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# NOTES

## **SOCATS: WORST CASE ANALYSIS IN THE WEST**

**Tamzin G. Brown**

### I. INTRODUCTION

On November 9, 1983, the Ninth Circuit of the United States Court of Appeals handed down an opinion, *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*,<sup>1</sup> which required the Bureau of Land Management (BLM) to prepare a worst case analysis<sup>2</sup> in its supplemental environmental assessment (EA) when scientific uncertainty existed as to the safety of a herbicide. This decision has provided a foundation for subsequent National Environmental Policy Act<sup>3</sup> (NEPA) challenges brought against other federal agencies which have avoided the NEPA full disclosure mandate. The Ninth Circuit's strong support of the NEPA mandate heralded renewed commitment to hold federal agencies to environmental accountability for their decisions.

### II. BACKGROUND

In 1979, a group of concerned citizens in southern Oregon filed suit to enjoin the BLM from spraying herbicides in the Medford District of

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1. 720 F.2d 1475 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 446 (U.S. Nov. 13, 1984) (No. 84-267) [hereinafter cited as *SOCATS*].

2. The worst case analysis is mandated by the Council on Environmental Quality's regulation promulgated in 1979, 40 C.F.R. § 1502.22 (1984).

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

3. 42 U.S.C. §§ 4321-4361 (1982).

western Oregon. The BLM was spraying various herbicides<sup>4</sup> to eliminate brushy vegetation which competed with the economically preferable Douglas fir. The BLM had prepared a programmatic environmental impact statement (PEIS) in 1978 when it proposed the ten-year spraying program. The PEIS was supplemented annually by EAs which updated the PEIS on a site specific basis. The PEIS had discussed the human health effects of Silvex, one of fourteen herbicides it was planning to use. It did not discuss any of the other herbicides except to say that there was "no known potential long term human health effects from the proposed action."<sup>5</sup> The plaintiffs, Southern Oregon Citizens Against Toxic Sprays (SOCATS), alleged that this was an inadequate discussion of the potential human health hazards, given the conflicting scientific data on the safety of the herbicides involved, particularly 2,4-D. The district court agreed and enjoined the spraying until a worst case analysis was prepared in a supplemental EA.

The safety of herbicides was not a new issue in the Oregon courts. In 1977 the U.S. District Court of Oregon, in *Citizens Against Toxic Sprays, Inc. v. Berglund*<sup>6</sup> (hereinafter *CATS*), enjoined the U.S. Forest Service from spraying phenoxy herbicides<sup>7</sup> in the Siuslaw National Forest until the agency had adequately addressed the environmental effects of its spraying program. In *CATS*, the Forest Service argued that the plaintiffs were requiring it to prove that phenoxy herbicides were safe or unsafe. The court disagreed, holding that NEPA requires a *discussion* of uncertain adverse environmental impacts, rather than *proof* of a chemical's relative safety.<sup>8</sup> Neither NEPA nor the court sought to turn the agency into a chemical analysis laboratory.

The *CATS* court presented an extensive overview of phenoxy herbicides and the Environmental Protection Agency's (EPA) continuing problems with the herbicide 2,4,5-T. It noted that 2,4-D, 2,4,5-T and Silvex accounted for 90% of all phenoxy production in the United States in 1971.<sup>9</sup> It mentioned public concern over TCDD (dioxin), a by-product of

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4. The herbicides included Silvex, 2,4-D and 12 others. *SOCATS*, 720 F.2d at 1477.

5. *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Watt*, No. 79-1098FR (D. Or. Sept. 9, 1982) [hereinafter *SOCATS v. Watt*].

6. 428 F. Supp. 908 (D. Or. 1977).

7. A phenoxy herbicide is one which contains a salt of phenol, which is an acidic compound. Of the phenoxy herbicides, 2,4-D is the most extensively used. The 2,4-D compound commonly used in forestry is low in water solubility but very soluble in oils. An oil soluble herbicide is more likely to be absorbed through the skin than a water soluble one. Thus, accumulation of herbicides in an organism is more likely to occur when the organism is exposed to persistent chemicals which have high oil solubility. See generally, Norris, "The Behavior of Herbicides in the Forest Environment and Risk Assessment" (available from the U.S. Dept. of Agriculture, Forest Service) [hereinafter *Norris*].

