Finding a Proposal for Major Federal Action Consistent with the Purposes of NEPA: Does Blue Ocean Preservation Society v. Watkins Breathe New Life into the Law

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CASENOTE

Finding a "Proposal" for Major Federal Action Consistent with the Purposes of NEPA: Does *Blue Ocean Preservation Society v. Watkins* Breathe New Life into the Law?

INTRODUCTION

The National Environmental Policy Act of 19691 (NEPA) was enacted, in part, "to promote efforts which will prevent or eliminate damage to the environment and biosphere."2 Congress had also intended that NEPA would coerce government agencies into considering "the environmental impact of their actions in decisionmaking."3 Indeed, the United States Supreme Court has identified the goals sought to be achieved by NEPA: "First, [it obligates the agency] 'to consider every significant aspect of the environmental impact of a proposed action.'4 Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."5 Judicial enforcement of the terms of NEPA, however, has been the subject of considerable debate. One issue which the courts have examined is precisely when a court can intervene in agency action and require preparation of an Environmental Impact Statement (EIS).

NEPA requires that federal agencies include an EIS "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."6 Yet, a precise definition of the term "proposal" does not appear within the NEPA text. The United States Supreme Court has announced in *Kleppe v. Sierra Club*7 that by the terms of NEPA, a proposal must exist before a federal agency can be compelled to prepare an EIS. Thus, defining the term "proposal" is critical to resolving the question of

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5. Id. (citing Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 143 (1981)).
when a court can intervene in an agency action and compel preparation of an EIS. The Kleppe Court, however, like the NEPA statute itself, did not define "proposal."

One problem with the ambiguity of the proposal requirement might best be illustrated by example. If the Kleppe standard is interpreted literally to include only formal, written proposals, it may conflict with NEPA's purposes because by the time an agency advances a formal proposal, it may already have decided to take the proposed action. At this point, government agencies are likely to be unwilling to halt their progress, and very little consideration would actually be given to the environmental consequences of the action. Moreover, the danger exists that once decisions are made and time and resources have been committed to the decision, "it is likely that more environmental harm will be tolerated."8

Blue Ocean Preservation Society v. Watkins,9 the subject of this casenote, exemplifies the need for thoughtful consideration of the environmental consequences of an agency action. The geothermal energy project which was the subject of that litigation involved sensitive, highly controversial environmental and cultural concerns. Arguably, as will be demonstrated in this casenote, Blue Ocean illustrates the most compelling case for requiring preparation of an EIS before the decision to undertake agency action.

This article addresses the question what constitutes a "proposal" for purposes of compelling federal agencies to prepare Environmental Impact Statements pursuant to NEPA. Specifically, this casenote examines the method by which the United States District Court for the District of Hawaii found a proposal for major federal action in Blue Ocean Preservation Society v. Watkins.10

BACKGROUND

The Hawaii Geothermal Energy Project

The Hawaii Geothermal Energy Project (Project) was developed in 1978 by the State of Hawaii, along with Congress and the Department of Energy (DOE).11 The government planned the project to be imple-

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8. Environmental Defense Fund v. Andrus, 596 F.2d 848, 853 (9th Cir. 1979) (quoting Lathan v. Volpe, 455 F.2d 1111, 1121 (9th Cir. 1971)).
10. Id.
11. Id. at 1452. The federal government participated to a great extent in the Project's development. In 1978, the DOE commissioned a private consultant to prepare a report which included recommendations for the development of geothermal energy in Hawaii. Id. at 1454. Additionally, the Plaintiffs produced 21 other DOE sponsored reports at trial which involved the development of geothermal energy in Hawaii. The Department of Interior also conducted meetings which monitored progress on the Project plan, and specifically addressed agency concerns in order to "facilitate expeditious implementation." Id. at 1454-55.
mented in four stages and intended that the project would provide island residents with electric power generated by geothermal energy plants located on the side of Kilauea volcano. According to the plan, the power would be transported from Kilauea, located on the big island of Hawaii, to the islands of Oahu and Maui through both underwater and overland cables. The early phases of the Project were to be implemented primarily with public funds in order to encourage private investors to undertake commercial development in the final phase.

