NOTES

WESTLANDS WATER DISTRICT v. UNITED STATES: FORGING NEPA INTO A DOUBLE-EDGED SWORD AGAINST A BIODIVERSITY STATUTE

Pursuant to section 4 of the Endangered Species Act of 1973[1] (ESA), in February of 1989 defendant National Marine Fisheries Service (NMFS) listed the winter-run Chinook salmon as a threatened species. In March of 1993, the United States Fish and Wildlife Service (Service), under section 4 of ESA, listed the Delta smelt as a threatened species. The decline of the two species is directly traceable to the construction and operation of the Federal Central Valley Project (CVP), a massive water project designed to supply water to Californian farmers and urban areas. The NMFS, in consultation with the Bureau of Reclamation (Bureau), issued a Biological opinion stating that the Bureau's proposed manner of long-term operation of the CVP would "likely jeopardize the continued existence of the winter-run Chinook salmon." The Central Valley Improvement Act (CVPIA)[2] was enacted in 1992 to restore these fisheries by increasing the water flow in the CVP.

In 1993, under its authority to operate the CVP, the Bureau allocated agricultural water contractors south of the Sacramento-San Joaquin Rivers Delta (Delta) 50% of their entitlement. The Bureau also made clear to plaintiff Westlands that "it should anticipate future water reductions unrelated to climactic conditions"[3] because that volume was contingent upon any further ESA limitation of the Bureau's ability to convey it. The water year of 1993 was not considered a critical dry year, and, except for the reductions required under ESA, the CVP contained sufficient supplies to completely satisfy the plaintiff Districts' entitlements.

The federal defendants[4] moved to dismiss plaintiff water districts' (Westlands) claims based on violations of the Fifth Amendment due

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1. 16 U.S.C. §§ 1531-1544 (1988).
2. Pub. L. No. 102-575, 106 Stat. 4706, 553481-3412 (1992) [hereinafter CVPIA].
3. Westlands Water Dist. v. United States, 850 F. Supp. 1388, 1396 (E.D. Cal. 1994).
4. United States of America, Department of the Interior, Department of Commerce, National Marine Fisheries Service, Roland H. Brown, Secretary of Commerce and Bruce Babbitt, Secretary of the Interior.

process and takings clauses, the National Environmental Policy Act of 1969 (NEPA),[5] and ESA. The District Court held that issues sufficient for trial existed on "whether parties contracting with the U.S. Bureau of Reclamation have any enforceable water rights previously granted by existing long term contracts,"[6] and whether an environmental impact statement (EIS) was required under NEPA for enactment and implementation of the CVPIA. *Westlands Water District v. United States*, 850 F. Supp. 1388 (E.D. Cal. 1994).

In the Ninth Circuit, a court deciding a motion to dismiss "must accept all material allegations in the complaint as true and construe them in the light most favorable to" the party opposing the motion.[7] In light of this rule, the facts above are as stated in the complaint and accepted by the court. Further, a 12(b)(6) motion, under the Federal Rules of Civil Procedure, "is viewed with disfavor and is rarely granted"[8] because, the Ninth Circuit has ruled, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[9] However, the court has discretion to consider facts which may be judicially noticed, such as matters of public record,[10] and "facts established by exhibits attached to the complaint"[11] if they contravene facts alleged in the complaint.[12]

Increasing environmental consciousness at the federal level has led to the rise of at least two distinct methods of legislative input into federal project implementation. Regulatory statutes are enacted to affect government action broadly. Here, for example, NEPA seeks to set requirements into the process of agency decision making as it affects the "quality of the human environment."[13] Statutes that enable or amend individual federal projects, such as the CVPIA[14] at issue in this case, are

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5. 42 U.S.C. §§ 4321-4347 (1988 & Supp. IV 1992).
6. *Westlands*, 850 F. Supp. at 1426.
7. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
8. *Westlands*, 850 F. Supp. at 1399 (quoting Hall v. Santa Barbara, 833 F.2d 1270, 1274 (9th Cir. 1986)).
9. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).
10. Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).
11. *Westlands*, 850 F. Supp. at 1399 (citing Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987)).
12. *Id.* at 1399 (citing Mullis v. United States Bankr. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988)).
13. 42 U.S.C. § 4332(2)(C).
14. CVPIA, *supra* note 2, § 3401.

intended to impose day-to-day operational requirements that will protect the diverse species and habitats of regions affected by that project.[15] Environmental statutes and the recent legislation guiding the operation of federal projects are intended to compliment each other. Despite their similar goals, however, they can be made to work at cross purposes. In the noted case, Westlands used NEPA to hamper the environmentalization of the CVP by the CVPIA.

The claims against defendants included Fifth Amendment due process and taking claims, as well as NEPA claims and claims under the ESA. However, to make clear the conflict between regulatory environmental statutes and project legislation, this casenote will examine only Westlands' claim that NEPA requires the government to produce an EIS for enacting the CVPIA and operating the CVP accordingly. At issue, then, are the standing of Westlands to bring this action, and the merits of its claim as reviewed under a 12(b)(6) motion to dismiss. These issues distill to questions of whether the change in the operation of the CVP is a "major federal action" for purposes of NEPA, and whether there is an irreconcilable conflict between NEPA and the CVPIA.

