Betty B. Fletcher: NEPA's Angel and Chief Editor of the Hard Look

by William H. Rodgers Jr.

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Editors' Summary

The underpinnings of modern environmental law rest comfortably on assumptions of a creative, active, thorough, and demanding judicial review. The judicial founders—and expounders—of environmental law were relentless practitioners of what became known as the "hard look" doctrine of judicial review. This was the stance of the great first judges of environmental law—they included David Bazelon, Harold Leventhal, and J. Skelly Wright—and this was the posture of those who came later—including the much admired Patricia Wald. This tradition of a meaningful hard look has been carried on—and extended—by many contemporary jurists, including Betty B. Fletcher of the U.S. Court of Appeals for the Ninth Circuit. In this review of the decisionmaking of Judge Fletcher, the environmental version of the hard look is on conspicuous display. And it stands in stark contrast to the "values" of lassitude, passivity, timidity, hesitation, and trusting acceptance that pass for "judicial review" in the new world celebrated by sorry precedents, such as *Lands Council v. McNair*.

As natural systems collapse around the world,[1] as an extinction crisis races into view,[2] as climate change rushes to meet an exploding human population that is completely unprepared for what will come,[3] as the U.S. Supreme Court's environmental decisionmaking goes from bad to worse,[4] it is time to identify the countervailing forces.

There are some healthy ones.

I wish to speak of one of the courts—in particular one judge, on one court. The judge is Betty B. Fletcher, and the court is the U.S. Court of Appeals for the Ninth Circuit.

What a strange place to start, you might say. Courts are the "least dangerous branch"[5] and the weakest phalanx in the U.S. government ranks. But they retain a variable—and occasionally potent—brew of social influences, ranging from spirited guidance to bold example to inspirational preachment to unarguable precedent. The U.S. environmental movement burst into prominence with the support and leadership of the U.S. judiciary,[6] and it has staggered with the withdrawal of that support. The Supreme Court's 5-4 decision in *Massachusetts v. EPA*[7] confirming the Clean Air Act's (CAA's)[8] utility in the climate change wars was met by a kind of "throwing off the chains" celebration in the law journals,[9] though the Supreme Court was soon back on its customary "none of our business" message.[10] Elsewhere in the world, the judicial role in the influence of environmental thought and the protection of natural assets is unmistakable and strong.[11]

I. Know Her by Her Enemies: The Voice of Environmental Law

That Betty Fletcher has become an environmental voice worth silencing is illustrated by two somewhat strange developments in her recent judicial career. One is the years-long campaign of Sen. Orrin Hatch (R-Utah) to block the appointment of Betty Fletcher's son, Willie Fletcher, to the

1. *See* The Worldwatch Institute, 2009: State of the World: Into a Warming World (2009).
2. *See* William H. Calvin, Global Fever: How to Treat Climate Change 4 (2008).
3. *See* James Lovelock, The Revenge of Gaia: Earth's Climate Crisis and the Fate of Humanity (2006).
4. *See* William H. Rodgers, Jr., *Preface to 2009 Pocket Parts* of 1 Environmental Law: Air & Water iii (Winter 2009).
5. *See* Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Branch of Politics (1986).
6. *See* Richard Lazarus, The Making of Environmental Law (2004).
7. 549 U.S. 497, 37 ELR 20075 (2007).
8. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
9. The decision was cited quickly in 234—perhaps 333—law review articles by the end of the following year. Search for William H. Rodgers Jr., by Melia Cossette, Intern Reference Librarian, Marian Gould Gallagher Law Library, Univ. of Wash. (Oct. 12, 2008) (using the databases Shepard's on LEXIS and Westlaw Secondary Sources and Law Reviews).
10. Summers v. Earth Island Inst., 129 S. Ct. 1142, 39 ELR 20047 (2009); Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 39 ELR 20279 (2008).
11. *See* Oliver Houck, Taking Back Eden: Eight Environmental Cases That Changed the World (2009).

Ninth Circuit.[12] This "dangerous appointment," so long dangling in the wind, has now come to pass, but Senator Hatch did exact the commitment from Betty Fletcher to go on senior status. Petty, petulant, no act of Congress this one. But the Betty Fletcher-Willy Fletcher moment will not cast a shadow as long as the Learned Hand-Augustus Hand get-together (these judges were cousins) on the U.S. Court of Appeals for the Second Circuit years ago.

A second recent toning-down of Judge Fletcher occurred in the context of her National Environmental Policy Act (NEPA)[13] decision invalidating the National Highway Traffic Safety Administration's latest round of Corporate Average Fuel Economy (CAFE) standards. The agency was carbon dioxide (CO_2)-oblivious, and the court ordered the agency to write an environmental impact statement (EIS). This was one of the most important judicial moments on climate change in the last decade. But the order to write the EIS disappeared in the subterranean world of judicial politics.[14] Here is the speculation and the outcome:

> Judge Fletcher even was obliged to appease the "denier" faction on her own court; the opinion was withdrawn and rewritten (under an apparent threat of an en banc move) to excise a direct order to the agency to prepare an EIS. But we do get a splendid NEPA opinion in full demolition mode. Thus, the Judge Fletcher opinion does a NEPA renovation of the agency's CAFE standards decision on multiple grounds:
>
> - "failure to monetize" the value of carbon emission reductions;
> - failure to fix the "SUV loophole";
> - failure to set fuel-economy standards for the so-called Class 2b trucks;
> - inadequate analysis of cumulative effects;
> - inadequate assessment of alternatives that are confined to a "very narrow range"; and
> - failure to address the "tipping point" evidence [on climate change] that small changes can have big effects.[15]

Controversy swirls around this jurist with a small voice and a big following.

12. As reported at the Law Symposium honoring the Honorable Betty Binns Fletcher, Univ. of Wash Sch. of Law, (Mar. 6, 2009). The *Washington Law Review* will devote its February 2010 issue to the distinguished career of Judge Betty B. Fletcher. *See* http://www.law.washington.edu/WLR/submissions.html.
13. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
14. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 37 ELR 20281 (9th Cir. 2007), *vacated and withdrawn in* Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 38 ELR 20214 (9th Cir. 2008) (Judge Fletcher is joined by Hawkins, J., with Siler, J., concurring in part and dissenting in part, in a brief opinion).
15. William H. Rodgers Jr., *NEPA's Insatiable Optimism,* 39 ELR 10618, 10620 (July 2009).

II. Judge Fletcher's Rise as a NEPA Scholar

Judge Fletcher's service on the Ninth Circuit extends from 1979 (she was confirmed by the U.S. Senate on Sept. 26 of that year) until the present time. Interestingly, then, she missed the halcyon years of the rise of environmental law (the 1970s) and has served on the court during an era of doubts, questions, rollbacks, rethinking, and reformulations of environmental law. During this period of time, Judge Fletcher wrote 34 opinions (28 as the author of the main opinion) on the topic of environmental law.[16] Scarcely one opinion a year. Spread across cases covering the huge physical landscape embraced by the Ninth Circuit. Discussing a wide variety of statutes and contexts.

Why did it matter and how did Judge Fletcher earn her reputation as one of the (if not *the*) leading U.S. judicial scholars on environmental matters?