Phase I of the Project consisted of drilling one well and building a small demonstration plant with a capacity of about 2.5 megawatts, for the purpose of providing information on the geothermal resource base. Phase I was jointly funded by the State of Hawaii and DOE, with the federal government contributing 80 percent of the total funding. Phase II involved research into the feasibility of transmitting electricity underwater through cable. It included cable development research as well as site-specific testing and test-laying of cable. The federal government provided 83 percent of the funding for Phase II. Additionally, the Hawaii legislature enacted a series of laws designed to further the first two phases of the Project, which it characterized as a "federal/state partnership effort."

Phase III of the Project included the drilling of twenty-five wells along Kilauea volcano. The wells would provide commercial scale exploration, with the purpose of verifying the geothermal resource. At the time of the Blue Ocean I litigation, Congress had already appropriated $5 million in federal funds to Phase III. Construction of the Commercial Hawaii Geothermal Project in Phase IV was to be the culmination of the Project. Then, up to 20 separate

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12. Id. at 1452-53.
13. Id. at 1453.
14. Id.
15. Id.
16. Id. The federal government contributed a total of $10.7 million to Phase I of the Project. Id.
17. Id.
18. Id. The federal government contributed over $24 million to "the research, design, construction and routing of underwater cable." Id.
19. Id. For example, the Hawaii legislature enacted laws which granted favorable excise tax treatment to those selling geothermal energy, "designated geothermal subzones for development purposes," and granted "agency authority to set geothermal royalty rates." Id.
20. The state and federal agencies both had active roles in the development of the Project. In 1988, the state enacted the "Geothermal and Cable System Development Permitting Act," Haw. Rev. Stat. §§ 196D-1 to 196D-14 (1988), which aided in streamlining the approval and permitting processes. 754 F.Supp. at 1453. In addition, the same Act established a group of representatives from each agency which had authority over some aspect of the Project. The group consisted of eight federal and eight state agencies, and its purpose was to simplify the permitting process in order to encourage commercial developers to participate in the Project's development. Id. at 1454.
21. Id.
22. Id.
power plants would be built with an approximate capacity of 25 megawatts each.\textsuperscript{23} The separate power plants would utilize eight to ten working wells, and the plants would be connected to one another by construction of roads, plumbing and power lines.\textsuperscript{24} Cables would also be installed to transport the power to Oahu and Maui.\textsuperscript{25}

**THE CONTROVERSY**

**Environmental Group/Native Hawaiian Concerns**

The site of the Hawaii Geothermal Energy Project is within Wao Kele O Puna rain forest, near Kilauea volcano on the island of Hawaii. Wao Kele O Puna is the last large rain forest in the United States.\textsuperscript{26} Although it consists of only 27,000 acres, biologists believe that the preservation of Wao Kele O Puna rain forest as a whole is critical to the survival of an extraordinarily diverse species population.\textsuperscript{27}

Although the State of Hawaii constitutes less than one-fifth of one percent of United States land area, 27 percent of the endangered species in the nation exist in Hawaii, and 72 percent of plant and bird species already extinct were indigenous to Hawaii.\textsuperscript{28} Wao Kele O Puna is also the only place in the Hawaiian islands where certain bird species, such as honey creepers, are able to survive.\textsuperscript{29}

The multitude of unique species living on the island of Hawaii, largely in the rain forest, makes Wao Kele O Puna a sensitive and highly vulnerable environment.\textsuperscript{30} Although proponents of the geothermal energy project argue that the development will only use 350 acres of the rain forest and thus have a negligible impact on the environment, some biologists are concerned. The 350 acres will be used largely for roads and power lines which will fracture the forest and endanger all of it.\textsuperscript{31}

The Native Hawaiian people also view the development of geothermal energy at Wao Kele O Puna as an attack on their religious freedom. For centuries, the Hawaiian people have worshipped the venerable goddess Pele, who is said to live within Kilauea volcano.\textsuperscript{32}


\textsuperscript{24} Id.

\textsuperscript{25} Id.


\textsuperscript{28} Id.


\textsuperscript{30} Chandler, supra note 26.

\textsuperscript{31} Id.

