THE YEAR OF SPOILED PORK: COMMENTS ON THE COURT'S EMERGENCE AS AN ENVIRONMENTAL DEFENDER

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On January 19, 1971, President Nixon, catching most White House observers by surprise, issued a terse, 275-word statement halting further construction of the Cross Florida Barge Canal. This was imperative, the President declared, "to prevent potentially serious environmental damages" and was done at the urging of the new Council on Environmental Quality; the Council warned that the project "could endanger the unique wildlife of the area and destroy this region of unusual and unique natural beauty."[1] Thus was the nation notified that the canal, weighed by the President against the newly minted values expressed in the National Environmental Policy Act, had been judged a $50 million mistake.

This announcement catapulted the Florida canal — a modest undertaking by the generous standard of federal water resource expenditures — from near obscurity to considerable significance. It was the first major federal project ever halted by a chief executive specifically on grounds of environmental impact.[2] It inflicted a unique defeat on the Army Corps of Engineers: Never before in its long, enormously successful history had a President halted one of its ongoing projects in peace time. Most significantly, it was the first victory in a vigorous new attack by environmentalists against federal water resources projects. Indeed, for environmentalists long critical of traditional procedures for federal water resource development, it was the first time they had ever acquired the political force to command such public concessions from the chief executive.

The White House announcement is notice to political analysts that this current thrust against water resource projects deserves attention. Yet the President's announcement throws the crucial tactics and actors out of proper perspective. The panoply of drama attending the President's intervention in the canal issue largely obscured the major role the courts and judicial strategies had played in that conflict. The President halted a project already stopped. Four days earlier, a federal district court had issued a temporary injunction against further canal construction at the request of the Environmental Defense Fund.

The major line of attack upon the canal had been through the courts. It was the courts that acted first against the canal's potential environmental damage. Generally, as the Florida case illustrated, the current thrust against water resource projects depends heavily upon judicial tactics. The courts occupy such a prominent position in this struggle that they may be the most important factor in determining the scope, impact, and duration of the conflict.

The canal case is one of three suits, all related to this new attack on water resource development, upon which the courts have ruled in recent months. These early cases are but a beginning to litigation in this new movement yet they are unusually significant because, if their rulings stand, they mark a sudden new direction in the politics and law affecting federal water resource projects. The purpose of this paper is to examine briefly the principle political and legal issues involved in the cases and the substance of the rulings. Conclusions from such early litigation must be tentative, but it seems important to clarify the issues and implications in light of their potentially great impact on water resource projects.

CONSERVATIONISTS AND PORK-BARREL POLITICS

The current attack on federal water resource projects is a new campaign in an old war. The environmentalists' battle against these projects is historic. The specific projects at issue and the tactics have varied, but the underlying mood of the movement is a gnawing impatience with the "pork-barrel system," that political calculus utilized by Congress and collaborating administrative agencies in allocating federal water resource funds. While fighting specific projects, their ultimate objective has often been to disrupt the "pork-barrel system" which, they believe, is the ultimate perpetrator of so many environmentally damaging projects.[3]

Congressional procedures for appropriating rivers and harbors funds have been exhaustively analyzed; almost all observers agree that it embraces a highly stable set of political understandings and significant actors. Essentially, the level and purpose of these expenditures has depended upon the interplay of political pressure from state and local interests zealous for public works, the desire of legislators to enhance their electoral status by producing federal projects for the folks at home, the tradition of reciprocity among congressmen in voting for local works, and the enthusiastic collaboration of bureaucratic agen-

cies whose administrative fortunes are buoyed by generous funding of local public works.[4] Typically, a successful project begins with its proposal by influential congressmen armed with the support of state and local interests anxious for its development. Feasibility studies, including a benefit-cost analysis, are then prepared by the action agency involved, usually the Army Corps of Engineers (or the Bureau of Reclamation), which usually escalates local support for the proposal. When a favorable benefit-cost ratio can be produced, the project is usually included in the omnibus Rivers and Harbors Bill within a short time (which may vary according to the political strength of its support). Serious obstruction is now uncustomary; members of Congress — themselves promotors of their own local works — usually approve a colleague's proposal according to a tradition of reciprocity on such matters. So predictably have the ground rules for this system operated that "pork-barrel politics" is considered among the most thoroughly institutionalized of all congressional decision-making procedures.

Environmentalists recognize the value of some projects emerging from this system, yet frequently criticize the procedure and its results. One objection is that Congress shows slight concern for the ecological impact of such projects and, in any case, will customarily subordinate such considerations to political expediency when the voting occurs. Conservationists assert that water resource projects are normally undertaken because they have formidible political and economic proponents, that congressmen rarely probe deeply into the rationale or impact of the projects — and have little incentive for doing so — and that legislators have too vested an interest in this procedure to welcome any significant alteration in its operation. All this, environmentalists argue, produces too many projects that are ecologically unsound, economically marginal, or simply unnecessary.

The administrative agencies that study the feasibility of these projects and ultimately build them share this ire. The Army Corps of Engineers and the Bureau of Reclamation — the principle agencies — bear most of this criticism. Conservationists argue that agency planners are too often captives to an "engineering mentality" that concentrates upon technical problems and seldom weighs environmental and aesthetic results of their work. Moreover, the argument continues, these agencies — who know from whence their appropriations flow — are motivated primarily by political sensibilities in processing

congressional proposals submitted to them for review. They work diligently to justify such schemes and energetically promote further works in the interest of burgeoning budgets, bureaucratic ascendency, and congressional favor. This produces dubious practices. Benefit-cost calculations are often manipulated to produce favorable ratios even though they might underestimate a project's cost (perhaps by excluding the toll of environmental damage) and exaggerate its benefits (by placing debatably high values on "recreation benefits," for example); alternatives to politically popular proposals may be disregarded or prematurely dismissed; politically unappealing or contentious projects may be shelved regardless of merit.[5] In short, conservationists assert that the active collaboration of these agencies in the pork-barrel system expands its scope and environmental damage.

Conservationists have been particularly irritated with the Corps of Engineers and the Bureau of Reclamation because their great control over water resource planning has been accompanied by immunity to review or revision of their administrative procedures through outside pressure. The last few decades, as a recent study of water resource litigation concludes, have generally been a period of administrative insularity from judicial and legislative review. "The period since the New Deal has seen much deference to administrative expertise by legislatures and courts. The consequence of this . . . is that the decision-maker is often removed from public or legislative scrutiny." The authors then raise an issue that has long agitated conservationists: "If experts making important low-visibility decisions are now giving insufficient attention to aesthetic and ecological values, the question arises whether existing patterns of decision-making should be changed" (Meyers and Tarlock, 1971: 846). In the opinion of most conservation spokesmen, the Army Corps of Engineers is the prime example of an agency ripe for such change. They assert that the Corps, thoroughly entrenched against criticism by astute bureaucratic politics and congressional grace, can virtually ignore any viewpoint incompatable with its traditional approach to water resource development.[6] "Only when monumental, countervailing, external political pressure was used," a former chairman of the Corps' environmental policy advisory board recently complained, "have the corps project directions been forced to change" (Stoddard, 1971). Such massive pressure has been difficult to generate. With a budget of about $1 billion for the current fiscal year

and a solid phalanx of congressional supporters testifying to its political favor, the Corps has been placed by most political observors in that tiny pantheon of administrative agencies — dominated by the F.B.I. — almost beyond the reach of reformers through ordinary politics.