In *Lujan v. National Wildlife Federation*, the Supreme Court detailed the standing requirements for a plaintiff bringing suit under NEPA.[16] In that case the plaintiff challenged the Bureau of Land Management's (BLM) "land withdrawal review program" alleging violation of the Federal Land Policy and Management Act of 1976 (FLPMA)[17] and NEPA.[18] The Court stated that both claims must be

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15. CVPIA states:

> The Purposes of this title shall be—
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> (a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California;
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> (b) to address impacts of the Central Valley Project on fish, wildlife and associated habitats;
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> (c) to improve the operational flexibility of the Central Valley Project;
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> (d) to increase water-related benefits provided by the Central Valley Project to the State of California through expanded use of voluntary water transfers and improved water conservation;
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> (e) to contribute to the State of California's interim and long-term efforts to protect the San Francisco Bay/Sacramento-San Joaquin Delta Estuary;
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> (f) to achieve a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors.

Id. § 3402.

16. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882-84 (1990).

17. 43 U.S.C. § 1701-1784 (1988).

brought under section 702 of the Administrative Procedure Act (APA)[19] because neither contains a provision for a private right of action.[20] Under the APA, the Court found two requirements for standing. First, the plaintiff must assert some identifiable "final agency action"[21] which causes injury to him.[22] Second, the plaintiff must show either, "that he has 'suffered legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'"[23] Because no "legal wrong" was asserted, the Court moved on to define the standard of injury under a statute. It stated that "to be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[24] The Court found that the "zone of interests" test for NEPA was satisfied because the plaintiffs' alleged "'recreational use and aesthetic enjoyment' are among the sorts of interests those statutes [NEPA and FLPMA] were specifically designed to protect."[25]

In *City of Davis v. Coleman*, the Ninth Circuit reiterated the standard for what is "final agency action" from *Lujan v. National Wildlife Federation* and "injury in fact" under NEPA:

> The procedural injury implicit in agency failure to prepare an EIS—the creation of a risk that serious environmental

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18. *Lujan*, 497 U.S. at 875.

19. 5 U.S.C. § 702 (1988).

20. *Lujan,* 497 U.S. at 882. APA § 702 reads in pertinent part:"[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

21. *Lujan*, 497 U.S. at 882. The APA states: "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . ." 5 U.S.C. § 551(13) (1988).

22. The Supreme Court stated that the plaintiff must establish the three elements of standing, "injury in fact," a "causal connection between the injury and the conduct complained of" and likelihood "that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992). The element of "injury in fact," as discussed by the Court, is the "invasion of a legally-protected interest" where such invasion is both "concrete and particularized," and "'actual or imminent.'" *Id.* Finally, the Court stated that "on a motion to dismiss [a] court presume[s] that general allegations embrace those specific facts that are necessary to support the claim," and thus, the complaint need only set forth "general factual allegations of injury resulting from defendant's conduct" to satisfy the injury in fact requirement. *Id.* at 2137.

23. *Lujan*, 497 U.S. at 883 (quoting 5 U.S.C. § 702).

24. *Id.*

25. *Id*. at 886 (italics omitted).

> impacts will be overlooked—is itself a sufficient "injury in fact" to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have.[26]

The issue in *City of Davis* concerned the construction of a highway interchange in an agricultural area near the city of Davis. Davis brought suit to require an EIS for the project so that the city could exercise its "procedural 'right to be heard,'" as provided in NEPA section 102(2)(C).[27] The District Court found that the city lacked standing to bring a NEPA claim against the Secretary of Transportation.[28] The Ninth Circuit Court disagreed, holding that "Davis' municipal interests fall within the scope of NEPA's protections"[29] because under California law, a municipality is responsible for protection of its citizens' environmental interests and is therefore a "'local agency' authorized 'to develop and enforce environmental standards'" within the meaning of NEPA section 102(2)(C).[30]

The same court found that the plaintiff lacked the primary responsibility for environmental quality necessary for standing under NEPA, because "unlike the City of Davis, the [plaintiff] is not required to develop and enforce environmental standards."[31] The plaintiff may choose whether or not to act at all. Further, the court held that the plaintiff's injuries "represent[ed] only pecuniary losses and frustrated financial expectations." Thus, they were "outside of NEPA's zone of interests and are not sufficient to establish standing."[32]

The Ninth Circuit considered what constitutes a "major federal action" for NEPA with respect to changes in the volume of water released from federal dams in *Upper Snake River Chapter of Trout Unlimited v.*

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26. City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975).

27. *Id.* at 666. NEPA Section 102(2)(c) states: "Copies of . . . [the EIS] and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available . . . and shall accompany the proposal through the existing agency review processes." *Id.* at 672 (quoting 42 U.S.C. § 4332(2)(C)).

28. *City of Davis*, 521 F.2d at 666.

29. *Id.* at 672.

30. Port of Astoria v. Hodel, 595 F.2d 467, 475 (9th Cir. 1979) (quoting 42 U.S.C. § 4332(2)(c)).

31. *Id.* at 475.