\textsuperscript{32} Bowman, supra note 26.
ians believe that Wao Kele O Puna is sacred to Madam Pele, and “drilling into her Kilauea volcano home is as sacrilegious as drilling under the Vatican.” Moreover, Hawaiian herbalists gather unique medicinal plants at Wao Kele O Puna, and native people gather rare flowers, ferns and other materials from the rain forest as part of their sacred performances in praise of Madam Pele.

In addition to the religious sanctity of Wao Kele O Puna for the Hawaiian people, the forest holds a cultural value which should be worthy of preservation. State archaeologists have recently discovered a fortified lava tube beneath the forest which contains ancient burial sites and religious structures. To native Hawaiians, the geothermal development represents a further erosion of what little remains of their religion and culture.

Environmental groups are also concerned with the safety hazards involved in the development of geothermal energy. On June 13, 1991, a well at a geothermal energy plant near Wao Kele O Puna exploded when a drill rig hit a high pressure steam zone about 3,475 feet below the ground. Toxic hydrogen sulfide gas spewed from the well, and 75 people were evacuated from their homes. The explosion has triggered an angry reaction from environmentalists, who opposed the development in the first place.

Government Concerns

Without a doubt, the state has an important interest in finding alternative energy sources for Hawaii. At the present time, Hawaii imports foreign oil for 90 percent of its fuel needs. Indeed, the Persian Gulf War confirmed the state’s need to find an alternative energy source. Geothermal energy, which can be powered through volcanic steam, is “a clean, inexpensive and indigenous alternative energy source.” It is an attractive and viable option which, along with other alternative energy sources such as solar and wind generated energy, could drastically reduce Hawaii’s dependence on foreign oil.

Hawaii’s Governor, John Waihee, has been faced with difficult decisions with respect to the development of geothermal energy in the islands. He was required to choose between increased importation of foreign oil, which clearly risked a potentially disastrous spill in the Pacific

33. Id.
34. Id.
35. Id.
37. Id.
38. Id.
40. Id.
Ocean, or developing parts of Wao Kele O Puna rain forest. According to Governor Waihee, the decision was further complicated because it presented "a choice between the lesser of two environmental evils: oil burning power plants, which give off gases thought to heat the atmosphere, or geothermal power at the expense of forest, which tends to cool the air." Indeed, Governor Waihee’s decision to proceed with the geothermal development has sparked heated and passionate debate.

The Blue Ocean Preservation Society v. Watkins “De Facto” Proposal

The plaintiffs in Blue Ocean Preservation Society v. Watkins were three environmental groups (Blue Ocean Preservation Society, Sierra Club, and Greenpeace Foundation) who sought to compel the federal government to prepare an EIS for Phases III and IV of the Hawaii Geothermal Energy Project. The government defendants moved for summary judgment, arguing that the United States District Court for the District of Hawaii lacked subject matter jurisdiction over the action because Plaintiffs’ claim was not ripe. The government’s position was premised upon the fact that no specific “proposal” had been advanced for Phases III and IV of the Project.

As a preliminary matter, it was necessary for the court to decide whether the four phases of the Project should be treated as a single project, or as four independent actions, for NEPA purposes. The government’s ripeness argument presupposed that the four phases constituted separate and independent projects, as the suit could only be unripe as to Phases III and IV if each phase could be treated as separate actions. Plaintiffs, on the other hand, asserted that an EIS was required for the Project as a whole. If Plaintiffs were correct in their assertion that the four phases were components of one major federal action, the issue would be ripe since implementation of the Project had already begun.