Some conservationist spokesmen, disenchanted with the general record of the federal administration of environmental matters, argue that the behavior of water resource agencies illustrates a rule: Do not expect most administrators, regardless of affiliation or environmental responsibilities, to be vigorous environmental protectors. For example, Joseph Sax, a leading environmental lawyer, argues that administrators usually "sub-optimize" and "nibble" away a trust to protect the environment when confronted with important ecological decisions. The administrator "sub-optimizes" by making the decision that seems best when "all the many constraints, pressures and influences at work are taken into account" (Sax, 1971: 53); this means balancing interests:

> An agency has its own priorities and legislative program; it has conflicting constituencies among which it must mediate, and in whose eyes it must—for its own good—appear to have a balanced position; it has a budget to consider and thereby a need for friends in the legislature (Sax, 1971: 53).

The end product is not the environmentally sound decision but the politically judicious one to the administrator's eye. "Nibbling," Sax suggests, is a way to rationalize bad environmental decisions. Having allowed major economic interests to intrude upon a decision where environmental concerns should govern, the administrator convinces himself that "this is the last intrusion that will be permitted, that no bad precedent is being set, and that the line will be drawn at the next case" (Sax, 1971: 55). But the line is seldom drawn and nibbling eventually becomes a continual compromise of major resource values the administrator is supposed to protect. Since most citizens fighting environmental degradation enjoy little access to or leverage with environmental administrators, Sax believes with many other conservation spokesmen that these practices virtually preclude any vigorously operative enforcement of the public's interest in environmental protection.

These arguments and the effort to remedy such grievances through judicial action are not new. Variations on these complaints may be discovered in conservation literature over the last half century during which litigation was often attempted

to topple the pork-barrel system. But the acquisition of political strength behind the movement and, more particularly, a rising confidence in judicial action is almost unprecedented. In the past, the courts have been mostly a frustration for environmentalists. Now circumstances seem to be creating a climate far more congenial to judicial action.

WHY THE COURTS?

Part of the renewed interest in litigation is undoubtedly an attempt to capitalize upon the public's growing sensitivity to environmental pollution and other manifestations of ecological abuse. The correlative of this environmental consciousness has been an increasing display of official concern with environmental damage and its remedy. A flurry of federal and state legislation has recently appeared to protect the environment from a multitude of hazards and public officials have now preached "saving the environment" almost to the point of a cliche. While the federal courts in the past have not been particularly sympathetic to the conservationist viewpoint on water resource management, they too may react to public opinion by demonstrating a greater receptivity to challenges against water resource projects based on environmental issues.

The new environmental legislation also offers a variety of new statutory grounds upon which water resource projects might be challenged. One particular incentive for litigation is the National Environmental Policy Act of 1969 (NEPA), somewhat prematurely called an "Environmental Bill of Rights."[7] Among its important provisions, the one generating the greatest interest in litigation is Section 102 which directs all federal agencies to accompany a recommendation or report on proposed legislation or other significant federal actions affecting the environment with a detailed statement by a responsible official containing: (1) an assessment of the environmental impact of the proposed action; (2) an estimate of unavoidable environmental damage should the project be undertaken; (3) a description of possible alternatives to the proposed action; (4) a statement relating local short-term environmental use to the maintenance and enhancement of long-term productivity; and (5) an inventory of irreversible or irretrievable commitments of resources which would be involved if the proposed action were undertaken. Many conservation leaders see this requirement for a "102 statement" as perhaps the most important opening wedge against environmentally harmful federal proj-

ects. The existence of these provisions is an invitation to environmentalists to use litigation to test whether Section 102 applies to rivers and harbors projects.

Some environmental spokesmen also contend that once the federal government makes a major commitment toward greater environmental protection it will be increasingly important to use judicial methods to assure that the pledge is redeemed. Sax, for instance, argues that while the courts are no substitute for environmental protection by legislators or administrators, the courts do have some advantages. Judges, Sax suggests, are "outsiders" to the political pressures that often sway administrators; environmental issues are more likely to be considered on their merits in the courts and one remedy to "sub-optimizing" and "nibbling" can thereby be achieved. Moreover, the courts are more likely to be directly responsive to citizen initiatives on environmental issues — they must, at least, ordinarily give a preliminary hearing to the complaint. Courts are more prone to extract and ponder the full implications of an environmental issue in a greater deliberative atmosphere than would an administrative forum. In the end, maintains Sax, using the judiciary to enforce environmental protection will be a way to shift the "center of gravity" away from a concern with private economic interests and political calculations among administrators and toward a concern with the public's stake in environmental protection.

Many conservationists also prefer the judiciary to elective officials as the most dependable locus of environmental defense. A deep distrust of "politicians" permeates much of the conservation movement; despite recent state and federal environmental legislation, many conservationists doubt the sincerity of the creators and expect them to compromise the policies severely when the inevitable political and economic resistance becomes massive. Others argue that since elective officials must ordinarily bargain and compromise to survive in office, it is visionary to expect them to take unwavering stands on environmental policy.

Certainly the President's behavior following the canal decision is a case in point, demonstrating that his aversion to canals was acute rather than chronic. He gave little evidence of a dependable commitment to abate or discourage potentially harmful water resource projects. A few months after the canal decision, he enthusiastically presided over the opening of the

Arkansas River Project, a sprawling, $1.5 billion lock, dam, and canal complex that dwarfed the Florida effort in cost and environmental impact (and, curiously enough, made Tulsa a seaport). Regardless of what motivated the President to reject the canal and embrace the Arkansas project, the lesson was clear. The President retained his freedom of maneuver in environmental affairs. No clearly consistent canal policy was likely to emerge from the White House.

It is hardly surprising that a President, probably to balance political pressures upon him, would be so apparently inconsistent in his environmental policies. But this emphasizes why environmentalists view the judiciary with such favor. A court decision, it would seem, promises more continuity, wider impact, and more sustained relevance to rivers and harbors projects because of the role precedent and conservation play in the judicial process. Moreover, Sax's whole case for the judiciary against the administrator can, with slight adaptation, be applied to elective officials.

To all these incentives for judicial action should be added, finally, the availability of private environmental groups specializing in environmental lawsuits as a spur to a judicial attack on pork-barrel projects. While the Sierra Club, Audubon Society, and Wilderness Society are among the many groups experienced over the years in environmental adjudication, the appearance of the Environmental Defense Fund (EDF) and, most recently, the National Resources Defense have added additional manpower, expertise, and organizational support to judicial strategies and have proven an additional stimulus for other groups to initiate litigation.