32. *Id.*

Hodel.[33] The court in *Upper Snake River* adopted the idea that "where a proposed federal action would not change the status quo, an EIS is not necessary."[34] In that case, the plaintiffs, environmental and sport fishing organizations, sought an injunction against the Bureau for failure to complete an EIS prior to reduction in the flow released from the Palisades Dam and Reservoir.[35] In the Ninth Circuit, under *City of Davis,* an agency must have "'reasonably concluded' that the project will have no significant adverse environmental consequences." Moreover, NEPA requires an EIS "whenever a project '*may* cause a significant degradation of some human environmental factor'" for its decision to survive review.[36] Thus, finding the Bureau's decision to be reasonable, the court concluded that the reduction was not a "'major Federal action' within the meaning of NEPA."[37] In support of its conclusion, the court quoted extensively from *County of Trinity v. Andrus*[38] for the proposition that the issue is "'not whether the actions are of sufficient magnitude to require the preparation of an EIS, but rather whether NEPA was intended to apply at all to the continuing operations of completed facilities.'"[39]

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33. 921 F.2d 232 (9th Cir. 1990).

34. *Id*. at 235 (citing Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115, 116 (9th Cir. 1980)).

35. *Id.* at 233.

36. *City of Davis*, 521 F.2d at 673 (italics in original) (quoting Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973)).

37. *Upper Snake River* , 921 F.2d at 234.

38. 438 F. Supp. 1368, 1388-89 (E.D. Cal. 1977).

39. *Upper Snake River,* 921 F.2d at 235 (quoting County of Trinity v. Andrus, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977)). The court in *County of Trinity v. Andrus*, having considered Bureau intentions to reduce CVP flows due to drought, found that the Bureau had "neither enlarged its capacity to divert water . . . nor revised its procedures or standards for releases into the Trinity River and the drawdown of reservoirs," and so had not undertaken any "major Federal action." *Id.* There had never been an EIS produced for the CVP because it was constructed before NEPA became effective, thus, as section 102(2)(C) did not apply retroactively, and the Bureau had operated that section of the CVP in the manner complained of for a decade prior to the suit, the court could find no new action to trigger NEPA's requirements. *Id.* at 1388 (citing Life of the Land v. Brinegar, 485 F.2d 460, 466 n.7 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974)). This conclusion was based on the theory that NEPA was not intended by Congress to require an EIS for the ordinary operation of completed facilities because of the massive paperwork such a policy would require. *Id.* at 1389-90. The court stated, "[i]f . . . an EIS were to be required to cover continuing operations over a timespan short enough to allow realistic adjustments of operations to meet changed conditions, the Bureau and most other federal agencies would be condemned to an endless round of paperwork . . . . If [NEPA] section 102(2)(C) were interpreted to require such 'operational' EIS's, the resulting interference with the intended functions of federal agencies could be so great as to render compliance 'impossible' within the meaning of the introductory paragraph of section 102, which directs compliance with its terms only 'to the fullest extent possible.'" *Id*. (citations omitted).

In *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, the Supreme Court found that with regard to NEPA section 102(2)(C), "where a clear and unavoidable conflict in statutory authorization exists, NEPA must give way."[40] Quoting *United States v. SCRAP*, the Court further stated, "NEPA was not intended to repeal by implication any other statute."[41] In *Flint Ridge*, environmental organizations sought declaratory relief requiring an EIS prior to the Department of Housing and Urban Development's (HUD) "approval and registration of a statement of record and property report" under the Interstate Land Sales Full Disclosure Act (Disclosure Act).[42] The plaintiffs were concerned about the terms and conditions of the disposal of lots as proposed to be developed in the disclosure statement, and argued that NEPA required an EIS for HUD's approval of such a statement.[43] HUD successfully countered that the Disclosure Act conflicted with NEPA because it did not allow enough time to complete an EIS. The Disclosure Act provides that the Secretary of HUD has thirty days after a developer registers subdivision to reject the disclosure statement for incompleteness or inaccuracy.[44] The Court reasoned that because the period of review was mandatory and it was "inconceivable that an environmental impact statement could, in 30 days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments," the two statutes' requirements could not be reconciled, and "NEPA must give way."[45]

The Ninth Circuit has intimated three factors that it will consider in deciding if a NEPA statutory conflict exists. In *Forelaws on Board v. Johnson*,[46] plaintiff environmental associations sought an EIS for the Bonneville Power Administration's (BPA) offer of long-term power supply contracts under the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act).[47] BPA's strongest defense was that, because the Regional Act required BPA to offer its customers long-term contracts "[a]s soon as practicable within nine months after

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40. 426 U.S. 776, 787-88 (1976) NEPA section 102(2)(c) requires an EIS for any "major federal actions" but only to the "fullest extent possible." 42 U.S.C. § 4332(2)(c).

41. *Id.* at 788 (quoting United States v. SCRAP, 412 U.S. 669, 694 (1973)).

42. *Id.* at 783; Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (1988).

43. *Id.* at 782-83.

44. *Id.* at 787.

45. *Flint Ridge Co.*, 426 U.S. at 788-89.

46. 743 F.2d 677, 679 (9th Cir. 1984), *cert. denied*, 478 U.S. 1004 (1986).

47. 16 U.S.C. §§ 839-839h (1988).