The Federal District Court found there was insufficient evidence in the record to support a ruling, at summary judgment, that the Project

42. Id.
44. Id. at 1452. At the time of this litigation Phases I and II of the Project had already been completed. The court’s discussion of the proposal requirement triggering the NEPA duty to prepare an EIS was therefore directed toward the remaining phases of the Project. Id. at 1460.
45. Id. at 1460. The environmental groups also filed a cross motion for partial summary judgment on the question of whether the Project constituted major federal action within the parameters contemplated by NEPA at 42 U.S.C. § 4332(2)(C) (1988). Id. at 1452. With respect to this question, the court held that “[t]he enormous commitment of federal resources to the Project easily establishes it as major federal action.” Id. at 1467. At the time of this litigation, Phase I of the Project had received $10.7 million, Phase II had received $24 million, and Phase III had received $5 million with two more installments of $5 million each anticipated. Id. at 1466–67.
46. Id. at 1456.
47. Id.
48. Id.
had always been intended to be a "single, integrated action" that would inevitably lead to construction of a commercial geothermal energy plant. The court found that issues of fact remained as to whether the Project was a single project with a single goal, or whether it began as mere background research projects that did not ripen into a proposal for a full-scale geothermal energy plant until sometime later. However, the court ruled that even if the Project could be characterized as four separate, distinct actions, the government was not entitled to summary judgment. Because the four phases of the Project were "sufficiently connected," the Project would have to be evaluated under a single EIS. The fact that Phases I and II were completed, however, rendered consideration of those Phases in a comprehensive EIS moot.

The Blue Ocean court then began its analysis of the ripeness argument by examining the United States Supreme Court's decision in Kleppe v. Sierra Club. In Kleppe, the Court held, and it has now become a well-settled point of law, that a federal agency may not be compelled to prepare an EIS unless a proposal has been advanced. The critical issue before the Kleppe court was whether NEPA required the federal government to prepare a regional EIS for a coal development program which encompassed portions of four states. The defendants in that action were government officials responsible for various actions which would allow the development of coal reserves on government owned or controlled land. The court of appeals in that case concluded that because the government "contemplated a regional plan or program," if it decided to control the development, it would be required to prepare a regional EIS.

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 1456–57.
53. *Id.* at 1457 (construing 40 C.F.R. § 1508.25(a) (1991), which provides that connected actions should be evaluated in the same EIS). The Regulation provides that "[a]ctions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a). The court found that subsection (i) clearly did not apply, the applicability of subsection (ii) was arguable, and subsection (iii) was exactly on point. 754 F.Supp. at 1457.
54. *Id.* at 1457 (construing 40 C.F.R. § 1508.25(a)).
55. *Id.* at 1459. Although the actions taken in Phases I and II could not be made the subject of an EIS, the court stated the effects of those phases "should be incorporated into the background 'data base' for assessment of the phases still at issue." *Id.* at 1460.
57. *Id.* at 401.
58. *Id.* at 398.
59. *Id.* at 394–95.
60. *Id.* at 403.
61. *Id.*
The court of appeals in Kleppe recognized the fact that mere contemplation of an action is not in itself sufficient to compel an EIS.\textsuperscript{62} That court reasoned, however, that NEPA allowed courts to require the preparation of an EIS before the "formal recommendation or report on a proposal."\textsuperscript{63} It then devised a balancing test to determine when a court could decide that agency action required preparation of an EIS. The factors to be considered in balancing included:

- the likelihood and imminence of the program's coming to fruition, the extent to which information is available on the effects of implementing the expected program and on alternatives thereto, the extent to which irretrievable commitments are being made and options precluded "as refinement of the proposal progresses," and the severity of the environmental effects should the action be implemented.\textsuperscript{64}

The United States Supreme Court, however, found no support for this decision either in the legislative history or text of NEPA, and reversed the court of appeals' decision.\textsuperscript{65} It emphasized the language of NEPA § 102(2)(C), as well as a prior Supreme Court case which announced that a federal agency must have prepared a final EIS when "it makes a recommendation or report on a proposal for federal action."\textsuperscript{66} The Court reasoned that "[a] court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement should be prepared."\textsuperscript{67} Rather, it would only be appropriate for a court to intervene "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement."\textsuperscript{68}

Although Kleppe appears to have solidified the requirement of a proposal before an EIS can be compelled, the United States Supreme Court did not articulate in that decision precisely what constitutes a "proposal." Thus, although the Blue Ocean I court was bound by Kleppe with respect to the necessity of finding a proposal, it was to a certain extent free to fashion an appropriate interpretation of the term. Indeed, the Blue Ocean I court's ultimate finding of a de facto proposal appears to be a well-reasoned solution that is consistent with the purposes of NEPA.

