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Robertson v. Methow Valley Citizens Council and the New “Worst Case Analysis” Regulation

I.

INTRODUCTION

On May 1, 1989, the Supreme Court decided *Robertson v. Methow Valley Citizens Council*,¹ holding that the National Environmental Policy Act of 1969 (NEPA) does not require federal agencies to include a “worst case analysis” in an environmental impact statement (EIS).²

Ironically, on March 24, 1989, while the Supreme Court was preparing its *Methow Valley* opinion, the supertanker *Exxon Valdez* struck a reef and spilled over ten million gallons of crude oil into the previously pristine waters of Alaska’s Prince William Sound. The magnitude of the oil spill, the largest in U.S. history, overwhelmed containment and clean-up efforts. It also demonstrated the inadequacy of the existing oil spill contingency plan and left the environmentally sensitive Sound, home to thousands of sea otters and seals, millions of seabirds, and one of the nation’s most important commercial fisheries, devastated.³ This oil spill, which according to Exxon was the first in nine thousand successful passages of tankers through Prince William Sound,⁴ dramatically emphasizes how some “worst case” predictions come true and why worst case analysis is needed to plan for improbable but catastrophic events. Unfortunately, in *Methow Valley* the Supreme Court chose to ignore this timely example of the necessity for worst case analysis.

This note will provide a historical account of worst case analysis,

1. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989).

2. *Id.* at 1848. On May 1, 1989, the Supreme Court also decided *Methow Valley’s* companion case, *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989), which likewise held that NEPA does not require federal agencies to include a worst case analysis in an EIS. *Marsh v. ONRC* does not discuss the worst case analysis question in detail, but references its holding to the analysis in *Methow Valley*. Accordingly, this note will refer to the Supreme Court’s disposition of the worst case analysis issue in the *Methow Valley* opinion.

3. Lemonick, *The Two Alaskas*, Time, Apr. 17, 1989 at 56; see also Rudolph, *An Oil Slick Trips Up Exxon*, Time, Apr. 24, 1989 at 46.

4. Report to our Shareholders: The Exxon Valdez, THE LAMP, Spring 1989, Vol. 71 No. 1 at 6, 7. THE LAMP is a quarterly publication for Exxon shareholders.

emphasizing its adoption and subsequent deletion from the regulations of the Council on Environmental Quality (CEQ),⁵ the Ninth Circuit's refusal to recognize the CEQ's deletion of the requirement, and the Supreme Court's reversal of the Ninth Circuit in *Methow Valley*. This note theorizes that the worst case analysis requirement met its demise at the hands of the CEQ and the Supreme Court not because it was ineffective, as maintained by those bodies, but because it was so effectively used in questioning the wisdom of agency behavior that pro-development federal agencies pressured both the Court and the CEQ to remove the requirement. Additionally, this note analyzes why worst case analysis is necessary to NEPA from both a legal and a practical perspective. Finally, because worst case analysis is important to NEPA, this note concludes that the CEQ's deletion of the term "worst case analysis" from its regulation regarding incomplete information should be construed as semantic in nature, and that the substance of the original regulation should be retained. Consequently, this note recommends that courts construing the new CEQ regulation look for guidance in case law construing the original regulation, and create a new "worst case analysis" requirement without the use of those proscribed terms.

II.

THE HISTORY OF THE WORST CASE ANALYSIS REQUIREMENT

A. *The CEQ's Regulations*

In 1977, President Carter directed the CEQ to promulgate regulations implementing the procedural provisions of NEPA.⁶ On November 29, 1978, the CEQ complied.⁷ Section 1502.22 of the CEQ's regulations became known as the worst case analysis regulation.⁸ This regulation provided that if important information relevant to an agency's evaluation of a proposed action was either incomplete or unavailable because it was too costly to obtain, or

5. The National Environmental Policy Act of 1969 (NEPA) created the Council on Environmental Quality (CEQ) "within the Executive Office of the President as an information clearinghouse and as a group to review federal policies and make recommendations for improving them." Note, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 Harv. Envtl. L. Rev. 347, 347 (1979).

6. Exec. Order No. 11,991, 3 C.F.R. 123 (1977 Comp.); see also *Methow Valley*, 109 S. Ct. at 1848.

7. 43 Fed. Reg. 55,978 (1978) (codified at 40 C.F.R. §§ 1500-1508 (1985)).