She didn't do it with results alone. Despite what her critics might think, wildlife[17] and the environmentalists[18] didn't always win before Judge Fletcher. The U.S. Forest Service (Forest Service)[19] and the developers[20] didn't always lose. This "mad-hatter of judicial review," as some have called her, could cast a skeptical eye on the convenient doctrines of decision-avoidance,[21] but she readily steered clear of decisions where the judicial terrain was especially treacherous.[22]

Judge Fletcher was lucky, in the order of things. Early in her tour of duty, she wrote an opinion upholding the Cali-

16. Search of Honorable Betty Fletcher's Environmental Cases for William H. Rodgers Jr., by Julia Vinson & Ann Hemmens, Reference Librarians, Marian Gould Gallagher Law Library, Univ. of Wash. (Jan. 14, 2009) (Westlaw database "Federal Judicial Circuit, Ninth Circuit Cases" (FED9-ALL), then searching for Opinions by Fletcher with the Digest Topic assigned to cases dealing with Environmental Law: OP(FLETCHER) & TO(149E); for Dissenting opinions by Fletcher and the Digest Topic assigned to cases dealing with Environmental Law: DIS(FLETCHER) & TO(149E); and for Concurring opinions by Fletcher and the Digest Topic assigned to cases dealing with Environmental Law: CON(FLETCHER) & TO(149E). Those results were reviewed to assure Betty B. Fletcher was the author of the respective opinions).
17. Defenders of Wildlife v. Bernal, 204 F.3d 920, 930 (9th Cir. 2000) (concurring opinion in a case affirming a district court decision that the construction of a "critically needed" new high school would not "take" the endangered Ferruginous pygmy owl. As of February 20, 2009, this owl is "delisted" and thus unprotected in Arizona; there are less than 30 of these birds alive today. Conversation with Noah Greenwald, Ctr. for Biological Diversity, Davis, Cal., Feb. 19, 2009. *See* Man Hing Ivory & Imports, Inc. v. Deukmejian, 702 F.2d 760, 13 ELR 20477 (9th Cir. 1983) (California statute prohibiting trade in elephant parts preempted by ESA).
18. Nader v. EPA, 859 F.2d 747, 19 ELR 20246 (9th Cir. 1988) (denial of citizen petition to revoke pesticides tolerance not appealable under §§346(a), 348 of the Federal Food, Drug, and Cosmetic Act).
19. *See* W. Radio Servs. Co. v. Glickman, 123 F.3d 1189 (9th Cir. 1997) (rejecting challenge to Forest Service approval of special use permit to construct telecommunications facility in a national forest).
20. *See* Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir. 1989); Weinberger v. City of Monterey, 848 F.2d 956 (9th Cir. 1988).
21. *See* West v. Sec'y of the Dep't of Transp., 206 F.2d 920, 30 ELR 20444 (9th Cir. 2000) (mootness).
22. *See* Nevada v. Watkins, 939 F.3d 710 (9th Cir. 1991) (mootness); Nevada v. Watkins, 943 F.2d 1080 (9th Cir. 1991) (mootness).

fornia law imposing a moratorium on new nuclear plants.[23] This ruling was later affirmed by the Supreme Court.[24] Judge Fletcher's second major environmental decision was *Save Our Ecosystems v. Clark*.[25] This decision would establish her instantly as a NEPA expert with deep knowledge, boldness, compassion, and a confident way in guiding the agencies through what is not infrequently a bureaucratic maze.

A. The Worst Case

Save Our Ecosystems was a double-barreled challenge to separate aerial spraying programs of the Bureau of Land Management (BLM) and the Forest Service on public lands in Oregon. The BLM had undertaken this act of beneficence "to destroy undergrowth thereby increasing the growth rate of conifers."[26] Following the Forest Service spraying,

> numerous and serious health problems were reported in the Five Rivers Valley, including spontaneous abortions, birth defects in humans and animals, and various other illnesses. The EPA began an investigation into these problems, but the Forest Service declined requests by the county health department and board of commissioners to delay the spraying.[27]

The major holdings of the court (in the opinion by Fletcher, J.) were that the worst-case analyses of each agency were deficient, that the U.S. Environmental Protection Agency (EPA) registration of the herbicides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[28] could not serve to excuse a proper NEPA analysis, that NEPA duties could include an independent obligation to do research, and that both spraying programs should be enjoined in their entirety until the NEPA requirements were fulfilled.

Judge Fletcher's opinion is notable for its scholarly criticism of the worst-case regulatory text.[29] (The rule later was undone and reworked by the Ronald Reagan Administration.)[30] It is notable for the care that is undertaken to instruct the agencies on how they might comply with their duties,[31] in the attention that is given to the context of the dispute,[32] and in the clarity with which the obligation to do research is stated.[33] On the all-important question of remedy, Judge Fletcher felt confident in stating that the prevailing rule[34] was that an injunction invariably must follow NEPA violations, except in the unusual case where it would do more harm than good. This would be a baseline worth remembering.

B. The Four Horsemen of the Hard Look

No one denies that identification of the cautious dimensions of hard-look judicial review is a precarious undertaking.[35] But Judge Fletcher was not beset by the customary doubts. She set the gold standards of judicial review in a series of four decisions challenging the Forest Service's justifications of various timber sales. In *Idaho Sporting Congress v. Thomas*,[36] she wrote an opinion reversing the agency and ordering preparation of an EIS for failure to evaluate the effects on water quality of Miners Creek and West Camas Creek. Judge Fletcher was unwilling to embrace disclosure of the agency's expert opinion without disclosure of the basis for it:

> [A]llowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second-guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion. In so finding, we note that NEPA's implementing regulations require agencies to "identify any methodologies used and [ ] make explicit reference by footnote to the scientific and other sources relied upon for conclusions" used in any EIS statement. 40 C.F.R. §1502.24.[37]

Another reversal and injunction against logging came in *Neighbors of Cuddy Mountain v. U.S. Forest Service*,[38] where the agency wrote an EIS but did a poor job of it. The court enforced a provision in the Payette Land and Resources Management Plan (developed under the National Forest Management Act (NFMA)[39]) that committed the agency to retaining "a minimum of 5 percent of old growth or mature forest, of which 2.5 percent must be old growth . . . *within*

23. Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n, 659 F.2d 903, 11 ELR 21070 (9th Cir. 1982).
24. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 457 U.S. 1152, 102 S. Ct. 2956 (1982).
25. 747 F.2d 1240, 15 ELR 20035 (9th Cir. 1984).
26. *Id.* at 1242.
27. *Id.* at 1243 (footnote omitted).
28. 7 U.S.C. §§136-136y, ELR Stat. FIFRA §§2-35.
29. 747 F.2d at 1244 n.5.
30. William H. Rodgers Jr. & Anna T. Moritz, *The Worst Case and the Worst Example: An Agenda for Any Young Lawyer Who Wants to Save the World From Climate Chaos,* S.E. Envtl. L.J. (forthcoming 2010).
31. 747 F.2d at 1245-46 (discussing a "spectrum of events" approach).
32. *Id.* at 1248 n.13 ("Monsanto is opposing the disclosure of EPA health and safety data before the Supreme Court while it argues here that the Forest Service may rely on that data.").
33. *Id.* at 1249:
    > Federal agencies routinely either do their own studies or commission studies of the particular area in which a proposed project is to be located. Almost every EIS contains some original research. And, almost every time an EIS is ruled inadequate by a court it is because more data or research is needed. The Forest Service does not, and indeed cannot, cite any case which holds that an agency is not obliged to do research to comply with NEPA. The Forest Service cannot abdicate its responsibilities by relying on another agency. It must evaluate the impact of its own actions.
34. *See id.* at 1250 n.15 ("It does not appear that any lower court, much less the Supreme Court, has ever found in a proceeding on the merits that federal actions violating NEPA could continue in opposition to the statutory mandates.") (quoting Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion,* 70 Cal. L. Rev. 524, 575 (1982)).
35. *See* Ecology Ctr., Inc. v. Austin, 430 F.3d 1057, 1071-72, 35 ELR 20248 (9th Cir. 2005) (McKeown, J., dissenting) (footnote omitted):
    > The Ninth Circuit, like the other circuits, repeats frequently the legal mantras of administrative review in the context of environmental decisions: "arbitrary and capricious," "hard look," and "no second guessing." These standards are easy to articulate, but it is more difficult to know when we have crossed the line from reviewer to decisionmaker.
36. 137 F.3d 1146, 28 ELR 21044 (9th Cir. 1998) (Miners Creek timber sale; 3.1 million board feet).
37. *Id.* at 1150.
38. 137 F.3d 1372, 28 ELR 21073 (9th Cir. 1998) (Grade / Dukes timber sale in the Payette National Forest in Idaho).
39. 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16.

each theoretical pileated woodpecker home range."[40] But the Forest Service forgot to mention how many woodpecker home ranges were within the sale area and "how many home ranges would be affected by the timber sale area."[41]

Next, the court in *Neighbors of Cuddy Mountain* enforced NEPA's cumulative effects requirements, saying:

> Significantly, the Forest Service has failed to even mention the number or percentage of trees meeting the definition of old growth that would be destroyed by the three other proposed timber sales in the Cuddy Mountain Roadless area, and whether the sales would affect the same pileated woodpecker home ranges that would be affected by the Grade/Dukes sale.[42]

Nor was it proper for the agency to "defer consideration of cumulative impacts to a future date. . . . Because the three proposed sales in this case were 'reasonably foreseeable,' the Forest Service was obligated to assess the cumulative impact of all sales on the availability of old growth habitat for the pileated woodpecker."[43]

The opinion of the court in *Neighbors of Cuddy Mountain* concludes that the three streams (containing redband trout) designated for a sedimentation bath by the timber sales could not be mitigated under NEPA by "broad generalizations" and "vague references." Indeed, Judge Fletcher wrote in clear confidence and obvious amazement[44]:

> In fact, we read the EIS as suggesting that the Forest Service did not even consider mitigating measures for the creeks actually affected by the sale, apparently because the Forest Service believes that mitigating measures elsewhere in Payette could "compensate" for the harms caused to the three creeks in the Grade/Dukes area. It is also not clear whether any mitigating measures would in fact be adopted. Nor has the Forest Service provided an estimate of how effective the mitigation measures would be if adopted, or given a reasoned explanation as to why such an estimate is not possible.