8. *Citizens Against Toxic Sprays, Inc. v. Berglund*, 428 F. Supp. 908, 922 (D. Or. 1977).

9. *Id.* at 914.

both Silvex and 2,4,5-T, whose adverse human health effects were documented from the use of Agent Orange in Vietnam. Although laboratory tests showed that dioxin caused birth defects in animals, the EPA had not yet made any conclusive findings on the human health hazards of phenoxy herbicides.<sup>10</sup>

The inconclusive data on the safety of phenoxy herbicide exposure was a similar problem in *SOCATS*. The plaintiffs in *SOCATS* lived near the forests designated by the BLM for herbicide spraying. Many plaintiffs worked in the forests as well as used them for recreation and food gathering.<sup>11</sup> The BLM proposed to apply the herbicides aurally by means of a helicopter, or alternatively by means of a tanker truck or backpacks.<sup>12</sup> Aerially applied herbicides are apt to drift upon non-target zones.<sup>13</sup> Thus, if the herbicides are toxic to humans, the potential for significant adverse effects on the human environment increases when the herbicides are aerially sprayed in populated areas.<sup>14</sup>

In its 1978 PEIS, the BLM devoted fifteen pages to the human health effects of Silvex but did not address the human health effects of its other proposed herbicides. Subsequently, the EPA suspended the use of Silvex. Although the BLM discontinued the use of Silvex, it continued to use 2,4-D and other herbicides without discussing their effects in any supplemental EA.<sup>15</sup> The Ninth Circuit focused on this discrepancy when it determined the inadequacy of the BLM's entire environmental analysis in *SOCATS*.

### III. THE ISSUES

The BLM raised three issues on appeal to the Ninth Circuit. The first

10. *Id.* at 917.

11. *SOCATS v. Watt*, No. 79-1098FR (D. Or. Sept. 9, 1982).

12. *Id.*

13. Norris, *supra* note 7, at 199. A "non-target zone" is an area which is not intentionally sprayed with herbicide.

14. The risk of harm from chemicals is measured by hazard and toxicity. "Toxicity" is the capability of a substance to harm a living organism by chemical action. "Hazard" is the probability that harm will result. Thus, a chemical may be highly toxic, but if it never comes into contact with humans it may be termed "safe" because the potential for exposure is low. *See generally*, Norris, *supra* note 7.

Toxicity may be acute or chronic. Acute toxicity is an immediate response of an organism to one or more large doses of a chemical. Chronic toxicity is a slower response of an organism from prolonged exposure to a chemical. Norris, *supra* note 7, at 198. The BLM also briefly described the effects of herbicides in the water supply in its final EIS, *Vegetation Management with Herbicides, Western Oregon*, at 3-93 (1978).

Aerially applied herbicides also offer the greatest opportunity for the chemicals to enter aquatic zones. If the herbicide lands on surface waters or in ephemeral stream channels, it may potentially produce high chemical concentrations and acute toxic effects by creating a pulse of chemical contact with an organism. Norris, *supra* note 7, at 202.

15. *SOCATS*, 720 F.2d at 1477.

was whether the worst case regulation required the agency to prepare a worst case analysis when the impacts from the spraying program, in the agency's opinion, were unlikely to cause significant adverse impacts on the human environment.<sup>16</sup> Essentially, the BLM argued it did not have to mention any uncertainty that surrounded the herbicides' relative safety because it believed adverse effects were unlikely.