8. 40 C.F.R. § 1502.22 (1985) (superseded). This superseded regulation will be referred to as the original CEQ regulation. The current version of this regulation, 40 C.F.R. § 1502.22 (1988), will be referred to as the new CEQ regulation.

because obtaining it was beyond the state of the art, the agency must include a "worst case analysis" in the EIS.⁹

At first, the worst case analysis regulation was highly praised.¹⁰ However, eight years later it had fallen into disfavor, and on April 25, 1986, in response to "numerous requests from both government agencies and private parties" (the CEQ failed to mention the complaints were largely if not wholly from pro-development agencies and interest groups), the CEQ amended its regulation dealing with incomplete or unavailable information, deleting the worst case analysis requirement.¹¹

B. *The Ninth Circuit's Rebellion*

The above regulatory history is noncontroversial. The debate over the history of worst case analysis centered on the following question: Did the CEQ's original regulation codify prior NEPA case law or did the CEQ invent the requirement? If the CEQ's regulation merely codified prior case law, the CEQ was powerless to remove the worst case analysis requirement from NEPA. On the other hand, if the CEQ had invented the requirement it was free to delete it. The Ninth Circuit found the former view correct, ignored the CEQ's amendment of the regulation, and continued to impose a worst case analysis requirement as a mandate of NEPA case law.¹² In *Methow Valley*, the Supreme Court reversed the Ninth Circuit and adopted the latter view. *Methow Valley* holds that NEPA does not require worst case analysis, and gives effect to the CEQ's deletion of the requirement.¹³ The following brief chronology outlines the legal battle which culminated in the Supreme Court's decision.

The seminal case upholding and construing the original CEQ regulation is *Sierra Club v. Sigler*.¹⁴ In *Sigler*, the Army Corps of Engineers (Corps) wanted to issue several permits authorizing private construction of a crude oil supertanker port in Galveston Bay. Galveston Bay is an important estuary which serves as a nursery and habitat for vast numbers of wildlife, including thousands of migratory birds and ninety-eight percent of the fish harvested by the

9. *Id.*; see also *Methow Valley*, 109 S. Ct. at 1848.

10. *Sierra Club v. Sigler*, 695 F.2d 957, 971 n.10 (5th Cir. 1983).

11. 51 Fed. Reg. 15,618, 19 (1986) (codified at 40 C.F.R. § 1502.22 (1988)).

12. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 817 n.11 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1835 (1989); see also *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489, 1497 n.8 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1851 (1989).

13. *Methow Valley*, 109 S. Ct. at 1848.

14. *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983).

Texas commercial fishing industry.¹⁵ The plaintiffs brought suit challenging the adequacy of the Corps' EIS regarding the permit decisions. Among other challenges, the plaintiffs asserted that the EIS failed to perform a worst case oil spill analysis.¹⁶ In response, the Corps argued that a catastrophic worst case analysis involving a total cargo loss by a supertanker in the Bay was beyond the statutory minima of NEPA.¹⁷

To resolve this challenge to the validity of the original CEQ regulation, the court looked to the language of NEPA and found some language "which may be said to endorse generally the concept of a worst case analysis."¹⁸ However, because NEPA is a very general statute the court concluded that its literal statutory language did not require worst case analysis.¹⁹ Yet, despite its refusal to find a justification for worst case analysis in the express language of NEPA, the court did find persuasive evidence in prior case law that NEPA requires worst case analysis.²⁰ *Sigler* also found support for a worst case analysis regulation in NEPA's legislative history.²¹

Specifically, *Sigler* found that prior to the CEQ's issuance of its worst case analysis regulation, NEPA's "common law" had already required worst case analysis. To support this finding, the court cited the following: "one of the costs that must be weighed by decisionmakers is the cost of uncertainty—i.e., the costs of proceeding without more and better information."²² Accordingly, *Sigler* held that "the CEQ's worst case analysis regulation merely codifies these judicially created principles."²³ Because the CEQ's worst case regulation was in accord with the language and legislative history of NEPA and closely tracked NEPA case law, the court concluded that it was not beyond the statutory minima of NEPA. Moreover, the court determined that the plaintiff's demand for a catastrophic worst case analysis was precisely what CEQ intended.²⁴

The Ninth Circuit adopted *Sigler's* approach in *Southern Oregon*

15. *Id.* at 961-62.