THE CRUCIAL LEGAL ISSUES

The success of the judicial attack on water resource projects will probably depend upon how the courts resolve several key issues likely to arise in the early litigation. Among them, the following four seem to be particularly crucial in defining what liabilities and opportunities conservationists will face in attempting this strategy.

Can the government be sued? This is the first, most fundamental matter that will be raised in suits against governmental agencies where the environmental impact of a federal project is concerned; it will determine whether judicial action against such projects is possible. To answer this question, the

courts must consider two issues: (1) whether environmentalists have the legal "standing" to sue the government on such a matter; and (2) whether the government enjoys "sovereign immunity" from such a suit.

The "standing" issue has been particularly nettlesome to conservationists in the past because, until recently, it was the major impediment to suing governmental agencies on environmental matters.[8] A plaintiff in a civil action enjoys standing when he has the power, or right, to obtain a court hearing of his action. Traditionally, the courts have held that when a plaintiff sues for redress of a damage that he alleges to be the fault of a defendant, the plaintiff must demonstrate some unique and identifiable harm to himself — or, at least, he must convince the court he might make such a demonstration. However, if an alleged harm is suffered by the plaintiff equally with everyone — if, in judicial terms, the harm is "public" — then the courts have customarily treated the matter as a "political" question beyond their jurisdiction. This logic made it difficult for a plaintiff to secure standing in the courts when he alleged that he was suing a defendant (private or governmental) for damages that had been inflicted upon him and others as part of a public. The courts, responding to the usual requirement for standing, dismissed the action; this became the usual fate of suits against public agencies when harm to the public interest in a clean environment was a basis for action.

The courts have recently taken a more expansive view of "standing" to the point where public interest litigation against governmental agencies has sometimes been permitted.[9] In such instances, the courts have been content to grant standing if the plaintiff could demonstrate that he was attempting to protect some public interest, or right, that was protected, implicitly or explicitly, by the government. The task that will face environmentalists in their early suits on water resource projects will be, apparently, less the problem of establishing whether a public interest suit is possible than the task of convincing the courts that the right to a clean environment is recognized and protected by the federal government.

The "sovereign immunity" doctrine asserts that the government cannot be sued against its will. This doctrine is likely to arise in a suit against a governmental entity when governmental lawyers assert that the government did not intend to permit a suit against a particular agency or activity. In the case

of rivers and harbors projects, the primary task of environmentalists will be to establish that the government has not excluded public works from environmental lawsuits and that they lie within the ambit of judicial review.

Can ongoing projects be subjected to suit? Assuming that conservationists can secure a judicial hearing, *which* projects are vulnerable to such action will be extremely important. Two of the earliest cases (the Florida barge canal and Cassatot River suits) are aimed at projects already underway and, in the latter instance, almost complete; environmentalists are especially anxious to bring the ecological damage from other ongoing projects to the court's attention. Should the courts take a narrow view of the public works susceptible to environmental litigation by confining suits to projects authorized but not underway, the scope and impact of the current environmental litigation would be materially reduced.

Persuading the courts to review ongoing projects may prove a formidable task. Governmental lawyers are likely to argue that a "balancing of interests" and a "respect for political decision" should govern the court's attitude in such cases; both doctrines have been utilized often by federal courts in the past to preclude their review of other federal activities. The "balancing of interests" argument is likely to rest upon an assertion that ongoing projects represent a major investment of public funds whose wisdom had already been decided by Congress and administrative agencies. Even if there may be environmental damage, so this argument might run, the courts must "balance" the benefits allegedly flowing from the project and the heavy investment already made against this potential harm and decide in favor of the project. The argument that authorization of a project constitutes a "policy decision" clearly plays upon the court's traditional aversion to overturning a congressional determination by substituting its judgment for that of elected legislators.

Are benefit-cost calculations susceptible to judicial review? Federal rivers and harbors projects cannot be constructed (even though Congress may authorize them) until the agency responsible for their development can justify them by a favorable benefit-cost analysis. This calculation becomes a legitimating formula for all federal public works; once a favorable benefit-cost ratio can be assigned to a project, the action agency — usually the Corps of Engineers — customarily requests and

receives a congressional appropriation for its construction. In practice, administrative agencies do not request funds until they can provide a benefit-cost ratio exceeding 1.0 — until estimates indicate there will be a better than even return on the federal investment.

The benefit-cost calculus is a crucial target for attack in the current litigation on water resource projects. It is not the principle of benefit-cost analysis but its alleged subversion in the resource planning agencies that incenses conservationists. They assert that the agencies often do not produce an honest, straightforward benefit-cost ratio for a project but, instead, conjure with the figures until they have abused this planning principle to produce a ratio satisfactory to the agency and its clientele; in particular, environmentalists would like to demonstrate that most benefit-cost ratios ignore the cost of environmental damages and unreasonably inflate the benefits in many projects. Ultimately, the goal is to prove that many, if not most, water resource projects will not produce favorable benefit-cost comparisons when more realistic estimates are utilized.

In a larger perspective, the issue involved in any attack on benefit-cost ratios is whether administrative decisions on the value of a water resource project is subject to judicial review in which new evidence germane to the decision can be introduced. Federal courts in the past have been reluctant to overturn, or even to review thoroughly, administrative decisions to construct some project or to engage in some activity alleged to be environmentally damaging.[10] While such decisions have been attacked as "arbitrary and capricious," the courts have seldom examined the determinations in much depth, choosing as a rule to defer to the judgment of the administrators involved.

A failure to secure judicial review of benefit-cost estimates for water resource developments would be a major defeat to the new conservationist movement. It would, for instance, deny them an occasion to introduce evidence of environmental damage from such projects; it would also create a strong, perhaps insurmountable presumption in favor of the government's decisions despite evidence of environmental damage introduced by other means. Many conservationists believe that benefit-cost calculations are the weakest link in the defense of water resource projects and must be exposed if the pork-barrel system is to be discredited.

What effect will NEPA have upon these suits? The three

cases we shall review, like all the early litigation in the current assault against water resource developments, have occurred within a short time after the passage of the National Environmental Policy Act (NEPA). It is now apparent that all these cases will involve an effort by conservationists to use various provisions of NEPA to attack water resource projects. In effect, these early cases constitute the first testing of NEPA's impact on water resource development and the first judicial definition of NEPA in operative terms.

NEPA may well be the most crucial factor in determining the success of the current attack on water resource projects. A major reason is that the three suits we shall examine attempt, in various ways, to use NEPA to secure standing to sue, to bring ongoing projects within the ambit of such suits, and to secure judicial review of the benefit-cost calculations behind the specific projects at issue. Specifically, the three actions we shall examine argue in different ways:

1. That the National Environmental Policy Act declares the congressional intent to create a public right to a clean environment and thus confers judicial standing on parties challenging governmental projects on the grounds of environmental damage.
2. That NEPA requires a "102 statement" relating to *all* federal projects, whether contemplated or underway. Thus, failure to produce such a statement conforming to congressional requirements as outlined in NEPA is grounds for judicial injunction against such developments until the statement is satisfactorily offered in court.
3. That benefit-cost calculations and other administrative determinations justifying any project must take into account environmental impact and this calculation is then subject to judicial review in which scientific and technical evidence disputing the administrative determination are admissable.