\textsuperscript{62} Id. at 404.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 404-05.
\textsuperscript{65} Id. at 405.
\textsuperscript{66} Id. at 406 (quoting Aberdeen & Rockfish Railroad Co. v. SCRAP, 422 U.S. 289, 320 (1975)).
\textsuperscript{67} Id. at 406.
\textsuperscript{68} Id. at 406 n.15.
The Blue Ocean court found a de facto proposal by first considering a representative scenario involving a proposal for major federal action. Typically, the court reasoned, a private proposal is submitted to a federal agency for its consideration. The federal agency subsequently will issue a report or recommendation on that proposal "before the proposed action is taken." In these situations, the court stated that the Kleppe rule clearly provided that an EIS "must be completed at the time such report or recommendation is made." In those situations which necessitate Congressional action, the proposal, along with the report or recommendation, and the EIS should all be submitted to Congress as an aid in the decision-making process.

The unique fact pattern involved in this case, however, did not appear to fit within the Kleppe parameters, and the Blue Ocean court distinguished the case at bar as follows:

[The proposal was submitted directly to Congress, and DOE did not issue a report or recommendation on it. DOE's failure to issue such a report or recommendation has already frustrated to some degree NEPA's purposes in that Congress acted on the proposal without being advised or informed of its potential environmental impact.]

The government nevertheless asserted that it could use the funds Congress had appropriated to Phase III without preparing an EIS.

The Council on Environmental Quality ("CEQ") has promulgated regulations which codified NEPA case law. The Blue Ocean court looked to those regulations for guidance and found that the government's approach seemed to conflict with NEPA's intended purposes as set forth in the CEQ's regulations. The court then examined the CEQ's definition of "proposal," and found that its definition was "plainly geared toward

70. Id. (emphasis added).
71. Id.
72. Id.
73. Id.
74. Id.
76. Blue Ocean, 754 F.Supp. at 1461 (construing 40 C.F.R § 1502.5 (1991), which provided that an EIS "shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made").
77. Id. (construing 40 C.F.R. § 1508.23 (1991), which defined "proposal" as follows: "'Proposal' exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated... A proposal may exist in fact as well as by agency declaration that one exists").
a more general, functional interpretation of the term, not the literal interpretation urged by the Government."78 Indeed, the facts of this case demonstrated that DOE intended to implement Phase III, with the ultimate goal of seeing the Project through to completion. This finding rendered the fact that there was no written proposal immaterial because under the CEQ regulations, "a proposal may exist in fact as well as by agency declaration."79

Additionally, the district court found that the fact that Congress had already appropriated $5 million to Phase III was dispositive that some kind of proposal had indeed been made. In Andrus v. Sierra Club,80 the United States Supreme Court held that appropriation requests were not proposals for major federal action pursuant to NEPA, and therefore federal agencies were not required to submit EIS's with such requests.81 It appears, however, that the Ninth Circuit has interpreted Andrus to mean that while an appropriation, in and of itself, does not constitute major federal action, an appropriation is the funding of an action which has already been proposed.82 Thus, a proposal for major federal action would presumptively have been submitted prior to receipt of an appropriation, and the NEPA duty to prepare an EIS should already have arisen. Because Congress had appropriated $5 million to Phase III of the Project at the time Blue Ocean was litigated, the court concluded that the federal action had already been proposed and the suit to compel the EIS was therefore ripe.83

In summary, the government's literal interpretation of the NEPA proposal requirement was rejected as inconsistent with the CEQ regulations. Furthermore, the congressional appropriation of $5 million demonstrated that a proposal had been made. The court ultimately concluded that "[t]his is a case in which a proposal 'exist[s] in fact,' whether or not it has ever been formally advanced as such."84 Thus, the time appeared to be ripe for the preparation of an EIS.85 However, because the court found that "issues of fact remained as to (1) DOE's level of commitment to the implementation of Phase III, and (2) DOE's role with respect to the $5 mil-  

