UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, SIERRA CLUB, and FRIENDS OF THE EARTH

Plaintiffs,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Defendant.

Civil Action No. 92-2102 (CRR)

FILED

JUN 30 1993

NANCY M. MAYER-WHITTINGTON
CLERK

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

For Plaintiffs: Patti Goldman, with Alan B. Morrison and Paul R.Q. Wolfson of the Public Citizen Litigation Group.

For Defendant: Bradley M. Campbell, with Samuel C. Alexander of the United States Department of Justice, Environmental and Natural Resources Division, and Roger B. Clegg, Acting Assistant Attorney General and Benedict S. Cohen, Acting Deputy Assistant Attorney General.

I. INTRODUCTION

Before the Court are the parties' cross Motions for Summary Judgment in the above-captioned case. In their Complaint, the Plaintiffs allege that the Defendant has failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., in the negotiation and conclusion of the North American Free Trade Agreement ("NAFTA"). More specifically, the Plaintiffs challenge the Defendant's failure to prepare an environmental impact statement ("EIS") on the NAFTA and request that the Court order the Defendant to produce an EIS on the NAFTA before the President submits it to Congress. The NEPA requires that all

federal agencies prepare an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

The Court held oral argument on the motions on May 25, 1993. After careful consideration of the papers filed by the parties, the arguments of counsel at the hearing, the underlying law, and the entire record in this action, the Court shall grant the Plaintiffs' Motion for Summary Judgment.

II. BACKGROUND

In 1991, the United States began trilateral negotiations with Canada and Mexico with the goal of establishing a North American free trade zone. See 56 Fed. Reg. 32,454-55 (July 16, 1991). These negotiations resulted in the NAFTA, a comprehensive document affecting every aspect of trade among the three countries. The NAFTA was signed by the trade representatives of the United States, Mexico and Canada on October 7, 1992.[1]

The NAFTA is subject to the provisions of the Trade Act of 1974, as amended. See 19 U.S.C. § 2101 et seq. ("the Trade Acts"). The Trade Acts provide that the Defendant United States Office of the Trade Representative ("OTR") shall serve as the President's chief negotiator in trade matters. Id. § 2171(c). The NAFTA will

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[1] The NAFTA addresses, inter alia, barriers to trade, intellectual property rights, and trade in goods. It also provides an exhaustive tariff schedule to govern trade between the three countries.

be submitted to Congress under the "fast track" approval process.[2] See 19 U.S.C. §§ 2191-2194, 2902-2903. Under the fast track process, the President submits the NAFTA to Congress along with implementing legislation and an explanation of the changes in the current law. 19 U.S.C. § 2903(a)(1)(B). The NAFTA must be approved by both Houses of Congress before it can become effective, and such approval occurs when the NAFTA's implementing legislation has been enacted by both the Senate and the House of Representatives. 19 U.S.C. § 2903(a)(1). Under the fast track process, once the NAFTA has been submitted to Congress, Congress has only 60 legislative days to approve or reject the agreement, id. § 2191(c) and (e); legislative debate is limited to 20 hours in each House, id. § 2191(f) and (g); and Congress may not change the implementing legislation or the Agreement. Id. § 2191(d). The President has no obligation to submit the NAFTA to Congress for ratification; however, he is expected to do so some time this fall. See John Dillin, Kantor Says NAFTA Will Bring More Jobs, Christian Science Moniter, June 23, 1993, at 2 (United States Trade Representative Mickey Kantor says that NAFTA should be ready for Congress in September.)

As noted earlier, the NEPA requires an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the

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[2] The fast track procedures are not statutory requirements but have been adopted as an exercise of the rule making power of the House of Representatives and the Senate. See 19 U.S.C. § 2191(a)(1).

human environment." 42 U.S.C. § 4332(2)(C). The Plaintiffs are three nonprofit groups that have taken an active interest in the environment: Public Citizen, the Sierra Club, and the Friends of the Earth. They contend that the Defendant United States Trade Representative and the NAFTA are subject to the NEPA and bring this action for declaratory relief to compel the Defendant to prepare an EIS on the NAFTA before it is submitted to Congress. The Plaintiffs allege that this Court has jurisdiction in this suit under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 et seq., which provides for judicial review of a final agency action by a party adversely affected or aggrieved by agency action within the meaning of a relevant statute, here the NEPA.

As the Defendant admits no EIS was prepared on the NAFTA, the question before the Court is whether the NEPA and the APA provide relief to the Plaintiffs under these circumstances. In other words, the issue before the Court is whether the NEPA and the APA properly apply to the NAFTA and the OTR's action in negotiating, drafting and ultimately approving the NAFTA on behalf of the United States. As to these issues, the Defendant claims that: 1) there is no jurisdiction over this suit under the APA; 2) the Plaintiffs have no standing in this action; and 3) the NEPA does not apply to the NAFTA. However, the Court concludes that the plain language and policies of the APA and the NEPA apply to the NAFTA and the OTR. Furthermore, the Court finds that there is jurisdiction here under the APA and that the Plaintiffs' allegations of environmental harm are sufficient for purposes of standing under the NEPA.

Finally, the Court determines that the Defendant has ignored the clear language and the legislative mandate of the NEPA in failing to prepare an EIS of the NAFTA, and, therefore, the Court shall grant summary judgment for the Plaintiffs.

III. THIS COURT HAS JURISDICTION OVER THIS ACTION UNDER THE APA BECAUSE THE DEFENDANT HAS TAKEN FINAL AGENCY ACTION IN ITS PREPARATION AND FINALIZATION OF THE NAFTA.

As a threshold matter, the Court concludes that it has subject matter jurisdiction under the APA for the Plaintiffs' claims under the NEPA.

The same Plaintiffs filed an earlier challenge to the NAFTA in August 1991. At that time, the negotiations for the NAFTA had not yet been concluded and no agreement had been finalized. That action was dismissed by the district court. Public Citizen v. Office of United States Trade Representative, 782 F. Supp. 139 (D.D.C. 1992) (June Green, J.). The Court of Appeals affirmed the dismissal of that action, holding that there was no jurisdiction under the APA because there had not been any final agency action under section 704 of the APA. Public Citizen v. Office of United States Trade Representative, 970 F.2d 916 (D.C. Cir. 1992). The Circuit noted that there was no event triggering the agency's obligation to prepare an EIS because no final NAFTA agreement had been reached, as only incomplete drafts had been prepared. Id. at 919. Under these circumstances, our Court of Appeals believed that a suit challenging the NAFTA was premature. Id. The Plaintiffs now properly assert that the OTR has taken final action as to the

NAFTA and there is jurisdiction under the APA in the instant action.

The Court begins, as our Court of Appeals did in the prior case, in analyzing the question of final agency action by examining the "NEPA itself, for it specifically identifies the time when an agency's action is sufficiently concrete to trigger the EIS requirement." Id. at 918. Our Court of Appeals explicitly stated that in order to challenge the NAFTA, the "[P]laintiffs must point to a specific proposal for legislation or other action 'at least arguably triggering the agency's obligation to prepare an impact statement.'" Id. at 918-19, quoting Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991). In rejecting the Plaintiffs' earlier claim, our Court of Appeals explicitly noted that no final agreement had yet been produced in NAFTA negotiations and that it was unclear whether the negotiations would ever produce a final agreement. Id.

However, it is undisputed that the NAFTA agreement has now been finalized and signed by the United States, Canada, and Mexico. It is also undisputed that the NAFTA signed by the three countries is the same agreement that will be sent to Congress. Furthermore, under the fast track procedure, the agreement itself cannot be changed after it has been sent to the Congress for ratification. 19 U.S.C. § 2191(d).[3] Therefore, the Court concludes that the

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[3] Various side agreements are being negotiated by the three countries on topics related to the NAFTA. However, the Defendant does not claim that the NAFTA itself is not a final agreement by virtue of the negotiation of these side agreements.

NAFTA agreement constitutes final agency action under the APA for purposes of this lawsuit.

A. THIS COURT HAS APA JURISDICTION BECAUSE THE DEFENDANT OFFICE OF TRADE REPRESENTATIVE IS AN AGENCY UNDER THE APA AND BECAUSE THE DEFENDANT HAS HAD SIGNIFICANT INVOLVEMENT IN THE PREPARATION, NEGOTIATION, AND DRAFTING OF THE NAFTA.

However, this does not end the Court's inquiry under the APA as the Defendant raises a related argument regarding jurisdiction that must be addressed as a threshold matter. The Defendant contends that there is no APA jurisdiction in this case because the President, and not the Defendant, is responsible for any final agency action on the NAFTA and there is no APA jurisdiction to review actions by the President. Defendant's Memorandum in Support of its Motion, at 15; see Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991) (no APA jurisdiction to challenge the actions of the President). More specifically, the Defendant claims that APA jurisdiction is improper here because: 1) the NAFTA is actually a result of the President's efforts, and not that of the OTR for purposes of the APA and the NEPA; 2) the final agency action with regard to the NAFTA is its submission to Congress by the President and not simply its negotiation and the production of a final agreement; and 3) the President has no obligation to submit the NAFTA to Congress. However, the Court is not persuaded that such arguments preclude APA jurisdiction in this case and believes that the Defendant's arguments misread the language of the applicable statutes and the case law. The Court shall address each of these

arguments in turn.

First, the Court concludes that the NAFTA is, in substantial part, a result of the work of the Defendant OTR and therefore reviewable under the APA and the NEPA. The Defendant Office of the United States Trade Representative is charged by statute with the responsibility for conducting international trade negotiations, developing and coordinating United States trade policy and imposing any retaliatory trade sanctions on other countries. See 19 U.S.C. §§ 2171, 2411-2417. It is undisputed that the Defendant OTR has, in substantial part, negotiated and drafted the NAFTA.

The Court again looks to the language and case law under the NEPA in order to understand whether the Defendant's actions regarding the NAFTA constitute final agency action under the APA. Under the NEPA, a federal agency is still required to prepare an EIS even if a project or proposal is not exclusively a federal agency endeavor. See Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D.Cal. 1985); cf. Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) (where U.S. Corps of Engineers granted a permit for part of a construction project, an EIS was required on the entire project). Furthermore, the Council for Environmental Quality ("CEQ"), which was established by the NEPA, has issued regulations pertaining to the NEPA and its interpretation of the NEPA is entitled to substantial deference. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (citations omitted); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355 (1989). The CEQ's regulations specifically provide that, for purposes of the NEPA, legislation:

> includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency . . . . The test for significant cooperation is whether the proposal is in fact predominately that of the agency rather than another source. . . . Proposals for legislation include requests for ratification of treaties.

40 C.F.R. § 1508.17 (1992); see Andrus, 442 U.S. at 357. The Court also notes that the CEQ regulations provide that major federal actions under NEPA include projects and programs entirely or partially conducted by federal agencies. 40 C.F.R. § 1508.18(a) (1992). Therefore, the significant actions taken by the Defendant OTR in negotiating and drafting the NAFTA are sufficient to trigger the EIS under the NEPA.[4]

Second, the Court concludes that the mere fact that the President submits the NAFTA to Congress does not bar review under the APA in this case. The Defendant principally relies on the Supreme Court's recent decision in Franklin v. Massachusetts, 112 S.Ct. 2767 (1992), for its argument that the President's submission of the NAFTA to Congress prevents APA jurisdiction here. In

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[4] The Office of the United States Trade Representative has a separate statutory basis for its authority and has many separate responsibilities aside from assisting and advising the President, see 19 U.S.C. §§ 2171, and thus, the OTR is an agency subject to the APA. See Soucie v. David, 448 F.2d 1067 (1971) (a component with substantial independent authority in the exercise of its functions is an agency); see also Energy Research Foundation v. Defense Nuclear Facilities Safety Bd., 917 F.2d 581 (D.C. Cir. 1990).

Furthermore, the Court notes that this finding is supported by the fact that the appointment of the OTR's top officials are subject to the advice and consent of the Senate, thus making them somewhat independent of the executive branch. 19 U.S.C. § 2171(b). In addition, the OTR is an agency under the Freedom of Information Act and the Privacy Act. See 15 C.F.R. §§ 2004, 2005 (1993).

Franklin, the Supreme Court held that there was no final agency action, and thus no jurisdiction under the APA, for the Secretary of Commerce's actions regarding the census. Under the automatic reapportionment statute at issue in that case, the Secretary of Commerce supervises the taking of the census, compiles the data and reports that information to the President. After receiving the Secretary's report, the President then has the statutory responsibility for transmitting a statement to Congress showing the results of the census and the number of Representatives to which each state is entitled. Id. at 2771. The Court in Franklin concluded that there was no APA jurisdiction of the Secretary of Commerce's actions because the President took the final action in reporting the census figures to Congress and such executive action was not reviewable under the APA.

The Defendant analogizes the President's submission of the census to the Congress to his submission of the NAFTA. However, such an analogy is misplaced. In Franklin, the Court reasoned that "[t]he core question is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties." Id. at 2773. The Court concluded that no decision making process was completed where the census figure supplied by the Secretary to the President was actually a "moving target, even after the Secretary reports to the President." Id. at 2774. The Court noted that, even after the Secretary submits his report to the President, the census information can be amended before being transmitted to Congress,

the President could instruct that the census be reformed, and that, in fact, the President was not required to adhere to the policy decisions reflected in the Secretary's report. Id. at 2774-75. Thus, the census report in Franklin was "more like a tentative recommendation than a final and binding determination." Id. at 2774. On the other hand, the NAFTA is in stark contrast to the census report in Franklin because the NAFTA is a complete and, most importantly, a final product that will not be changed before submission to Congress. The NAFTA that was negotiated and signed by the Trade Representative is the same document that shall be submitted to Congress and which is the subject of this suit.

Third and finally, the fact that the President is under no obligation to submit the NAFTA to the Congress is not a bar to APA jurisdiction. Once again, a reference to the NEPA demonstrates why the actions by the Defendant here are final for purposes of APA jurisdiction and the preparation of an EIS. As discussed earlier, the NEPA requires that an EIS must be prepared for legislative proposals. See Izaak Walton League of American v. Marsh, 655 F.2d 346 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981). The case law is clear that an EIS must be prepared once such a proposal is completed and that its submission to Congress is not required. Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986) (noting that once Congress acts on a proposal, the aggrieved party may lose its right to judicial review). As the NEPA unambiguously requires an EIS on "proposals for legislation," 42 U.S.C. § 4332(2)(C), the Court concludes that an EIS on the NAFTA is required.

IV. THE EXERCISE OF APA JURISDICTION UNDER THE APA IN THIS CASE IS NOT A VIOLATION OF SEPARATION OF POWERS BECAUSE THE NAFTA HAS ALREADY BEEN DRAFTED AND APPROVED BY THE THREE COUNTRIES AND THE PREPARATION OF AN EIS WILL NOT INTERFERE WITH THE PRESIDENT'S AUTHORITY.