If environmental interests can successfully maintain these assertions during the early, precedent-setting cases, the obvious consequence would be to virtually remove the impregnability from judicial attack which rivers and harbors projects previously enjoyed. Will it happen? Three suits involving rivers and canal projects have now been heard in the federal courts. Three cases are a modest beginning to the litigation, but they do indicate a definite trend which, if continued, is likely to force major changes in water resource politics.

THE EARLY CASES

Within a few months the federal courts have ruled on

three environmental cases all related to the new attack on water resource projects. It will be helpful to examine the substance of the rulings individually before attempting assessment of their cumulative impact.

The Florida Barge Canal Case. Like a phoenix of pork-barrel politics, the Cross Florida Barge Canal rose from its own ashes. Repeatedly proposed by Florida promoters since 1825, an east-west canal across the upper Florida peninsula was rejected in feasibility studies by the Corps of Engineers until 1942 when Congress authorized it as a defense measure. With the war's end, however, the canal languished until the Corps produced a favorable benefit-cost ratio in 1958; initial appropriations for the canal followed and actual construction began in 1964.[11]

At its completion in 1972, the canal would have been a 107-mile trough across the top portion of the state beginning from the city of Palatka on the St. Johns River and ending at the city of Yankeetown on the Gulf of Mexico. The Corps intended to use the Oklawaha River which flows north from central Florida into the St. Johns as part of the navigational system; this required, among other things, dredging the river to a depth of 12′ and a width of 150′ where it connected with the canal; the Florida Aquifier — a major source of underground water for the entire state — would supply the system's water. When all the locks, dams, and bridges along the canal were completed, the project's total cost was estimated at $195,200,000.[12] Many aspects of the project were matters of ecological controversy, but none more contentious than the potentially irreversible damage it might inflict upon the Oklawaha River. At the time construction began, the Oklawaha had been designated by the Secrearies of Interior and Agriculture as one of 64 "wild rivers" which Congress had proclaimed an intention to preserve in their natural state; with the wild rivers legislation mired in Congress when the canal began, however, the Oklawaha was unprotected.

Organized opposition began in 1966 with the formation of a conservationist alliance against the canal. The opposition gained momentum and strength during the next several years but failed to make a significant impression upon public officials at state and national levels.[13] Finally, in September, 1969, the Environmental Defense Fund (EDF) officially entered the controversy by filing a suit in Washington, D.C., District Court on behalf of the Florida Defenders of the Environment — a

major coalition of state conservationists and others — requesting the court to issue a preliminary injunction against further canal construction until a hearing on the merits of the suit could occur.[14] During the year intervening between this request and the hearing on the preliminary injunction, the plaintiffs obtained evidence from diverse sources to persuade the court to act against the canal on grounds of environmental impact: a statement of the Florida Game and Fresh Water Fish Commission that environmental damage would greatly reduce the canal's benefits; a request by Secretary of the Interior Hickel that the Secretary of the Army institute a moratorium on the canal during which ecological studies of its impact could be undertaken; and a carefully documented, handsome 115-page document created by the Florida Defenders of the Environment (1970) offering expert testimony to a wide range of unfavorable environmental effects which could be anticipated from the canal's construction.[15]

The preliminary hearing began in early January, 1971. Although many issues were raised by the plaintiffs, the hearing focused upon three that were crucial to the plaintiff's case and that could be expected during the early stage of other litigation on water resource projects.[16] The court's opinion on all three was a major victory for the EDF and its allies. It was the first major reversal of a long-standing judicial reluctance to hear citizen suits against water resource projects based upon the claim of environmental damage and a significant departure from the court's traditional aversion to inquiring into the administrative determinations leading to the construction of such projects. The hearing did not produce a major substantive analysis of the law involved in the case since the plaintiffs were at this stage seeking only an injunction to delay the project until a full trial could be had and a hearing on the merits of the plaintiff's action was not held in view of the President's subsequent halting of the project; it did, however, permit new dimensions of legal argument on water resource projects for the first time.

First, the court considered the *standing issue*. The EDF argued that the environmental damages they anticipated from the canal were real damages entitling the plaintiffs to standing and that, additionally, they were protecting an interest which lay within that zone of interest Congress intended to protect by numerous statutes in the last 25 years, including NEPA. In rebuttal, counsel for the Corps argued that it enjoyed "sovereign

immunity" and that, in any case, the plaintiffs lacked a sufficiently concrete claim to damages to constitute "standing" to sue. The court, dismissing the defense of "sovereign immunity" because it saw no congressional intent to bar such suits, also recognized the plaintiff's claim to standing. "The plaintiffs will suffer real injury if the anticipated environmental damage occurs," it remarked. "The interests they seek to protect are arguably within the zone of interests protected by certain statutes upon which they rely. . . ."[17] Without citing the specific statutes, the court's opinion strongly implied that it considered the congressional intent in the matter rather unambiguous.

The status of ongoing projects was also discussed. The EDF asserted that the Corps had violated a trust, imposed upon it by Congress, to take adequate account of the environmental impact of its projects and that this trust applied to projects already authorized or under construction as well as to projects only contemplated. Governmental lawyers responded that a project authorized in 1942 and initiated in 1964 should not be brought within the purview of congressional legislation intended to force a review of environmental impact from federal projects. Reminding the court of the heavy public investment already sunk into the canal, the lawyers asserted that Congress had already expressed its will on such authorized projects and reminded the court of the many hazards which would follow a review of ongoing projects on grounds of environmental impact. Here was an issue new to the courts, one with potentially large implications for the future of other water resource projects already underway. In its decision, the court asserted that Congress did not intend to shield projects under construction from scrutiny of their environmental impact and gave particular weight to Congress' expression of environmental concern in the National Environmental Policy Act:

> . . . In view of the possible disastrous effects to the drinking water supply of Florida, the partial state of contruction, the extensive alleged remaining construction time, and the clear priority Congress has recently given to preserving and protecting the Nation's natural resources, certain statutes cited — including but not limited to the National Environmental Policy Act . . . the Fish and Wildlife Coordinating Act . . . and the Act of July 23, 1942 [authorizing the canal] . . . must be held applicable to construction of the Cross-Florida Barge Canal.[18]

Specifically, the court noted that the Corps had made no effort to comply with the requirement for an environmental impact statement in NEPA.

Finally, the *weight of evidence on prospective environ-*

mental damage figured importantly in the court's thinking: The EDF case rested heavily upon its ability to present evidence of the canal's prospective environmental damage and upon the court's receptivity to the evidence. The court acknowledged in its opinion the strong influence the evidence had exerted. The court cited the "great probative weight" which it assigned to the report of the Bureau of Sport Fisheries and Wildlife, to Secretary Hickel's letter, and to the EDF analysis of the canal in reaching its decision. This evidence constituted the important scientific input which environmentalists had hoped to inject into such suits and which they largely depended upon the courts to consider if their suits were to be effective.