Secondly, the BLM asserted it could rely on the EPA's registration of the herbicides under the Federal Insecticide, Fungicide and Rodenticide Act<sup>17</sup> (FIFRA) and, therefore, did not need to prepare a worst case analysis.<sup>18</sup> The BLM contended that since one agency had decided that use of a herbicide was acceptable, it need not go through another analysis of that herbicide. The BLM maintained that FIFRA registration was the functional equivalent of an EIS for the use of a particular herbicide.<sup>19</sup>

Finally, the BLM argued that the worst case regulation applied only to EISs and not to the supplemental EAs.<sup>20</sup> In support of this theory, it relied on language in the regulation which referred to an agency's duty to disclose scientific uncertainty in an *environmental impact statement*.<sup>21</sup> The BLM assumed this meant that the regulation applied only to EISs.

Despite the BLM's arguments, the Ninth Circuit held for the plaintiffs on each issue. On the first issue, the court held the *potential* for adverse impacts, rather than the agency's own beliefs, called for a worst case analysis.<sup>22</sup> Next, the court held the BLM could not rely on a herbicide's FIFRA registration because FIFRA and NEPA had different standards of review.<sup>23</sup> Thirdly, the court held an agency had a continuing duty to evaluate information pertinent to its original EIS.<sup>24</sup> Since an EA was the most efficient means of evaluating new information, the EA was the most appropriate document for the worst case analysis.<sup>25</sup>

#### IV. ANALYSIS

NEPA is a procedural, prospective statute which mandates full disclosure of potential consequences of agency decisions.<sup>26</sup> Its purpose is to force agencies to evaluate the potential future impact of their actions and

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16. *Id.* at 1479.

17. 7 U.S.C. §§ 136, 136a-136y (1982).

18. *SOCATS*, 720 F.2d at 1479-80.

19. Brief for Petitioner at 15, *SOCATS v. Clark*, 720 F.2d 1475 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 446 (U.S. Nov. 13, 1984) (No. 84-267).

20. *SOCATS*, 720 F.2d at 1480.

21. 40 C.F.R. § 1502.22.

22. *SOCATS*, 720 F.2d at 1479.

23. *Id.* at 1480.

24. *Id.*

25. *Id.*

26. *Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974).

to use ecological information in their planning processes.<sup>27</sup> The worst case regulation was promulgated in 1979 by the Council on Environmental Quality (CEQ) under NEPA authority.<sup>28</sup> The regulation emphasizes the need for full disclosure when an agency decides to proceed with its proposed action in the face of uncertainty.<sup>29</sup> The CEQ promulgated the regulation in response to agency non-compliance with the full disclosure mandate.<sup>30</sup> Agencies had avoided discussing potential adverse impacts under the guise of speculation and scientific uncertainty in order to diffuse negative public reaction to their proposed plans.<sup>31</sup>

The worst case regulation addresses the problem of how an agency is to proceed when information, essential to a reasoned choice among alternatives, is either incomplete or unavailable. First the agency must try to obtain the missing information.<sup>32</sup> If this proves impossible either because of exorbitant costs or simply because the information does not exist, the agency must weigh the need to proceed with its action against the risk and severity of resultant adverse impacts.<sup>33</sup> Only if the agency decides to proceed in the face of uncertainty must it prepare a worst case analysis.<sup>34</sup>

In *SOCATS*, the BLM did not contest the district court's findings that scientific uncertainty existed concerning the adverse impacts of herbicides on human health.<sup>35</sup> Rather, the agency argued that it did not have to comply with the regulation on a procedural basis. It sought to avoid preparation of a worst case analysis by alternatively arguing that 1) it believed that the herbicides were safe and a worst case was unlikely to occur, 2) the EPA had assessed the herbicides' safety and therefore it was unnecessary for the BLM to do so, and 3) even if the herbicides' safety was questionable, a worst case analysis was required only in an EIS, not in the EAs.

#### A. *The Need for a Worst Case Analysis*

The court was correct in stating that the existence of potential significant adverse impacts, rather than the agency's belief those impacts

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27. 42 U.S.C. § 4332 (1982).