The Defendant further argues that an exercise of APA jurisdiction in this case would violate separation of powers by infringing on the Executive's right and ability to conduct foreign policy. Defendant's Memorandum in Support of its Motion, at 20. However, such an argument is not persuasive in this case.

The Court concludes that the separation of powers doctrine does not bar the Plaintiffs' claims because an exercise of jurisdiction in this case under the APA and the NEPA is not an infringement of the powers of the President. In arguing that the EIS requirement will impede the President's power to conduct foreign policy, the Defendant conveniently ignores the fact that the power to regulate commerce with foreign nations is given to the Congress under the Constitution. See Constitution, Art. 1, Sec. 8, cl. 3.

Furthermore, assuming arguendo that the EIS requirement here raises a separation of powers question, the circumstances surrounding this lawsuit demonstrate that an application of the NEPA to the NAFTA will not impede the President's power in any meaningful way. The NAFTA is a completed document which has been signed and agreed to by the three heads of state for the United States, Canada, and Mexico. The only remaining step to be taken regarding the NAFTA is a domestic one, specifically, the submission of the NAFTA for approval by the Congress for possible

ratification. The EIS requirement is, therefore, a domestic issue, where an agency must inform the relevant decision makers, in this case the Congress, of the environmental consequences of a proposal for legislation. See 42 U.S.C. § 4332(2)(C). Given the current posture of the NAFTA, the Court does not believe that the EIS requirement would so infringe on the President's power as to be a violation of the doctrine of separation of powers.[5]

V. THE PLAINTIFFS HAVE STANDING TO CHALLENGE THE DEFENDANT'S FAILURE TO PREPARE AN EIS FOR THE NAFTA BECAUSE THE PLAINTIFFS ALLEGE SUFFICIENT AND COGNIZABLE INJURY.

The Plaintiffs claim that they have standing because the NAFTA, by its terms, will result in changes to federal and state law and policy in a variety of health and environmental matters and that these changes will have an environmental impact on them. Furthermore, the Plaintiffs argue that NAFTA will result in environmental changes to certain geographical areas, such as the area on the border between the United States and Mexico. Under these circumstances, the Plaintiffs contend that "the Court can determine whether NAFTA is likely to harm plaintiffs." Plaintiffs' Reply Brief at 9. The Court finds that the Plaintiffs' allegations, and the affidavits submitted in support thereof, establish standing under the NEPA.

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[5] The Defendant's argument concerning separation of powers had more force in the prior suit regarding the NAFTA because the Plaintiffs were requesting that an EIS be completed before the conclusion of the NAFTA negotiations. See Public Citizen v. Office of United States Trade Representative, 782 F. Supp. 139 (D.D.C. 1992) (June Green, J.). However, such a suit was dismissed on other grounds and thus no infringement of Executive power occurred.

It is clearly established law that:

> [t]he procedural and informational thrust of [the] NEPA gives rise to cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental injury may occur.

City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 492 (D.C. Cir. 1990).[6] The Court agrees with the Plaintiffs that the NAFTA will create binding obligations on state and federal agencies to conform with its terms. The NAFTA, by its very terms, sets forth criteria that may form a basis for challenging various domestic health and environmental laws. See e.g. Plaintiffs' Exhibit A (NAFTA, Chapter 7). Those laws that are found to be contrary to the NAFTA's free trade provisions either cannot be applied or can become the basis of trade sanctions.[7] In addition, by virtue of the Supremacy Clause, a state law that conflicts with the NAFTA is preempted by the NAFTA. See id.

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[6] In the prior suit brought by the Plaintiffs, the district court dismissed the action, holding that the Plaintiffs did not establish standing under the NEPA. Public Citizen v. Office of U.S. Trade Representative, 782 F. Supp. 139, 142 (D.D.C. 1992). More specifically, Judge June Green found that the Plaintiffs failed to establish standing derivatively through its members because it could not show that members' environmental or recreational interests would be harmed by a particular agency action. Id. However, as discussed earlier, no final NAFTA agreement had been reached when that suit was pending and thus any allegations of harm were premature. Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916, 919 (D.C. Cir. 1992). In addition, our Court of Appeals did not reach the issue of standing in affirming the district court's dismissal. Id.

[7] The Plaintiffs set forth numerous health and environmental measures which may be set aside as contrary to the NAFTA, thus leading to injury. These include, inter alia, pesticide residue standards, chemical bans, bans on seafood imports based on certain environmental criteria, and pollution controls. See Wallach Affidavit.

(NAFTA, Article 105 (countries must "ensure that all necessary measures are taken" to comply with the NAFTA, including compliance by "state and provincial governments")). Thus, changes in federal and state law to conform with the NAFTA may very likely result in environmental injuries to certain members of the Plaintiff organizations, particularly those in California and Wisconsin. See Claybrook Affidavit ¶¶ 6-8; McCloskey Affidavit ¶ 5; Wallach Affidavit ¶¶ 53-57.[8] For example, the NAFTA could serve as a basis to challenge federal and state laws, such as the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 348 (c)(3)(A) & 376(b)(2), as well as California's Proposition 65, Cal. Health & Safety Code §§ 2549.5 et seq., that prohibit certain carcinogens in water and food. See Wallach Affidavit ¶¶ 34, 55-56.

Furthermore, the Court notes that the allegations of possible environmental harm as a result of the NAFTA to members of the Plaintiff organizations who live on the United States-Mexico border region are sufficiently concrete as to establish standing. See Audley Affidavit ¶¶ 6, 13-20, 39-47; Perkins Affidavit ¶ 12. In particular, the Court notes that a limited free trade zone along

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[8] History demonstrates that the conflict between the NAFTA and other federal and local laws is far from hypothetical. For example, a dispute panel under the General Agreement on Tariffs and Trade, commonly referred to as GATT, has recently ruled that the Marine Mammal Protection Act impermissibly restricts Mexican trade in violation of GATT. See Plaintiffs' Exhibit C (GATT Panel Report, United States - Restrictions on Imports of Tuna, at 40-42, 45-47 (1991)). The Marine Mammal Protection Act is an environmental statute that prohibits tuna imports from countries that use fishing methods that kill dolphins in greater numbers than domestic companies are permitted by the statute. 16 U.S.C. § 1371; see Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297 (D.D.C.), aff'd, 540 F.2d 1141 (1976).

the United States-Mexican border, known as the Maquiladora program, demonstrates that the Plaintiffs' environmental concerns are not speculative. The Maquiladora program has resulted in grave environmental problems to those people living on either side of the border. See Audley Affidavit ¶ 21-26. These problems are so severe that the area has been called a "virtual cesspool and breeding ground for infectious diseases . . . . " Plaintiffs' Exhibit T, (Council on Scientific Affairs, "A Permanent US - Mexico Border Environmental Health Commission," 263 JAMA 3319, 3320 (1990)). The Plaintiffs also make claims as to the air quality on behalf of their members in specific metropolitan areas, such as San Diego, California, and El Paso, Texas, and allege that air quality in these cities will suffer as a result of the NAFTA. See e.g., Claybrook Affidavit ¶ 8.

In fact, as part of its work on the NAFTA, the Defendant prepared a Review of U.S.-Mexico Environmental Issues ("the Review"), which identifies numerous environmental issues related to the NAFTA. See Plaintiffs' Exhibit D. The Review confirms that the NAFTA will have significant environmental effects and acknowledges that NAFTA may worsen the environmental problems already existing in the United States-Mexico border area. Id., (Executive Summary at 3-7).[9] Such allegations of injury are

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[9] The Environmental Review was a general study conducted on the possible ramifications of the NAFTA but the Defendant does not contend that it qualifies as an EIS under the NEPA. It does not qualify as a EIS because it does not analyze the effect of the actual NAFTA, or identify and analyze other alternatives. 42 U.S.C. § 4332(2)(C); see Natural Resources Defense Council v. Morton, 337 F. Supp. 165 (D.D.C.) (Richey, J.), aff'd, 458 F.2d 827

sufficient for standing purposes. See Public Citizen v. National Highway Traffic Safety Admin., 848 F.2d 265 (D.C. Cir. 1988); National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988); Oregon Environmental Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987).

The Defendant complains that many of the alleged environmental effects of the NAFTA are too widespread to be confined to a particular geographical location.[10] However, the absence of a geographical nexus does not defeat a claim of standing because that "would mean that the most injurious and widespread Government actions could be questioned by nobody." United States v. SCRAP, 412 U.S. 669, 687-88 (1973).[11]

Thus, the Court concludes that standing is proper where allegation of environmental harms to particular members of the

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(D.C. Cir. 1972) (Leventhal, J.).

[10] Such claims include the allowance of pesticides on food imports from Mexico.

[11] In addition, the Plaintiffs allege that certain NAFTA provisions will cause a wide variety of other pervasive and adverse environmental effects. For example, they claim that NAFTA's reduction of trade barriers will cause a reduction in prices for domestic agricultural and meat products, thus creating pressure to intensify domestic production methods which will have a detrimental effect on the environment. See Plaintiffs' Exhibit A (NAFTA, Chapter 7); Ritchie Affidavit ¶¶ 4-8. In addition, the Plaintiffs allege that NAFTA's energy incentives for oil and gas exploration will encourage the use of nonrenewable energy resources. See Plaintiffs' Exhibit A (NAFTA, Chapter 6); Wallach ¶ 65. Finally, they claim that the NAFTA may have "pollution haven effects" in that domestic companies will move their operations to Mexico to avoid more stringent U.S. environmental laws. See Plaintiffs' Exhibit D (Review, Executive Summary at 7). While the Court does not rely on these allegations for purposes of standing, it does note that an EIS would help to clarify the extent and scope of the environmental impact of the NAFTA. See supra Section VI.

Plaintiff organizations are sufficiently concrete.[12]

VI. REQUIRING THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT ON THE NAFTA BEFORE ITS SUBMISSION TO CONGRESS IS REQUIRED BY THE CLEAR LANGUAGE OF THE NEPA AND IS CONSISTENT WITH THE POLICIES BEHIND IT.

Having determined that the APA and the NEPA apply to the NAFTA, the plain language of the NEPA makes it a foregone conclusion that the OTR must prepare an EIS on the NAFTA.[13] The NEPA requires that all federal agencies "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement setting forth the environmental impact of the proposed action. 42 U.S.C. §

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[12] The Court also notes that the Plaintiffs also allege standing on the basis of an injury to their organizational interests by claiming that they are unable to keep their members adequately informed. The Supreme Court has stated that such injury is within the zone of interest that the NEPA was designed to protect. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). Such claims of informational standing have been rejected where a plaintiff has been unable to identify any particular agency action as the source of injury. Foundation on Economic Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991) (no EIS required for a federal agency's day-to-day operations). However, the Court is not convinced that such informational standing is wholly improper where the Plaintiffs are challenging a specific proposal for legislation such as the NAFTA.

[13] The purposes of the NEPA are to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . ." 42 U.S.C. § 4321.

4332(2)(C).[14] Furthermore, it is established law that "the policies, regulations and public laws of the United States shall be interpreted and administered with the policies of NEPA 'to the fullest extent possible.'" Trustees for Alaska v. Hodel, 806 F.2d 1378, 1382 (9th Cir. 1986) (quoting 42 U.S.C. § 4332; citing Lathan v. Brinegar, 506 F.2d 677, 687 (9th Cir. 1974) (en banc)).

There is a narrow exception to the NEPA's EIS requirement only where compliance with the NEPA would result in a "clear and fundamental conflict of statutory authority." Flint Ridge Development Co. v. Scenic Rivers Ass'n., 426 U.S. 776, 791 (1976). However, such an exception is narrowly construed. See Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986) (a 90-day time limit for issuing permits under the Marine Mammal Protection Act did not excuse compliance with the NEPA's EIS requirement). There is nothing in the fast track procedures or the Trade laws that specifies that the NEPA shall not apply to the NAFTA. The Court also notes that other governmental entities, most notably the State Department, prepare EISs for international treaties. 22 C.F.R. §§ 161.5(d), 161.7(d)(2) (1992). Furthermore, as the timetable for the NAFTA's submission to Congress is not explicit, the statutes here can be reconciled with the EIS requirement contained in the

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[14] The Court also notes that CEQ regulations require an EIS where federal actions "establish a precedent for future actions with significant effects or represent[] a decision in principle about a future consideration," 40 C.F.R. § 1508.27(b)(6), or "threaten[] a violation of Federal, State, or local law or requirements imposed for the protection of the environment," id. § 1508.27(b)(10), especially where those effects are "likely to be highly controversial." Id. § 1508.27(b)(4).

NEPA.[15]

Finally, the Court notes that the House of Representatives unanimously passed a resolution stating that "Congress will not approve legislation to implement any trade agreement if such agreement jeopardizes United States health, safety, labor, or environmental laws." H.R. Res. 246, 102nd Cong., 2nd Sess. (1992), and that certain Senators have requested that an EIS be prepared on the NAFTA.[16] Such events confirm that Congress is interested in the environmental effects of the NAFTA and would be aided by the preparation of an EIS.

VII. CONCLUSION

The NEPA, and the policies under it, clearly require that a

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[15] The Defendant argues that requiring an EIS at this juncture will be unduly burdensome because there is inadequate time available for its preparation. However, the Court notes that the OTR could have very easily begun the EIS process earlier in the NAFTA negotiation process and thus any tight timetable for the preparation of an EIS on the NAFTA is entirely the result of the inaction by the prior adminstration.

In addition, our Court of Appeals noted that Congress retains the power to change its rules governing the fast track process and extend the statutory limit on its consideration of the NAFTA if it wishes to postpone such consideration until an EIS has been prepared. Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916, 922 (D.C. Cir. 1992). Furthermore, it would be manifestly unjust to deny relief in this case on the grounds that there was inadequate time to prepare an EIS because the Plaintiffs brought their prior lawsuit specifically to ensure that they could obtain judicial review with ample time for the OTR to complete an EIS. See Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139 (D.D.C. 1992) (June Green, J.); Plaintiffs' Brief in Support of its Motion for Summary Judgment, at 13.

[16] See e.g., Plaintiffs' Exhibit Z (Letter from Senator Patrick Leahy to Carla A. Hills, dated March 26, 1992, at 3).

federal agency prepare an environmental impact statement on every proposal for legislation significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Court finds that the Plaintiffs have demonstrated that there is a reasonable risk that the NAFTA may cause environmental injury and the Court concludes that the actions of the Defendant Office of the United States Trade Representative in negotiating, drafting, and signing the NAFTA are subject to review under the APA and NEPA. Therefore, the Court shall enter summary judgment for the Plaintiffs and order that the Defendant prepare an environmental impact statement on the NAFTA with all deliberate speed.