On January 15, 1971, the court issued a preliminary injunction halting further construction of the canal until "an in-depth re-evaluation of the Canal project with respect to its environmental impact" was completed. While litigation continues, the practical import of the injunction is probably to halt the canal permanently. The decision was encouraging to environmentalists as the first tentative evidence that the major grounds for their new judicial strategy might be accepted by the courts. Within a few weeks, a second federal court ruling set a potentially more significant precedent and greatly amplified the initial rulings in the Florida case.

The Cassatot River Case. Less publicized than the Florida case, the decision about the Gillham Dam on Arkansas' Cassatot River may be more significant because the courts for the first time defined the scope of the environmental impact statement which NEPA would require of Corps projects; it apparently armed conservationists with a powerful weapon to delay, and perhaps prevent, many projects now underway or contemplated.

In 1958, Congress authorized the Corps of Engineers to begin the Millwood Project, a comprehensive river basin plan to dam six rivers flowing from the Ouachita Mountains in southeast Oklahoma and southwest Arkansas and to create six small impoundments behind them. When the EDF initiated its suit against the Gillham Dam across the Cassatot River in 1970, the dam was partially complete at a cost of $16 million. The Cassatot still remained a 100-mile, free-flowing "white water" stream with numerous recreational uses including unusual opportunities for excellent small-mouth bass fishing. Once erected, the dam would back its waters over the best portions of the river,

destroying its free-flowing character. The EDF entered the case to preserve the Cassatot unimpounded. It asked for a permanent injunction halting the project on the grounds that the Corps had failed to produce a satisfactory impact statement and because prudent assessment of the dam's impact would reveal it more desirable to leave the stream undammed.[19]

The central issue of the case was what *kind* of environmental impact study was required of the Corps under NEPA — an issue never joined in the Florida suit because the Corps produced no impact statement. At a preliminary hearing the court accepted EDF's claim to standing and its contention that ongoing Corps projects were subject to NEPA's requirement for environmental impact statements. The Corps agreed to cease their dam construction until a hearing on the merits of the case was completed. After this hearing in February, 1971, the court issued its final opinion, declaring that the Corps, despite judicial goading, had failed to produce an acceptable impact statement; a permanent injunction against further dam construction was issued "unless and until the Corps complies with the provisions of NEPA."

The importance of this decision lies in the court's definition of what the Corps had to do to produce an environmental impact statement required by NEPA. To begin, the court asserted that there could be no double standard on such studies — one for new projects, another for ongoing ones. (The Corps made no pretense that the statement it filed with the court met the explicit standards of NEPA. Instead, it argued that less rigorous standards should apply to ongoing projects.) In rejecting the "double standard" argument, the court opened all uncompleted Corps projects to the full force of NEPA's Section 102.

What was the Corps expected to do? At a minimum, the court declared, the Corps would have to follow each of the five steps in Section 102. Then the court pointed to a number of specific deficiencies in the Corps' justification of the project:

1. The Corps took no account in its benefit-cost ratio of the value of preserving the Cassatot as a free-flowing stream. The benefit-cost ratio, therefore, overestimated the project's benefits.
2. No effort was made to account for environmental impacts which were ignored before the project was initiated. Specifically, no effort was made to consider the many objections raised by the EDF at the preliminary hearing.
3. The Corps had not provided a resonable time to collect scientific data illuminating the environmental consequences of the project.

4. The benefit-cost calculation depended upon an unreasonably low discount rate.
5. Little attention had been given to alternatives for the dam.[20]

None of these objections, noted the court, might eventually preclude completion of the dam, but the Corps' error lay in its refusal to take these matters into account. Summarizing its viewpoint, the court declared a very generous interpretation of NEPA which, if it prevails, will vastly expand the opportunities for environmentalists to attack subsequent Corps projects in the courts:

> At the very least, NEPA is an environmental full disclosure law. . . . The "detailed statement" required by Section 102 (2) (c) should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public, and, indeed, Congress, to all known *possible* consequences of proposed agency action. Where experts, or concerned public or private organizations, or even ordinary lay citizens, bring to the attention of the responsible agency environmental impacts which they contend will result from the proposed agency action, then the 102 statement should set forth these contentions and opinions even if the responsible agency finds no merit in them whatsoever.[21]

Such an interpretation of NEPA would permit environmentalists to force the Corps into a searching consideration of the environmental implications of its activities and would, for the first time, probably enable conservationists to bring all the related issues into the courts.

The Tennessee-Tombigbee Canal. The EDF attacked its latest, costliest Corps project in 1971 when it was still a gleam in an engineer's eye. Authorized in 1946 and scheduled for initial construction in 1971, the Tennessee-Tombigbee waterway was to be a 170-mile-long canal, dam, and lock project linking the Tennessee River at its northernmost point with Alabama's Tombigbee River at its southern end; the Corps had estimated its cost at $386.6 million and the benefit-cost ratio at 1.6 to 1.0. The suit, argued in Washington, D.C., Federal District Court in September, 1971, alleged that the Corps had failed to comply with NEPA by ignoring the environmental degradation that would accompany the waterway and that the benefit-cost ratio calculated by the Corps greatly exaggerated benefits and unreasonably minimized costs.

The EDF pointed specifically to the Corps' failure to consider the potential environmental damage resulting from linking two river systems with different ecologies, from the innundation of large tracts of prime forest and agricultural land, and

from the loss of fish and game habitat. But the heaviest fire was directed to the benefit-cost ratio calculated by the Corps. The EDF asserted that the Corps had never considered environmental degradation as a construction cost as it should have done. The EDF argued that when these damages were considered and, moreover, when a more reasonable discount rate was used to calculate the benefit-cost ratio, the result would be a benefit-cost ratio of 0.099 to 1.0 for the Tombigbee — about ten cents for every dollar invested.[22] The Corps environmental impact statement, filed in late 1970 and never revised despite criticism by the EDF, had largely ignored the environmental damage that might result from the waterway and had, in fact, admitted the possibility of environmental damage. However, the Corps argued, the canal's benefits still exceeded its liabilities and answers to the environmental problems posed by the EDF could be found during the ten years of the canal's construction.

The Corps did not convince the court. In September, 1971, the court granted the EDF a temporary injunction halting further development of the Tennessee-Tombigbee waterway pending final disposition of the suit. In an order devoid of much significant commentary, the court was content to declare its opinion that the plaintiffs "would suffer irreparable injury for which there was no adequate remedy at law" if the project were begun then; its verdict was that the Corps "had not fully complied with the requirements of the National Environmental Policy Act of 1969. . . ."[23] The EDF counted this its greatest victory to date in the fight against water resource projects; it was assuredly the most expensive trophy that conservationists had yet wrested from the Corps in the contest.