16. *Id.* at 964.

17. *Id.* at 969.

18. *Id.* The *Sigler* court found that the statutory language of NEPA generally endorses the concept of worst case analysis at 42 U.S.C. § 4331(b)(3) (1982) (responsibility of the federal government to avoid unintended consequences of environmental use), and at 42 U.S.C. § 4332 (EIS is to disclose all environmental impacts).

19. 695 F.2d at 969.

20. *Id.* at 969-70.

21. *Id.* at 970 n.9.

22. *Id.* at 970, citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

23. *Id.* at 971.

24. *Id.* at 971-72.

Citizens Against Toxic Sprays v. Clark (SOCATS).²⁵ In *SOCATS*, an environmental group brought suit challenging a herbicide spraying program in Oregon forests run by the Bureau of Land Management (BLM) because there was considerable scientific uncertainty regarding the safe level of exposure to the herbicides used.²⁶ Due to this uncertainty (which could not be eliminated by further study), the court enjoined the BLM from spraying until it performed a worst case analysis.²⁷ In discussing the need for a worst case analysis, *SOCATS* held that the worst case analysis requirement imposed by the original CEQ regulation codified prior NEPA case law.²⁸ This conclusion was reaffirmed in later Ninth Circuit NEPA decisions regarding worst case analysis.²⁹

Accordingly, even after the CEQ rescinded its worst case analysis regulation in 1986, the Ninth Circuit continued to require agencies to perform worst case analysis in cases of incomplete or unavailable information as an element of NEPA case law.³⁰ The Ninth Circuit concisely stated this position in two cases decided after the CEQ rescinded its original regulation.³¹

In the first case, *Oregon Natural Resources Council v. Marsh*, the plaintiffs brought suit challenging the adequacy of a supplemental EIS filed by the Corps for the Elk Creek Dam project on the Rogue River drainage in Oregon. The Rogue River is a designated wild and scenic river³² known nationally for its white-water rafting and fly-fishing. The plaintiffs were concerned about information gaps and scientific uncertainty regarding the effect a dam on a tributary of the Rogue River could have on the temperature and turbidity of the Rogue. To address this concern over incomplete and unavailable information, the court ruled that the Corps must either prepare a worst case analysis or conduct further research.³³

In holding that worst case analysis was required in spite of the

25. *Southern Oregon Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984) [hereinafter *SOCATS*].

26. *Id.* at 1477.

27. *Id.*

28. *Id.* at 1478, *citing* *Sierra Club v. Sigler*, 695 F.2d 957, 971 (5th Cir. 1983).

29. *See* *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984); *National Wildlife Federation v. U.S. Forest Service*, 592 F. Supp. 931, 943 n.23 (D. Or. 1984); *see also* cases cited *supra* note 12.

30. *See* cases cited *supra* note 12.

31. *Id.*

32. *See* *Wild and Scenic Rivers Act of 1968*, 16 U.S.C. 1271, 1274(a) (1982).

33. *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489, 1500 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1851 (1989), *on remand*, 880 F.2d 242 (9th Cir. 1989).

CEQ's deletion of this requirement from the applicable regulation, the court noted:

We reject the argument of the Corps that section 1502.22 [40 C.F.R. § 1502.22 (1985) (superseded)] is inapplicable due to its rescission on May 27, 1986. The worst case regulation is a codification of prior NEPA case law. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984). Thus, the rules embodied in the regulation remain in effect even though the regulation was rescinded.³⁴

In the second case, *Methow Valley Citizens Council v. Regional Forester*, the Forest Service had decided to grant a permit allowing construction of a ski area on a mountain called Sandy Butte. Sandy Butte overlooks the Methow Valley, an unspoiled, sparsely populated area on the eastern side of the North Cascade Mountains in the State of Washington. The Methow Valley provides critical winter range and migration corridors for Washington's largest migratory deer herd. The plaintiffs brought suit, challenging the adequacy of a Forest Service EIS. The plaintiffs were concerned that the Forest Service lacked adequate information to predict the effects that the proposed ski area and the resulting development of the Methow Valley would have on the deer herd. The court agreed, and held that the Forest Service must either gather the information or prepare a worst case analysis.³⁵ On the issue of worst case analysis the court stated:

The worst case analysis requirement was codified in 1979, 40 C.F.R. 1502.22, and rescinded in 1986. This rescission, however, does not nullify the requirement, *Marsh*, 820 F.2d at 1058 n.8, since the regulation was merely a codification of prior NEPA case law. *See Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1478 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984); *see also Save Our Ecosystems v. Clark* 747 F.2d 1240, 1244 (9th Cir. 1984).³⁶

Both of these Ninth Circuit cases requiring worst case analysis despite the CEQ's deletion of the requirement were appealed to the Supreme Court. *The Methow Valley* opinion followed.³⁷

C. *The Supreme Court's Opinion*

Based on *Sigler's* holding that the CEQ's original regulation was the equivalent of NEPA's "common law" and a codification of "ju-

34. *Id.* at 1497 n.8.

35. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1835 (1989).

36. *Id.* at 817 n.11.

37. *See supra* notes 2 and 12.

judicially created principles," the Ninth Circuit's decisions were defensible. Nonetheless, the Supreme Court rejected the Ninth Circuit's position, and held that a "review of NEPA case law reveals that the regulation, in fact, was not a codification of prior judicial decisions."³⁸ The Court concluded that "[t]he cases cited by the Court of Appeals ultimately rely on the Fifth Circuit's decision in *Sierra Club v. Sigler*."³⁹ According to the Court, *Sigler* simply recognized that the worst case analysis regulation codified the judicially created principle that an EIS must consider the probability of the occurrence of any environmental effect it discusses.⁴⁰ Thus, the Supreme Court concluded:

As CEQ recognized at the time it superseded the regulation, case law prior to the adoption of the 'worst case analysis' provision did require agencies to describe environmental impacts even in the face of substantial uncertainty, but did not require that this obligation necessarily be met through the mechanism of a "worst case analysis." See 51 Fed. Reg. 15625 (1986). CEQ's abandonment of the "worst case analysis" provision, therefore, is not inconsistent with any previously established judicial interpretation of the statute.⁴¹

Accordingly, the Supreme Court held that while NEPA does require agencies to address the problem of incomplete and unavailable information in the EIS process, it does not require a "worst case analysis."

III.

WHY DID THE WORST CASE ANALYSIS REQUIREMENT MEET ITS DEMISE?

When it promulgated the worst case analysis regulation, the CEQ noted that "[t]his provision received strong support from many commenters [sic]."⁴² Notably, one commentator applauded the

38. *Methow Valley*, 109 S. Ct. at 1848. It is interesting to note that Nicholas Yost, the principle author of the CEQ's worst case analysis regulation, see *infra* note 50, disagrees with the Supreme Court's determination of the origin of the regulation he helped to create: "The worst case requirement, though not the nomenclature, existed before adoption of the CEQ NEPA regulations. CEQ built the worst case analysis on a combination of case law and an administrative need to devise a mechanism for the study and consideration of a certain kind of impact." Yost, *Don't Gut Worst Case Analysis*, 13 *Env'tl. L. Rep.* 10394, 95 (Dec. 1983). To support his position, Mr. Yost cited *Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) and *Alaska v. Andrus*, 580 F.2d 465, 473 n.36 (D.C. Cir.), *vacated in part sub nom.* *Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978).

39. 109 S. Ct. 1848 (1989).

40. *Id.*

41. *Id.*

42. 43 Fed. Reg. 55,978, 84 (1978).

new regulation because it would force agencies to investigate all the possible impacts of their projects, stating;

Current ecological knowledge is still in many instances quite limited, and a duty to develop new information will serve both to expand the frontiers of environmental knowledge and prevent agencies from hiding behind this ignorance of a project's true environmental ramifications.⁴³

Other commentators echoed this praise, maintaining that worst case analysis would serve two purposes:

- (1) to force a systematic balancing of the conflicting needs for action and complete information, and;
- (2) to remove the potential for ignoring unfavorable information—a loophole otherwise available to agencies that want to proceed with undesirable courses of action.⁴⁴

Why then, if the CEQ's worst case analysis regulation was so warmly received and highly praised, was it rescinded?