The Court notes that this agreement was negotiated by President Bush and his Trade Representative Carla A. Hill, and thus this lawsuit should not be construed as a failure of the present Administration. However, such an impact statement is essential for providing the Congress and the public the information needed to assess the present and future environmental consequences of, as well as the alternatives to, the NAFTA when it is submitted to the Congress for approval. See Natural Resources Defense Council v. Morton, 337 F. Supp. 165 (D.D.C.) (Richey, J.), aff'd, 458 F.2d 827 (D.C. Cir. 1972) (Leventhal, J.).

The Court shall enter an Order of even date herewith in accordance with this Opinion.

June 30, 1993
DATE

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, et al.,

Plaintiffs,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Defendant.

Civil Action No. 92-2102 (CRR)

FILED

JUN 30 1993

NANCY M. MAYER-WHITTINGTON
CLERK

ORDER

Before the Court are the parties' cross Motions for Summary Judgment in the above-captioned case. After careful consideration of the parties' Motions, all the papers filed in this case, and the applicable law, and for the reasons articulated in the Opinion of the Court of even date herewith, it is, by the Court, this 30 day of June, 1993,

ORDERED that the Plaintiffs' Motion for Summary Judgment shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Defendant's Motion for Summary Judgment shall be and hereby is DENIED; and it is

FURTHER ORDERED that the Defendant Office of the United States Trade Representative has acted contrary to law under the Administrative Procedures Act, 5 U.S.C. § 701 et seq., by failing to prepare an Environmental Impact Statement on the North American Free Trade Agreement as required by the National Environmental Policy Act; and it is

FURTHER ORDERED that the Plaintiffs shall have a Declaratory

Judgment that the Defendant Office of the United States Trade Representative must prepare an Environmental Impact Statement on thc North American Free Trade Agreement pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332; and it is

FURTHER ORDERED that the Defendant shall prepare such an Environmental Impact Statement forthwith, and that the Court retains jurisdiction to determine an appropriate schedule for the issuance of the aforementioned Environmental Impact Statement if there is a dispute between the parties as to a reasonable timetable for its preparation; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, FRIENDS OF THE EARTH, and SIERRA CLUB, Plaintiffs, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Defendant.	Civil Action No. 92-2102 (CRR) Judge Charles R. Richey

REPLY MEMORANDUM IN SUPPORT OF THE MOTION
BY THE UNITED STATES TO DISMISS, OR
IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Table of Authorities..... ii

Introduction..... 1

Argument..... 3

I. This Case Is Not Reviewable Under Franklin..... 3

A. Public Citizen has failed to establish any basis on which this Court may exercise review of NEPA claims..... 3

B. APA review cannot be exercised without grave and concrete interference with the separation of powers..... 8

C. Legislative EIS requirements are not judicially enforceable..... 13

II. Public Citizen Has Failed To Establish Standing..... 16

A. Public Citizen's averments of harm from NAFTA compliance establish no element of standing..... 17

B. Public Citizen's predictions of border and economic sector impacts establish no element of standing..... 20

III. NEPA Does Not Apply NAFTA..... 22

A. NEPA does not apply to the President..... 22

B. NEPA's EIS requirements conflict with the Trade Acts..... 24

C. NAFTA's effects are beyond NEPA's scope..... 28

Conclusion..... 30

TABLE OF AUTHORITIES

CASES

*Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991) 3, 16

Atchison, Topeka, & Sante Fe Ry v. Callaway, 431 F. Supp. 722 (1977) ..... passim

Babbitt v. United Farm Workers, 442 U.S. 289 (1979)..... 21

Busic v. United States, 446 U.S. 398 (1980) 28

Chamber of Commerce v. Department of the Interior, 439 F. Supp. 762 (D.D.C. 1977) 15

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.), cert. denied, 112 S. Ct. 616 (1991) 23

*Cohen v. Rice, No. 91-0282-B, slip op. (D. Maine Sep. 18, 1992) 4

Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1976) 28, 29

Dames & Moore v. Regan, 453 U.S. 654 (1981) 8

*Flint Ridge Dev. Co. v. Scenic River Ass'n, 426 U.S. 776 (1976) 24, 25

*Foundation on Economic Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991) 18

*Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) .... passim

Haig v. Agee, 453 U.S. 280 (1981) 8

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) 8

Hubbard v. Environmental Protection Agency, No. 90-5233, slip op. (D.C. Cir. Nov. 27, 1992) .... passim

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 29

Limerick Ecology Action, Inc. v. Nuclear Regulatory Comm'n, 869 F.2d 719 (3rd Cir. 1989)..... 23

---

* Cases upon which the United States principally relies are marked by an asterisk.

Los Angeles v. NHTSA, 912 F.2d 478 (D.C. Cir. 1990), cert. denied, 112 S. Ct. 1225 (1992) 22

*Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) ..... passim

*Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990) ..... passim

*Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986) ..... passim

Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) 28

NRDC v. Lujan, 768 F. Supp. 870 (D.D.C. 1991) 15

*Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981) 10, 26

*Public Citizen v. Department of Justice, 491 U.S. 440 (1989) 12, 13

Public Citizen v. United States Trade Representative, 970 F.2d 916 (D.C. Cir. 1992) ..... passim

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 26

Sierra Club v. Morton, 405 U.S. 727 (1972) 18

Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986) 15

*United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936) 8, 9

Wingfield v. Office of Management and Budget, 9 Env. Rep. Cases 1961 (D.D.C. 1977) 15

STATUTES

U.S. Const. art. I, § 8, cl. 3 11
U.S. Const. art. II, § 3 ..... passim
U.S. Const. art. III ..... passim

Administrative Procedure Act (APA), 5 U.S.C. § 702 ..... passim

Federal Advisory Committee Act (FACA),
5 U.S.C. App. 2 12

Federal Insecticide, Fungicide, and Rodenticide
Act (FIFRA), 7 U.S.C. §§ 136 et seq 28

National Environmental Policy Act (NEPA),
42 U.S.C. §§ 4321-4370b ..... passim

Omnibus Trade and Competitiveness Act of 1988,
Pub. L. 100-418, 102 Stat. 1107 et seq. (1988)
(codified at 19 U.S.C. §§ 2101-2191, 2901-2909)
(collectively, the Trade Acts) ..... passim
19 U.S.C. § 2151 27
19 U.S.C. § 2155 27
19 U.S.C. § 2155(g) 27
19 U.S.C. § 2901 ..... 26, 27
19 U.S.C. § 2902(c) 5
19 U.S.C. § 2903(a)(1) 5
19 U.S.C. § 2903(a)(1)(B) 5
19 U.S.C. § 2903(b)(1) 5

40 C.F.R. §§ 1500-1517 ..... passim
40 C.F.R. § 1504.1 14
40 C.F.R. § 1508.12 23
40 C.F.R. § 1508.17 23
40 C.F.R. § 1508.18(b)(1) 23

57 Fed. Reg. 43603 (Sep. 21 1992) 5

MISCELLANEOUS

Declaration of Julius L. Katz (Nov. 14, 1991) 25

Declaration of Julius L. Katz (Nov. 5, 1992) ..... passim

Supplemental Declaration of Julius L. Katz
(Dec. 10, 1992) ..... passim

Edward S. Corwin, The President 200-223 (5th ed.
1984) 8

"The Extension of Fast Track Procedures:
Message from the President of the United
States," H.R. Doc. No. 51, 102d Cong., 1st
Sess. (1991) 6

Federalist No. 64, at 392-93 (Jay)
(C. Rossiter ed. 1961) 10

Louis Henkin, Foreign Affairs and the Constitution 173-188 (1972) 8

Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments (Sep. 18, 1992) 18

Review of U.S.-Mexico Environmental Issues (Feb. 26, 1982) 20

INTRODUCTION

The reply brief that Plaintiffs Public Citizen, Friends of the Earth, and Sierra Club (collectively, Public Citizen) have filed in this action is simply a plea for this Court to disregard any controlling constitutional, statutory, or other binding authority that does not appear within the four corners of the National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321-4370b; see also 40 C.F.R. §§ 1500-1517 (Council on Environmental Quality (CEQ) regulations). Only by donning NEPA blinders is Public Citizen able to ignore the Supreme Court's unequivocal holding that review under the Administrative Procedure Act (APA), 5 U.S.C. § 702, is unavailable where only the President may take final action. Franklin v. Massachusetts, 112 S. Ct. 2767, 2773-76 (1992). This bars any review of Public Citizen's NEPA claims because only the President, and not the United States Trade Representative (USTR), may take final action with respect to the North American Free Trade Agreement (NAFTA). This bar to review is further supported by the constitutional separation of powers. Any consequent limits to judicial enforcement of NEPA result from a straightforward application of pertinent law and not, as Public Citizen would have it, from an "absurd" or "extraordinary" position fashioned by the government.

Public Citizen's unwillingness to confront controlling precedent is equally evident in its failure to adduce specific facts to support its claim to standing. Public Citizen simply has repackaged the averments that already have been found inade-

quate to establish its standing. Those averments reiterate speculations about NAFTA's effects that are demonstrably false as a matter of law, purely conjectural as a matter of fact, and concern purported "injury" from future events that an EIS -- which addresses environmental impacts -- would not address.

Public Citizen's arguments on the merits, which conspicuously lead off their brief in an attempt to distract this Court from the fatal flaws in their claim to review, also disregard of pertinent law, particularly the elaborate and considered mechanism Congress established to reconcile public and legislative participation in trade policy to the President's powers and the imperatives of diplomacy.[1] Public Citizen offers many policy reasons for its preference that NEPA be superimposed on the comprehensive procedures in the Trade Acts, and is explicit about its intention to expose confidential matters to public scrutiny and to impede the fast-track process. But Public Citizen's policy goals, like the terms of NEPA they seek to impose, squarely conflict with the Trade Acts and the fast-track process. Thus, Public Citizen's political preference cannot be given the cognizance of law. Moreover, even if the Court were to focus on NEPA to the exclusion of other authority, NAFTA's effects are too attenuated to "significantly affect[]" the environment within the meaning of the statute.

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[1] The Trade Act of 1974 and subsequent amendments, 19 U.S.C. §§ 2101 et seq., including the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 et seq. (1988) (codified at 19 U.S.C. §§ 2101-2191, 2901-2906) (collectively, the Trade Acts)

ARGUMENT

I. THIS CASE IS NOT REVIEWABLE UNDER FRANKLIN.

A. Public Citizen has failed to establish any basis on which this Court may exercise review of NEPA claims. Public Citizen has failed to offer the Court any plausible basis on which to exercise review. As fully set forth in the United States' opening brief, Franklin makes clear that APA review, which is limited to "final agency action," 5 U.S.C. § 702, is not permitted where only the President may make a "final and binding" determination. Franklin v. Massachusetts, 112 S. Ct. 2767, 2773-76 (1992)(discussed in U.S. Br. at 15-20). This principle is applied even where the President's role may be "ministerial," and assumes particular strength where "Congress thought it was important to involve a constitutional officer in the . . . process." Franklin, 112 S. Ct. at 2775. The court of appeals has made clear that this construction is necessary to preserve the constitutional "balance" between the Executive and Legislative Branches. Armstrong v. Bush, 924 F.2d 282, 288-89 (D.C. Cir. 1991). These holdings must be applied according to two further and settled dictates. First, the terms of the APA must be satisfied before the merits of a claim under NEPA can be addressed. Lujan v. National Wildlife Federation, 110 S. Ct. 3177, 3190 (1990)(NWF). Second, as recently reaffirmed by the en banc court of appeals, the APA is a waiver of sovereign immunity and, as such, its terms must be narrowly construed. Hubbard v.

Environmental Protection Agency, No. 90-5233, slip op. at 4-5 (D.C. Cir. Nov. 27, 1992)(en banc).

In its reply, Public Citizen simply fails to apply these principles or to account for the numerous sources of authority that vest the President with sole discretion to take final action on a trade agreement. With respect to NAFTA, the only actions that may be deemed final are the President's signing of the agreement or the President's transmittal of the agreement and implementing legislation to Congress. The President's power over such actions is established as a matter of constitutional law, both in the President's exclusive power over the conduct of international negotiations and agreements, see U.S. Br. at 20-24 (collecting authorities), and the President's undisputed duty to transmit legislation to Congress, under the explicit command that the President "shall from time to time . . . recommend to [Congress'] Consideration such measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. Franklin established that the statutory conferral of power on the President to take action precludes APA review; certainly the constitutional assignment of such power should be accorded no less significance. See Franklin, 112 S. Ct. at 2774-75. Cohen v. Rice, No. 91-0282-B, slip op. at 2 (D. Maine Sep. 18, 1992)(reproduced as attachment B)(President's base closure recommendations to Congress not reviewable under Franklin even though prepared by an agency).

Consistent with the President's inherent and textually conferred powers, the Trade Acts repeatedly provide that only the President may take action, including final action, with respect to a trade agreement. For example, the Trade Acts provide that the President, and only the President, must provide the statutory notification of his intention to enter a trade agreement, 19 U.S.C. § 2903(a)(1); the President, and only the President, may submit the final agreement, implementing legislation, and supporting information to Congress, 19 U.S.C. § 2903(a)(1)(B). The Trade Acts are even more explicit than the statute at issue in Franklin in providing that only the President may perform each step along the way to final action. 19 U.S.C. § 2902(c) (President to provide notice of negotiations); 19 U.S.C. § 2903(b)(1)(President to request extension of fast track).

These constitutional and statutory requirements that the President take any "final" action with regard to NAFTA are dispositive of Public Citizen's claim to review as a matter of law under Franklin. Yet they also have been amply illustrated by the course of NAFTA's negotiation and conclusion as a matter of fact. The United States' undisputed submissions to this Court establish the President's direct, personal role from the inception of NAFTA negotiations through the conclusion of the agreement.[2] This role culminated in the announcement by the

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[2] See Declaration of Julius L. Katz (Nov. 5, 1992) ¶¶ 5-6; see also 57 Fed. Reg. 43603 (Sep. 21 1992) (President's notice of intent to enter NAFTA); Response of the Administration to Issues Raised in Connection with the Negotiation of a North

(continued...)

White House last week that President Bush intends to sign NAFTA on December 17, 1992, at the same time the other NAFTA heads of state sign the agreement. Supplemental Declaration of Julius L. Katz ¶ 4 (Dec. 11, 1992). The President thereafter will decide, in his sole discretion, whether and when to transmit the agreement and implementing legislation to Congress. If President Bush does not transmit the agreement before January 20, 1993, the decision will lie in the sole discretion of his successor. Katz Decl. ¶ 6; Supp. Katz Decl. ¶¶ 4-6. In either event, and as was true for the agency defendant in Franklin, USTR "cannot act alone." 112 S. Ct. at 2775.