28. NEPA authorized the CEQ to promulgate regulations to implement NEPA policy. 42 U.S.C. § 4344 (1982). The Supreme Court has held that CEQ regulations are binding on administrative agencies and are entitled to substantial deference by the courts. *Andrus v. Sierra Club*, 442 U.S. 347 (1979). The CEQ has explained the purpose of the worst case analysis in *The Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18026, 18032 (1980).

29. 40 C.F.R. § 1502.22.

30. *Sigler v. Sierra Club*, 695 F.2d 957, 973, n.13 (5th Cir. 1983).

31. *Id.*

32. 40 C.F.R. § 1502.22(a).

33. 40 C.F.R. § 1502.22(b).

34. *Id.*

35. *SOCATS*, 720 F.2d at 1478.

were improbable, required the preparation of a worst case analysis.<sup>36</sup> The probability of a worst case occurrence is a separate issue, to be addressed by rating the likelihood of the occurrence. The worst case regulation specifically provided for a probability analysis in order not to place undue emphasis on the worst case scenario.<sup>37</sup> Even though the worst case was unlikely to happen, the agency could not avoid discussing the situation if that situation could reasonably occur.<sup>38</sup> Since the BLM's scientists admitted a safe threshold of toxicity had not been established, the court found scientific uncertainty existed.<sup>39</sup> Under the worst case regulation, the BLM was required to disclose this uncertainty regardless of its own faith in the safety of herbicides. If the BLM believed damage to human health from 2,4-D was unlikely, it was free to note this unlikelihood in a probability analysis.

The *SOCATS* court relied primarily on two decisions when it addressed the need for a worst case analysis. The first case, *Sierra Club v. Sigler*,<sup>40</sup> was a Fifth Circuit decision from Texas. The second case, *Village of False Pass v. Watt*,<sup>41</sup> arose in the United States District Court of Alaska. Both cases involved the need for worst case analysis of oil spills.

In *Sigler*, the Fifth Circuit required the Army Corps of Engineers to prepare a worst case analysis of an oil spill by a supertanker in an ecologically sensitive estuary. The occurrence of such an oil spill was of low probability, but would produce disastrous results if it occurred. The uncertainty revolved around the "likelihood, scope and consequences" of such a massive oil spill.<sup>42</sup> The court determined that the remoteness of the occurrence did not bar preparation of a worst case analysis.<sup>43</sup> It stated that so long as such an incident could reasonably occur, the agency must address the potential environmental damage.<sup>44</sup>

*Sigler* set important precedent for *SOCATS* by establishing the authority of the worst case regulation.<sup>45</sup> The court noted NEPA's general

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36. *Id.* at 1479.

37. 40 C.F.R. § 1502.22(b): "If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence." See also McChesney, "CEQ's 'Worst Case Analysis' Rule for EISs," 13 ENVTL. L. REP. 10069, 10072 (1983).

38. Reasonableness has always been a limiting factor in NEPA disclosure. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973).

39. *SOCATS*, 720 F.2d at 1479.

40. 695 F.2d 957 (5th Cir. 1983).

41. 565 F.Supp. 1123 (D. Alaska 1983), *aff'd sub nom*, *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984).

42. *Sierra Club v. Sigler*, 695 F.2d at 974.

43. *Id.*

44. *Id.*

45. *Id.* at 969-972.

mandate of environmental accountability and tied the promulgation of the worst case regulation to a response by the CEQ to agency noncompliance with the full disclosure policy.<sup>46</sup> By holding remoteness did not bar preparation of a worst case analysis, the court foreclosed the agency's argument that it need not confront consequences it deemed unlikely.<sup>47</sup> As long as the worst case could reasonably result from the proposed action, the agency had to prepare a worst case analysis.