Step three of the education of Judge Fletcher in the matter of the Forest Service is *Blue Mountains Biodiversity Project v. Blackwood*,[45] which condemned the environmental assessment (EA) undertaken by the agency and extended an injunction against timber salvage sales in the wake of the "largest wildfire" in the recorded history of the Umatilla National Forest.[46] The short roster of NEPA failures identified in this Judge Fletcher opinion included misapplication of the proper test for preparation of an EIS (plaintiffs had met this test by demonstrating "substantial questions" about whether the project would have a "significant effect" on the environment),[47] a passing over of the threshold test of "highly controversial"[48] (which is typically triggered by principled differences of scientific opinion nicely illustrated by the debate over post-fire salvage logging),[49] failure to address the sedimentation risk of further logging with anything but generalities ("The Forest Service's only attempt to measure sedimentation failed when its data collection box overloaded with sediment"; "the proper evaluation should identify the impact of the increased sediment from the logging and road-building on the fisheries habitat in light of the documented increases that already have resulted from the fire"[50]), an unconvincing discussion of mitigation measures,[51] and an ugly agency "segmentation strategy" that overlooked cumulative effects in an obvious rush to implement.[52]

Judge Fletcher closes her analysis in *Blue Mountains Biodiversity Project* with these wry observations:

> Although we now impose the "snag" that the Forest Service feared but the law requires, the Forest Service has largely succeeded in its strategy. In the two and one-half months between the denial of plaintiffs' motion for injunction pending appeal and our injunction following oral argument, over half of the trees in the Big Tower project area have been cut and removed without the benefit of meaningful environmental analysis. Plaintiffs' appeal is not rendered moot, however, because trees remain standing in the Big Tower area and the Forest Service has not yet acted on its remaining proposed sales in the Tower Fire area.[53]

So long as "trees remain standing," it seems, Judge Fletcher's court is in session to protect them.

Phase four of Judge Fletcher and the Forest Service is recorded in *Ecology Center, Inc. v. Austin*,[54] which was another post-wildfire salvage logging endeavor in the wake of the year 2000 wildfires that destroyed 74,000 acres on the Lolo National Forest. Thus, this case, like the Big Tower salvage project in the Umatilla, draws the court into dealing with the consequences of the agency's century-long "no burn" policy that was destructive, ignorant, immutable, and static.[55] The principal holding is that NFMA and NEPA violations rendered the agency's efforts

40. 137 F.3d at 1377 (emphasis added by court).
41. *Id.* at 1379 (footnote omitted).
42. *Id.* at 1379.
43. *Id.* at 1381.
44. *Id.*
45. 161 F.3d 1208, 29 ELR 20424 (9th Cir. 1998) (the Big Tower Salvage and Revegetation Project in the Umatilla National Forest) (EA).
46. *Id.* at 1210.
47. *See id.* at 1212.
48. The "highly controversial" language appears in the Council on Environmental Quality's (CEQ's) NEPA regulations. *See* 40 C.F.R. §1508.27(b)(4).
49. *Compare Blue Mountains,* 161 F.3d at 1212-13, *with* William H. Rodgers Jr., Environmental Law in Indian Country §1.19 at 503-05 (2005).
50. 161 F.3d at 1213.
51. *Id.* at 1214.
52. *See id.* at 1215. The Forest Service was contemplating five separate salvage sales, which the court said should have been evaluated in a single EIS. The court was obviously moved by the revelation that "all five sales were disclosed by name to a coalition of logging companies, along with estimated sale quantities and timelines even before the Big Tower EA was completed." *Id.* (footnote omitted). Additionally, the acting Forest Supervisor disclosed in a letter to logging companies a rush-to-judgment tactic that was not misunderstood by Judge Fletcher. *See id.* at 1215 n.6.

    After observing that "due to the unique fisheries and water quality values in the [Tower Fire area], it is envisioned that the area will be controversial," [the acting Forest Supervisor] noted that the Forest Service's strategy for forest recovery "emphasizes multiple, smaller scale project NEPA preparation to achieve quick success."
53. *Id.* at 1215 (emphasis added).
54. 430 F.3d 1057, 35 ELR 20248 (9th Cir. 2005) (Lolo National Forest Post Burn Project).
55. The "treatise" on this topic is Robert Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation,* 36 Envtl. L. 301 (2006).

arbitrary and capricious, which required a reversal and remand of Judge Donald W. Molloy's grant of summary judgment for the Forest Service. The dispute focuses on the Forest Service's methodology (let's even call it a "policy choice") to proceed with what is described as "commercial thinning of small diameter timber and prescribed burning in old growth forest stands, as well as salvage logging of burned and insect-killed timber in various areas of the forest."[56] The Forest Service calls this "rehabilitative 'treatment' of old growth (and potential old-growth) forest stands; this treatment entails thinning of old-growth standards via commercial logging and prescribed burning." The Forest Service says that the treatment "is designed to leave most of the desirable old-growth trees in place and to improve their health."[57]

True to form, Judge Fletcher was no more willing to accept "rehabilitative treatment" on faith than she would have been to accept universal fire-suppression on faith. The key to her was that the agency's "hypothesis and prediction" be "verified with observation"[58] so that the idea could move beyond ukase, assumption, and opinion. She did not see that here:

> Just as it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective, it is arbitrary and capricious for the Forest Service to irreversibly "treat" more and more old-growth forest without first determining that such treatment is safe and effective for dependent species. This is not a case in which the Forest Service is asking for the opportunity to verify its theory of the benefits of old-growth treatment. Rather, the Service is asking us to grant it the license to continue treating old-growth forests while excusing it from ever having to verify that such treatment is not harmful.[59]

The agency was insisting upon its own opinion:

> [T]his is not a case in which different experts have studied the effects of commercial thinning and prescribed burning in old-growth forests and reached different conclusions. Here, experts have differing hypotheses regarding the effects that treating old-growth has on dependent species, yet the Forest Service proposes to continue treating old-growth without first taking the time to observe what those effects actually are. In light of its responsibilities under NFMA, this is arbitrary and capricious.[60]

The official mind was made up, and the official opinion was expressed in the EIS:

> The EIS discusses in detail only the Service's own reasons for proposing treatment, and it treats the prediction that treatment will benefit old-growth dependent species as a fact instead of an untested and debated hypothesis. Even if the Service considered these issues but concluded that it need not or could not "undertake further scientific study" regarding the impact of treatment on dependent species, it should have "explain[ed] in the EIS why such an undertaking [wa]s not necessary or feasible."[61]

In *Ecology Center*, Judge Fletcher added injury to insult of the Forest Service by finding fault with the agency's soil quality analysis. She reasoned that the EIS discussed and embraced a Regional Soil Quality Standard "as if it is binding" in the Lolo National Forest (which it was not).[62] But this sleight of hand made the draft and final EIS misleading and therefore arbitrary. There was a strong dissent on this point, in particular by Margaret McKeown.[63]

Judge Fletcher's "hard look" is bold and consistent. She is a devotee of adaptive management, not imperial management. The Forest Service gets no presumption of regularity and earns no credits for longevity. No misstep is overlooked. Courts give agencies no blind acceptance. They are, instead, the "validators" and the "repudiators" of agency behavior. This is a very dynamic arrangement, but agencies can go from here to there by validating their hypotheses, proving their point, and reasoning. Judge Fletcher's rigorous "natural selection" approach to judicial review has high casualty rates, but she would say what loses out along the way is agency folderol, dissembling, fakery, and lawlessness.