Faced with these consistent, repeated recognitions in law and fact that only the President may take final action on NAFTA, Public Citizen responds by donning its NEPA blinders. Public Citizen argues that the scope of the APA must be construed according to NEPA, which imposes obligations on agencies that provide "significant cooperation" in the development of a proposed action. Pl. Reply at 19-21. This argument defies the now settled principle that the APA's requirements for review must be satisfied before a court may reach the merits of a NEPA claim. NWF, 110 S. Ct. at 3190; Public Citizen v. United States Trade Representative, 970 F.2d 916, 918 (D.C. Cir. 1992) (NAFTA I).

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[2](...continued)
American Free Trade Agreement (May 1, 1991), Pl. Ex. R. ("Transmitted to the Congress by the President")(emphasis supplied); "The Extension of Fast Track Procedures: Message from the President of the United States," H.R. Doc. No. 51, 102d Cong., 1st Sess. (1991), U.S. Ex. 1 in No. 91-1916 (JLG)(U.S. Ex. 1*)(President's description of pending negotiations).

This also is flatly inconsistent with the holding in Franklin, which makes clear that litigants cannot expand the scope of APA review by pointing to an agency's role (or its "significant cooperation") in the President's final action. 112 S. Ct. at 2775 (rejecting argument that agency preparation of transmittal gave President's role "no substantive content"). Public Citizen's claim to APA review thus asks for no less than a declaration that both Franklin and NWF were wrongly decided.

Public Citizen also tries to transform the conclusion of a major international agreement into "final agency action" by asserting that USTR "conducted the negotiations and developed the NAFTA's terms," and that USTR initialed the agreement and sent copies of the text to Congress. Pl. Reply at 21-22. The court of appeals made clear however, that USTR's role in the first round of this litigation, -- "conduct[ing] the negotiations and develop[ing] the NAFTA's terms", id. -- may never be deemed a "final agency action" that creates a basis for APA review. See NAFTA I, 970 F.2d at 919. Public Citizen has identified no basis for attributing legal or practical significance to USTR's initialing of the agreement or its provision of copies of the agreement to Congress. These gestures were clerical: initialing merely indicated the negotiators' agreement on a fixed text for submission to their respective heads of state. The distribution of text copies hardly constitutes "final agency action."

More fundamentally, the acts of agency subordinates could never amend constitutional and statutory assignments of power to

the President. Indeed, if such agency acts could establish "final agency action," Franklin would have been a far stronger case for APA review than this case, because USTR's role with regard to NAFTA is far more constrained, and the President's role far more dominant and less "ministerial," than was true concerning the agency and the President in Franklin.

B. APA review cannot be exercised without grave and concrete interference with the separation of powers. Public Citizen's failure to provide a basis on which to distinguish Franklin is fatal to any claim to APA review, and the constitutional concerns touched upon in Franklin are even more serious in this case. See Franklin, 112 S. Ct. at 2775 (refusing APA review "[o]ut of respect for the separation of powers and the unique constitutional position of the President"). The unprecedented review that Public Citizen seeks would impermissibly impinge on two distinct executive powers: the President's power to conduct foreign relations and to conclude international agreements, United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936)("the President alone has the power to speak or listen as a representative of the nation");[3] and the President's power to transmit matters to Congress in accordance with the express constitutional command that the President "shall ... recommend to [Congress'] Consideration such measures as he

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[3] See also Dames & Moore v. Regan, 453 U.S. 654 (1981); Haig v. Agee, 453 U.S. 280 (1981); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Louis Henkin, Foreign Affairs and the Constitution 173-188 (1972); Edward S. Corwin, The President 200-223 (5th ed. 1984).

shall judge necessary and expedient." U.S. Const. art. II, § 3. The constitutional doubt such review would raise precludes its exercise here.

Review threatens severe interference with the constitutional separation of powers because any relief by this Court, even if narrowly directed to USTR, would involve the judiciary in the President's diplomatic relationship with other nations; in his decision to transmit international agreement and legislation to Congress; and in the congressionally established political process for trade agreement approval. The separation of powers permits neither Congress nor the judiciary to constrain the President's power to negotiate and conclude agreements with by imposing an EIS requirement. Curtiss-Wright Export Corp., 299 U.S. at 319. ("Congress itself is powerless to invade" negotiation and conclusion of international agreements). Nor may the judiciary enforce limits on the President's transmittal of an agreement or implementing legislation, which the constitutional text plainly commits to his sole discretion. U.S. Const. art. II, § 3 (the President "shall . . . recommend to [Congress] . . . such measures as he shall judge necessary and expedient") (emphasis supplied). And there is simply no precedent for judicial involvement in the political process in which the President seeks approval for an international agreement.

The constitutional concerns that review would present in this case are practical as well as principled. Other NAFTA parties, and parties to other negotiations vital to United States

foreign policy, may infer from any exercise of review in this case that the President lacks sufficient authority to enter into agreements. Supp. Katz. Decl. ¶ 7. Review would also diminish foreign governments' confidence in the President's reliability and power to seek Congress' consideration of the agreement on an expedited basis. Id.; see also Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1366 (D.C. Cir. 1981)(Wilkey, J.)("spectre of [NEPA] litigation" would impinge foreign relations). The President's authority as the nation's sole representative would be undermined by a process in which issues concerning the adequacy of other countries' laws, institutions, and intentions would be publicly "adjudicated," wherever remote environmental effects are possible.

In addition, the possibility that this process would lead to public disclosure of sensitive positions asserted in negotiations would threaten other nations' confidence in the President's ability to maintain confidentiality, and to act with expedition and discretion. The Framers specifically recognized this ability as a fundamental element of effective diplomacy. Federalist No. 64, at 392-93 (Jay)(C. Rossiter ed. 1961)(President must be able to act with "perfect secrecy and immediate dispatch" in international relations). Moreover, the political process in which Congress asserts its power to approve or reject an international agreement like NAFTA, and in which it debates the adequacy of any information (including information about environmental issues) transmitted by the President, should take

place on the floor of each congressional chamber, without concurrent or antecedent "adjudication" of such issues in an Article III court. The principal negotiator for NAFTA has testified without dispute that these concerns are directly presented in this case. See Katz Decl ¶ 9; Supp. Katz Decl. ¶ 7. This diplomat's appraisal should be accorded deference, and belies Public Citizen's unfounded assertion that this case presents only "the mere possibility of some hypothetical harm" to the powers of the coordinate branches. Pl. Reply at 25.

It is no answer to argue, as Public Citizen has throughout two rounds of litigation over NAFTA, that Congress' power over foreign commerce renders this an area of shared power, in which the Supreme Court has suggested a "balancing approach" to separation of powers issues. Pl. Reply at 24-25 (citing Nixon v. Administrator of General Servs., 433 U.S. 425, 443 (1977)). As an initial matter, this argument misapprehends the nature of Congress' foreign commerce power: Congress has no power itself to negotiate or conclude a trade or other international agreement with foreign sovereigns. Congress surely may legislate as it will concerning foreign commerce. U.S. Const. art. I, § 8, cl. 3. Congress may refuse to consider, or may reject, NAFTA and its implementing bills and even may set tariff rates or enact trade statutes that conflict with NAFTA. But Congress may not constitutionally interfere with the President's negotiation or conclusion of a trade agreement, nor constrain the President's transmittal of such an agreement to Congress. If this Court were

to conclude otherwise, the effect of such relief would be to limit the power of the Congress as well as that of the President, by permitting the 91st Congress (which enacted NEPA in 1970) to interfere with the 103rd Congress' consideration of NAFTA and its implementing legislation. Thus, there is no "balance" that this Court can strike in exercising review that would ameliorate the threatened intrusion on presidential and congressional powers.

Public Citizen's attempt to dismiss the pertinence of Public Citizen v. Department of Justice, 491 U.S. 440 (1989), to this issue simply is disingenuous. Public Citizen suggests that only Justice Kennedy's concurrence identified a constitutional problem in an attempt, by Public Citizen itself, to impose the public disclosure and other procedural requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, on the Department of Justice's role in the President's selection of judicial nominees. Both majority and concurrence, however, recognized the separation of powers issue presented and refused to apply FACA on that ground. Compare Public Citizen, 491 U.S. at 466 (1989) (construing statute to avoid "dangerous constitutional thickets") with id. at 485 (Kennedy, J., concurring)(concluding that Congress could not impose procedural requirements on President's inherent constitutional authority). The parallels between Public Citizen and this case are indeed striking. FACA's procedural requirements are directly comparable to those of NEPA. There as here, the nominal agency defendant was not the President. Further, there as here, the defendant acted in support of the

President in exercising constitutional power subject to ultimate control by the Legislative Branch: in Public Citizen, the nomination was subject to advice and consent of the Senate; in this case, NAFTA requires approval by both House and Senate. Indeed, this is an even more compelling case for dismissal than Public Citizen, because this case involves not only domestic political concerns of the two branches, but also sensitive issues of international diplomacy that were absent in Public Citizen.[4]

C. Legislative EIS requirements are not judicially enforceable. The numerous provisions of law and undisputed facts in this case establishing that only the President may take final action with respect to NAFTA, together place this case at the core of the President's power and beyond the scope of APA review under any plausible reading of Franklin. Public Citizen nonetheless seeks to avoid this result, urging the Court to refrain from applying Franklin because it "would mean that NEPA's requirement that agencies prepare EISs on proposals for legislation, 42 U.S.C. §. 4332(2)(C), is never judicially enforceable because the President, not federal agencies, has the constitutional power to submit legislation to Congress." Pl. Reply at 1; see also id. at 21-22. This case does not require the Court to reach this broad issue, however, because the

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[4] These considerations also support dismissal under the doctrine of equitable discretion. See U.S. Br. at 44-45 (collecting cases). Contrary to Public Citizen's assertions in its reply, Pl. Reply at 16 n.2, no case relied on by the United States requires either a showing of mootness or of a political question.

President's sole power to take final action with respect to NAFTA is so unequivocally established in the Constitution, the Trade Acts, and the factual record.

If the Court were to address the implications of Franklin for APA review of LEIS requirements generally, however, it should do so in light of Public Citizen's recognition that "the President, not federal agencies, has the constitutional power to submit legislation to Congress." Pl. Reply at 1; Franklin, 112 S. Ct. at 2775 (refusing APA review "[o]ut of respect for the separation of powers and the unique constitutional position of the President"). Because Franklin makes clear that APA review is unavailable when the President is responsible for a submittal to Congress, this certainly supports the United States' consistent position that NEPA's legislative EIS (LEIS) requirement is not enforceable judicially, but is only subject to oversight by the sitting Congress and, within the Executive Branch, through CEQ, the Environmental Protection Agency and other federal agencies. See 40 C.F.R. § 1504.1.

This Court was among the first to confront the issue of whether there is a private right of action to enforce LEIS requirements under the APA. Atchison, Topeka, & Sante Fe Ry v. Callaway, 431 F. Supp. 722 (1977)(Richey, J.). The Court premised its decision that there is such a private right of action, and on the absence of any language in NEPA to distinguish between the LEIS and other NEPA requirements, and on the APA presumption of reviewability. Id. at 726-29. At that time,

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If the Court were to address the implications of Franklin for APA review of LEIS requirements generally, however, it should do so in light of Public Citizen's recognition that "the President, not federal agencies, has the constitutional power to submit legislation to Congress." Pl. Reply at 1; Franklin, 112 S. Ct. at 2775 (refusing APA review "[o]ut of respect for the separation of powers and the unique constitutional position of the President"). Because Franklin makes clear that APA review is unavailable when the President is responsible for a submittal to Congress, this certainly supports the United States' consistent position that NEPA's legislative EIS (LEIS) requirement is not enforceable judicially, but is only subject to oversight by the sitting Congress and, within the Executive Branch, through CEQ, the Environmental Protection Agency and other federal agencies. See 40 C.F.R. § 1504.1.

This Court was among the first to confront the issue of whether there is a private right of action to enforce LEIS requirements under the APA. Atchison, Topeka, & Sante Fe Ry v. Callaway, 431 F. Supp. 722 (1977)(Richey, J.). The Court premised its decision that there is such a private right of action on the absence of any language in NEPA to distinguish between the LEIS and other NEPA requirements, and on the APA presumption of reviewability. Id. at 726-29. At that time,

however, the Court identified a division of authority on the question, and specifically discussed a contrary decision in Wingfield v. Office of Management and Budget, 9 Env. Rep. Cases 1961 (D.D.C. 1977)(text of opinion reproduced as attachment A). Wingfield reasoned that:

> Congress has within its own investigatory and other resources ample means to obtain from the Executive whatever information it desires relating to environmental impact prior to taking action. It is clear, of course, that Congress did not intend to stultify itself by [NEPA] if at any point it was satisfied it had enough information to proceed in a given situation.

Id. at 1963 (quoted in Callaway, 431 F. Supp. at 727). The Wingfield court recognized the constitutional concern presented by judicial enforcement of LEIS requirements, stating that "[f]or the Court to interject itself into the complexities of ongoing legislative process at the behest of a private party would require the clearest kind of directive from Congress, which is not present here." 9 Env. Rep. Cases at 1963. The court further said that to enforce the LEIS requirement would "place the Court in conflict with coordinate branches of the Government." Id.[5]

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[5] No case has considered this issue as it now comes before this Court in light of Franklin. Other prior cases have arisen in unusual procedural postures and so add little to the analysis in Callaway and Wingfield. See NRDC v. Lujan, 768 F. Supp. 870 (D.D.C. 1991)(following Callaway)(dismissed on other grounds in Order, No. 89-2345 (D.D.C. Feb. 27, 1992)(dismissing LEIS case for lack of case or controversy due to congressional inaction)); see also Chamber of Commerce v. Department of the Interior, 439 F. Supp. 762 (D.D.C. 1977)(denying standing to compel LEIS preparation); cf. Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986)(agency had agreed to prepare an EIS, APA reviewability not discussed).

The United States respectfully submits that the legal footing of this Court's decision in Callaway fifteen years ago has been changed by NWF, Franklin, and Armstrong. Together, these cases make clear that the requirement of "final agency action" is an absolute prerequisite to NEPA review, and that this is lacking where the legal or factual context establish that only the President may make a final and binding determination with respect to the action that plaintiffs invoking the APA and NEPA seek to challenge. Thus, the APA provides the basis, which this Court in Callaway found lacking in NEPA, for distinguishing between the enforceability of EISs and LEISs. Moreover, while this Court placed emphasis in Callaway on the presumption of reviewability, subsequent cases have given greater emphasis to the principle that, as a waiver of sovereign immunity, the APA is to be narrowly construed. Hubbard, No. 90-5233, slip op. at 4-5.