In contrast, the district court in *Village of False Pass* rejected the need for a worst case analysis because the analysis could be included at a later point in the offshore leasing process.<sup>48</sup> Secretary of Interior Watt proposed leasing offshore tracts for oil and gas exploration in Alaska. Local residents and environmental groups opposed the leasing because it would disturb the migratory route and breeding grounds for several species of marine animals. Although uncertainty existed as to the impact of seismic activity and oil spills on whales and other species,<sup>49</sup> Secretary Watt viewed the uncertain information as unimportant for making the decision to lease the tracts.<sup>50</sup>

The district court accepted the Secretary's decision regarding oil spills because the court concluded a massive oil spill could not reasonably occur at the leasing stage.<sup>51</sup> However, the court disagreed the impact of seismic activity on whales was unimportant at the leasing stage, and gave the Secretary the choice of supplying the missing information or preparing a worst case analysis.<sup>52</sup> The Secretary chose to prepare a supplemental statement which restricted the seasons and methods of operation for seismic exploration.<sup>53</sup>

On appeal, the Ninth Circuit affirmed the district court's opinion. The court held the Secretary did not abuse his discretion by delaying further consideration of the missing information.<sup>54</sup> He could consider that information at a future date when he had to prepare another EIS at the exploration and development stages.<sup>55</sup>

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46. *Id.* at 969, 973.

47. *Id.* at 974.

48. The court stated that the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1982) divided oil and gas leasing into three stages: leasing, exploration, and development and production. *Village of False Pass v. Watt*, 565 F. Supp. at 1132. An EIS was required at each stage. Since an oil spill could not occur at the leasing stage, a worst case analysis was not required until the exploration stage.

49. *Village of False Pass v. Watt*, 565 F. Supp. at 1150, 1151.

50. *Id.* at 1152.

51. *Id.*

52. *Id.* at 1153.

53. *Village of False Pass v. Clark*, 733 F.2d at 612.

54. *Id.* at 616.

55. *Id.*

In a dissenting opinion, Judge Canby noted that the majority ignored the practical ramifications of its decision. While the Secretary may legally suspend or cancel a lease once it is issued, his absolute discretion not to lease a tract is lost.<sup>56</sup> In other words, if the Secretary considers the potential adverse impacts of the worst case before proceeding with the proposed action, he still has the choice not to lease and not to begin a chain of exploration and development events. Once the leasing and exploration processes begin, it becomes increasingly difficult, from a practical standpoint, for the agency to extricate itself from its decision.<sup>57</sup> If the purpose of the worst case regulation is to force an agency to consider the consequences of proceeding in the face of uncertainty, it makes more sense for the agency to consider the potential worst case before it embarks on a course of action, rather than later when the agency has less freedom to back out of its decision.

The *SOCATS* court was strongly influenced by the district court's decision in *Village of False Pass*, which held the Department of Interior's treatment of seismic activity on whale populations in the EIS was inadequate.<sup>58</sup> Due to the fact scientific uncertainty existed concerning the extent and likelihood of adverse impacts on the environment, the court indicated the agency had to disclose this information gap.<sup>59</sup> This disclosure assured the public that the agency had considered the negative ramifications of its proposed action.

### B. *FIFRA Registration and the Need for Independent Research*

The BLM's argument that the EPA's registration of herbicides under

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56. *Id.* at 617.

57. *Id.* at 619. *See also* *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983). This case involved the Department of Interior's issuance of oil and gas leases in the Targhee and Bridge-Teton National Forests without preparation of an EIS. The Department issued the leases after making a Finding of No Significant Impact. The Department determined there would be no significant adverse environmental impacts because of restrictive stipulations placed in the leases. The Sierra Club argued that the Department could not *prevent* adverse environmental impacts, but only *condition* the exploration activities. Therefore, significant environmental disturbance would occur and an EIS must be prepared. The court agreed and stated, "[t]he appropriate time for preparing an EIS is *prior* to a decision, when the decisionmaker retains a maximum range of options." [Emphasis in original].

More recently, the Ninth Circuit, in a decision by Judge Hatfield, set aside a Department of Interior decision issuing oil and gas leases in the Flathead and Gallatin National Forests. *Conner v. Burford*, No. CV-82-42-BU (9th Cir. March 13, 1985) (order granting Summary Judgment). The Department failed to complete an EIS for the proposed leasing, arguing that restrictive stipulations in the leases would render environmental impacts insignificant. In dismissing the Department's argument, the court stated that use of the stipulations "as a mechanism to avoid an EIS when issuing numerous leases on potential wilderness areas circumvent[ed] the spirit of NEPA." *Id.* at 4.