December 5, 1980,"[48] a timing conflict analogous to that in *Flint Ridge* existed, and therefore NEPA did not apply.[49] The court rejected this argument for three reasons. First, the court found "nothing in the legislative history or the language of the Regional Act suggesting that Congress intended an exemption from NEPA requirements."[50] Second, the court found that within the statutorily allowed nine months to offer contracts and the subsequent year allowed for acceptance, BPA had sufficient time to prepare an EIS.[51] Finally, the court found BPA's contention that it had only a month in which to prepare an EIS to be unreasonable as an "excessively narrow construction" of the Regional Act in contravention of the necessarily broad construction of NEPA's requirement for agencies to "comply 'to the fullest extent possible.'"[52] The court stated that, "[g]iven the language and history of this Act, the lack of any mandated deadlines remotely similar to the 30 days in *Flint Ridge*, and the broad construction we are compelled to give NEPA, we must conclude that there is no irreconcilable conflict between the Regional Act and NEPA requirements . . . ."[53]

The court in *Merrell v. Thomas* held that the Environmental Protection Agency (EPA) did not have to issue an EIS when registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[54] The court looked at four amendments to FIFRA and discovered that the registration procedure therein performed many of the tasks an EIS would, and also intentionally limited the process to "fall[] short" of EIS standards, implying that NEPA's requirements were inappropriate.[55] Further, the latter three amendments were enacted after the EPA had concluded that FIFRA was not subject to NEPA. Thus, the court noted that "'when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is

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48. Forelaws on Bd. v. Johnson, 743 F.2d 677, 680 (9th Cir. 1984) (quoting 16 U.S.C. § 839c(g)(1)).

49. *Id.* at 681.

50. *Id.* at 683.

51. *Id.* at 684-85.

52. *Id.* at 683 (quoting Conference Report, 115 CONG. REC. 39,702-703 (1969) ("'No agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.'").

53. *Forelaws on Bd.*, 743 F.2d at 685 (italics in original).

54. Merrell v. Thomas, 807 F.2d 776, 782 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); 7 U.S.C. §§ 136-164 (1988 & Supp. V 1993).

55. *Merrell*, 807 F.2d at 778-79.

persuasive evidence that the interpretation is the one intended by Congress.'"[56] The court also noted that FIFRA included timing constraints that conflicted with the time required to perform an EIS.[57] The court concluded that application of NEPA to the existing FIFRA structure would be counter to the intentions of Congress: "To apply NEPA to FIFRA's registration process would sabotage the delicate machinery that Congress designed to register new pesticides."[58]

In order to modify the purposes and obligations created by the CVP in favor of biodiversity and habitat recovery, the CVPIA was enacted October 30, 1992. The modifications pertinent to the issues in the noted case required that 800,000 acre feet per year of CVP water be dedicated to support of "fish, wildlife and habitat restoration purposes," and that at least 340,000 acre feet per year be released to the Trinity River for "fishery restoration, propagation and maintenance," to "provide for water supplies of suitable quality to maintain and improve wetland habitat."[59]

In the noted case, the District Court denied defendants' motion to dismiss Westlands' claim that NEPA requires an EIS for enactment and implementation of the CVPIA.[60] The court concluded that:

> [d]efendants argue to foreclose . . . preparation of an EIS for enactment and implementation of the CVPIA. It cannot be credibly argued that the disputed water allocation decisions are not major federal actions, or that they do not significantly affect the human environment. Nor is it clear that Congress intended the CVPIA to supplant NEPA or to immunize the Bureau's actions from judicial scrutiny.[61]

It bears repeating that this holding is based on the facts as alleged by Westlands because of the Ninth Circuit rule that a court deciding a motion to dismiss "must accept as true all material allegations in the

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56. *Id.* at 779 (quoting Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3255 (1986)).

57. *Id*. at 778.

58. *Id.* at 779.

59. CVPIA, *supra* note 2, § 3406(b)(2), (b)(23).

60. Westlands Water Dist. v. United States, 850 F. Supp. 1388, 1426-27 (E.D. Cal. 1994).

61. *Id.* at 1426.

complaint and construe them in the light most favorable to" the plaintiffs.[62]

The court noted four requirements for the plaintiffs to gain standing. The first three are the Article III "case or controversy" requirements that the injury complained of must be "particularized," "concrete[ly] and demonstrabl[y]" traceable to the action of the defendant, and redressable by the remedy sought.[63] The fourth, from *National Wildlife Federation*, requires the plaintiff to establish standing under NEPA through section 702 of the APA.[64] To qualify, plaintiffs must have interests that fall within the "zone of interests" sought to be protected by NEPA.[65] The court noted that satisfaction of the "zone of interests" test necessarily satisfies the Article III requirements as well, and looked to NEPA's legislative purpose to discover what it seeks to protect.[66] The court found in the operational sections of the statute that, to effectuate its purpose, NEPA "requires federal agencies to . . . prepar[e] and consid[er] an EIS—whenever the proposed action may significantly affect the quality of the human environment."[67] In addition, "[a]n agency's failure to prepare an EIS may mean the loss of the last opportunity to eliminate serious . . . environmental impacts . . . ."[68] It is that risk, if the plaintiff alleges interests that would be harmed by the effects, that constitutes the "injury in fact" satisfying the requirement detailed in *City of Davis*.[69] Westlands alleged injuries to "(1) the groundwater quality and supply; (2) crop production; (3) soil quality of land to which groundwater is applied; [and] (4) the Westlands area, due to dust from fallowed land."[70] While the economic incentive for farmers to allege such injuries shows through, the court found that "the facts

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62. *Id*. at 1399 (citing NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)).
63. *Id.* at 1411 n.10 (citing Warth v. Seldin, 422 U.S. 490 (1975)).
64. *Id.* at 1411.
65. *Id.*
66. *Id.* NEPA states:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . .

42 U.S.C. § 4321.
67. *Westlands Water Dist.*, 850 F. Supp. at 1411.
68. *Id*.
69. *Id.* (citing City of Davis v. Coleman, 521 F.2d 661, 670-71 (9th Cir. 1975)).
70. *Id.* at 1412.

alleged, taken as true, describe significant adverse environmental effects."[71] The court found this showing, under *Defenders of Wildlife*, to be sufficient to confer standing on the individuals affected by the lack of an EIS.[72]

The court concluded its discussion of individual standing by distinguishing two cases pressed by Defendants as controlling.[73] In *Trinity County Concerned Citizens v. Babbitt*, plaintiff loggers alleged environmental injury to the spotted owl by the increased risk of fire in areas reserved from logging by designation under the ESA as "critical habitat."[74] The court saw through the thinly veiled ruse and stated, "[T]he remarkable implication that logging is in the best interests of the spotted owl . . . is entirely speculative, in that it relies upon 'the intervention of inherently unpredictable natural phenomena,'"[75] and is "no more than an economic injury in disguise."[76] Thus, the court denied NEPA standing to plaintiffs because, "economic injuries are not within NEPA's zone of interests."[77] While allowing that the plaintiffs in the noted case admit to "some economic impetus for bringing suit" the court distinguishes its decision from *Trinity County Concerned Citizens* by merely stating its belief that "[n]othing in the complaints demonstrates the plaintiffs' allegations are a pretext to redress purely economic concerns."[78]

The court then distinguished *Mountain States Legal Foundation v. Madigan*, where, again, loggers attempted to assert environmental injury to the forest by the prevention of logging.[79] The court rejected their arguments and granted the defendants' motion to dismiss the plaintiff's NEPA claims. The court stated, "[T]hough plaintiffs sometimes make a feint at alleging concern for the health of the forest,

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71. *Id.*

72. *Id.* at 1412-13. The Supreme Court stated in *Defenders of Wildlife* that "on a motion to dismiss [a] court presume[s] that general allegations embrace those specific facts that are necessary to support the claim," and thus, the complaint need only set forth "general factual allegations of injury resulting from defendant's conduct" to satisfy the injury in fact requirement. Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130, 2137 (1992).

73. *Westlands Water Dist.*, 850 F. Supp. at 1412-1413.

74. No. CIV.A.92-1194, 1993 WL 650393, at *5-6 (D.D.C. Sept. 22, 1993).

75. *Id.* at *6.

76. *Id.* (quoting Mountain States Legal Found. v. Madigan, Civ. No. 92-0097, slip op. at 4 (D.D.C. May 7, 1992)).

77. *Id.* at *6.

78. *Westlands Water Dist.*, 850 F. Supp. at 1412.

79. No. CIV.A.92-0097, 1992 WL 613292, at *1 (D.D.C. May 7, 1992).

the only manner in which they are claiming injury to themselves is by the decreased timber harvesting that would be allowed under" one of the challenged Final Environmental Impact Statement's alternatives.[80] The court in the noted case managed to distinguish *Mountain States Legal Foundation* by restating Westlands' factual allegations of future harm to the groundwater supply, water quality, air quality and the soil, and finding that "[t]hese interests do not frustrate NEPA's broad concerns for the environment as a whole . . . ."[81]

Individual injury sufficient for NEPA standing established, the court moved on to consider defendants' assertion that the plaintiffs, as water districts, "cannot establish standing for their own injury under *Port of Astoria*."[82] Because the decision in *Port of Astoria* requires that a local agency must be "primarily responsible for the development and enforcement of environmental standards" to have standing, the court looked to the California Water Code (Water Code) for such authorization.[83] The court found that the Water Code, in its definition of "local agency" and the enablement of those agencies to "adopt and implement a groundwater management plan" does not confer the required primary responsibility.[84] Further, the court cited the California Supreme Court opinion in *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District* for the rule that the California State Water Resources Control Board has the authority to regulate water for the protection of the environment.[85] Finally, based on the Supremacy Clause, the court collapsed plaintiffs' contention that Water Code sections 35407 and 3509 grant the right to bring an action in disregard of the APA's standing requirements.[86] Anticipating a failure to acquire local agency standing, Westlands also asserted standing as an association.[87]

The court, applying the test for association standing from *Hunt v. Washington State Apple Advertising Comm'n*,[88] found that plaintiffs'

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80. *Id.* at *2.
81. *Westlands Water Dist.*, 850 F. Supp. at 1413.
82. *Id.* (italics in original); Port of Astoria v. Hodel, 595 F.2d 467 (9th Cir. 1979).
83. *Westlands Water Dist.*, 850 F. Supp. at 1413.
84. *Id.*
85. *Id.* (citing Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., 26 Cal.3d 183, 198 (Cal. 1980).
86. *Id.* at 1413-14.
87. *Id.* at 1414.
88. 432 U.S. 333 (1977).