There are other theories of judicial review afoot, and they are practiced by Fletcher colleagues on the Ninth Circuit. The en banc decision in *Lands Council v. McNair*[64] can only be read as a repudiation of—and a challenge to—the Fletcher version of the "hard look":

> In essence, [the earlier *Lands Council* panel decision] asks this court to act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty. As we will explain, this is not a proper role for a federal appellate court. But Lands Council's arguments illustrate how, in recent years, our environmental jurisprudence has, at times, shifted away from the appropriate standard of review and could be read to suggest that this court should play such a role.[65]

Elsewhere, the *Lands Council* en banc panel underscores another version of arbitrary and capricious review.[66] The court's task

> is not to engage in assessments of "the quality and degree of on-site analysis and make fine-grained judgments of its worth," but only to ensure the Forest Service has not relied on improper factors, entirely failed to consider a problem, or offered an explanation counter to the evidence before it.

56. *Ecology Center, Inc.,* 430 F.3d at 1061.
57. *Id.* at 1063.
58. *Id.* at 1064 (quoting Lands Council v. Powell, 379 F.3d 738, 752, 34 ELR 20073 (9th Cir. 2004), *amended by* 395 F.3d 1019 (9th Cir. 2005)).
59. *Id.*
60. *Id.* at 1065.
61. *Id.* (reference omitted).
62. *Id.* at 1069.
63. *Id.* at 1071-72.
64. 537 F.3d 981, 38 ELR 20151 (9th Cir. 2008) (en banc).
65. *Id.* at 988.
66. *Id.* at 993.

Frankly, the Judge Fletcher approach to judicial review beats the studied somnolence of *Lands Council* hands-down. The one demands the best of the agencies, and it has selection, improvement, and change within it. Judge Fletcher opinions are rigorous, demanding, and even entertaining. *Lands Council* is wrong in rejecting "fine-grained" judicial judgment in favor of lazy tolerance. It is wrong to make a virtue of judicial ignorance and passivity. If science is beyond the understanding of judges, they should be in another line of work. And it is wrong to treat judicial review as a static inquiry into how powers are separated in a highly dynamic and interactive system.

C. *To the Columbia River: Into the Heart of the Hard Look*

One case, in particular, reveals the techniques of Betty B. Fletcher. That case is *Northwest Environmental Advocates v. National Marine Fisheries Service*.[67] The occasion was an elaborate challenge (six different port authorities were intervenors) to the U.S. Army Corps of Engineers' (the Corps') projects to deepen the Columbia River navigation channel and to propose new deepwater disposal sites for huge volumes of dredged material. (There are references in the record to 4.5 million cubic yards of sand per year for 50 years.)[68] The "old river" (40-foot channel depth) wasn't deep enough for the demands of modern commerce, and the world's containership trade was obliged to arrive "light-loaded"—in the approximate sense, one might suppose, that airplanes are "light-loaded" because of the deficiencies of the accommodations. The majority of the Ninth Circuit panel (opinion by Silverman, C.J., joined by Gould, C.J.) agrees with District Judge Ricardo S. Martinez and holds that the Corps had undertaken its NEPA and other responsibilities with the requisite "hard look," most particularly explaining the fate of the sand and the consequences for coastal erosion along the 100 miles of shoreline from Tillamook Head, Oregon, to Point Grenville, Washington.

The opinion of the court in *Northwest Environmental Advocates* is not a bad opinion. It is sprightly and thorough and convincing. But it is representative of how the hard look has lost its sharp edges over the 30-year career of the Hon. Betty B. Fletcher.

Judge Fletcher dissents, and she lets us know what we are missing and what can be found in exceptional judicial review in environmental (especially NEPA) cases. Let's focus on: (1) the presumption of agency validity and regularity; (2) the value of judicial review and instruction; (3) the worth of social and ecological contextual awareness; (4) NEPA's review on the record; (5) the insistence that agency "good faith" is no substitute for analysis and compliance; and (6) sensitivity to the special traps of environmental sampling and modeling.

While wearing the cape of a federal appellate judge, an effective proponent of judicial review in environmental cases must be partly investigative reporter, partly environmental historian, partly scientific reviewer, partly undercover ombudsman, partly a main street politician, and partly an eager pursuer of empirical reality. Resignation from any of these roles is always a tempting option under the prevailing judicial rectitudes of deference, separation of powers, decision-avoidance, and passivity.

Judge Fletcher is one of the defiant ones. Her version of judicial review resonated to the older tunes, and it still has a bite to it.

1. The Presumption of Agency Validity and Regularity

The Corps is an amazing agency with a stunning history and a raft of dedicated staffers.[69] Judge Fletcher knows this full well. Yet, she opens her dissent in *Northwest Environmental Advocates* with a reference that "the Corps is want to undervalue costs and overvalue benefits so that it can get on with is mission—constructing water projects."[70] She could have cited 100 sources for this proposition. NEPA exists because agencies proved themselves to be environmentally oblivious, and the statute can continue only so long as courts insist upon enforcing the legal obligation to undertake the environmental job.[71] Compliance with environmental laws can be expensive, thankless, distracting, unrewarding, and a hindrance to realization of higher goals.

The Betty B. Fletcher Note One in *Northwest Environmental Advocates* could be recorded as "presumption of validity and regularity suspended for the moment." But her customary approach in NEPA cases (and actions are louder than words) is somewhat stronger. It is: "Presume anything you want. I have my own doubts and I'm disposed to look into the matter."

2. The Value of Critical Review and Instruction

Much of life is one exam after another. The tougher ones are better recalled because we learn from our mistakes and try harder to correct foibles revealed.

The young naval officers in the nuclear program never forgot their personal interviews with Hyman Rickover.

Judge Fletcher isn't quite that tough but nearly so. Agency programs that could clear this formidable obstacle had clear

67. 460 F.3d 1125, 36 ELR 20176 (9th Cir. 2006).

68. *Id.* at 1135 (majority opinion, quoting a 1999 document of the Corps):
> If the deepwater site is used as intended (4.5 mcy [million cubic yards] of MCR [Mouth of Columbia River] sand placed per year for 50 yrs), the implications on the littoral sediment budget at MCR and adjacent coastal areas could be profound. The removal of 225 mcy of sand from MCR (via dredging) and subsequent placement at the "deepwater" site would be equivalent to removing the above and below portions of Peacock spit. The result of such a mass removal of littoral sand would likely be adverse: Local and possible regional coastal erosion may result. The stability of MCR jetties may be reduced due to increased toe scour, resulting from such a littoral sediment deficit.

69. Prof. Kim Diana Connolly, South Carolina School of Law, has written knowledgeably on this topic. *See* Wetlands Law & Policy: Understanding Section 404 (Kim Diana Connolly et al., eds. American Bar Ass'n 2005).

70. 460 F.3d at 1147 (footnote one omitted).

71. National Environmental Policy Act §105 (codified at 42 U.S.C. §4335 (2007)) (NEPA policies are "supplementary" to "existing authorizations" of federal agencies).

sailing, and those that didn't, knew what to do next. Agency staffers who had a hand in writing a Fletcher-approved EIS (there were a few) would beam in the spotlight of achievement.

The experience could be unsettling. What did Judge Fletcher say to the Corps in her *Northwest Environmental Advocates* dissent?

> I have much to criticize about the Corps' failure to consider adequately the environmental consequences of its proposed action. I will get to that. But I choose to first talk about its disgraceful attempt to justify the dollars and cents of its proposed project. This should not come as a surprise to any of us. The Corps is wont to undervalue costs and overvalue benefits so that it can get on with its mission-constructing water projects.[72]

And what does she say to her colleagues?

> Fundamentally, the majority takes an ostrich's head-in-the-sand approach to reviewing the agency's analysis, settling for the Corps' explanation without undertaking the required review of its decision making. It is true, we are not permitted to substitute our judgment for the reasoned decision of the agency. Neither, however, are we permitted to rubber-stamp the agency's decision of what factors must be considered and what factors need not be considered without taking a detailed look at whether the agency's reasoning is sound. Here, it is not.[73]

She says much more, of course, in a reasoned, instructive, and productive way. Judicial review always has a "before" and it always has an "after." Judge Fletcher consistently tries to learn from the one and pass on what she knows to the other.

3. The Value of Social and Ecological Contextual Awareness

Like the vast majority of federal judges, Judge Fletcher is a sophisticated, knowledgeable, and intelligent person. This jumps out at two different places in her *Northwest Environmental Advocates* dissent.