78. Id.
79. Id. at 1462 (quoting 40 C.F.R. § 1508.23).
81. Id. at 364-65.
82. National Wildlife Federation v. Coston, 773 F.2d 1513, 1518 (9th Cir. 1985) (emphasis added).
83. Blue Ocean, 754 F.Supp. at 1462. The court also cited additional grounds for finding a proposal. The funding for Phase III was appropriated in response to a "Proposal to Establish the Hawaii Geothermal Resource Verification and Characterization Program," which the State of Hawaii submitted to Congress. Because of DOE's significant role in the Project and the consistent characterization of the Project as a "state/federal partnership," the court found that this proposal could easily be attributed to DOE, and thus trigger the NEPA duty to prepare an EIS. Id.
84. Id. at 1462 (quoting 40 C.F.R. § 1508.23).
85. Id. (emphasis added).
lion appropriation," it could not hold that the time was ripe to compel an EIS.

UNITED STATES SUPREME COURT INTERPRETATIONS OF THE NEPA PROPOSAL REQUIREMENT

The Andrus Rule

In determining the propriety of the Blue Ocean Court’s finding of a de facto proposal, it is necessary to measure its fidelity to principles announced by the United States Supreme Court. The two most important


87. Blue Ocean, 754 F.Supp. at 1465-66 (emphasis added). In a second litigation, Blue Ocean II, 767 F.Supp. 1518, the three environmental groups again sought to compel the government to prepare an EIS. In response, the government moved for dismissal on the ground that the entire case had become moot. Id. at 1520.

The government first characterized Phase III as “research work not development or project construction work” and argued that as such, Phase III did not constitute major federal action which would trigger an EIS pursuant to NEPA. Id. at 1522. The government conceded, however, that since the “environmental sensitivity of this geothermal resource is so acute,” it would prepare an EIS. Id.

The Blue Ocean II court answered that the facts and law in this case could not support the characterization of Phase III as “research work” which did not constitute major federal action. Id. Moreover, even if Phase III could be characterized as research work, the extent of federal funding clearly supported the standards for major federal action. Id.

Based upon its promise to prepare an EIS as well as its promise not to participate in the Project until the EIS was completed, the defendants next asserted that the case had become moot. Id. The court, however, was troubled by defendants’ past conduct, and held that the case could not be rendered moot based solely upon defendants’ promises. Id. The court flatly stated that there was an “acute possibility that DOE may yet again change its mind or renege on its stated intent.” Id. at 1522-23. The DOE had already changed its position several times; moreover, the government “unequivocally state[d] its position that it is not required to prepare an EIS.” Id. at 1523. The court reasoned that “the government had thus reaffirm[ed] its position that nothing but its own volition is prompting the preparation of the EIS, and in so doing concedes that nothing would prevent it from again changing its position.” Id. at 1523.

After the decision in Blue Ocean I, which left open the possibility of requiring federal preparation of an EIS, the DOE had also sought to reprogram the $5 million Congress had appropriated to Phase III. Id. at 1521. Indeed, since the Blue Ocean I court found major federal action based largely upon Congress’s $5 million appropriation, the DOE sought to apply the money to another project, perhaps in an effort to stave off responsibility for EIS preparation. Id. Certain members of Congress, led by U.S. Senator Daniel Inouye, opposed the reprogramming and directed the DOE to use the appropriation to prepare the required Environmental Assessments or EIS. Id.

With respect to DOE’s claim that it was not necessarily committed to Phase III of the Project, the Blue Ocean II court found that given the fact that the DOE’s attempt to reprogram the money failed, the DOE was required to use the money as directed by Congress. Id. at 1526. The matter was therefore held to be ripe for the court’s consideration.

Having found a proposal for major federal action within the meaning of NEPA, the court required the environmental groups only to “raise questions about whether the Project may significantly affect the environment” in order to meet their burden of proof on this issue, and the court held that it was satisfied with the proof offered. Id. Accordingly, the plaintiffs were entitled to summary judgment compelling federal EIS preparation. Id. at 1527.
decisions with respect to the NEPA "proposal" requirement which would have an impact on *Blue Ocean I* are *Andrus v. Sierra Club* and *Kleppe v. Sierra Club*. Those cases and their application, therefore, will be analyzed next.