In addition, Congress' "ample means to obtain from the Executive whatever information it desires relating to environmental impact prior to taking action," as identified by the Wingfield court, have been fully exhibited in this case. Congress demanded, and the President took, both substantive and procedural steps to ensure that environmental issues were adequately considered in NAFTA. See U.S. Ex. B at Tab 7.

II. PUBLIC CITIZEN HAS FAILED TO ESTABLISH STANDING.

Public Citizen bears the burden of coming forward with evidence establishing "specific facts" in support of each element of standing: injury in fact, traceability, and redressability.

Fed. R. Civ. P. 56(e); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992)(Defenders). Yet there is no basis for this count to depart from Judge Green's earlier conclusion that Public Citizen lacks standing. The averments now before the Court remain hopelessly conjectural and have not traced any distinct injury to NAFTA that an EIS would not even address.

A. Public Citizen's averments of harm from NAFTA compliance establish no element of standing. Public Citizen appears now to acknowledge that its claim of environmental injury cannot depend on the likelihood of future challenges to United States laws, shifting instead to the position that "[t]his Court need not predict whether such trade challenges will be brought; it need only conclude that the NAFTA's terms are likely to harm plaintiffs in the event of compliance, be it voluntary or the result of a dispute resolution proceeding." Pl. Reply at 10. As examples of the effect of NAFTA "compliance," Public Citizen states that the Environmental Protection Agency "will, where it has discretion, likely decide not to adopt a pesticide tolerance that would conflict with the NAFTA," or that the Department of Energy may conclude that certain renewable energy subsidies conflict with the agreement. Pl. Br. at 8-9.

By this argument, Public Citizen simply substitutes a new set of improbable, hypothetical harms for another. Where once Public Citizen asked this Court to evaluate its predictions of future trade disputes, it now asks the Court to predict how NAFTA will affect the future exercise of regulatory discretion by

"federal agencies or the Congress." This is nothing more than a generalized interest in future environmental policy, and such ideological or political concerns are never sufficient to establish an injury in the sense required by Article III. Sierra Club v. Morton, 405 U.S. 727, 739 (1972)); Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991).

Another reason that Public Citizen's averments about NAFTA compliance cannot establish an Article III injury is that they falsely assume that trade agreements, and NAFTA in particular, constrain environmental regulation in a manner that will reduce environmental protection, and that the precise nature of those constraints can be authoritatively determined now. There is no basis, however, on which to assume that any United States regulatory agency or legislative body, whether state or federal, will be unable to maintain and strengthen environmental protection to the same degree that it would in the absence of NAFTA. NAFTA broadly preserves each country's right to maintain, enforce, and strengthen its environmental standards. See Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments (Sep. 18, 1992)(the President's Report), U.S. Ex. B., Tab 7. Public Citizen's assertions of harm because pesticide standards may "conflict" with NAFTA, or that NAFTA affirmatively allows "harmful pesticides on food imports from Mexico," therefore are demonstrably false under NAFTA's provisions. Pl. Reply at 10-11.

Similarly, Public Citizen's rote assertion that NAFTA would eliminate renewable energy subsidies is based on an unsupported inference from one provision of the text. Pl. Br. at 11 (citing Affidavit of Lori Wallach ¶ 65). The fact that NAFTA authorizes certain subsidies says nothing about whether other subsidies conflict with the agreement, and no such exercise in interpretation can be meaningful outside the context of a specific trade dispute. See NAFTA art. 608.1. Pl. Ex. A. In addition, even if an authoritative interpretation could be established in the abstract, there would remain the further task of correlating abstract interpretations of NAFTA with likely political and administrative choices in the future, and correlating those choices in turn with actual environmental impacts. It would be difficult to conjure up a more extreme example of a purported injury depending entirely on the actions of countless third parties, ranging from federal and state lawmakers to judges and agency bureaucrats. Defenders, 112 S. Ct. at 2137 (standing may not depend "on the unfettered choices made by independent actors not before the courts")(quoting ASARCO, Inc. v. Kadish, 490 U.S. 605, 615 (1989)(Kennedy, J.)).

Accordingly, the ostensible "injury" that Public Citizen identifies with NAFTA is too conjectural to support standing, and an EIS would never answer Public Citizen's purported lack of information about environmental impacts of NAFTA. The tasks of inferring whether and to what extent future legislators and regulators may make different choices under NAFTA, what those

choices might be in the absence of NAFTA, and whether there is any net difference in environmental impacts between these two imagined worlds, requires an oracle rather than an EIS.[6]

B. Public Citizen's predictions of border and economic sector impacts establish no element of standing. The speculation Public Citizen has adduced as "evidence" of harm from the legal and political effects attributed to NAFTA compliance are reproduced in the "evidence" of harms identified with economic sector impacts and with harms to Public Citizen's border members. Yet in the latter examples, the number of contingent, discretionary responses that are necessary to establish environmental "injury" increase by several fold, to encompass both private and public choices, in both the United States and Mexico. E.g. Declaration of John Audley ¶¶ 14-20 (predicting future Mexican government's future course in environmental enforcement; id. at ¶¶ 21-26 (predicting course of future economic development). The resulting claim of injury is commensurately more conjectural, and Public Citizen's need for information about NAFTA's environmental impacts is correspondingly less than likely to be redressed in an EIS. See Defenders, 112 S. Ct. at 2136 ("it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a

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[6] Accordingly, USTR's Environmental Review (Feb. 26, 1982), Pl. Ex. b, does not purport to make specific predictions concerning environmental impacts and Public Citizen does not suggest that the analyis in that document constitutes an EIS.

favorable decision'")(quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976)).

The asserted harms from economic sector and border impacts also depend on the erroneous assumption that specific NAFTA provisions have discrete environmental impacts that may be ascertained in isolation. The general parameters for trade set by NAFTA defy such analysis, however. The environmental impacts of any particular provision will depend on a host of variables that permit a nearly infinite set of possible environmental outcomes. These outcomes will depend primarily on factors beyond the scope of NEPA. For example, the effect of NAFTA on border air and water quality will depend only in minor part on provisions in NAFTA itself: impacts will turn on each NAFTA country's autonomous decisions concerning its environmental laws and level of enforcement; the implementation of the bilateral Border Environmental Plan to address these problems; the effect of wealth on demands for environmental quality; the pace of development in the NAFTA parties' economies; the global economic conditions; the distribution of new development at the border and interior of the NAFTA parties; and other national and international developments and pressures. This confluence of intervening factors precludes any assertion that Public Citizen's affiants have presented an injury that is "certainly impending." Babbitt v. United Farm Workers, 442 U.S. 289, 298 (1979). And

predictions of this sort never could yield a credible statement of environmental impacts traced to specific NAFTA provisions.[7]

Public Citizen strenuously contends that the informational or procedural nature of NEPA injuries allows for greater uncertainty in the evidence adduced to establish the requisites of standing. Pl. Reply at 13 (quoting Defenders, 112 S. Ct. at 2142-43 n.7.). This is a patent distortion of the relevant opinion which states only that in the case of a procedural or informational claims plaintiffs who otherwise establish a cognizable, redressable injury do not bear the burden of establishing that the challenged agency decision would have been different if a certain procedure had been followed or, as under NEPA, an EIS had been prepared. 112 S. Ct. at 2142-43 n. 7. The United States has never sought to impose such a burden in this case. Rather, the United States has maintained that Public Citizen must satisfy the requirement, reaffirmed in Defenders, 112 S. Ct. at 2136, of an "imminent" injury, that is traceable to NAFTA's provisions, which an EIS could address.

III. NEPA DOES NOT APPLY TO NAFTA

A. NEPA does not apply to the President. Public Citizen concedes that NEPA limits the scope of the EIS requirement to federal "agencies," 42 U.S.C. § 4332, and that NEPA does not

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[7] The claim of standing here thus contrasts sharply with that in Los Angeles v. NHTSA, 912 F.2d 478, 492 (D.C. Cir. 1990), cert. denied, 112 S. Ct. 1225 (1992)(cited in Pl. Reply at 12), which involved the direct effect of a specific, known pollution control decision (automobile emission standards) and a single type of environmental impact (greenhouse gas production). See also U.S. Br. at 30 (discussing Los Angeles v. NHTSA).

apply to the President. 40 C.F.R. § 1508.12. The President's exclusive constitutional, statutory, and actual role in concluding and signing NAFTA, and transmitting the agreement and implementing legislation to Congress are therefore as fatal to Public Citizen's claims on the merits as they are to its claim to APA review under Franklin, 112 S. Ct at 2773-76. USTR's supporting role in NAFTA does not divest the agreement of its inherently presidential character.

Rather than explaining how USTR could possibly undertake an international agreement without the President's authority, Public Citizen simply points to the CEQ regulation stating that "treaties and international conventions or agreements" are federal actions subject to NEPA. 40 C.F.R. § 1508.18(b)(1); see also 40 C.F.R. § 1508.17. This regulation, however, must be read in conjunction with the CEQ regulation that excludes the President from the scope of NEPA. 40 C.F.R. § 1508.12. In light of the President's role in international agreements pursuant to the Trade Acts and the Constitution, Public Citizen's reliance on the CEQ regulation is misplaced. Moreover, whatever the force of the CEQ regulations,[8] they are powerless to expand the scope of

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[8] CEQ regulations are not binding on other agencies unless they have adopted them or otherwise promulgated their own NEPA regulations. See Defenders, 112 S. Ct. at 2140, 2141 & n.4 (plurality opinion). Public Citizen relies on several pre-Defenders cases to argue that USTR is bound by CEQ regulations. See, e.g., Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201-02 (D.C. Cir.), cert. denied, 112 S. Ct. 616 (1991). But see Limerick Ecology Action, Inc. v. Nuclear Regulatory Comm'n, 869 F.2d 719, 725 (3rd Cir. 1989) (CEQ regulations not binding on other agencies). Unlike this case, however, all the

(continued...)

NEPA, constrict the President's constitutional powers, or rewrite the Trade Acts in the way Public Citizen suggests.

B. NEPA's EIS requirements conflict with the Trade Acts. The Trade Acts and the fast-track process establish comprehensive procedures in which Congress balanced the President's need for flexibility and speed in negotiation and conclusion of an agreement on the one hand, and Congress' desire to permit participation in trade policy on the other. To alter this balance by superimposing NEPA's conflicting procedures onto the Trade Acts would sabotage the Acts' carefully drawn time frames and procedures as well as the foreign and domestic policy concerns that underlie these provisions. See Flint Ridge Dev. Co. v. Scenic River Ass'n, 426 U.S. 776, 787-88 (1976); Merrell v. Thomas, 807 F.2d 776, 779, 781 (9th Cir. 1986).

Public Citizen has failed to explain away the two distinct conflicts between NEPA's EIS requirement and the Trade Acts. First, the lengthy EIS process conflicts with the expedited consideration of trade agreements provided for in the Trade Acts, and thus would thwart Congress' intent to fashion a process that permits the President to transmit and Congress to consider a trade agreement in a timely manner. See Flint Ridge, 426 U.S. at 787-88 (statutory timetables preclude compliance with lengthy EIS

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[8](...continued)
cases on which Public Citizen relies involve agencies that had adopted the CEQ regulations or conceded that NEPA applied to the challenged action.

process).[9] To compel the preparation of an EIS on trade agreements would require USTR either to persuade the President to delay signing the agreement, notifying Congress, and transmitting implementing legislation, or to prepare an EIS prior to the completion of negotiations. The first alternative assumes a power, which USTR does not have, to stay the President's hand. Even if USTR had such a power, to force such a delay would impinge on the President's constitutional and statutory powers. The second alternative -- requiring preparation of an EIS prior to the completion of negotiations -- is practically as well as legally impossible, as it would require repeated preparation of preliminary EISs for negotiating positions as well as for proposed agreements that might never culminate in a final agreement. NAFTA I, 970 F.2d at 919-20: Declaration of Julius L. Katz (Nov. 14, 1991) (No. 91-1916) ¶ 9. ("[C]onsensus in any one area does not become final unless and until final agreement is reached in all sectors ....").

The second conflict that would result from grafting the NEPA EIS requirement onto trade negotiations arises from the specific and comprehensive process set forth in the Trade Acts. Of course, as Public Citizen notes, a conflict sufficient to preclude application of the EIS requirement does not arise simply because Congress provides a few general objectives to guide

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[9] Indeed, Public Citizen's own reading of the Trade Acts suggests that "the fast-track procedures by their nature prevent a court from intervening in time to provide meaningful judicial review." NAFTA I, 970 F.2d at 922.

application of a statute. Pl. Reply at 27. A conflict does arise, however, if, as in the Trade Acts, Congress tailors a comprehensive process that is carefully limited to accommodate diplomacy -- limits left unaddressed by the more general approach taken by NEPA. Merrell, 807 F.2d at 779.[10] The court of appeals previously has refused to apply NEPA where presented with a similarly comprehensive and time-sensitive procedural scheme that was designed to accommodate sensitive foreign and trade policy concerns. NRDC v. NRC, 647 F.2d at 1366, 1386 (Wilkey and Robinson, JJ.).[11]

The Trade Acts provide a detailed declaration of Congress' trade objectives, Congress' expectations about the scope of information and analysis that should support an agreement, and the fora for comment on the agreement.[12] Congress specifically declared the objectives that are to guide negotiations in each of sixteen major trade categories. 19 U.S.C. § 2901. Only with

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[10] USTR's position that NEPA does not apply to NAFTA has not diminished its commitment to ensuring that "important environmental effects will not be overlooked." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). The President's Report describes the extensive consideration that, in accordance with the procedures specified in the Trade Acts, has been devoted to environmental concerns. See U.S. Ex. B. at Tab 7.

[11] Contrary to Public Citizen's suggestion, both opinions in NRDC v. NRC found the application of the EIS requirement to result in statutory conflict.

[12] Although these provisions, imposed as a condition of the fast-track process, specify that the President engage in some analysis of the agreement and seek certain types of input, they do not require -- contrary to Public Citizen's claim, Pl. Br. at 36 -- either the level of analysis or the consideration of alternatives that an EIS requires.

respect to trade in services and foreign investment does Congress require consideration of environmental objectives. 19 U.S.C. § 2901 (9) & (11). Furthermore, the Trade Acts specify that as a condition for invoking the fast-track process, the President is to submit a report describing how and to what extent the agreement makes progress in achieving these objectives.

