the proper standard by which to gauge an EIS discussing offshore oil projects. The issue, therefore, will likely reach the courts, and because of America’s continuing energy problems they may well follow the Second Circuit’s lead despite the major deficiencies analyzed above.

In other energy areas, most notably coal development and nuclear power, the initial question which must be answered is whether Divisibility as a concept is applicable. The first point to consider is whether such projects possess the requisite factor of continuing gov-

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14 See text at note 14, supra.
15 See text and notes at notes 3 and 4, supra.
16 This is not to say that the courts should enforce NEPA to the point of hopelessly bogging down important projects over inconsequential details, rather it is that the courts should rule within the spirit of NEPA.
17 43 U.S.C. §§ 1651 et seq. (Supp. IV 1974). See also text and notes at note 5, supra.
environment control. The relevant statutes and regulations indicate that the government retains sufficient control over mining and nuclear power to invoke Divisibility. A determination of whether coal and nuclear power possess the second requisite concept of being easily divisible, multistage projects, however, is more difficult. The stages of an offshore oil project—exploration, production, and transportation—are clearly delineated and pose serious separate environmental risks. In the mining and nuclear power situations the delineations are less distinct. For example, locating offshore oil and determining the feasibility of going after it involves a large scale exploration effort. Exploration for coal is far less involved; in many cases the location and potential yield of coal deposits are clearly known. With respect to nuclear power, exploration is not a factor. In addition, transportation of offshore oil to shore involves serious environmental risks because of the danger of pipeline leakage or tankers running aground. The transportation of coal by railroad poses almost no environmental risks. In the case of nuclear power the product being transported is the end product, electricity and, again, the environmental risks are far less apparent. In terms of environmental risks, production is the key stage of both coal and nuclear power projects. Consequently, it is the only stage which must be dealt with in any detail in an EIS. It does not appear likely, therefore, that mining and nuclear power possess the requisite concept of being easily divisible, multistage projects to allow courts to invoke Divisibility.

It is quite possible, however, that the Second Circuit’s approach will have an indirect effect on other types of energy projects for, if nothing else, Divisibility represents a message to other courts. Implicit in Divisibility is the notion that the judiciary can prevent NEPA from hindering the nation’s energy development. Since Con-

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See text at note 37, supra.


Id.


Exploration in this context relates to the development of a nuclear power plant and does not involve the search for radioactive minerals. The exploration for such minerals is considered a separate exercise and is not treated in an EIS for the construction of a nuclear power plant.

gress is apparently taking a similar stance, other courts may very well devise their own schemes to circumvent NEPA.

V. CONCLUSION

This article has demonstrated that the Second Circuit’s Divisibility approach in *Suffolk County* is unsound from several perspectives. As a legal matter, the court has overstated the degree of control the Secretary maintains over an OCS project and has developed a two-part test which results in the erroneous conclusion that NEPA does not require speculation. From a jurisprudential point of view the court has acted in a quasi-legislative fashion, usurping an issue which should have clearly been left with Congress. Whether other courts will follow such an approach in additional OCS oil and gas development projects or in other energy areas, only time will tell. It is hoped that they will not, and will enforce NEPA according to its mandate, leaving any changes to be made in the hands of Congress.

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