assertion that their rights as associations to "protect the water supply until an EIS is prepared," was sufficient for NEPA standing.[89] The court quoted the test from *Hunt*:

> [A]n association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests [the association] seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.[90]

Defendants challenged only the "germaneness" element of the test, but the court found that the Water Code section relied on by the plaintiffs for local agency standing sufficed to confer standing under *Hunt*.[91] Finally, the court found that maintenance of a clean water supply and protection of the quality of the groundwater were "within the 'zone of interests' of NEPA's purposes of protecting the environment," and therefore were sufficient for standing under NEPA.[92]

The court began its consideration of the merits of the NEPA claims with the threshold question of whether a "major federal action" exists to which NEPA may attach.[93] In construing what the "major" portion of the phrase requires,[94] the court looked to the Code of Federal Regulations, Title 40, sections 1508.27 and 1508.18(b) and found examples of "categories into which various major federal actions 'tend to fall.'"[95] These included "the '[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.'"[96] The court then considered defendants' characterization of the CVPIA as a "routine managerial action within the ambit of the CVP Act" that is not "major"

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89. *Westlands Water Dist.*, 850 F. Supp. at 1414.

90. *Id.* (quoting *Hunt*, 432 U.S. at 343).

91. *Id.*

92. *Id.* at 1414.

93. NEPA § 102(2)(C) requires that all "major federal actions significantly affecting the quality of the human environment" be supported by an EIS. 42 U.S.C. § 4332(2)(c).

94. The court did not mention and presumably assumes that the CVPIA is obviously "federal."

95. *Westlands Water Dist.*, 850 F. Supp. at 1415 (quoting 40 CFR § 1508.18(b) (1993)).

96. *Id*.

for purposes of NEPA.[97] The court looked briefly to the legislative history of the CVPIA and determined that it was "intended to have a significant impact on the environment of the Central Valley by the reallocation of a significant portion of CVP water to environmental purposes."[98] Applying the "status quo" standard developed in *Upper Snake River*, the court found the intent of the legislature demonstrated that the CVPIA was not part of the normal operations of the CVP and was thus "major" in the sense given the word by *County of Trinity v. Andrus.*[99] Thus, the court found that it could not say, "as a matter of law that the actions of the federal defendants in implementing the CVPIA do not constitute 'major federal actions' beyond the scope of their normal operations."[100]

The court then detailed the requirements for a finding of federal "action," using *Port of Astoria*[101] and *San Francisco v. United States.*[102] The court cited the former for the question of whether the action and its effects "were within the contemplation of the original project when adopted or approved,"[103] and the latter for the rule that, "[t]he inquiry requires a determination of whether plaintiffs have complained of actions which may cause significant degradation of the human environment."[104] That the CVPIA was enacted at all, therefore, implied to the court that its effects were not contemplated by the CVP Act.[105] The plaintiff's allegation of a "50% to 75% reduction in the supply of water to contractors" was sufficient to demonstrate the threat of significant degradation because of the contractors' increased use of groundwater.[106] Thus, the court ruled, "[t]hese facts, taken as true, represent a change in normal CVP operations having 'significant effect on the human

97. *Id.*

98. *Id.*

99. *Id.* (citing Upper Snake River v. Hodel, 921 F.2d 232, 234 (9th Cir. 1990); and County of Trinity v. Andrus, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977).

100. *Id.* at 1415.

101. 595 F.2d 467 (9th Cir. 1979).

102. City and County of San Francisco v. United States, 615 F.2d 498, 500 (9th Cir. 1980). The court found that the leasing of a shipyard following two years of inactivity did not constitute a major federal action because the use of the yard was considered a "phase in an essentially continuous activity," *Id.* As such, it would not cause "significant degradation of the human environment." *Id.*

103. *Westlands Water Dist.*, 850 F. Supp. at 1415.

104. *Id.*

105. *Id.*

106. *Id.* at 1416.

environment,'" and therefore constituted an "action" sufficient for NEPA.[107]

The final issue relevant to the instant discussion was the court's treatment of the possibility of an irreconcilable conflict between the CVPIA and NEPA. The most basic statement of the rule regarding this issue comes from *United States v. SCRAP*: "NEPA was not intended to repeal by implication any other statute."[108] To narrow the application of this rule for the issue at hand, the court quoted the United States Supreme Court decision in *Flint Ridge* for the proposition that "[w]here there is an 'irreconcilable and fundamental' statutory conflict, no environmental impact statement is required."[109] Defendants cited three sections of the CVPIA that require action from the Secretary of the Interior (Secretary) "upon" or "immediately upon enactment of" the CVPIA.[110] The citations were intended to demonstrate that the time allotted by Congress for the Secretary to take action does not allow for an EIS to be prepared, and that NEPA must therefore be left behind.[111]

The court responded by stating, "[u]nquestionably, the CVPIA was enacted with a sense of urgency," and went on to relate in great detail the depth of the environmental harm the CVP had wreaked, and that the CVPIA was intended to mitigate.[112] However, the court then quoted selectively from CVPIA section 3406(b)(2)[113] and concluded that "[a]lthough the language conveys a sense of urgency, Congress acknowledged that other legal obligations under all federal law had to be

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107. *Id.*

108. *Id.* (quoting United States v. SCRAP, 412 U.S. 669, 694 (1973)).