TOWARD A NEW WATER RESOURCE POLICY

We may be witnessing in these early cases the evolution of a new era in federal water resource policy. We are definitely observing the first tentative definition of a wholly new judicial attitude toward water resource developments. The federal courts' previous deference to congressional decisions about water resource planning seems to be yielding to an unprecedented sensitivity toward the environmenal impact of water resource projects; this, in turn, seems to promise a new judicial restraint upon the creation of such developments.

The potential alterations that may follow in the politics of water resource development are intriguing and possibly pro-

found. One must, of course, be chary about predictions; we have three cases and not one yet appealed. Still, even if the full force of these early rulings should be blunted by subsequent litigation, a complete return to the *status quo ante* in water resource policy seems unlikely, given the breadth of these early decisions. In light of all this, perhaps this early litigation is most notable because it appears to reverse a direction followed in federal water resource policy for more than a century and to advance a new policy several significant steps. Conservationists may have finally found — ironically, in the courts — the fulcrum with which to move water resource policy.

If these potentially great changes occur, the genesis appears to lie in the federal court's application of the National Environmental Policy Act of 1969 to water resource projects. Summarizing the cases we have just reviewed, the courts' most significant interpretations of NEPA relate to its general intent and, especially, to the meaning of the environmental impact statement required by Section 102. Regarding the general intent of the act, the decisions argue: (1) that NEPA virtually assures "standing" for plaintiffs suing governmental agencies because agency activities allegedly produce environmental degradation — this seems to guarantee judicial recognition of "public interest" actions against federal activities affecting the environment, and (2) that NEPA applies fully and equally to projects partially complete and to those still being planned. These decisions, should they stand, would bring all federal water resource projects not yet finished within the reach of conservationist suits on grounds of environmental impact.

Equally important, the courts have declared such a rigorous interpretation of the environmental impact statement that it may become a formidable weapon in the hands of environmentalists. In the decisions we have reviewed the court has asserted: (1) that the act (in the words of the Cassatot decision) is a "full disclosure law" which compels water resource planning agencies to give detailed, sustained, and perhaps exhaustive, attention to *all* potential environmental damages that *might* result from their future activities; and (2) that benefit-cost analysis must give attention to the costs of environmental damage from projects, must adopt a higher (and more realistic) discount rate than has been customary, and must consider all reasonable alternatives to projects, including their abandonment. These judicial strictures not only confront planning agencies with an entirely new set of responsibilities and liabilities

in planning water resource projects, but they open the way for conservationists to bring into court testimony about the environmental impact, benefit-cost ratios, and alternatives to proposed water resource projects that have never before received a careful judicial airing. Obviously, to permit these interpretations of the impact statement is to arm conservationists with a flexible, and probably very efficient, set of new tactical weapons to modify, delay, obstruct, and possibly prevent a multitude of water development plans.

Why would environmentalists gain so much from this interpretation of the environmental impact statement? To begin, the benefit-cost calculations of planning agencies — the Corps in particular — are very vulnerable to challenge along the lines the courts now appear to permit; no longer could these calculations be considered an effective, and unassailable, legitimating formula for public works desired by Congress. If the present rulings stand, there might be a sharp decline in new projects undertaken by such agencies. In these early cases, the Corps' benefit-cost calculations have proven extremely shaky and unconvincing when submitted to a searching evaluation in which costs of environmental damage, reasonable discount rates, and alternatives are considered. Indeed, in these cases the Corps, hard pressed to defend its benefit-cost figures, made no effective case for them in the court. Conservationists have long argued that we have passed the point where the essential, economically productive water resource projects have been created; what is now being done, they contend, is to satisfy the congressional appetite for political pork with marginal endeavors. If the new judicial ground rules for benefit-cost calculations are followed in the planning agencies, it seems likely, at the very least, that review of a great many contemplated projects will prove this assertion.

Apart from whatever effect the rulings may have upon benefit-cost calculations, the concept of the impact statement as a "full disclosure" law offers additional opportunities for environmentalists to thwart present designs for water development. For an agency to consider *all* possible environmental impacts that *might* follow a project — and in a manner satisfactory to the court and with attention to the technical objections of conservationists — is surely to impose a Herculean task for planners. Even if this judicial injunction is not literally construed and only plausibly important environmental impacts are studied by agency planners, the preparation of an impact state-

ment dealing with these would take enormous time and equip conservationists with a great many occasions for objection; many projects might be abandoned and others modified as the price extracted by environmental interests for permitting the planning to proceed. All this would probably reduce the number of future projects and severely modify others; environmentalists would have a cudgel to wield over planning agencies with, one suspects, considerable effect.

Lest all this seem excessively speculative, the present predicament of the Corps needs emphasis: the Corps has yet to produce an environmental impact statement satisfactory to the court when environmentalists have challenged projects under the terms of NEPA. Since the Corps has yet to find this satisfactory formula under the rigorous strictures propounded by the federal courts, at the moment all incomplete or contemplated projects are in jeopardy of long delay at least, and perhaps rejection during litigation. Perhaps this will pass. The Corps may have taken the task of preparing an impact statement entirely too lightly and future efforts may be more successful. But there is also some evidence that the Corps has been genuinely confounded by the judiciary's interpretation of Section 102 and is still floundering in the effort to prepare a satisfactory statement. In any case, the point is that this early litigation has already thrown a rather dark aspect over all presently incomplete Corps projects and, one presumes, other water developments in other agencies as well.

All this, of course, has potentially great implications for the venerable politics of the pork barrel. If these decisions remained substantially intact for an appreciable period, it might greatly alter the political character of public works appropriations. It would, perhaps, substantially reduce the flow of water resource projects that develop along the constituency-Congress-agency axis. The variety of water resource developments available to congressmen would be constricted; the satisfaction of local demands for public works would be more difficult. No one knows exactly what to expect at this point, but the implications cut deeply into the basic fabric of congressional politics.

Environmentalists mostly regard these repercussions as delicious possibilities. But a congressional backlash is already developing — an indication that these early decisions have indeed threatened the status of the pork-barrel process — and pressure to undo the impact of these early decisions is now

mounting. A few days after the court halted the Tennessee-Tombigbee waterway, Senator James O. Eastland (D.-Miss.), a major proponent of the canal, released a statement urging "a new, close look" at the Environmental Protection Act and the agencies that administer it. "Special-interest groups, invoking the ecology theme, are holding up badly needed governmental projects," he complained. The Senator then advanced an argument likely to be echoed by the many congressional interests whose public works projects will be similarly jeopardized by NEPA:

> Many of these suits amount to nothing, and the result is added cost for the taxpayer. . . . Many of these suits are in the vital field of public power. Any delay along these lines could mean serious consequences for an already overworked power system. . . . I would urge Congress to review the operation of these laws in an effort to determine how they are working—and if they are operating in the interest of the nation as a whole (Associated Press, 1971).[24]