It appears that the worst case analysis regulation was rescinded by the CEQ not because it failed to protect the environment, but because it protected the environment too well. Agencies disliked the worst case analysis requirement because it made pro-development proposals look bad. For example, agency bureaucrats probably were reluctant to admit that they were going to approve construction of a ski area even though the construction would result in the death of one-half of a thirty thousand-member mule deer herd,⁴⁵ or that they intended to build a dam even though it could destroy one of the nation's best fly-fishing rivers.⁴⁶ Development-minded agencies dislike being forced to examine and discuss such possible negative effects of their favorite projects because this information could convince the public, and thus political decision makers, that the agency's project is ill advised.

Moreover, in addition to exposing weaknesses in agency proposals, worst case analysis was a powerful litigation tool which was used successfully, too successfully in the eyes of pro-development federal agencies, as a means to call into question the wisdom of agency behavior.⁴⁷ The Supreme Court listed this "counterproductive" impact of the worst case analysis regulation among its princi-

43. *New Rules for the NEPA Process: CEQ Establishes Uniform Procedures to Improve Implementation*, 9 *Env'tl. L. Rep.* 10005, 08 (Jan. 1979); see also *Sierra Club v. Sigler*, 695 F.2d 957, 971 n.10 (5th Cir. 1983).

44. Note, *supra* note 5, at 374; see also *Sigler*, 695 F.2d at 971 n.10.

45. See *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1841 (1989).

46. See *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989).

47. 50 Fed.Reg. 32,236 (1985). But see *Yost, supra* note 38, at 10,396 (arguing that

pal reasons for rejecting the requirement.⁴⁸ However, in its discussion condemning worst case analysis, the Supreme Court omitted the other side of the debate. Worst case analysis is strongly supported by most if not all major environmental groups as a necessary and beneficial component of the EIS process.⁴⁹ As noted by Nicholas Yost, the principle author of the original CEQ regulation,⁵⁰ in an article arguing against its amendment, "[t]he requirement for worst case analysis was one of those provisions of deepest interest to those concerned with environmental protection. To gut this critical requirement would be to undermine seriously the consensus that exists with respect to the CEQ NEPA regulations taken as a whole."⁵¹ Based on this record, especially the strong support for worst case analysis among environmental groups involved in NEPA litigation, the Supreme Court could not have rejected worst case analysis because it failed to protect the environment. Rather, the Supreme Court deleted this requirement from NEPA at the urging of pro-development federal agencies and private pro-development interest groups.

IV.

WORST CASE ANALYSIS IS NECESSARY TO NEPA

Although worst case analysis has been rejected by the CEQ and the Supreme Court, a substantially similar inquiry is still required by NEPA. NEPA is designed to foster informed decision making and public review of proposed agency actions through a full disclosure of the action's environmental impacts.⁵² Accordingly, NEPA recognizes that informed decision making is not possible without adequate consideration of incomplete and unavailable information. To satisfy NEPA, an EIS must identify "which environmental ef-

the worst case analysis regulation imposed no undue burden or delay on federal agencies).

48. *Methow Valley*, 109 S. Ct. at 1849 n.17.

49. See Amicus Brief of Environmental Defense Fund, Friends of the Earth, Izaak Walton League, National Audubon Society, National Parks and Conservation Association, National Trust for Historic Preservation, National Wildlife Federation, Natural Resources Defense Council, and the Wilderness Society at 17-24, *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989).

50. Nicholas Yost was the General Counsel of the Council on Environmental Quality from 1977 to 1981, with lead responsibility for drafting the CEQ NEPA regulations. Yost, *supra* note 38, at 10,394.

51. *Id.* at 10,396.

52. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1978).

fects are essentially unknown,"⁵³ consider "the probabilities as well as the consequences" of such effects,⁵⁴ and evaluate "the cost of uncertainty—i.e., the costs of proceeding without more and better information."⁵⁵ The worst case analysis regulation was designed by the CEQ to satisfy these three judicially imposed requirements.⁵⁶ These legal requirements continue to exist under *Methow Valley*,⁵⁷ and must be satisfied by an inquiry similar to a worst case analysis.

Moreover, there is a practical need for worst case analysis or its functional equivalent. This practical need is best expressed by the principal author⁵⁸ of the original CEQ regulation:

[W]orst case is designed for the improbable (but potentially catastrophic) situation. If a catastrophic impact is probable (e.g., a 60 percent chance that a nuclear installation will melt down within 10 years), nobody in their right mind would dream of going forward. It is where the potential impact is catastrophic but improbable that the analytical tool of worst case is needed.