With respect to advice and public comment, the Trade Acts are equally specific, striking a balance between the need for confidentiality and the need for public comment. These provisions direct the President to seek comment on a proposed trade agreement in select venues: the President may seek advice from the International Trade Commission on tariff modification, on nine sectors of the economy 19 U.S.C. 2151; the President may seek the advice of cabinet level agencies. The Trade Acts also provide for limited public hearings on the impacts of tariff modification of a trade agreement, create an Advisory Committee for Trade Policy specifying the number of members, their terms, and the interests the members should represent 19 U.S.C. § 2155. Finally, Section 2155 permits the President to appoint additional functional or sectoral advisory committees, pursuant to which the President created nine committees, five of which include representatives from environmental groups. See U.S. Ex. B. at Tab 7. These provisions circumscribe participation to ensure that neither confidentiality nor expedition will be compromised. See, e.g. 19 U.S.C. § 2155(g) (confidentiality requirements).

Congress addressed with great specificity the objectives that should guide trade agreements, the circumscribed role for the assessment of environmental issues, the appropriate venues for public comment; and necessary requirements of confidentiality. To apply the NEPA's EIS requirement would render these considered choices meaningless, and in many respects would "make [those choices] redundant." See Merrell, 807 F.2d at 781;[13] see also Busic v. United States, 446 U.S. 398, 406 (1980)(specific statute prevails over general).

C. NAFTA's Effects Are Beyond NEPA's Scope. The effects of broad, complex changes in economic relationships, such as those set in motion by trade agreements are too indirect to be cognizable under NEPA. NAFTA I, 970 F.2d at 921 n.6; see also Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 773-74 (1983) (PANE) ("Some effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [the NEPA EIS requirement]."); Concerned About Trident v. Rumsfeld, 555 F.2d

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[13] Public Citizen attempts to distinguish Merrell on the grounds that the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 et seq. (FIFRA), which was under consideration in that case, "essentially duplicates NEPA." Pl. Reply at 27 n.8. In Merrell, however, the Court of Appeals declined to adopt the view that FIFRA procedures were functionally equivalent to NEPA, and focused on Congress' intent as reflected in comprehensive procedures that strike a balance of factors at odds with the balance set in NEPA. 807 F.2d at 781. The Trade Acts reveal a similar intent to bring a different balance of factors to bear on trade negotiations than those set forth in NEPA.

817, 828 (D.C. Cir. 1976) (an EIS need not encompass remote and highly speculative consequences).

Public Citizen's predictions of increased border pollution and its possible transboundary migration comprise just this sort of indirect chain of causation. Their averments of environmental effects to the border region arise from highly uncertain predictions concerning the economic consequences of a free trade agreement, that are entirely dependent on independent responses and myriad political and economic influences other than NAFTA. As discussed with respect to standing, however, such changes in economic relationships depend on too many variables other than NAFTA to correlate specific environmental impacts with NAFTA provisions. Many of these averments are based on NAFTA provisions that say nothing about the issue Public Citizen presents: language in NAFTA permitting certain oil and gas subsidies does not imply any limitation on renewable energy subsidies, NAFTA art. 608, Pl. Ex. 1; provisions authorizing new standards for vehicles crossing the border imply nothing about what those standards will be. NAFTA annex 913.5.a1, Pl. Ex. 1.[14]

Even if Public Citizen could show that NAFTA imposed some constraints on environmental regulation or enforcement, in direct

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[14] NAFTA does create a subcommittee to establish compatible standards for all parties. NAFTA, Pl. Ex. A, Annex 913.5.a1. This subcommittee, however, has no legislative authority to enact these standards. Thus, the appropriate time to do an EIS, if one is required, is when the United States proposes regulations to implement a subcommittee proposal. See Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976) (NEPA does not require an EIS until action actually proposed); NAFTA I, 970 F.2d at 919-20 (same).

contradiction to the express terms of the agreement, this still would not provide sufficient support for Public Citizen's claim that NAFTA "significantly affect[s]" the environment within the meaning of NEPA, unless Public Citizen could show that equal or greater environmental protection could not be achieved in a manner consistent with NAFTA -- an impossible showing.

Furthermore, Public Citizen erroneously assumes that an EIS could and should discern the environmental effect of general principles such as NAFTA's proscription against "environmental" regulations that are discriminatory in purpose or effect or serve no legitimate environmental purpose. The task of preparing such an EIS, however would be akin to charting the future effect on the human environment of the due process clause or some other limit on legislative power. Accordingly, there is no support for the assumption that NAFTA will "significantly affect[]" the environment in the way contemplated by NEPA.[15]

CONCLUSION

For the foregoing reasons, and those set forth in the United States' opening brief, plaintiffs' motion for summary judgment should be denied and the United States' motion to dismiss the complaint or for summary judgment should be granted.

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[15] Public Citizen seeks to obscure the many intervening links between the agreement and its remote environmental effects by arguing that agencies will bring their actions into compliance with NAFTA without another party to the agreement having to resort to the dispute process. Pl. Reply at 8, 17. Once again Public Citizen's argument relies on a flawed and simplistic assumption that an agency can discern potential conflicts that might arise from general principles, inventory them, and predict their resolution in the absence of a concrete trade dispute.

Respectfully submitted,

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December 11, 1992

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Attachment A

ATTACHMENT A

WINGFIELD v. OMB

U.S. District Court
District of Columbia

ROBERT L. WINGFIELD v. THE OFFICE OF MANAGEMENT AND BUDGET and BERT LANCE, Director Thereof; THE DEPARTMENT OF THE INTERIOR and CECIL ANDRUS, Secretary Thereof; THE COUNCIL ON ENVIRONMENTAL QUALITY and CHARLES WARREN, Chairman Thereof; THE DEPARTMENT OF AGRICULTURE and ROBERT BERGLAND, Secretary Thereof; THE UNITED STATES FOREST SERVICE and JOHN McGUIRE, Chief Thereof; THE UNITED STATES SOIL CONSERVATION SERVICE and R.M. DAVIS, Administrator Thereof; THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS COSTLE, Administrator Thereof; and THE FEDERAL ENERGY ADMINISTRATION and JOHN O'LEARY, Administrator Thereof, No. 77-0489, April 4, 1977

LAND

1. **Federal, state, and local regulation — Statutory construction (§8.05)**

   Federal, state, and local regulation — Special land uses — Mining (§8.421)

   Court jurisdiction and procedure — Parties — Standing (§15.212)

Private individual has no standing to sue to enforce National Environmental Policy Act Section 102(2)(c) directive that environmental impact statement be included in every recommendation or report on proposals for legislation, since that provision was intended solely to aid Congress and was not intended to create right of action in private party to claim injury from ongoing legislative process.

2. **Federal, state, and local regulation — Special land uses — Mining (§8.421)**

   Court jurisdiction and procedure — Parties — Standing (§15.212)

Individual who owns mining lands lacks standing to sue Council on Environmental Quality to force it to comply with its own guidelines requiring it to prepare National Environmental Policy Act environmental impact statements on recommendations or reports on proposals for strip mining legislation, since individual's injury, which would occur only if Congress accepts CEQ's recommendations and if President signs them into law, is too speculative and remote to support standing.

STATUTES

Federal — National Environmental Policy Act — In general (§95.0111)

Federal — National Environmental Policy Act — Impact statement preparation (§95.0112)

Construed.

Individual sues several Executive Branch agencies and departments to compel them to comply with NEPA requirement that impact statement be prepared on reports or recommendations on proposals for legislation. On plaintiff's motion for preliminary injunction and defendants' motion to dismiss.

Defendants' motion granted.

Raymond Peck, James Day, Mark Savit, and Gerard Doyle, Washington, D.C., for plaintiff.

Floyd L. France, Irwin L. Schroeder, and Lawrence Hannaway, Department of Justice, Washington, for defendants.

Full Text of Opinion

THE COURT: Gentlemen, in the case that was argued this morning, I thought I would get you back to give my ruling, having in mind that if nothing else Plaintiff has conveyed a certain sense of urgency about the issues.

There is one housekeeping matter before I give you my ruling.

I don't believe this letter to Senator Jackson from the White House, from Mr. Schlesinger, Assistant to the President, was given an exhibit number. I think for the record we should give it No. 3. We have two exhibits from this morning. We will mark it Plaintiff's Exhibit 3, if that is agreeable.

MR. PECK: I had intended to offer it, Your Honor.

THE COURT: I think it was a mistake on my part. I wanted to correct it.

I hand it to you now, Madam Clerk, together with the jacket.

(Whereupon Letter from Mr. Schlesinger to Senator Jackson was marked Plaintiff's Exhibit No. 3 and received in evidence.)

THE COURT: Plaintiff in this case owns substantial properties where surface mining and underground mining operations

are progressing. He has filed a seven-count complaint, which asks for declaratory judgment and in other respects seeks an injunction and mandamus, with the view to preventing various agencies of the Federal Government from submitting or continuing to submit to the Congress, without accompanying environmental impact statements, various reports and recommendations on pending legislation before the Congress, which in various aspects affects surface coal mining operations and the reclamation of abandoned mines.

Strip mining legislation, so-called, has been pending in Congress in various forms since original proposals were made to the Ninty-Third Congress by President Nixon's Administration in 1973.

The legislation was eventually defeated by pocket veto of President Ford. Later it was reenacted, still during President Ford's Administration, and then successfully vetoed by him.

In January 1977, it was reintroduced in substantially the same form, prior to the inauguration of President Carter; and it is apparent from an exhibit in evidence that the Carter Administration has since urged expeditious passage of the legislation.

The papers indicate that legislative reports and recommendations are being developed by the Department of Interior, by the Department of Agriculture, the Environmental Protection Agency, Federal Energy Administration, CEQ, and others.

Plaintiff relies on the following provision of NEPA, in Section 42 U.S.C. 4332(c), which reads:

> "The Congress authorizes and directs that to the fullest extent possible all agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment a detailed statement by the responsible official."

Quite simply, Plaintiff contends that the Department of Interior and other agencies of the Federal Government are in the process of submitting recommendations or reports on the earlier proposals for legislation which significantly affect the quality of human environment; but it is alleged they are not now planning to accompany them with detailed environmental impact statements and in some instances have already submitted recommendations without such statements.

Defendants have moved to dismiss, claiming lack of standing, and suggesting that the Court should refrain from interfering in what is essentially a political matter involving the Executive and the Congress.

Plaintiff urges there is adequate standing because of the direct economic interest of the Plaintiff in the outcome of the proposed legislation and contends that no political question is presented inasmuch as Plaintiff seeks an injunction not against the Congress but solely against the Executive departments which I have named to stop them from proceeding in a manner which Congress has stated would be inappropriate.

He also alleges that the CEQ is not complying with the Administrative Procedure Act in that it has failed to adhere to its own regulations.

Plaintiff's economic interest in these legislative developments is highly speculative inasmuch as the legislation is still in the formative stage; and there is no indication of what the effect, if any, will be upon his affairs in the event some legislation of some kind is enacted.

His interest as a member of the public is even more speculative. However, these NEPA standing questions need not be addressed as far as Plaintiff's NEPA claims are concerned.

Upon examination of the statute, it appears to the Court perfectly clear that Congress desired to have recommendations or reports on proposals supported by environmental impact statements at the time the initial legislative proposals were made. It is less clear that Congress intended that every subsequent recommendation or report on pending legislation was to be treated as a proposal and hence subject to an additional environmental impact statement.

[1] Even this need not be decided as a matter of statutory construction. This particular provision, however interpreted, was designed solely to aid the Congress and was not intended to create a right of action in a private party to claim injury in some fashion from the ongoing legislative process.

Congress has within its own investigatory and other resources ample means to obtain from the Executive whatever information it desires relating to environmental impact prior to taking action. It is clear, of course, that Congress did not intend to stultify itself by this legislation if at any point it was satisfied it had enough information to proceed in a given situation.

The ability of Congress by various means at its disposal to obtain whatever environmental information it deems necessary to perform its function is, of course, undisputable.

For the Court to interject itself into the complexities of the ongoing legislative process at the behest of a private party would require the clearest kind of directive from Congress, which is not present here.

Moreover the issue presented is, by its implications at least, a highly political question. It places the Court in conflict with coordinate branches of the Government, since even Plaintiff recognizes that the President, himself, whatever the strictures of the Act, could present whatever proposals and recommendations he chose to the Congress without reference to NEPA.

The political nature of the issue is sharply emphasized by the prayer for preliminary injunction which was made today.

It appears that the Secretary of the Interior, at the request of the Chairman of the Committee on Interior and Insular Affairs of the House of Representatives, is scheduled to appear tomorrow before that Committee to testify on behalf of the Executive Branch with respect to this legislation and will propose certain amendments to the pending bills which will ban mining on prime and unique farmlands.

An immediate preliminary injunction is urged to interfere with this testimony.

Apart from the NEPA issues, one other aspect of standing must, however, be addressed.

Although other agencies of the Government are not bound by the CEQ regulations, CEQ, itself, of course, under established principles found in the Administrative Procedure Act, is required to adhere to its own regulations; and it is indicated that it is not doing so in this particular instance. This raises a clear question of standing.

Plaintiff's alleged injury here is to his economic interest in surface mining should CEQ's recommendations become law. While the fact that harm may occur in the future isn't necessarily fatal to standing, it can lessen the concreteness of the controversy and thus mitigate against a recognition of standing, as was pointed out in Harrington v. Bush, a decision of our Circuit on February 18 of this year.

[2] Examining the situation, the Court feels that the injury here is too speculative and remote to support standing. The injury here would occur only if the House accepts CEQ's recommendations, the Senate accepts them as well and that the legislative package as finally passed by both Houses is signed into law by the President.

I would cite in this regard also Metcalf v. National Petroleum Council, also decided February 18, 1977 by our Court of Appeals.

In addition, it should be pointed out that this injury, if any, would be created by the passage of legislation by Congress and its approval by the President. It would not be caused by Defendants here but by the independent action of third parties not before the Court. As Simon v. Eastern Kentucky Welfare Rights organization in 426 U.S. 26 teaches, this provides further reason for concluding that Plaintiff has no standing to complain of this alleged violation by CEQ of the Administrative Procedure Act.

Accordingly, I have come to the conclusion that the motion to dismiss must be granted. Of course, it follows that the prayer for preliminary injunction is denied.

I have prepared just a one-line order so that the record will be complete ordering that Defendants' motion to dismiss be granted for reasons stated in open Court. I will hand it to the Clerk.

I want to thank counsel on both sides for the able briefs and arguments and the professional way this matter has been handled.

I realize it is a difficult issue. I have done the best I can with it. I now leave it in the Plaintiff's hands for what further action he wants to take upstairs.

MR. PECK: Your Honor, may we ask when we could get a copy of the opinion, in view of the shortness of time?

THE COURT: I have nothing here that you can read. I have notes from which I talked.