This is a warning, and not surprising. It is millennial to assume that congressional promoters of the pork barrel will not attempt to undo, or significantly diminish, the force of present judicial attitudes toward NEPA. And other interests — executive, state, local, and private — have reason to join the endeavor. What form might this reaction take? Legislatively, it might take the form of amendments, new titles, or new bills defining the substance of the impact statement in Section 102 in such a way as to give planning agencies some release from the extremely meticulous considerations of environmental impact to their activities now required by the judiciary. It might assume the form of executive action, perhaps emanating from the presidency, in which new guidelines for the preparation of impact statements will be propounded in a way acceptable to the court and more indulgent toward the interests now objecting to the current judicial rulings. Even higher courts may modify these early rulings. The interpretation of the impact statement as a "full disclosure law" may be particularly liable to overturn on appeal. The lower court has presently defined the meaning of "full disclosure" so unqualifiedly that it may seem to force upon administrations not only a prudent concern for the full environmental implications of federal activities but a procedure so cluttered with minutiae and delay as to be unreasonable.[25] This might not mean a major defeat for interests seeking to protect the environment; the crucial issue would be the criteria which appellate courts eventually decide should be followed if reasonable concern for environmental impact is

to be exercised by agency planners. While one might conjecture at length about the method and direction of the inevitable reaction to these early rulings, what seems certain is that the reaction will come and a second crucial period will arrive in the developing, as yet embryonic, transformation in water resource policy.

Thus, it should be recorded that in the year 1971 the federal judiciary opened up the possibility of a new chapter in water resource policy and that the possibilities remain real, as does their undoing. It is clear enough that the judiciary has goaded the federal government into the first tentative steps toward a reappraisal of water resource developments on grounds of environmental impact and, in doing so, has raised the possibility of a wholly new direction in pork-barrel legislation. We do not yet know whether we have witnessed the beginning of a new policy era, the abortive attempt at reform, or something between, but the cases we have discussed will be prominent in whatever is the eventual outcome.

POSTSCRIPT: THE 'GOOD FAITH' DOCTRINE

In early January, 1972, the Corps of Engineers filed with the U.S. District Court for Eastern Arkansas a new environmental impact statement on the Cassatot River project. Contending that it had now complied with NEPA, the Corps requested that the court set aside its earlier injunction against work on the Gillham Dam. In contrast to its earlier 12-page statement, the Corps this time produced a 1,450-page document, estimated to have cost $250,000, consisting of a 200-page summary of the dam's environmental impact framed in terms of the categories established by NEPA's Section 102(2) (c) and 1250 pages of supporting appendicies.[26]

The new statement carefully followed the formal guidelines dictated by the court in the earlier Cassatot hearing. The Environmental Defense Fund rested its case against the statement primarily on the ground that the statement was not "impartial and objective." The crucial issue in the hearing became: *how deeply would the court inquire into the substance of an impact statement which appeared to comply formally with NEPA's Section 102?* In a decision upholding the Corps' new statement, the court declared on May 5, 1972, that it would inquire into the substance of the statement only to the extent necessary to determine that (1) the statement had been "consciously" prepared "in good faith"; and (2) it alerted decision makers to the

major environmental problems involved in the project. Specifically, the court declared that it was satisfied the impact statement had been prepared in "good faith":

> . . .the defendants prepared the new impact statement in good faith and . . . had made a good faith effort to comply with the provisions of NEPA. The court further found that the new EIA [environmental impact statement] was not consciously slanted or biased and that the defendants had not consciously or intentionally withheld any pertinent information required by NEPA. The Court also found that the defendants had attempted to make a full disclosure of the pertinent facts and opinions, both favorable and unfavorable. . . .[27]

Further, the court noted that while the Corps might have been remiss in getting detailed data about particular environmental issues associated with the dam, it was sufficient that the Corps had explored the issue in a manner "sufficient to alert the decision-maker of the problem[s]. And, so alerted, the decision-maker can make such further inquiry as might be deemed necessary, useful or helpful."

In declaring these two criteria, the court emphasized its conviction that the judiciary should not unduly delay projects approved by legislative or executive officials. "The Court does not believe that Congress intended that the NEPA be used as a vehicle for the continual delay and postponement of legislative and executive decisions." Ultimately, concluded the court, environmentalists opposing projects such as the Gillham Dam should not depend upon the judicial process:

> The judiciary can delay the construction of the dam pending compliance by the defendants with the congressionally mandated provisions of the NEPA but, ultimately, plaintiffs' only chance to stop the dam, or to alter the same, lies in their ability . . . to convince the decision-maker of the wisdom and correctness of their views on the merits.[28]

If the court's twin criteria for impact statements stand the test of subsequent appeal, they would largely remove the judiciary from a probing substantive investigation of impact statements and would greatly diminish the appeal of the courts as a means for environmentalists to combat pork-barrel projects. As the court noted above, its decision would leave the determination of the wisdom in pork-barrel projects largely in the hands of legislators and administrators — where environmentalists would prefer no such monopoly of judgment exist.

FOOTNOTES

[1] The legal status of the President's announcement remains a mystery. It was not, as many commentators assumed, an executive order. Why it was not is obscure. Possibly, the President assumed his order to be

an exercise of his powers as Commander-in-Chief since the project was supervised by the Army Corps of Engineers. Perhaps he wanted to leave his decision open to later revision. Since the President took the unusual step of impounding funds appropriated for the project, he may have been aware of legal complications that might follow had this been done by executive order. On the tangled legal status of presidential announcements, see Corwin (1956: 393-396).

[2] The canal, however, was not the first public works project halted by a chief executive after construction began, nor the first federal activity halted by a president because of environmental impact. Franklin Roosevelt, for instance, ordered the Army to halt construction of of an artillery range in Utah to save the nesting grounds of trumpeter swans and, shortly thereafter, halted all public works projects not essential to national defense after Pearl Harbor. For the swan incident, see Udall (1964: 157); a discussion of the public works abatement is found in Goostree (1962).

[3] Almost from its inception, the American conservation movement has voiced a deep animosity toward governmental efforts to impound rivers and against the political forces that generate the endeavor. The evangelical voice of this movement may be found in Muir (1901) and, more recently, in Leydet (1964). The current mood of cold rage can be caught in Marine (1969: Chapter 4).

[4] The intricate interaction among the participants in the pork-barrel process is nicely analyzed and summarized in McConnell (1966: Chapter 7); a more theoretical and empirical discussion of the process may be found in Fenno (1966: Chapters 9, 11).

[5] Environmentalists, of course, enjoy no monoply on criticism of the benefit-cost calculus in water resource development. A large, extremely varied body of literature exists on this topic, mostly created by economists, public administration experts, and political scientists. A useful review and critique of the political aspects of the benefit-cost logic may be found in Wildavsky (1968: 65-83). Two critical studies of the benefit-cost calculations used in recent federal water resource projects may be found in Carlin (1971) and Roberts (1971).

[6] There is little disagreement among analysts of the Corps on this point. The most thorough examination of the Corps' politics, dated but still relevant, is Maas (1951).

[7] Public Law 91-190, 91st Congress, S. 1075, January 1, 1970.