We do not site nuclear power plants in downtown Washington, D.C. or San Francisco, not because of what *will* happen but because of what *could* happen. The safety record of nuclear power plants has, after all, been a fine one in terms of actual health impacts. Nobody, as the nuclear industry is fond of saying, died at Three Mile Island. Nevertheless, we would all, I suspect, be leery about putting a nuclear power plant in the middle of a city. Why? Because the potential for catastrophic impact, however improbable, deters the reasonable person from taking a risk which can be avoided by remote siting. That is all worst case analysis is about—directing professional attention and study to improbable but unfortunately not inconceivable (and in some cases not very improbable) environmental consequences of proposals for major federal action (emphasis in original).⁵⁹

The "worst case" Exxon oil spill in Prince William Sound mentioned at the outset dramatically emphasizes this point: worst case events occur and federal agencies must plan for these contingencies. Consideration of environmental impacts in the face of uncertain in-

53. *Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

54. *Carolina Env'tl. Study Group v. United States*, 510 F.2d 796, 799 (D.C. Cir. 1975).

55. *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir.), *vacated on other grounds sub nom. Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978).

56. *See supra* note 38.

57. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1849 n.17 (1989).

58. *See supra* notes 38 and 50.

59. Yost, *supra* note 38, at 10,395.

formation, as required by NEPA,⁶⁰ is not possible without an idea of all possible impacts including the worst possible impact. Worst case analysis or its functional equivalent is necessary to perform this practical task.

V.

THE EFFECT OF METHOW VALLEY AND THE NEW CEQ REGULATION

Will *Methow Valley* free pro-development federal agencies to hide behind their "ignorance of a project's true environmental ramifications?"⁶¹ The Supreme Court's rejection of the worst case analysis requirement shifts the focus of NEPA's treatment of incomplete and unavailable information to the new CEQ regulation.⁶² This regulation contains much of the substance of the original worst case analysis regulation. To a certain degree, the CEQ has simply removed the offending "worst case" language from the required analysis.

For example, the CEQ has stated that the purpose of the regulation has not changed:

It must again be emphasized that the Council [CEQ] concurs in the underlying goals of the original regulation—that is, disclosure of the fact of incomplete or unavailable information; acquisition of that information if reasonably possible; and evaluation of reasonably foreseeable significant adverse impacts even in the absence of all information. These goals are based on sound public policy and early NEPA case law.⁶³

Moreover, the triggering requirement of both regulations is the same. The original regulation requires a worst case analysis when the information relevant to adverse impacts is essential but unknown and the costs of obtaining it are exorbitant, or the information relevant to adverse impacts is important⁶⁴ and the means of obtaining it are not known.⁶⁵ The new CEQ regulation requires an analysis of missing and uncertain information in exactly the same circumstances—if information cannot be obtained because the over-

60. *See supra* note 57.

61. *See supra* note 43.

62. 40 C.F.R. § 1502.22 (1988).

63. 51 Fed. Reg. 15,620 (1986) (footnote omitted); *see also* 49 Fed. Reg. 50,744 (1984).

64. The Ninth Circuit held that the CEQ intended no distinction between the words "essential" and "important." *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 n.5 (9th Cir. 1984).

65. *Id.* at 1243 (quoting 40 C.F.R. § 1502.22 (1981)).

all costs of obtaining it are exorbitant or the means of obtaining it are not known. However, after this triggering requirement is met, the new regulation does not require a "worst case analysis" denominated as such; rather, it requires analysis of "reasonably foreseeable significant adverse effects."⁶⁶

This semantic change does not alter the basic requirement: agencies must evaluate the effects of incomplete or unavailable information. The new regulation requires an analysis of reasonably foreseeable significant adverse effects in the case of incomplete or unavailable information containing:

- 1) An admission the information is incomplete or unavailable;
- 2) A discussion of the relevance of the incomplete or unavailable information;
- 3) A summary of existing credible scientific evidence relevant to evaluating the reasonably foreseeable adverse impacts; and
- 4) The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.⁶⁷

The CEQ defines "reasonably foreseeable" to include impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.⁶⁸

This new regulation essentially requires a "worst case analysis" without using that forbidden nomenclature. For instance, the CEQ's definition of "reasonably foreseeable" includes low probability catastrophic impact events. The analysis of low probability catastrophic impact events was also the cornerstone of the original worst case analysis regulation. Although the CEQ has added the phrase "credible scientific evidence" to the new regulation, this is not a new requirement nor a restriction on the scope of agency inquiry. The CEQ's definition of "credible scientific evidence" is very broad,⁶⁹ requiring only the use of theoretical approaches or research methods generally accepted in the scientific community. The CEQ admits this is a broad standard and states that a narrower definition would have been inappropriate.⁷⁰ More-

66. 40 C.F.R. § 1502.22 (1988).