58. *SOCATS*, 720 F.2d at 1479. The Ninth Circuit's decision in *Village of False Pass* had not yet been issued at the time of the *SOCATS* appellate review. Therefore, the *SOCATS* court only considered the *Village of False Pass* district court's treatment of the case.

59. *Id.*

FIFRA precluded any specific analysis of herbicide safety was misplaced. FIFRA involves a cost-benefit analysis, whereas NEPA requires information gathering and disclosure.<sup>60</sup> A pesticide registered under FIFRA may cause acute toxic effects on humans, but still be highly effective for its intended use.<sup>61</sup> The data upon which registration is based is derived from a general environmental standard rather than site specific analysis.<sup>62</sup> The purpose of NEPA, on the other hand, is to provide information which is site specific to the proposed action and its environmental consequences.<sup>63</sup> While FIFRA initially evaluates a pesticide's effectiveness vis-à-vis its cost to the environment, NEPA discusses how that pesticide will effect a specific area of intended use. If the BLM had been allowed to rely on FIFRA registration, it would have circumvented the NEPA full disclosure requirement. It was essential for the BLM to anticipate and describe the effect of 2,4-D and the other herbicides on the human environment of southern Oregon.

The *SOCATS* court did not support its holding on the FIFRA registration with a detailed analysis. It merely stated, "[t]he BLM must assess independently the safety of the herbicides that it uses."<sup>64</sup> Such a broad holding, albeit correct, cannot guide future agency decisions concerning the necessity for preparing a worst case analysis. Did this mean each agency had to become its own expert in every field in which it lacked knowledge? Could it ever share data? The court never addressed these questions, perhaps assuming that common sense would temper these extreme results. The court may also have implicitly relied on NEPA language and CEQ regulations which seem to preclude those results by their emphasis on agency cooperation and reduction of paperwork.<sup>65</sup>

60. In order to register a pesticide under FIFRA, the EPA looks at data involving the anticipated extent of use and amount of exposure to humans and the environment in general. 7 U.S.C. § 136a(c)(2)(A) (1976). The EPA then weighs economic standards (national volume of use, impact of the cost of meeting environmental quality standards) against the benefits of the use. *Id.* NEPA merely directs the agency to disclose the effects of use of a particular pesticide. 42 U.S.C. § 4332(C). Registration goes to the usefulness of the chemical while NEPA disclosure goes to the chemical's impact on a specific human environment.

61. A pesticide which is highly toxic will be classified for restricted use. 7 U.S.C. § 136a(d). The restricted use classification reflects a determination that "the acute dermal or inhalation toxicity presents a hazard to the applicator or other persons" or that use of the chemical "without additional regulatory restriction may cause unreasonable adverse effects on the environment. . . ." 7 U.S.C. § 136a(d)(B)(i),(ii).

62. 7 U.S.C. § 136a(c)(2)(A).

63. 42 U.S.C. § 4332(C).

64. *SOCATS*, 720 F.2d at 1480.

65. 42 U.S.C. § 4332(C); "Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."

40 C.F.R. § 1500.4(n). To reduce paperwork, "[A]n agency may adopt appropriate environmental documents prepared by another agency."

The *SOCATS* court's holding has since been clarified by the Ninth Circuit's decision in *Save Our Ecosystems v. Clark*.<sup>66</sup> *Save Our Ecosystems* was a consolidation of two suits brought against the BLM and Forest Service to enjoin herbicide spraying in the forests of western Oregon. The Forest Service argued the lower court had required the agency to perform original research in the field of herbicide safety. The Ninth Circuit disagreed and mentioned a number of options the agency could choose if it preferred not to do original research.<sup>67</sup> The agency could consider the EPA's data within the specific context of its spraying program, or require chemical companies to provide such data and research.<sup>68</sup> Alternatively, the agency could commission studies by outside consultants or conduct its own studies.<sup>69</sup> The bottom line was an agency must evaluate the environmental impacts of its actions. It could not extrapolate another agency's data from another area because NEPA requires a site specific analysis.<sup>70</sup>