The issue before the Supreme Court in *Andrus v. Sierra Club* was whether federal agencies were required, by the terms of NEPA, to submit Environmental Impact Statements to Congress along with appropriation requests. In *Andrus*, three environmental groups asserted that the Secretary of the Interior (Secretary) and the Director of the Office of Management and Budget (Director) should have submitted an EIS to Congress with their proposed curtailments in the National Wildlife Refuge System (NWRS) budget.

The primary purpose of the NWRS was to create a national program "for the restoration, preservation, development and management of wildlife and wild lands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wild lands to obtain the maximum benefits from these resources." The environmental groups' position was that the budget curtailments would adversely affect the NWRS and as a result, would "significantly affect the quality of the human environment." Accordingly, they argued that the budget cuts "should have been accompanied by an EIS."

The Court noted that because President Carter had ordered the CEQ to produce mandatory regulations implementing NEPA, which would apply to all federal agencies, the CEQ's interpretation of NEPA should be entitled to "substantial deference." With respect to the NEPA section at issue, the regulations specifically provided that "[l]egislation' includes a bill or legislative proposal to Congress... but does not include requests for appropriations." The Court concluded, therefore, that under the CEQ regulation EIS's were not required for appropriation requests.

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91. *Andrus*, 442 U.S. at 352.
92. *Id.* (quoting 50 C.F.R. § 25.11(b) (1978)).
93. *Id.* at 352-53.
94. *Id.*
95. *Id.* at 357-58.
96. This section requires inclusion of EIS's in recommendations or reports on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988) (emphasis added).
98. *Id.* at 364-65.
The Andrus Court also concluded that appropriation requests were not "proposals for . . . major Federal actions" pursuant to NEPA. In order to reach this conclusion, the court reasoned that appropriations requests did not propose federal actions, but rather that they "fund[ed] actions already proposed." Indeed, the court announced:

Section 102(2)(C) is . . . best interpreted as applying to those recommendations or reports that actually propose programmatic actions, rather than to those which merely suggest how such actions may be funded. Any other result would create unnecessary redundancy. For example, if the mere funding of otherwise unaltered agency programs were construed to constitute major federal actions significantly affecting the quality of the human environment, the resulting EIS's would merely recapitulate the EIS's that should have accompanied the initial proposals of the programs.

The Ninth Circuit has construed this language to mean that appropriations requests fund actions already proposed, rather than proposing the federal actions. The Blue Ocean I court's finding, therefore, that the action in question had already been proposed, was consistent with Ninth Circuit law. Because Congress had appropriated $5 million to Phase III of the Project, the NEPA duty to prepare an EIS had already arisen; because the EIS had not been prepared, it seemed an inevitable conclusion that the duty had been breached.

The Kleppe Rule

Arguably, the Kleppe decision might be interpreted as articulating a requirement of a formal, written proposal for major federal action before a court would be permitted to intervene and compel the federal government to prepare an EIS. Indeed, the Kleppe Court feared that assertions of judicial authority before a formal proposal was advanced would "leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation."

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99. Id. at 361–62.
100. Id. at 362.
101. Id.
103. "[T]he time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption." Kleppe v. Sierra Club, 427 U.S. 390, 406 n.15 (1976).
104. Id. at 406.
In *Kleppe*, Justice Thurgood Marshall concurred in part and dissented in part from the majority holding. While Justice Marshall agreed with much of the Court's opinion, he disagreed that federal courts could not remedy NEPA violations "no matter how blatant—until it is too late for an adequate remedy to be formulated." 105 He believed that the majority had incorrectly interpreted NEPA to preclude judicial intervention prior to a formal agency proposal, 106 and asserted that interpreting the majority opinion as such would undercut the intended purposes of NEPA. Justice Marshall first asserted that an early start in preparing an EIS was necessary to comply with the statutory requirements of NEPA because "there comes a time when an agency that fails to begin preparation of a statement on a contemplated project is violating the law." 107 This is true because "the basic function of an EIS is to serve as a forward-looking instrument to assist in evaluating ‘proposals’ for major federal action...." 108 and NEPA § 102(2)(C) requires that an agency must have a final EIS prepared at the time when it "makes a recommendation or report on a proposal for federal action." 109 Justice Marshall recognized that preparation of an EIS takes time, and consequently, if an EIS is to be completed by the time a formal proposal is submitted, its preparation must begin before the proposal is ready. 110