One is her recitation of the Corps' selective choice of facts—to the point of using "benefit to foreign ships"—to justify a project that was questionable in the context of regional priorities.[74] The second is her derivation from the record of the critical ecological fact that what is going on here is the removal of massive amounts of sand from the littoral system to the deep ocean,[75] which is a functional black hole. It's comparable to sending the sand to the moon where it can be of no ecological service on earth. This is a serious environmental matter.

But is there anything in the orthodoxy of judicial review that hinders a clever and informed federal judge from deriving a deeper economic understanding or environmental insight from the record before her in a NEPA case? Sadly, the answer is "yes." The intellectual situation in the federal courts, of course, doesn't approach the know-nothingism and "Dumb-as-we-want-to-be" themes recited in the popular literature.[76] But, remember, preachments of ever-so-light and cautious and restrained judicial review are grounded in the so-called incompetent, ill-equipped, and out-of-our-league assessments of the judicial function.[77] Justice Antonin Scalia makes light of—and takes bows for—his ignorance of what the "atmosphere" embraces because he pretends that all it really means is that he won't butt into matters he does not understand.[78]

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72. 460 F.3d at 1147.
73. *Id.* at 1162.
74. *Id.* at 1147. Judge Fletcher wrote:
> Here, instead of objectively looking at whether the proposed project is a net economic benefit to the American economy, it has chosen a method of analysis that reaches its desired result—admitted even by it as perhaps not the best methodology—but a methodology that justifies the project. It ignores salient facts: Northwest ports (Puget Sound and Grays Harbor) can handle the freight and offer safer shorter transit—the river trip is longer (one-hundred miles from the bar to Portland) and fraught with hazards (the shifting bar at the mouth and shifting sand bars up river). Two-thirds of the container ship business has already left the river. The Portland Port that is up the Willamette River cannot be deepened because of pollution. No wonder the Corps declined to consider displacement of traffic from one American port to another. It insisted on including supposed benefit to foreign ships as part of the benefit. Should American taxpayers take comfort that foreign bottoms are the principal beneficiaries of any economies in the project?
>
> What about the cost side? No analysis is made of the costs of potential devastating erosion that may result to the Washington and Oregon coastlines and the jetties.

Id.

75. *See* 460 F.3d at 1156:
> As Exhibit J explains, historically, for the most part, disposal of dredged sand largely occurred within the littoral system. Although transport patterns were being altered, that is, the way in which the sand was being moved around was changing, and although less sand was being sent downstream because of dams, once downstream the amount of sand in the system remained fixed. By contrast, the record indicates that near-shore and beach disposal are not a permanent solution and that ocean disposal (outside of the littoral system) will increasingly be employed. Increased ocean disposal means that, unlike in the past, the amount of sand being moved around near the mouth of the river will not remain fixed. Over 50 years, 262 mcy may be removed from the littoral system. This permanent removal of material from the littoral system is not the same as moving sand from one part of the littoral system to another. Exhibit J does not address the effect of the removal of sand from the littoral system. The agency nowhere analyzes what happens when 262 mcy is removed from the littoral system entirely, despite the fact that this is an anticipated possibility, verging on a probability.
76. *See, e.g.,* Susan Jacoby, The Age of American Unreason (2008); Damian Thompson, Counterknowledge (2008).
77. *See* Lands Council v. McNair, 537 F.3d 981, 38 ELR 20163 (9th Cir. 2008) (en banc).
78. The following is part of the Transcript of Record at 22-23, *Massachusetts v. EPA,* 549 U.S. 497, 37 ELR 20075 (2006) (No. 05-1120), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1120.pdf:
> Justice Scalia:
> To be sure, carbon dioxide is a pollutant, and it can be an air pollutant. If we fill this room with carbon dioxide, it could be an air pollutant that endangers health. But I always thought that an air pollutant was something different from a stratospheric pollutant, and your claim here is not that the pollution of what we normally call air is endangering health. That isn't, that isn't—your assertion is that after the pollutant leaves the air and goes up into the stratosphere it is [a] contribution to global warming.
>
> Mr. Milkey (for the State of Massachusetts):
> Respectfully, Your Honor. It is not the stratosphere. It's the troposphere.
>
> Justice Scalia:
> Troposphere, whatever. I told you before I'm not a scientist.
> (Laughter)

In this *Massachusetts* colloquy, Justice Scalia actually displays more ignorance than he intends. The CAA doesn't reach indoor air pollution. But a quick reading of the dictionary wouldn't tell you that. The larger point is that the Justice is proclaiming his own limitations as an asset in the ongoing debate of proper ambitions of judicial review. I am unelected, he means, and ignorant and untrained in science. And therefore, what? I should defer to a faceless administrator who is unelected, calculating in the use of science, and completely interested in the outcome.

By her behavior, Judge Fletcher does not acknowledge an "untrained for the job" exception to judicial review. One cannot help but believe that law must join the rest of the world in appreciation of its interdisciplinary empirical realities. Judicial review will thrive and it will extend to all matters agencies do. "Too hard for me to understand" will not forever be a credit on the resumés of our future appellate judges.

4. NEPA Review of the Record

The majority in *Northwest Environmental Advocates* found no abuse of discretion in the district court's decision to strike the declaration of economist Ernest Niemi. It was prepared at the request of petitioners and offered "to determine whether or not the Forest Service EIS provides a misleading description of the Project's potential economic impacts."[79] But the majority ruled that the Niemi document fell within none of the exceptions to the customary view that NEPA review is limited to the administrative record. Judge Barry G. Silverman wrote that "the record reveals that the Corps considered all relevant factors and provides an adequate basis for explaining the Corps' decisions."[80] By contrast, Judge Fletcher responded: "As long as it is not employed to substitute the court's substantive determination for that of the agency, the Niemi declaration is exceedingly useful to a thorough review of the agency's economic analysis. In a highly technical area, it sheds light on the sufficiency of the analysis undertaken by the agency."[81] Judge Fletcher would admit the document for the purpose of identifying "omissions and inaccuracies" in the agency's analysis and for identification of the "probable overstatement" of project benefits.[82]

As we might have predicted, the proponent of more aggressive review (in this case Judge Fletcher) favored record supplementation while opponents of more searching review did not. Curiosity and doubts need an extended playing field. What is interesting in this arcane corner of law is that this topic of record supplementation is a seething hotbed of controversy.[83] I have seen a case announcing that "exceptions" to the rule of "review on the record" number in the double figures.[84] Perhaps we are approaching a world where the norm is review "on the record" plus anything else useful that can be found in the course of litigation. Judicial curiosity always will have its way, but courts can have their cake on this topic and eat it too. They can always review the documents and then decide whether they should be added to the record of the ruling they wish to make.

5. Insistence That Agency Good Faith Is No Substitute for Analysis and Compliance

The Corps did a considerable public service in *Northwest Environmental Advocates* when it went out of its way to inform the world in the EIS that full and extravagant use of the deepwater disposal sites it contended for had serious consequences for the littoral sediment budget at the mouth of the river with possible "profound" implications for "adjacent coastal areas."[85] Impressed by this candid revelation, the majority gladly accepted the Corps' explanation that it intended to do nothing of the sort (some evidence to the contrary is called a "misnomer").[86] And thus the majority said:

> The record clearly reveals that the Corps considered the potential for coastal erosion due to sediment loss. The Corps even structured disposal plans to minimize this possibility as much as possible. We thus hold that the Corps took a hard look at the effects of removing [Mouth of Columbia River] sediment from the littoral system.[87]

Judge Fletcher reacts to this Corps gesture of good faith in a different way. She says that this agency good deed will not go unpunished with further labor. She wonders why the Corps worked so hard to gain approval of things it would not do. Thus:

> The "hard look" standard requires, not just that the Corps express its preference not to reach a situation in which all MCR dredge is disposed of in deep water, and develop a management and monitoring plan intended to accomplish this preference, but that the Corps analyze the impacts of such a potential outcome, even if the Corps hopes to avoid it.[88]

And further:

> The impacts of disposal of all dredged materials from the MCR Project and channel-deepening into the deep-water site should, therefore, have been analyzed under NEPA. The majority's assertion that because the Corps was aware of potentially adverse impacts and tried to avoid them, it need not study or quantify those impacts, is simply inconsistent with this standard.[89]

Justice Scalia:
That's why I don't want to deal with global warming, to tell you the truth.