MR. PECK: I meant a transcript.

THE COURT: I do believe that you can talk that over with the court reporter who is very accommodating in such matters. I hope she can get it to you right away.

MR. PECK: Thank you, Your Honor.

(Whereupon the hearing on the motions was concluded.)

ORDER

This matter came before the Court this day on oral argument of defendants' motion to dismiss and plaintiff's opposition thereto, and after considering the briefs and hearing the parties it appears to the

Court that the motion must be granted, now therefore it is

ORDERED that defendant's motion to dismiss is granted for the reasons stated on the record, and the complaint is hereby dismissed.

CAROLINA ENVIRONMENTAL STUDY GROUP v. AEC

U.S. District Court
Western District of North Carolina
Charlotte Division

CAROLINA ENVIRONMENTAL STUDY GROUP, INC.; CATAWBA CENTRAL LABOR UNION; SANDRA P. REED; DR. JOHN O.P. HALL; MARY GREGORY PHILLIPS HALL; SUZANNE RICHETSON; SHELLEY BLUM; DELORES M. HART; DR. SHERMAN L. BURSON, JR.; DR. JAMES W. CLAY; DR. JULIAN D. MASON, JR.; JULIA A. TALBUTT; JAMES WADE McHENRY; JESSE RILEY; BOBBY AGLE; SUE S. RILEY; THOMAS L. WOLPERT; DR. CARLOS BELL; DR. JOSEPH A. SLECHTA; ROY ALEXANDER; SARAH SLECHTA; BRUCE BRODT; WILLIAM CONVEY, JR.; DR. RICHARD W. REICHARD; HARRIETT E. REICHARD; RUBY GARDINER; WILLIAM H. VAN EVERY, JR.; ERNIE PATTERSON; HALLAM WALKER; PATRICIA KYLE; DR. KENNETH W. GREGG; DR. LUCKETT V. DAVIS; MELVIN BURRIS; DUKE E. WRIGHT; MICHAEL HUDDLESTON; DR. JOHN A. FREEMAN; TOMMY M. MARTIN; and WILLIAM J. BLOUGH v. UNITED STATES ATOMIC ENERGY COMMISSION; DR. DIXY LEE RAY; JAMES T. RAMEY; DR. CLARENCE E. LARSON, and WILLIAM O. DOUB, as individuals and in their capacities as Commissioners of the United States Atomic Energy Commission; and DUKE POWER COMPANY, No. C-C-73-139, March 31, 1977

RADIATION

1. Federal, state, and local regulation — In general (§83.01)

Liability by industry — Utilities — Nuclear power plants (§86.942)

Court jurisdiction and procedure — In general (§90.01)

Private individuals who live and own property near completed and proposed nuclear power plants which will cause chronic and certain injury and which present reasonable future threat of catastrophic accidents have standing to challenge constitutionality of Price-Anderson Act limiting plants' financial liability.

2. Constitutional rights and limitations — In general (§80.01)

Liability by industry — Utilities — Nuclear power plants (§86.942)

Price-Anderson Act, which limits nuclear power plant's total liability for injury, death, and property damage arising out of single nuclear accident to $560 million, violates due process clause of U.S. Constitution by allowing destruction of property and lives without reasonable certainty of compensation, and violates equal protection clause by irrationally placing risk of nuclear accidents upon those who live near plants.

Individuals living near nuclear power plants challenge constitutionality of Price-Anderson Act limiting liability for nuclear accident.

Decision for plaintiffs.

Norman B. Smith, Smith, Patterson, Follin, and Curtis, Greensboro, N.C.; George S. Daly, Jr., Casey and Daley, Charlotte, N.C.; and William B. Shultz and Alan B. Morrison, Washington, D.C., for plaintiffs.

Douglas M. Martin, assistant U.S. attorney, Clarence W. Walker, Kennedy, Covington, Lobdell, and Hickman, and William L. Porter, Duke Power Company, all of Charlotte; Joseph DiStefano, AEC, Peter L. Strauss and Stephen F. Eilperin, Nuclear Regulatory Commission, and Joseph P. Knotts, Jr. and J. Michael McGarry III, Conner and Knotts, all of Washington, for defendants.

Full Text of Opinion

McMillan, J.

PRELIMINARY STATEMENT

Plaintiffs brought this action to obtain a declaration of the unconstitutionality of those portions of the Price-Anderson Act, 42 U.S.C. §2210(c) and §2210(e), which place a limitation of $560,000,000 on the maximum amount of liability of a power

Attachment B

ATTACHMENT B

US DISTRICT COURT
DISTRICT OF MAINE
FILED
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BY: CC/Canal
DEPUTY CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SEN. WILLIAM S. COHEN, et al., Plaintiffs,	
v.	CIVIL NO. 91-0282-B
DONALD RICE, Secretary of the Air Force, et. al., Defendants.	

ORDER AND MEMORANDUM OF OPINION

BRODY, District Judge

This action for a declaratory judgment and injunctive relief is before the Court on Defendants' Motion for Summary Judgment. The Plaintiffs allege that they were injured by the failure on the part of the Secretaries of the Air Force and Defense and the Base Closure and Realignment Commission ("Base Closure Commission" or the "Commission") to act pursuant to the statutory requirements delineated in the Base Closure Act ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat. 1808 (1990). Plaintiffs seek to enjoin the Secretary of Defense and the Secretary of the Air Force from carrying out the decision to close Loring Air Force Base ("Loring" or the "Base"), and from taking any actions that may interfere with the ability of Loring to operate as though it were not scheduled for closure. Plaintiffs also request that the Court declare: (i) that the realignment recommendation to close Loring, provided by the Secretaries of the Air Force and Defense, was developed in a manner inconsistent with the requirements of the Base Closure Act; (ii) that the Secretaries' adoption of the

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closure findings, conclusions and recommendations made by the Air Force with respect to the decision to close Loring was arbitrary and capricious and otherwise not in conformity with law; (iii) that the closure and realignment recommendations submitted by the Commission to the President with respect to Loring were made in violation of the Act; and (iv) that the Commission's adoption of the list of closure and realignment findings, conclusions and recommendations made by the Air Force with respect to the decision to close Loring was arbitrary and capricious and not otherwise in conformity with law.

Agency actions, such as actions by the Secretary of Defense and the Base Closure Commission, may be the subject of judicial review if they fall within the purview of the Administrative Procedure Act ("APA"). 5 U.S.C. §701 et. seq. Plaintiffs acknowledge that substantive decisions made under the Base Closure Act are not subject to judicial review under the APA because such decisions are made by the President and, therefore, are not agency action. However, Plaintiffs assert that the procedures by which the Secretary of Defense and the Commission make recommendations to the President, under the Base Closure Act, are subject to judicial review under the APA. Based on the U.S. Supreme Court's June 26, 1992 decision in Franklin v. Massachusetts, which discusses the parameters of final agency action, this Court is satisfied that the procedures by which the President receives recommendations from the Base Closure Commission and the Secretary of Defense can not be considered "final agency action" under the APA. Therefore, such

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procedures are not subject to judicial review. Accordingly, Defendants' motion is GRANTED.

I. BACKGROUND

A. The Complaint

This controversy revolves around the decision to close Loring. Loring, which is located in Limestone, Maine, is one of twenty-one Strategic Air Command Bases maintained by the Air Force in the continental United States. In April 1991, pursuant to the Base Closure Act, the Secretary of Defense recommended that fourteen Air Force facilities, including Loring, be closed and that six be realigned. See 56 Fed. Reg. 15184 (April 15, 1991). Thereafter, the Base Closure Commission engaged in an analysis and review of the Secretary's recommendations. The Commission ultimately recommended that one of the Air Force facilities recommended for closure by the Secretary remain open, but concurred with the Secretary's recommendation that Loring be closed.

On July 10, 1991, President Bush approved the recommendations of the Commission. See 27 Weekly Comp. Pres. Doc. 930 (July 15, 1991). Following the President's approval, the House and Senate Armed Services Committees held hearings on the Commission's recommendations.

On July 30, 1991, as permitted by Section 2908 of the Act, the House considered a resolution, sponsored by Congressional plaintiff Rep. Snowe, to disapprove the Commission's recommendations. See 137 Cong. Re. H6006 (daily ed. July 31, 1991). The House entertained floor debate on the proposal, including the objections

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of Rep. Snowe which parallel the allegations set forth here. Id. By a vote of 364 to 60, the House rejected the proposal, thus permitting the closure and realignment process to continue. See 137 Cong. Re. H6039.

Having exhausted their remedies in the political arena, the plaintiffs, United States Senators William S. Cohen and George J. Mitchell, United States Representative Olympia J. Snowe, Governor John R. McKernan, Jr., the Towns of Limestone, Ashland, Caswell, Fort Fairfield, Mars Hill, New Sweden, Van Buren, the Cities of Caribou and Presque Isle, Aroostook County, the Save Loring Committee, the American Federation of Government Employees Local Union Chapter # 2943 and Alan Mulherin, brought their challenge to the Court.

B. Procedural Posture

Defendants moved to dismiss the Plaintiffs' complaint on February 28, 1992. On May 20, 1992 the Court issued an order denying the motion in part and granting it in part. Specifically, the Court dismissed Plaintiffs' claims which focused on alleged deficiencies in the performance of the Secretaries of the Air Force and Defense. The Court stated that deficiencies in this category were not judicially reviewable because the Secretaries' recommendations are clearly committed to their discretion under the Act and because Congress provided for alternative methods of review for the Secretaries' recommendations. Order and Mem. at 9-10 (May 20, 1992). In addition, the Court dismissed Plaintiffs' challenges to the decision-making process by which the Commission reviewed the

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Secretary of Defense's recommendations, finding that these challenges, like the challenges to the recommendations of the Secretaries, were not subject to second guessing by the judiciary. Order and Mem. at 11 (May 20, 1992). However, the Court denied Defendants' Motion to Dismiss with regard to Plaintiffs' claims that the Secretary of Defense failed to transmit to the General Accounting Office ("GAO"), members of Congress and the Commission all the information used in making the base closure recommendations in question. The Court also denied the Defendants' Motion to Dismiss with regard to the Plaintiffs' assertion that the Commission failed to hold public hearings as required by the Act. In denying the Defendants' motion on these claims, the Court adopted the reasoning of the Third Circuit in Specter v. Garrett, No. 91-1932, 1992 U.S. App. LEXIS 6969, (3rd Cir. April 17, 1992). The Court denied Defendants' motion in part, finding no clear congressional intent under the Base Closure Act to preclude judicial review of the Plaintiffs' claims under the APA. Subsequent to this Court's order on Defendant' Motion to Dismiss, the Supreme Court's interpretation of reviewable final agency action under the APA was handed down in Franklin v. Massachusetts, 60 U.S.L.W. 4781 (No. 91-1502, slip op. June 26, 1992). In light of Franklin, the Court is satisfied that Plaintiffs' remaining claims must now be dismissed. Franklin clearly holds that the APA does not provide a mechanism for judicial review in this context.

C. The Administrative Procedure Act

The APA sets forth the procedures by which federal agencies

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are held accountable to the public and their actions subject to review by the courts. The APA provides that any "person . . . aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. §702. The APA provides that the reviewing court will "set aside agency action . . . found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right . . .;[or] without observance of the procedure required by law." 5 U.S.C. §706(2). Review under the APA is available, however, only "to the extent that . . . statutes [do not] preclude judicial review" and the agency action "is [not] committed to agency discretion by law." 5 U.S.C. §701(a). In addition, the APA is available only for review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §704 (emphasis added).

D. The Base Closure Act

In this case the Plaintiffs seek to apply the APA to actions taken pursuant to the Base Closure Act. The Defense Base Closure and Realignment Act of 1990 is the latest in a series of statutes enacted by Congress during the past fifteen years to regulate the process by which domestic military bases are closed and realigned. Section 2901 of the Act declares that the law's purpose is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States. §2901(b).

Under the Act, the Secretary of Defense must submit to

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Congress, as part of the Defense Department's budget justification documents, a force-structure plan with recommendations for the closure and realignment of military installations. §2903(a)-(b). The Act requires the Secretary to publish in the Federal Register and transmit to the congressional defense committees the criteria to be used by the Department of Defense in making recommendations for installation closures. §2903(b)(2)(A).

In addition, the Act establishes a Commission of eight members to be appointed by the President with the advice and consent of the Senate. §2902(c). The Commission receives the Secretary's recommendations and, after conducting public hearings on them, must transmit to the President a report containing the Commission's findings and conclusions based on its review and analysis of the Secretary's recommendations. §2903(d).

The Act provides that the Commission is to be assisted in its task by the GAO. The Secretary must give the GAO all the information used in making its initial recommendations in order to facilitate the GAO's review. §2903(c)(4). The GAO must report on the Secretary's recommendations to the Congress and to the Commission. §2903(d)(5).

Once the Commission has transmitted its recommendations to the President, the President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit that determination to the Commission and to Congress. §2903(e)(2)(3). If the President approves the Commission's recommendations, Congress has 45 days from the date of this approval to pass a joint

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resolution disapproving of the recommendations in their entirety. §§2904(b), 2908. If such a resolution is enacted, the Secretary of Defense may not close the bases approved for closure by the President. §2904(b).

If the President disapproves of the Commission's recommendations in whole or in part, the recommendations must be returned to the Commission with the reasons for the disapproval. §2903(e)(1)-(3). The Commission must then reconsider its recommendations in light of the President's actions and submit a revised list for the President's consideration. §2903(e)(3). If the President does not transmit an approved list of recommendations to Congress by September 1 of the year in which the Commission has transmitted recommendations, the base closure process for that year is terminated. §2903(e)(5).

E. The Nature of Relief Sought by the Plaintiffs

The Plaintiffs seek a remand of the recommendation to close Loring to the Commission to correct the process under which the recommendation was promulgated. The Plaintiffs note that the effect of such a remand on the decision of the President cannot be determined until after the Commission has reconsidered its actions. Pls.' Response Defs.' Mot. Summ. J. at 10.

II. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

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is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In light of the Supreme Court's holding in Franklin v. Massachusetts, it is clear that the actions the Plaintiffs complain of do not constitute final agency action under the APA. Because there is no final agency action, there is no legal basis under which Plaintiffs' factual allegations can be reviewed.

III. DISCUSSION

While this Court and the Third Circuit in Specter found no clear evidence of congressional intent to preclude all judicial review of actions taken pursuant to the Base Closure Act, the issue of whether there had been final agency action was not specifically addressed. In Franklin, the State of Massachusetts challenged the Secretary of Commerce's inclusion of military personnel serving overseas for census purposes. 60 U.S.L.W. 4781 (No. 91-1502, slip op. June 26, 1992). For only the second time since 1900, the Secretary of Commerce allocated the Department of Defense's overseas employees to particular states. The Secretary counted these employees as residents of their "home of record", as designated in their personnel files. This allocation altered the relative state populations enough to shift the apportionment of Representatives which, under the Constitution, must be based on the "actual Enumeration of persons in each State." Art. I, §2, cl. 3; Amdt. 14, §2.