109. *Westlands Water Dist.*, 850 F. Supp. at 1415 (quoting Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787-88 (1976)).

110. CVPIA, *supra* note 2, § 3406(b), (b)(2), (b)(23).

111. *Westlands Water Dist.*, 850 F. Supp. at 1417-18.

112. *Id.* at 1418-19.

113. The court's rendering is as follows:

> Upon the CVPIA's enactment, Congress required the Secretary 'immediately upon enactment of this title,' to operate the Central Valley Project 'to meet all obligations of State and Federal law, including but not limited to the Federal Endangered Species Act . . . .' Section 3406(b)(2) directs that the Secretary 'upon enactment of this title' direct and manage, annually, eight hundred thousand acre-feet of Central Valley Project yield 'for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title' as well as 'to help to meet such obligations as may be legally imposed upon the Central Valley Project under State and Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act.'

satisfied. Congress could easily have excused NEPA compliance had it intended."[114] Further, the court read the operative provisions of the CVPIA, specifically 3404(c), 3505(1) and 3406(b), to be subject to federal law.[115] The court then pointed to a provision in section 3409 that requires the Secretary to prepare a NEPA programmatic EIS within three years of CVPIA enactment to consider the impacts and benefits associated with the renewal of CVP water contracts. For the court, this fact reinforced the point that Congress was both fully aware of NEPA's implications and had decided to require further environmental review.[116] Finalizing its arguments and ruling, the court stated:

> Given the construction required by the term "to the fullest extent possible," and taken as a whole, the CVPIA does not impliedly repeal NEPA's requirement for an EIS. Although unquestionably passed with a sense of urgency for the protection of threatened species, the requirement that statutes be construed in favor of NEPA compliance and legislative history demonstrating an intent that "existing requirements of NEPA" not be affected, prevent granting the motion to dismiss on this ground.[117]

In a final effort to prevent NEPA application to the CVPIA, defendants argued that the CVPIA's requirements of discrete volumes of water releases did not allow for the information and alternatives provided by an EIS to have any effect on implementation of the CVPIA. In short, they argued that an EIS for the CVPIA would be "a nullity."[118] Considering this argument pursuant to the analysis in *Robertson v. Methow Valley Citizens Council*,[119] the *Westlands* court recognized that

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Id.

114. *Id.* at 1419.

115. *Id.*

116. *Id.* (quoting Central Valley Reform Act, H. REP. NO. 576, 102d Cong. (June 16, 1992)). The legislative history of section 3409 explicitly states, "[t]his section is intended to ensure maximum flexibility and consistency in the long-term operation of the CVP and is not intended to affect any existing requirements of NEPA." *Id.* at 1419 (italics omitted).

117. *Westlands Water Dist.*, 850 F. Supp. at 1419.

118. *Id.*

119. 490 U.S. 332, 349-52 (1989). In *Methow Valley*, the Supreme Court considered a citizen group's challenge to a Forest Service EIS that admittedly lacked "site specific" mitigation plans for the proposed ski area. *Id*. at 339. The Court upheld the EIS, finding "a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated . . . and a substantive requirement that a complete mitigation plan be actually formulated and adopted." *Id*. at 354.

an EIS was intended to inform the discretion of those agency decisionmakers empowered to control a given project.[120] Thus, the court found that an EIS for the CVPIA could "inform the discretion by which the Bureau [selects] which CVP water will implement the CVPIA."[121] The court notes further that because the Secretary could choose to use the "'fast track' EIS schedule" he had sufficient discretion to allow work in compliance with NEPA.[122] Making its final conclusion, the court said:

> Nothing in the language and history of the CVPIA nor in any specifically mandated deadline in the act, requires the conclusion that a clear and irreconcilable conflict between the CVPIA and NEPA exists. This does not preclude an evidentiary showing by the Federal Defendants that NEPA compliance is impossible.[123]

The court's decision upholding the viability of Westlands' NEPA claim against the enactment and implementation of the CVPIA is a small victory for the farmers and municipalities represented by the plaintiffs. It is, however, a very broad cut against government environmentalization of federal projects. Environmental concerns are a comparatively recent development in national politics and legislation. Emphasizing these concerns has proven to be a difficult battle. With the help of far sighted legislators enacting statutes such as NEPA and the ESA, the government has been forced to take a hard look at the environmental consequences of what it intended to do. The noted case is a toe-hold for developers to use NEPA against the increasing environmental consciousness of the federal and state governments. That a group of plaintiffs can successfully allege injury to the groundwater, the soil, the air and the land, based solely on the damage that the plaintiffs themselves would cause by overdraft of their own aquifer, is a staggering statement for this court to have made. NEPA has become a double-edged sword.

The court was aware that the cases categorically find economic injury to be insufficient for standing under NEPA; economics are demonstrably not within the "zone of interests" NEPA seeks to protect.[124] This, then, is the most powerful criticism of the court's

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120. *Westlands Water Dist.*, 850 F. Supp. at 1420.