79. 460 F.3d at 1144.
80. *Id.* at 1145.
81. *Id.* at 1151.
82. *Id.* at 1152.
83. Rodgers, *supra* note 49, §1:17 at 461-63 (with references in Winter 2009 Pocket Part).
84. *See* Midcoast Fishermen's Ass'n v. Gutierrez, 592 F. Supp. 2d 40 (D.D.C. 2008) (John Facciola, Mag. J.); *see also* Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation,* 81 Cal. L. Rev. 929 (1993).
85. Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125, 1135, 36 ELR 20176 (9th Cir. 2006).
86. *Id.* at 1136.
87. *Id.* at 1137.
88. *Id.* at 1158.
89. *Id.*

And further:

> Here, the Corps tells us that there won't be a problem. Although the agency admits the adverse consequences will be profound, it hasn't studied what will happen if the "worst-case" scenario comes to pass[;] the Corps asks us to trust it. That is not the standard. The Army Corps has failed to take the required "hard look" at the cumulative impacts on coastal erosion of dumping large quantities of the dredged materials from the Mouth of the Columbia River and those from channel deepening into the proposed deep-water disposal site. . . .
>
> We should remand for the agency to undertake further study. Instead, the majority allows channel deepening and authorization of the deep-water disposal site to proceed, even without an understanding of the cumulative effects on coastal erosion of a "reasonably foreseeable" future project.[90]

6. Sensitivity to the Special Traps of Environmental Sampling and Monitoring

The last Judge Fletcher attribute on display in *Northwest Environmental Advocates* is her innate suspicions (and therefore heightened review) of agency matters pertaining to sampling and modeling. Sampling has the mysterious trait of not disclosing things not sampled or of hiding reality under mysterious clouds of averaging and other techniques. Modeling is a selective grab of empirical reality and it, too, is capable of building its own reality.

Northwest Environmental Advocates challenged the sufficiency of the Corps' analysis of the effects of channel deepening on river toxicity.[91] Judge Fletcher's opinion perks up at the revelation in the record on this point:

> In its Biological Opinion, National Oceanic and Atmospheric Administration (NOAA) Fisheries identified the Columbia River's toxicity to be "among the highest levels measured in estuarine sites in Washington and Oregon." . . . These high levels of toxicity, just short of lethal, pose a serious threat to juvenile salmonids dependent upon the estuary, not to mention the potential adverse effects on humans and other species. The Army Corps explained the problem of "side-slope adjustment" noting that
>
> After the initial deepening the riverbed would begin to adjust to the new channel depth. Riverbeds adjacent to the deeper dredge cuts will degrade as bedload is deflected down the cut slope and into the navigation channel. This process will continue for 5-10 years before the side-slopes reach equilibrium with the channel hydraulics. Sand eroded from these sides will become part of the active bedload transport on the riverbed.[92]

Judge Fletcher thus would hold:

> Salmon runs are at perilously low levels. The last thing that salmon need is another ladder to climb, so to speak. The Corps' failure to thoroughly analyze toxicity in the side-slope sediment renders its NEPA analysis incomplete-the agency has not considered all "relevant factors" associated with the direct and indirect impacts of channel deepening on river toxicity.[93]

Also challenged was the analysis of channel-deepening on the salinity of the Columbia River estuary. The older model in use was discredited by the record. And the newer model, plaintiffs said, was employed "too hastily, before its accuracy had been verified."[94] Its prediction of a 5 ppt (parts per thousand) of salinity increase in the shallows was contested by the efforts to redeem the record:

> The district court apparently relied, not on evidence within the record, but upon its own Google search about the Corps' salinity model. The Corps relied upon a model admittedly fraught with uncertainty to reach its conclusion that the channel deepening would produce no adverse impact on the salmonids from salinity in the estuaries. I suggest that studies employing an older, inadequate model followed by complete reliance on an untested model does not constitute the "hard look" required by NEPA.[95]

D. Betty Fletcher at War: Soldiering and Whale-Watching

There is no national security exception to NEPA, and Judge Fletcher is one of few that made that datum a reality.

She stood tall against the shock and awe of a transformed U.S. Army that was announced in 1999 as "the creation of a 'more responsive, deployable, agile, versatile, lethal, survivable, and sustainable [force] which is also strategically responsible and nimble.'"[96] The part of the plan that found its way into court was the Army's "expansion, land use, and activities associated with transforming the 2nd Brigade," stationed on Oahu, Hawai'i, into a "Stryker Brigade Combat Unit" in Hawai'i.[97] The Army had written a programmatic EIS on its Army Transformation Campaign Plan and followed that up with a site-specific EIS for the transformation of the 2nd Brigade in Hawai'i. The latter effort was accompanied by a vigorous scoping and outreach effort in Hawai'i, extending to "low-income, minority and Native Hawaiian constituencies."[98]

This beating of the bushes turned up some plaintiffs the Army was not looking for—the Hawaiian groups 'Ilio'ulaokalani Coalition, Na'Imi Pono, and Kipuka. Argument in the district court before Judge David Ezra (who is able and experienced in environmental matters) focused on whether plaintiffs had waived their objections and whether the "alternatives" that must be considered in any NEPA analysis embraced the prospect of moving the 2nd Brigade Com-

90. *Id.* at 1159.
91. *See id.* at 1159-60.
92. *Id.* at 1160.
93. *Id.* at 1161.
94. *Id.* at 1161.
95. *Id.* at 1162.
96. 'Ilio'ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 108736 ELR 20204 (9th Cir. 2006) (quoting the 2002 Record of Decision on the Programmatic EIS).
97. *Id.* at 1087.
98. *Id.* at 1090.

bat Team off Hawai'i. The district court granted summary judgment for the Army.[99] But the Ninth Circuit (opinion by Judge Fletcher) reversed in part and remanded, directing preparation of a supplemental site-specific EIS "to consider all reasonable alternatives, most notably the potential for transforming the 2nd Brigade outside of Hawai'i."[100]

Judge Carlos T. Bea wrote a strong dissent,[101] capturing the collective anguish that must have swept through the ranks with the news that the U.S. military actually must consider leaving Hawai'i. Judge Bea commences his dissent with these pointed observations:

> This case questions whether a court can second-guess the Army when it decides that modernizing its brigade units as quickly as possible, while maintaining combat readiness, can be done only "in place," i.e., at each brigade's present base location. In the name of environmental "concerns," the majority would require the Army to consider what it has already reasonably rejected: whether it should consider moving Army units around the country for the new training—regardless [that] it would cause delay in modernizing, lack of combat-readiness and entail prohibitive costs—because of possible environmental impacts training "in place" could cause.[102]

Judge Bea explained his disdainful reference to "environmental concerns" and went on to say they had become too sizeable for their legal britches:

> I place the word in quotes because it may have acquired a special meaning in the context of environmental litigation. Where other litigants have "objections," environmental groups seem to have "concerns." This may imply the "concerned" possess a greater commitment, sensitivity and objectivity. Nonetheless, for our purposes, to have effect in litigation, "concerns," like objections, must be voiced and justified, or be lost by doctrines of waiver and exhaustion of administrative remedies.[103]

And what was Judge Fletcher's response to this explicit charge that "environmental concerns" had become the next great threat to national security? She said: Comply with the law. Follow your own counsel. You're good at it[104] and we're proud of you for it.

The Fletcher opinion in this *Stryker Brigade Combat* case is quite convincing in its own right. It dismisses the "waiver and exhaustion" business with a deft rejection of the notion of whether an obscure announcement in *USA Today* (which drew very little response) could foreclose NEPA claims.[105] And it holds that the Army's "tiering" argument—that the question of the "in-place" location of any transformed 2nd Brigade would take place in Hawai'i—was invalid for the simple reason that the programmatic EIS decided none of the things credited to it.[106] Judge Fletcher sees the case as the classical "tiering" Alphonse-Gaston where the agency defers consideration of the site-specific saying it will be taken up later, only to decline to take it up later by arguing that it had been taken up earlier.[107] In her instructions on "Where the Army Went Wrong," Judge Fletcher wrote:

> The Army can't have it both ways. Either it needed to explain in the PEIS its decision to transform the 2nd Brigade in Hawaii and consider reasonable alternatives in the PEIS [that would include other sites] or it needed to explain that decision in the SEIS, but the Army cannot simultaneously argue that the decision had been made in the PEIS and that it had not. Somewhere, the Army must undertake site-specific analysis, including consideration of reasonable alternatives.[108]

Judge Fletcher is the bearer of bad legal news, but her opinion makes clear that the Army's own experts, attorneys, officers, and staffers raised the same questions about justifying the location selections.[109]

There is nothing preachy or argumentative or ideological in Judge Fletcher's letter to the Army. She knows her NEPA, and she knows her role. Mistakes were made, and she was not alone in seeing them. Her philosophy is to fix things and move on.