67. *Id.*

68. *Id.*

69. In response to comments on this issue CEQ has stated: "The definition of the word 'credible' is 'capable of being believed.'" 51 Fed. Reg. 15,618, 15,622-23 (1986) (citing WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1984)).

70. 51 Fed. Reg. 15,618, 16,622-23 (1986).

over, case law recognizes "speculation" is implicit in NEPA,⁷¹ further reducing the effect of the CEQ's limitation of inquiry to "credible scientific evidence." Finally, the CEQ's addition of the language requiring that the analysis not be based on pure conjecture and within the "rule of reason" does not add a new requirement. Previous case law also provided that the analysis in an EIS could not be based on pure conjecture and had to be within the rule of reason.⁷²

Thus, it is possible to argue, the CEQ's new regulation substantially restates the existing law governing worst case analysis. The amendment of the original worst case analysis regulation to the new analysis of reasonably foreseeable significant adverse effects is essentially an exercise in semantics to appease the development forces which pressured the CEQ to change the regulation. Other than deleting the controversial label "worst case analysis" and adding some new language clarifying existing requirements of case law, the substance of the old worst case analysis regulation remains fundamentally unaltered. Consequently, courts construing the meaning of the new regulation should look to interpretations of the original regulation, including all of the elements of worst case analysis, except the name, that existed under prior case law. On the other hand, courts could use the CEQ's new language, such as the phrases "reasonably foreseeable" and "credible scientific evidence," as levers with which to limit the scope of agency inquiry required by NEPA, thus substantially weakening the scope of environmental protection previously provided by the worst case analysis requirement.

VI.

CONCLUSION

The Supreme Court's *Methow Valley* opinion has ended the era of worst case analysis, denominated as such, under NEPA. Despite being praised by the CEQ and environmentalists alike at the outset,

71. *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir.) *vacated on other grounds sub nom.* *Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978); *see also* *Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (reasonable forecasting and speculation is implicit in NEPA and agencies must not be allowed to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry").

72. *Scientists' Inst. for Pub. Information*, 481 F.2d at 1092; *see also* *Carolina Env'tl. Study Group v. Atomic Energy Comm'n*, 510 F.2d 796, 798 (D.C. Cir. 1975) (NEPA requires a description of reasonably foreseeable impacts and a "rule of reason" is used to ascertain the impacts anticipated); *Sierra Club v. Sigler*, 695 F.2d 957, 970 (5th Cir. 1983) (courts grappling with the problem of uncertainty resulting from missing information have adopted a case by case "rule of reason" approach).

the worst case analysis requirement rapidly drew condemnation from pro-development federal agencies because it was used effectively by environmental groups to cast doubt upon the wisdom of agency undertakings. Consequently, worst case analysis met its demise not because it was ineffective in protecting the environment, but because it protected the environment too well.

Though worst case analysis is no longer required, *Methow Valley* continues to recognize the longstanding NEPA requirement that an EIS must evaluate the effect of incomplete and unavailable information. The key instrument in evaluating incomplete and unavailable information in the EIS process is now the new CEQ regulation requiring analysis of reasonably foreseeable significant adverse impacts. This new CEQ regulation can be construed as substantially similar to the original CEQ worst case analysis regulation. Accordingly, from an environmentalist's perspective the damage done by the Supreme Court's reversal of the worst case analysis requirement can be mitigated if courts read a substantially similar requirement into the new regulation. Conversely, the new regulation offers the courts greater leeway to reduce the scope of environmental protection once provided by the worse case analysis requirement. In light of the timely example of the *Exxon Valdez* disaster, a "worst case" oil spill for which the responsible federal agencies were completely unprepared, the latter judicial interpretation would be the "worst case" result of the Supreme Court's *Methow Valley* decision.

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