### C. *Placement of the Worst Case Analysis in an Environmental Assessment*

The BLM's final argument was the worst case regulation technically applied to only a full EIS rather than to supplemental EAs.<sup>71</sup> Since the BLM's original PEIS, prepared in 1978 before the effective date of the worst case regulation, had been deemed adequate at the time, the BLM thought it could skirt the worst case requirement. In support of its position, the BLM noted that the regulation referred only to "environmental impact statements" and not to "environmental assessments."<sup>72</sup>

The *SOCATS* court flatly rejected this theory, stating, "[T]he label of the document is unimportant. We review the sufficiency of the environmental analysis as a whole."<sup>73</sup> The court determined the BLM's overall environmental analysis was inadequate because it never specifically addressed the human health effects of the herbicides sprayed. The court also noted the agency's continuing duty to provide new environmental

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66. 747 F.2d 1240 (9th Cir. 1984).

67. *Id.* at 1247.

68. *Id.*

69. *Id.*

70. *Id.*

71. An environmental assessment (EA) is a brief, concise document designed for disclosure of environmental impacts. It is similar to an EIS but less lengthy. The EA has three functions:

- 1) to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS;
- 2) to aid an agency's compliance with NEPA when no EIS is necessary;
- 3) to facilitate preparation of an EIS when one is required.

*The Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18026, 18037 (1981).

72. *SOCATS*, 720 F.2d at 1480.

73. *Id.*

information, particularly when the agency's proposed action was an ongoing concern.<sup>74</sup>

This holding represented a great victory for conservationists because it stressed the substantive policies of NEPA rather than procedural niceties. The court emphasized the informational value of the agency's documents not as an end in itself, but as a tool for making responsible decisions. This, of course, is the purpose of NEPA.

Ultimately . . . it is not better documents but better decisions that count . . . . The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.<sup>75</sup>

## V. CONCLUSION

NEPA was enacted in 1969 as "[O]ur basic national charter for protection of the environment."<sup>76</sup> Its purpose was to force agencies to consider the larger environmental consequences of their actions and to use ecological information in the planning and development of their projects.<sup>77</sup> The worst case regulation further emphasized this purpose by requiring an agency to inform the public when uncertainty existed as to significant adverse impacts on the human environment. In upholding the validity of the worst case regulation, both the Ninth and Fifth Circuits have agreed that an agency must disclose scientific uncertainty regarding effects of its proposed actions. If the agency chooses to proceed in the face of this uncertainty, it must analyze the potential worst case and rate the probability of its occurrence. Remoteness of such an occurrence will not bar the preparation of a worst case analysis.<sup>78</sup>

The willingness of the Ninth Circuit to review the agency's environmental analysis as a whole, rather than in a piecemeal fashion, is the strength of *SOCATS*. The court directed its attention to the substantive policies of NEPA, thus insuring the BLM will act "[A]ccording to the letter and spirit of the Act."<sup>79</sup> By underscoring the BLM's ongoing duty to evaluate and disclose information on herbicide exposure from its spraying program, the court closed the door on agency non-compliance with environmental accountability.

The BLM's problems in *SOCATS* were largely self-imposed. Its own reticence in confronting the potential hazards of herbicide spraying

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74. *Id.*

75. 40 C.F.R. § 1500.1(c).

76. 40 C.F.R. § 1500.1(a).

77. 42 U.S.C. § 4332 (H).

78. *Sigler v. Sierra Club*, 695 F.2d at 974.

79. 40 C.F.R. § 1500.1(a).

directly contradicted NEPA's disclosure mandate. The *SOCATS* message declares agencies cannot avoid taking a hard look at the consequences of their actions. The agencies must be "fully aware of the impact of their decisions when they make them."<sup>80</sup>

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80. *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. at 922.