She took a similar approach in *Natural Resources Defense Council, Inc. v. Winter*,[110] which is a scholarly (45 pages, 69 footnotes) affirmance of the district court's NEPA-based preliminary injunction against the Navy's use of high-intensity mid-frequency active sonar (MFA sonar) by the Third Fleet in large training exercises off the coast of Southern California (hence the SOCAL exercises). This was a titanic struggle between the U.S. Navy and the advocates for marine mammals that were thought to be heavily touched by the MFA sonar. The Supreme Court entered this fray, reversing Judge Fletcher and ruling that the Ninth Circuit had applied the wrong standard for a preliminary injunction by holding that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm."[111] The correct standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an

99. *Id.* at 1087.
100. *Id.*
101. *Id.* at 1102.
102. *Id.* at 1102 (Bea, J., dissenting) (footnote omitted).
103. *Id.* at 1102 n.1.
104. *See* Stephen Dycus, National Defense and the Environment 10 (1996) (an essay entitled "National Defense v. Environmental Protection: Can We Have It Both Ways." "Because we live in a dangerous and contentious world, we must not destroy the very thing we would fight to protect. And if war is unavoidable, we have to be mindful of the political values for which we go to war."
105. *Compare* 464 F.3d at 1088-89, *with id.* at 1091-93.
106. *Compare* 464 F.3d at 1094-95 (discussing 40 C.F.R. §1502.20). In particular, the court states:
> The Army's PEIS reached a deeper level of specificity than is usual in that it named several specific units that will transform in the Interim Phase and indicated that such transformation will take place "on-site." Although the PEIS names the 2nd Brigade in Hawai`i as one of these units set for transformation on-site, it does not undertake any analysis of the environmental impacts associated with that transformation.

Id. at 1095.
107. For further elaboration of this problem, see Rodgers, *supra* note 49, §1:23 at 616-31.
108. 464 F.3d at 1097.
109. *Id.* at 1089-90, 1096-99. In particular, see *id.* at 1099, where Lt. Col. Kozlowski is to "put together a task force to correct *the mistake of not addressing location selections in the PEIS*" (emphasis added in the Fletcher opinion).
110. 518 F.3d 658, 38 ELR 20057 (9th Cir. 2008).
111. Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 375, 39 ELR 20279 (2008).

injunction."[112] The majority made clear, moreover, that "even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."[113] This new NEPA law, which apparently was invented to honor the warriors, immediately was heisted to serve the vandals. Thus, the "patriotic" reformulation of the rules for injunctive relief in environmental cases was put to use quickly in the district courts to justify the denial of injunctions seeking to restrain polluting phosphate mining in Idaho[114] and destructive forestry practices in Georgia.[115]

Judge Fletcher must have lost some sleep over this one. The U.S. Navy chose not to comply with NEPA in the clearest of cases. Who could have thought these massive exercises with well-documented effects were not "major Federal actions"?[116] And the Navy functionally got away with it. The only Justice who noticed was Justice Ruth Bader Ginsburg, who wrote:

> The central question in this action under the National Environmental Policy Act of 1969 (NEPA) was whether the Navy must prepare an environmental impact statement (EIS). The Navy does not challenge its obligation to do so, and it represents that the EIS will be complete in January 2009—one month after the instant exercises conclude. If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis—and the Navy's training could have proceeded without interruption.[117]

This was not a case where plaintiffs were likely to prevail on the merits. It was closer to a sure thing.

Consider a few additional items of NEPA know-nothingism that Judge Fletcher must ponder in the wake of her "errors" in *Winter*:

- Chief Justice John Roberts declares:

  > The Court of Appeals upheld a preliminary injunction imposing restrictions on the Navy's sonar training, even though that court acknowledged that "the record contains no evidence that marine mammals have been harmed" by the Navy's exercises. 518 F.3d 658, 696 (C.A.9 2008).[118]

  Actually, what Judge Fletcher said is:

  > Moreover, while the record contains no evidence that marine mammals have been harmed by the use of MFA sonar in the Southern California Operating Area, *the scientific consensus* that MFA sonar may cause injury and death to marine mammals combined with the evidence that such injury, absent a stranding, is difficult to detect—especially in the case of the vulnerable beaked whale—further disproves the suggestion that the harm caused by MFA sonar in the SOCAL exercises is merely speculative.[119]

  Clipping off a quotation to drop a reference to "scientific consensus" is hack work—the sort of thing that has a bad reputation in police courts.

- Chief Justice Roberts also declares:

  > The Navy emphasizes that it has used MFA sonar during training exercises in SOCAL for 40 years, without a single documented sonar-related injury to any marine mammal. The Navy asserts that, at most, MFA sonar may cause temporary hearing loss or brief disruptions of marine mammals' behavioral patterns.[120]

  Actually, in its EA—the document that is supposed to explain why an EIS is not in order—the Navy predicts interference leading often to serious damage to several thousand marine mammals as a direct result of these exercises. Remember that "Level A" harassment is an "act that physically injures the marine mammal."[121] "Level B" harassment "is an act that disrupts the behavior of a marine mammal."[122] Judge Fletcher explained:

  > The Navy argues that the harm resulting to the environment from the use of MFA sonar in the SOCAL exercises is merely "speculative." But the Navy's own EA proves otherwise. The EA estimates that the use of MFA sonar in the SOCAL exercises will result in 564 instances of physical injury including permanent hearing loss (Level A harassment) and nearly 170,000 behavioral disturbances (Level B harassment), more than 8,000 of which would also involve temporary hearing loss. As explained above, while the Navy protests that these figures are overestimates resulting from its conservative approach, the EA makes clear that the figures are "consistent with the best available science." Indeed, the Navy's failure to suggest *by how much* its figures overestimate the actual harm to marine mammals confirms that the EA's figures are the best available estimates. Those estimates, in turn, contradict the Navy's suggestion that the harm caused by MFA sonar in the SOCAL exercises is merely speculative.[123]

  In the course of finding that the Navy's interests outweigh those of the plaintiffs, Chief Justice Roberts writes:

  > These interests must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court. Plaintiffs have submitted declarations asserting that they take whale watching trips, observe marine mammals underwater, conduct scientific research on marine mammals, and photograph these animals in their natural habitats. Plaintiffs contend that the Navy's use of MFA sonar will injure marine mammals or

112. *Id.*
113. *Id.*
114. Greater Yellowstone Coal. v. Timchak, No. CV-08-388-E-MHW, 2008 WL 5101754 (D. Idaho Nov. 26, 2008), *aff'd in part, vacated in part,* 323 Fed. App'x 512 (9th Cir. 2009).
115. Sierra Club v. U.S. Forest Serv., 593 F. Supp. 2d 1306 (N.D. Ga. 2008).
116. This is the NEPA threshold. *See* 42 U.S.C. §4332(2)(C) (2007).
117. 129 S. Ct. at 387 (Ginsburg, J., joined by Souter, J., dissenting).
118. 129 S. Ct. at 370 (majority opinion).
119. Natural Res. Def. Council v. Winter, 518 F.3d 658, 696-97, 38 ELR 20057 (9th Cir. 2008) (emphasis added).
120. 129 S. Ct. at 371.
121. 518 F.3d at 668.
122. *Id.*
123. *Id.* at 696. *Compare id.* at 696 (on the eight marine mammal species, including one endangered species (pygmy sperm whales), that would be exposed to over 1,000 incidents of Level B harassment).

> alter their behavioral patterns, impairing plaintiffs' ability to study and observe the animals.[124]

These declarations of plaintiffs are obviously standing affidavits—made up to satisfy the zany standing rules of the Supreme Court. They are not remotely a full measures of the interests asserted. What is at stake is not the *human* interest in underwater observances but the *whales'* interest in life and freedom from an ocean of pain and harassment. This interest of nonhuman life is validated by NEPA and by the Marine Mammal Protection Act. A high court that accords nonhuman life no intrinsic value (when Congress has said otherwise) needs education from a Judge Fletcher or two. Chief Justice Roberts has completely—and carelessly—misstated the balancing act.

