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CQ362

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NEPA Task Force
Council on Environmental Quality
P. O. Box 221150
Salt Lake City, UT 84122

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Dear Sir or Madam,

I have a general thought which gives concern to many people who follow NEPA actions. On 9 July 2000 Judge Andrew Kleinfeld of the U.S. 9th Circuit Court of Appeals wrote an opinion which could be the death knell for the environmental impact statement as we have know it for the last thirty years.

Judge Kleinfeld wrote a sharply worded dissent in *Metcalf v. Daley*, a case which turned on whether agencies of the Commerce Department authorized a resumption of gray whale harvesting off the coast of Washington without properly complying with NEPA. The URL for the complete text of the decision on the Web is:

<http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=9th&navby=case&no=9836135>

I suggest that the task force study this case if you are not familiar with it. The arguments in this case raise the question, at least, of whether the original theory of impact assessment has been stood completely on its head by the way we have actually come to use it.

I believe we used to think of impact assessment as something that could rationally be expected to take place BEFORE a decisional commitment was made. Judge Kleinfeld abandons this rational expectation for the view that one only goes to the time and trouble of doing an impact assessment (whether an EA, or an EA and an EIS) after one is basically persuaded that the decision should be made.

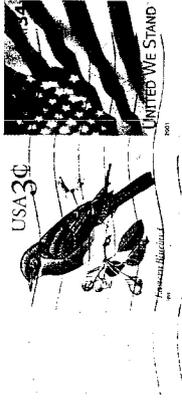
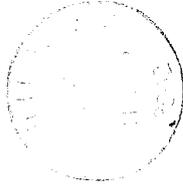
We did once believe, didn't we, that assessments should precede choice and that they could and should, in a basic sense, shape it? Or did I miss the death of that rational expectation?

Sincerely,



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