The statutory scheme which fulfills this constitutional command creates an interlocking set of responsibilities for the Secretary of Commerce and the President. This interlocking set of

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responsibilities is comparable to those of the President, the Base Closure Commission and the Secretary of Defense under the Base Closure Act. Under the apportionment statutes, the Secretary of Commerce is required to take a decennial census of the population and report the collected information to the President. 13 U.S.C. §141(a)-(b). The President then sends Congress a statement, based upon data from the decennial census, showing the number of persons in each State and the number of Representatives to which each state would be entitled under an "apportionment of the then existing number of Representatives by the method known as the method of equal proportions . . . ." 2 U.S.C. §2a(a).

In Franklin, the President's acceptance of the Secretary's allocation of overseas military personnel to their home of record, approved of an apportionment scheme which altered state populations enough to shift a Representative from Massachusetts to the State of Washington. Massachusetts and two of its registered voters brought suit against the Secretary of Commerce, among others, challenging the allocation of the overseas personnel as arbitrary and capricious under the APA. Under these facts, the Franklin court held that there was no final agency action subject to review. 60 U.S.L.W. at 4784. The Franklin court applied Abbott Laboratories v. Gardner, which states that one must look to whether the impact of agency action is "sufficiently direct and immediate" to determine whether such an action is final. 387 U.S. 136, 152 (1967). Applying the Abbott test, the Franklin court held that the "Secretary of Commerce's report to the President carries no direct

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consequences for the reapportionment [and, therefore,] it serves more like a tentative recommendation than a final and binding determination." 60 U.S.L.W. at 4784. Because no statute prohibited the President from rejecting the Secretary of Commerce's report, and because no statute ruled out an instruction by the President to the Secretary to reform the census, the Supreme Court held that the ruling of the Secretary of Commerce was similar to the ruling of a subordinate official and, therefore, not final agency action. Id.

In Abbott, the Court found final agency action when an agency promulgated regulations and conformity with those regulations caused injury. 387 U.S. 136 (1967). In the current controversy, the Plaintiffs did not change their position in reliance on the recommendations of the Secretary and the Commission. In fact, the Plaintiffs would not be injured but for the President's acceptance of the Commission's recommendations. Further, while the reviewability of Presidential action under the APA may have been an open question before Franklin, Franklin holds that Presidential action is not reviewable under the APA. 60 U.S.L.W. at 4785.

The holding and reasoning of Franklin are directly applicable to the facts of the present controversy. In Franklin, the Supreme Court stated that agency action is "final" when an agency "complete[s] its decision-making process and . . . the result of that process is one that will directly affect the parties." Id. at 4784 (emphasis added). The Franklin court examined a number of statutes which created interlocking responsibilities between

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agencies and the Executive. See eg. 20 U.S.C. §1017(d); 30 U.S.C. §1315(c); 42 U.S.C. §3015(f); 42 U.S.C. §6633(b)(2). The Court distinguished statutes under which the President is expressly required to transmit an agency's report directly to Congress from those in which the President is not so required, and held that while the former may generate final agency action, the latter do not. Id.

Under the Base Closure Act, the President is not required to submit the Commission's recommendations to Congress. In fact, under the Base Closure Act, the President has even greater discretion than in the case of the census in Franklin. Under the Constitution, the President can not halt the taking of the census whereas, under the Base Closure Act, the President has the power to terminate the base closure process by not transmitting an approved list of recommendations to Congress. Because the President is not required to transmit the Commission's recommendations to Congress, the recommendations carry no direct consequences for base closure and, therefore, are not final agency action.

At oral argument, Plaintiffs sought to distinguish Franklin from the case at bar by noting that in Franklin the Supreme Court stated that the Secretary of Commerce's report to the President was an unusual candidate for consideration as agency action within the APA. The Supreme Court said that the Secretary of Commerce's role in regard to the census was difficult to classify as agency action because, among other things, the Secretary of Commerce's report is not promulgated to the public in the Federal Register and no

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administrative record is generated. Id. at 4783. Plaintiffs argued that because the Commission's actions are subject to publication in the Federal Register and because the Commission is required under the Act to hold public hearings before issuing its recommendations, the Commission's issuance of recommendations can be more readily viewed as agency action than the Secretary of Commerce's report. The Plaintiffs suggest that because the Commission's actions fall into a more traditional pattern of agency proceedings, its actions are reviewable despite the Supreme Court's conclusion that the Secretary of Commerce's actions are not. This argument is inapposite because even if the Commission's actions are more readily classified as agency action, it is the determination of what constitutes final agency action that is of significance here.

Plaintiffs also seek to distinguish Franklin by suggesting that Franklin precludes only substantive challenges to agency action and not claims that an agency followed improper procedures. Pls.' Response Defs.' Mot. Summ. J. at 15. This distinction is flawed because under Franklin, the finality of an agency's action does not turn on the nature of the challenge to it. Under the Base Closure Act the only final action would be that of the President. Permitting judicial review of an intermediate step in the process, even on purely procedural grounds, would be inconsistent with Franklin and would ignore the limitation imposed by the APA.

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IV. CONCLUSION

Accordingly, Defendants' Motion for Summary Judgment is GRANTED[1].

SO ORDERED

MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 18th day of September, 1992.

[1]. In light of this disposition the other arguments raised by Defendants in support of their motion need not be addressed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, FRIENDS OF THE EARTH, and SIERRA CLUB, Plaintiffs, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Defendant.	Civil Action No. 92-2102 (CRR) Judge Charles R. Richey

CERTIFICATE OF SERVICE

I, Bradley M. Campbell, hereby certify that on this 11th day of December 1992, I caused two copies of the foregoing Reply in Support of the United States' Motion to Dismiss or in the Alternative for Summary Judgment, and the accompanying declaration, to be served by hand on the following:

Alan B. Morrison
Patti A. Goldman
Paul R. Q. Wolfson
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
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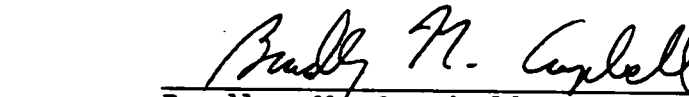

Bradley M. Campbell

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ARGUMENT SCHEDULED FOR AUGUST 24, 1993

BRIEF FOR THE APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5212

PUBLIC CITIZEN, FRIENDS OF THE EARTH,
and SIERRA CLUB,

Appellees,

v.

UNITED STATES TRADE REPRESENTATIVE,

Appellants.

ON EXPEDITED APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO Brian Burke, ODP	Take necessary action ☐
	Approval or signature ☐
	Comment ☐
	Prepare reply ☐
	Discuss with me ☐
	For your information ☒
	See remarks below ☐
FROM Kevin Kizer, OMB	DATE 7-14-93

REMARKS

Attached is the paper I mentioned in our conversation this morning. ~~the~~ Please treat it close hold.

Kevin

OMB FORM 4
Rev Aug 70

CREATE FILE

TALKING POINTS

Q & A's

NAFTA PROTECTS THE ENVIRONMENT

WITH NAFTA:

- **A Precedent Setting Commission for Environmental Cooperation:** The NAFTA environmental side agreement creates a pathbreaking trilateral organization devoted to protecting the environment -- making NAFTA the greenest trade agreement in history. The side agreement helped convince leading environmental groups to support NAFTA, including the National Wildlife Federation, the World Wildlife Fund, the National Audubon Society, the Natural Resources Defense Council, the Environmental Defense Fund, and Conservation International.

- **Fines and Trade Sanctions for Countries that Fail to Enforce Their Domestic Trade Laws:** NAFTA allows the U.S. to impose fines and trade sanctions if our NAFTA partners fail to enforce their laws protecting the environment.

- **Billions of Dollars for Border Cleanup:** The United States is negotiating with Mexico to create a revolutionary new entity for funding border cleanup. The bilateral organization envisioned will leverage assets from the private sector, both federal governments, as well as state and local governments.

- **Better Prospects for More Environmental Protection in Mexico:** Countries better protect their environments as they become more developed. Better economic conditions in all NAFTA countries -- including Mexico -- will increase awareness and resources for the environment.

- **Protection of Existing U.S. Standards:** The NAFTA and the side agreements explicitly protect existing U.S. environmental protection laws -- including state and even municipal laws.

WITHOUT NAFTA:

- **No Commission on the Environment:** No NAFTA means no Commission on the Environment -- no standing forum for addressing environmental concerns.

- **No New Money for Border Cleanup:** No NAFTA means no new organization devoted to funding border cleanup -- and a loss of billions in new funding.

- **Worsening Conditions in Mexico:** The economic shock of losing NAFTA would make it far more difficult for Mexico to devote resources to enforcing its environmental laws.

PHOTOCOPY
PRESERVATION

TO: Ricki Seidman, Andre Oliver
FR: Jose Cerda III

Enclosed please find some suggested Q & A's that might be useful for tomorrow's announcement of the new Drug Director. Let me know if you need anything.

INDIAN GAMING

DRUG BUDGET/POLICY QUESTION

Q: Your FY 1994 Budget included a federal drug spending chart that seems to indicate that your "Drug War" is going to be the same as George Bush's. It's about the same amount of money, and the supply-demand ratio has not really changed? How do you explain that?

A: First of all, my drug budget and strategy will not be the same as George Bush's. It will be focused on the two major promises I made during the campaign: (1) to increase the number of police on our streets and expand community policing; and (2) to dramatically increase the availability of drug treatment.

The previous Administration's strategy was based on halting the world flow of drugs. We're going to set our sites more at home and do a better job of controlling drug demand and preventing drug-related crime.

But that's not to say we're not going to do a better job of interdiction, too. As the biggest consumer of illegal drugs we have an important international responsibility in fighting drugs. It's just that while the previous administration always stressed the international aspect of the drug war, it always spent the majority of the drug budget on domestic efforts. That's not new. I want to stop the politicizing of the drug war and emphasize our problems at home.

Second, the drug budget does not factor in the impact of including drug treatment as part of our national health care legislation. This is the most important thing we can do to expand the availability of drug treatment.

The medical costs of AIDS, tuberculosis, and other illnesses show what a huge drain drug use puts on our health care system -- and on the economy as a whole. Some estimates of the economic impact of illegal drugs range in the hundreds of billions of dollars, and health care may be the best way to address this problem and represents a complete departure from past treatment policies.

HEALTH CARE AND DRUG TREATMENT

Q: You keep mentioning that drug treatment has been considered by your Health Care Task Force, but what if you can't pass health care legislation quickly? Do you have any details on the drug treatment benefit to be included in the health care package?

A: The Health Care Task Force included a team of treatment professionals that studied various options for including a drug treatment benefit in the health care reform legislation. Focusing on drug treatment within the context of health care is appropriate. As I mentioned, the overwhelming medical costs of AIDS, tuberculosis, and other illnesses bear witness to the drain put on our health care system -- and our whole economy -- by illegal drugs.

More importantly, including a drug treatment benefit in our health care reform package would be a dramatic, long-term shift in our drug policy. It would greatly expand and de-stigmatize the availability of drug treatment. Treatment needs to be viewed more within the health context, and I believe our proposal will accomplish that.

INTERNATIONAL

Q: How do you respond to reports that your budget "slashes" important international drug control spending, and that it undermines the U.S. Government's commitment to our allies in the "War on Drugs"?

A: The Budget does not "slash" international drug accounts; it only cuts them by 1%. And, while I believe these budget numbers provide a good start, all international accounts are currently being reviewed, and further adjustments may be forthcoming.

Our drug strategy will continue to have an international component -- it must. As one of the largest consumers of illegal drugs, we have an important international role to play in fighting illegal drugs and will not abandon countries that have shown the political will to join us in taking on the drug problem.

OFFICE OF NATIONAL DRUG CONTROL POLICY

Q: How do you respond to the critics of your plan to "reorganize" ONDCP? Many of them have accused you of "gutting" the office. Have you?

A: NO -- We expect the reorganization of ONDCP to help revitalize the office. By raising the Director's position to cabinet-level, and by making ONDCP a more focused policy and planning office, we fully expect to be able to better coordinate federal drug control programs. The reorganization should not impact this primary responsibility.

With respect to other statutory responsibilities of the office, we expect them all to receive a thorough review by the new director, who I'm sure will consult with Members of Congress on possible revisions to the office's functions.

DELAY IN FILLING THE DRUG DIRECTOR'S JOB

Q: Why has it taken you so long to fill this job?

A: The Drug Director's job is one of the most varied jobs in the federal government, requiring knowledge in just about every aspect of government -- law enforcement, treatment and prevention, urban issues, intelligence matters, international relations, and more. Candidates from all backgrounds must be considered. And ultimately, I don't think anyone can argue with our choice of Lee Brown.

Also, I think it's interesting that while it took me some three months to fill this jobs, no one seems to remember that the position was vacant for four months after Bill Bennett's resignation.

100,000 COPS PLEDGE

Q: What are you doing about your pledge to put 100,000 new police on the streets? The budget only shows a $25 million for a Police Corps and $50 million for Community Policing?

A: I am committed to putting 100,000 new police officers on the street, and my budget shows a bigger investment than the $75 million you've mention.

More cops on the street will make our streets safer. In anticipation of the verdict in the Rodney King trial, LA police chief Willie Williams put 600 additional police officers on the streets and -- guess what? -- violent crime dropped 12% across the city.

I've already proposed spending close to $1 billion for additional police -- $200 million in the jobs bills, $75 million in new Justice programs for FY 1994, and more than $500 million next year through the Community Investment Program for enterprise zones. I think that's a solid down payment. We've budgeted more than $2 billion for police-related programs over the next five years, but we're still working on the authorizing legislation.

DOMESTIC POLICY Q & A FOR THE PRESIDENT'S PRESS CONFERENCE

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DRUG BUDGET QUESTION

Q: Your FY 1994 Budget included a federal drug spending chart that seems to indicate that your "Drug War" is going to be the same as George Bush's. It's about the same amount of money, and the supply-demand ratio has not really changed? How do you explain that?

A: First of all, my drug budget and strategy will not be the same as George Bush's. It will be focused on the two major promises I made during the campaign: (1) to increase the number of police on our streets and expand community policing; and (2) to dramatically increase the availability of drug treatment.

The previous Administration's strategy was based on halting the world flow of drugs. We're going to set our sites more at home and do a better job of controlling drug demand and preventing drug-related crime.

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