121. *Id.*

122. *Id.*

123. *Id.*

124. The court stated, "[p]urely economic injury is insufficient [for standing under NEPA]." *Id.* at 1411 (citing Port of Astoria v. Hodel, 545 F.2d 467, 475 (9th Cir. 1979)).

decision. In spite of having precedent for a determination that Westlands' claims of injury were merely a cover for economic concerns, the court chose not to see through the veil and found the complaint to allege "significant adverse environmental effects."[125] The court distinguished both logging cases, *Trinity County Concerned Citizens* and *Mountain States* despite their strong analogy to the issue at hand. The plaintiffs in *Mountain States Legal Foundation* asserted injury to the forests by the prevention of logging and the defendants made a motion to dismiss.[126] As in the noted case, the court in *Mountain States* was forced to take the facts asserted by the plaintiffs as true, but read into those facts sufficiently to find that, "a careful reading of the Complaint reveals that plaintiffs base their standing to assert a challenge under NEPA solely on injury to economic and social interests."[127]

Structurally, the claim of injury in the noted case is very similar to those in the logging cases. Westlands' injury derived from the "increased reliance on groundwater for irrigation, resulting in a severe decline in the groundwater level," and its resultant effects on the environment.[128] Thus, the asserted injury arose from the actions of the farmers overdrafting their available water supply, and thereby creating salt buildup, land subsidence, and other problems which in turn allegedly harm their environmental interests.[129] Similarly, the loggers' injuries arose from prevention of their logging in certain areas, which, in various ways between the two logging cases, allegedly harmed the environment, and thus injured the loggers. In all three cases, the environmental injury complained of under NEPA arose in the causal chain only after the plaintiffs suffered economic injury. While logging is perhaps a more obviously non-environmental interest than farming, both are fundamentally economic interests that are outside NEPA's concern. The plaintiffs' interests in these cases are far too similar for their standing to be decided differently.

The other major flaw is the court's characterization of the Secretary's discretion to "utilize a 'fast track' EIS schedule" as sufficient agency discretion in the implementation of the CVPIA, thus preventing

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125. *Id.* at 1412.

126. Mountain States Legal Found. v. Madigan, No. CIV.A.92-0097, 1992 WL 613292, at *1 (D.D.C. May 7, 1992).

127. *Id.* at *2.

128. *Westlands Water Dist.*, 850 F. Supp. at 1412 (quoting the plaintiff's complaint at ¶ 53).

129. *Id.* at 1412.

an EIS from becoming a mere "nullity."[130] The ability to choose between two different speeds at which to produce a useless document is not the sort of discretion discussed in *Jones v. Gordon.*[131] In that case, the agency's discretion to publish notice "within any particular period" eliminated any conflict between the statute which required notice to be published and NEPA, thus avoiding exclusion of NEPA's requirements under *Flint Ridge*.[132] Thus, the court's reasoning does not meet the defendants' argument that any EIS performed for the CVPIA would be a nullity because the CVPIA requires the Bureau to release exactly 800,000 acre feet of water each year. The decision to produce an EIS quickly or slowly cannot affect the volume of water required to be released.[133]

The decision in the noted case goes against not only the precedent set by the logging cases discussed above, but operates to forge NEPA into a double-edged sword to be used against environmental projects. As the mere existence of this case demonstrates, a tougher case may come in time. A NEPA case pitting fish against owls, or any two important environmental interests against each other, could set bad precedent for the use of NEPA in anti-environmental litigation. Perhaps the government will act with enough legislative foresight to allow time to weigh conflicting environmental values through the effective use of NEPA's EIS procedural requirements.

The *Westlands* decision, while accomplishing little in the way of precedent because of its procedural posture, nonetheless raises the specter of the use of NEPA to undermine statutes fostering biodiversity. Moreover, the environmental concerns successfully asserted by Westlands did not exist until the CVP made the irrigation of farmland possible. Ironically, the environmentalization of a western water project

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130. *Id.* at 1420.

131. Jones v. Gordon, 792 F.2d 821, 826 (9th Cir. 1986). The court cites *Jones* for the proposition that where an agency has the discretion to withhold an action until an EIS is produced, there can be no irreconcilable conflict like that in *Flint Ridge*. *Westlands Water Dist.*, 850 F. Supp. at 1420.

132. *Jones*, 792 F.2d at 826. *See also Forelaws on Bd.*, 743 F.2d at 681 (holding that NEPA is inapplicable "when secretary has no discretion as to coal leases") (quoting Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 558 (D.C. Cir. 1979)), *cert. denied*, 478 U.S. 1004 (1986).

133. The court did not mention it, but plaintiffs would presumably have better served their cause had they pointed out that subsection D of 3406(b)(2) states, "[i]f the quantity of water dedicated under this paragraph, or any portion thereof, is not needed for the purposes of this section, based on a finding by the Secretary, the Secretary is authorized to make such water available for other project purposes." CVPIA, *supra* note 2, § 3406(b)(2)(D).

is being hampered by the assertion of NEPA, the statute designed to protect environmental concerns. The economic concerns being protected did not exist before the project and are part of the reason it has caused the listing of two species of fish. This kind of injury was not intended to be covered by NEPA, and the CVPIA was not written to allow for it. Note the danger, however, in arguing against the application of section 102(2)(C) to the CVPIA: such arguments may limit NEPA's positive application elsewhere.

WILLIAM H. FERGUSON III