Notwithstanding the force of Justice Marshall's arguments, he wrote as a dissenter in *Kleppe* joined only by Justice Brennan. 111 Yet, because the *Kleppe* majority did not articulate a precise definition of "proposal," the *Kleppe* majority could have fashioned its own interpretation, aided by CEQ regulations, and based upon the unique fact pattern in that case. Might the *Blue Ocean* court be accused of stretching the limits of the law articulated in *Kleppe* in order to reach a result which it considered to be in the best interests of environmental protectionism? The answer to this question must be no, if indeed the purposes of NEPA are to be served. The government's actions in *Blue Ocean* were clearly an attempt to circumvent the preparation of an EIS required by NEPA and avoid its duty to take "a ‘hard look’ at [the] environmental consequences." 112 Moreover, the acute environmental and cultural sensitivities involved in this case would appear to necessitate the findings of the *Blue Ocean* court in order to

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105. *Id.* at 415 (Marshall, J., concurring in part and dissenting in part).
106. *Id.* at 416.
107. *Id.* at 418.
110. *Id.* at 417.
111. At the time of this writing, both Justice Marshall and Justice Brennan had retired from the Court.
“apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they ‘retain a maximum range of options.’”¹¹³ At the time of the Blue Ocean I litigation, Phases I and II of the project had already been completed, and Phase III was under way without preparation of an EIS. With the enormous commitment of time and resources invested in the Project, it is questionable at best whether the government still had a maximum range of options with respect to the completion of the project. Indeed, the Ninth Circuit has stressed that an EIS “must be prepared before any irreversible and irretrievable commitment of resources,”¹¹⁴ for “delay in preparing an EIS may make all parties less flexible. After major investment of both time and money, it is likely that more environmental harm will be tolerated.”¹¹⁵

The government defendants also had concerns that this litigation would become precedent requiring federal EIS preparation before the submission of a formal proposal, and consequently that this might invite litigation. In answer to such a suggestion, Justice Marshall wrote:

> But the recognition of any right invites litigation, and it is a curious notion of statutory construction that makes substantive rights depend on whether persons would seek to enforce them in court. [Citation omitted.] In any case, to the extent the litigation is the result of agency noncompliance with NEPA, the Court can hardly complain about it.¹¹⁶

Despite the government’s concerns, however, it has decided not to appeal the decision.

Whether other courts will follow the Ninth Circuit’s lead in finding de facto proposals, and whether such interpretations would withstand a challenge in the current United States Supreme Court remains to be seen. In this particular case, however, it may well be that the Ninth Circuit’s departure from a literal interpretation was the only decision which would have been true to the letter and spirit of NEPA.

**CONCLUSION**

*Blue Ocean* represents a necessary shift from a narrow construction of the *Kleppe* “proposal” rule, if the purposes of NEPA are to be served. Moreover, a narrow construction of *Kleppe* would appear to con-

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¹¹⁴. Id. at 1446.
¹¹⁵. Environmental Defense Fund v. Andrus, 596 F.2d 848, 853 (9th Cir. 1979) (citing Lathan v. Volpe, 455 F.2d 1111, 1121 (9th Cir. 1971)).
flict with the CEQ's policy of early EIS preparation and functional "pro-
posal" interpretation. It appears that in at least some cases, interpreting
Kleppe to require formal proposals for major federal action cannot be rec-
 onciled with what courts have recognized to be the point of NEPA: early
consideration of the environmental consequences of a proposed agency
action.

The Blue Ocean interpretation of the proposal requirement and
consequent finding of a de facto proposal serves NEPA's intended pur-
poses, particularly in a case such as this where acute environmental as
well as cultural interests must be protected by the courts from agency
attempts to circumvent NEPA requirements. While the State of Hawaii
and the federal government have compelling reasons to explore the devel-
opment of geothermal energy, courts must not allow violations of statu-
tory mandate. This is particularly true when irreversible damage to land,
wildlife and the heritage of a people may be the consequence.

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