[8] In recent years the upsurge of interest in environmental problems has stimulated a searching reexamination of the "standing" problem by legal scholars and environmental lawyers. Among the many current studies of this problem, the following are particularly illuminating in describing the issues: Berger (1969); Jaffe (1968). A useful synopsis of the current case law on the standing problem is found in Meyers and Tarlock (1971: 896-931).

[9] In these cases the courts have generally held that the persons suing could commence their action so long as some legal right had been violated which made the plaintiffs "aggrieved" even if the plaintiffs themselves had not been specifically wronged. Leading cases in this matter are currently *Scenic Hudson Preservation Conference* v. *Federal Power Commission* (1965), *Citizens Committee for the Hudson Valley and Sierra Club* v. *John Volpe, et al.* (1969), and *Zabel v. Tabb* (1970).

[10] The doctrine of judicial non-review of "agency discretion" is not limited to water resource planning but has traditionally extended to most agency actions in other domains of administrative concern also.

[11] A careful history of the Florida canal has yet to be written. Though never a *cause celèbre* among environmentalists until the President stopped it, the project did receive some reasonably accurate, if rather polemical, journalistic treatment. Most useful is Laycock (1970: Chapter 5), and Roberts (1971).

[12] In fact, the Corps estimated that total costs might exceed this widely advertised figure and approach $221,000,000. The Corps did not call attention to the larger estimate during the litigation. The Corps' larger estimate is found in documents cited in Roberts (1971: 9).

[13] The opposition formed in two waves. Initially, they had pressed the Corps to consider alternate routes for the waterway. When they became convinced the Corps had no intention of giving an alternative serious consideration, they directed their attack on the canal itself.

[14] The principal purpose of the Florida Defenders of the Environment was to provide the scientific input for the plaintiffs.

[15] This document was a major strategic innovation. It was the first thorough, scientifically detailed study of the environmental impact of a water resource project prepared by experts specifically for litigation. It has been widely praised and used as a model by environmentalists in similar battles elsewhere.

[16] *Environment Defense Fund, Incorporated, et al.* v. *Corps of Engineers of the United States Army, et al.* 324 F. Supp. 878 (D.D.C. 1971).

[17] *Ibid.*, Memorandum of the Court, p. 2.

[18] *Ibid.*, pp. 3-4.

[19] *Environmental Defense Fund* v. *Corps of Enginers,* U.S. District Court, Eastern District Arkansas, 325 F. Supp. 728, 2 ERC 1261 (1971).

[20] *Ibid., Memorandum Opinion Number Five of the Court,* pp. 7 ff.

[21] *Ibid.*, p. 15.

[27] This extremely low estimate was made by the EDF's expert economist and publicized in *Newsweek* (1971).

[28] *Environmental Defense Fund, Inc. et al.* v. *Corps of Engineers of the United States Army, et al.* United States District Court for the District of Columbia, Civil Action no. 1395-71, *Findings of Fact, Conclusions of Law and Order,* p. 4.

[24] Reported by Associated Press in *St. Petersburg Times* (1971).

[25] But the executive branch is proceeding to draft guidelines for impact statements which do meet the stringent judicial standards nonetheless. See Water Resources Council (1971).

[26] *Environmental Defense Fund, Inc., et al.* v. *Corps of Engineers of the United States Army, et al.,* U.S. District Court, Eastern District of Arkansas, Western Division, Civil Case No. LR-70-C-203.

[27] *Memorandum Opinion Number Six,* p. 2.

[33] *Ibid.*, p. 6.

REFERENCES

ASSOCIATED PRESS (1971) October 12, *St. Petersburg Times.*

BERGER, Raoul (1969) "Standing to Sue in Public Actions: Is It a Constitutional Requirement?" 78 Yale Law Journal 816-839.

CARLIN, Alan (1971) "The Grand Canyon Controversy: Lessons for Federal Cost-Benefit Practices," in Charles J. MEYERS and A. Don TARLOCK (eds.), Selected Legal and Economic Aspects of Environmental Protection. Mineola, N.Y.: The Foundation Press.

CORWIN, Edwards S. (1956) The President: Office and Powers. New York: N.Y. University Press.

FENNO, Richard F., Jr., (1966) The Power of the Purse. Boston: Little, Brown and Co.

FLORIDA DEFENDERS OF THE ENVIRONMENT (1970) Environmental Impact of the Cross-Florida Barge Canal with Special Emphasis on the Oklawaha Regional Ecosystem. Gainesville, Florida: Florida Defenders of the Environment.

GOOSTREE, Robert E. (1962) "The Power of the President to Impound Appropriated Funds," 1962 American University Law Review 32-47.

JAFFE, Louis L. (1968) "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff," 116 University of Pennsylvania Law Review 1033-1042.

LAYCOCK, George (1970) The Diligent Destroyers. New York: Ballentine Books.

LEYDET, Francois (1964) Time and the River Flowing. San Francisco: Sierra Club Press.

MAAS, Arthur (1951) Muddy Waters. Cambridge: Harvard University Press.

MARINE, Gene (1969) America the Raped. New York: Simon and Schuster.

McCONNELL, Grant (1966) Private Power and American Democracy. New York: Alfred A. Knopf.

MEYERS, Charles J., and A. Don TARLOCK (1971) Water Resources Management. Mineola, N.Y.: The Foundation Press.

MUIR, John (1901) Our National Parks. Boston: Houghton Mifflin.

NEWSWEEK (1971) "Benefits or Baloney?" September 13 Newsweek 65.

ROBERTS, Paul E. (1971) "Cross-Florida Barge Canal: A Current Appraisal," 1971 Business and Economic Dimensions 1-12.

SAX, Joseph L. (1971) Defending the Environment. New York: Alfred A. Knopf.

STODDARD, Charles H. (1971) July 24, New York Times.

UDALL, Stewart L. (1964) The Quiet Crisis. New York: Avon Books.

WATER RESOURCES COUNCIL (1971) "Proposed Principles and Standards for Planning Water and Related Land Resources," in Dec. 12 Federal Register, Part 2.

WILDAVSKY, Aaron (1968) "The Political Economy of Efficiency," in Austin RANNEY (ed.) Political Science and Public Policy. Chicago: Markham Publishing Co.

CASES

Citizens Committee for the Hudson Valley and the Sierra Club v. *John Volpe et al.* 425 F. 2nd 97 (1969).

Environmental Defense Fund v. *Corps of Engineers* 325 F. Supp. 728, 2 ERC 1261 (1971).

Environmental Defense Fund, Inc., et al. v. *Corps of Engineers of the United States Army, et al.* 324 F. Supp. 878 (D.D.C. 1971).

Environmental Defense Fund, Inc., et al. v. *Corps of Engineers of the United States Army, et al.* United States District Court for the District of Columbia, Civil Action No. 2655-69.

Scenic Hudson Preservation Conference v. *Federal Power Commission* 354 F. 2nd 608 (1965).

Zabel v. *Tabb* 430 F. 2nd 199 (1970).