III. Judge Fletcher as Enforcer

A consistent theme in the Judge Fletcher record is the unshakeable conviction that environmental laws are to be complied with. Sanctions are to be assessed. Reckonings are in order. Environmental law, after all, is the law of planetary housekeeping and the public commons. It is especially vulnerable to the defectors, the cheaters, and the corner-cutters.

Judge Fletcher was never one to look the other way.

Strict compliance is the consistent theme of her NEPA cases and it spills over conspicuously into a wide range of enforcement moments. Judge Fletcher is an enforcer of the environmental laws: in the interpretation, in the selection of the remedy, in the sentencing, in her treatment of citizen enforcers, and in her disdain for anything that smacked of the "political fix."

A. *In the Interpretation*

Judge Fletcher is the author of the leading criminal case under the Clean Water Act (CWA),[125] *United States v. Weitzenhoff*,[126] which is a dramatic expression of the "differences" between environmental law and traditional regimes of criminal law. The case arose from a Federal Bureau of Investigation examination of the conduct of the manager and assistant manager of the East Honolulu Community Services Sewage Treatment Plant not far from the beaches of Oahu. What these workers did, usually under cover of darkness, was to dispose of huge quantities of waste activated sludge (436,000 pounds of pollutant solids) "by pumping it from the storage tanks directly into the ocean."[127] The defendants said that they understood that their permit authorized these sorts of things. Judge Fletcher ruled against them, declaring that the "knowingly" language in the criminal provisions of the CWA[128] anticipated that "criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit."[129]

Judge Fletcher's interpretation of "knowingly" to mean not "knowing violation of the law" but "knowing conduct that is in violation of law"[130] was of course both necessary to save the CWA from a universal "How Was I to Know?" defense and also a departure from criminal law bedrock principles requiring proof of culpability as to each element of the offense. The dissenters announced: "We have now made felons of a large number of innocent people doing socially valuable work."[131] The *Weitzenhoff* decision was the topic of discussion across the land in continuing legal education courses and otherwise. The name of Judge Fletcher was forever etched in the memories of the corporate defense bar.

Judge Fletcher also was the author of the opinion in another infamous criminal case arising out of asbestos cleanup, *United States v. W.R. Grace*,[132] in Libby, Montana. The gist of this case is captured in the following account by the court:

> In the superseding indictment, the government changed the section heading under which the disputed paragraphs had been listed from "Obstruction of Superfund Clean-Up" to "Knowing Endangerment of EPA Employees and the Libby Community and Obstruction of the EPA's Superfund Clean-Up." It also changed paragraphs 173, 174, 176-80, 182 and 183, by adding at the end of each original paragraph the phrase, "thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA's investigation and causing releases of asbestos into the air in the Libby Community."[133]

The Fletcher opinion kept this important environmental criminal case afloat. It reversed the district court order dismissing the "knowing endangerment" count. And it reversed the district court orders narrowing the regulatory definition of "asbestos" and excluding a report of the Agency for Toxic Substances & Disease Registry (ATSDR) from expert consideration and testimony.[134] In the end, of course, the famous prosecution of W.R. Grace sunk of its own free will, as it were, with a jury verdict of acquittal.[135]

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124. 129 S. Ct. at 377-78.
125. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
126. 35 F.3d 1275, 24 ELR 21504 (9th Cir. 1994) (As Amended on Denial of Rehearing and Rehearing En Banc).
127. *Id.* at 1282.
128. 33 U.S.C. §1319(c)(2).
129. 35 F.3d at 1284.
130. *Id.* at 1283.
131. *See id.* at 1293 (Kleinfeld, .J., joined by Reinhardt, Kozinski, Trott, and Nelson, JJ., dissenting from the order rejecting the suggestion for rehearing en banc).
132. 504 F.3d 745, 37 ELR 20244 (9th Cir. 2007) (Fletcher, J., joined by Pregerson and Ferguson, JJ.).
133. *Id.* at 750.
134. As to ATSDR, see William H. Rodgers Jr., 4 Environmental Law: Hazardous Wastes & Substances §8.9 at 610-12 (1992) (with semi-annual pocket parts).
135. *See* Kirk Johnson, *Chemical Company Is Acquitted in Asbestos Case,* N.Y. Times, May 9, 2009, at A10, *available at* http://www.nytimes.com/2009/05/09/us/09grace.html?_r=1; Bob Van Voris & Amy Linn, *W.R. Grace Found Not Guilty in Montana Asbestos Trial,* Bloomberg.com, May 8, 2009, http://www.bloomberg.com/apps/news?pid=20601127&sid=a2KONaswwu1Y&refer=law. *Compare* Johnson, *supra*, and Van Voris & Linn, *supra*, *with* Sarah Gilman, *Two Weeks in the West,* High Country News, Apr. 28, 2008, at 3 ("After weeks of negotiation and seven years of litigation, W.R. Grace & Co. set up a $3 billion trust to compensate the families of thousands of people who were sickened or killed by its Libby, Mont., vermiculite (essentially asbestos) mine and its products.").

The Fletcher touch of environmental interpretation shows itself again in her dissent to the en banc Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[136] ruling in *Carson Harbor Village, Ltd. v. Unocal*[137] that gradual and passive migration of contaminants through former owners' property is not a "disposal" for purposes of liability. Judge Fletcher sees this ruling as a free pass for the indifferent and as an incentive to look the other way. There is a touch of indignation in the dissent:

> In reaching this conclusion, the majority purports to engage in a plain meaning analysis. However, the majority's analysis is nothing more than ipse dixit. Remarkably, nowhere does the majority consider the ordinary, contemporary, common meaning of the terms defining "disposal."[138]

This dissenting opinion, as might be expected, fully engages the facts of the matter. Judge Fletcher writes:

> The evidence in the record is that the slag and tar-like waste was located within a 17-acre open-flow wetlands area of the plaintiff's property. The evidence also indicates that the slag and tar-like substance had high concentrations of lead and TPH [total petroleum hydrocarbon]. In addition, there is evidence that water flowing through the wetlands carried lead and TPH and that these hazardous [substances] settled in the soil throughout the wetlands. Thus, contrary to the majority's conclusory assertion, the plain meaning of "disposal" that *includes* "deposit" exactly describes the spread of hazardous [substances] throughout the wetlands: The wastes were carried by the water flowing through the wetlands and *deposited* in the surrounding soil.[139]

In *Craft v. National Park Service*,[140] Judge Fletcher made clear again that no one could get away with trashing the planet or its cultural treasures on her watch, even if they had found new ways to do it. The decision rejects overbreadth and vagueness objections to the imposition of civil penalties against shipwreck divers who used hammers and chisels to remove artifacts contrary to NOAA regulations protecting the seabed and historical resources of the Channel Islands National Marine Sanctuary.

Judge Fletcher obviously was not a joiner of political trends in her jurisprudence. Nor was she a resister. Here is how she made pragmatic sense out of Congress' petulant and somewhat embarrassing rescission of funding to complete the ESA listing of the California red-legged frog:

> We agree with the district court that the Secretary violated his nondiscretionary duty to take final action on the California red-legged frog by February 2, 1995. We also agree that the appropriations rider does not repeal or modify the Secretary's listing duty under the Endangered Species Act. Nonetheless, we find that lack of available appropriated funds prevents the Secretary from complying with the Act. Accordingly, we must vacate and remand to the district court to modify its order and judgment to provide that compliance with the requirement that the Secretary make a final determination as to the endangered status of the California red-legged frog is delayed until a reasonable time after appropriated funds are made available, the time to be specified by the district court.[141]

B. In the Sentencing

The Fletcher touch of righteous indignation in matters of compliance rises to the surface again in *United States v. Technic Services, Inc. (TSI)*,[142] where the court affirms convictions for CAA/CWA violations by an asbestos contractor at a pulp mill in Sitka, Alaska. The contractor, represented by one Rick Rushing, among other things, obstructed and impeded inspection and enforcement by the U.S. Department of Labor and EPA by deactivating employee air-monitoring devices and soliciting employees to sign a false statement that TSI was not washing wastewater into Silver Bay. The majority finds error by the district court for enhancing Rushing's prison term for an "abuse of a position of trust" under U.S.S.G. §3B1.3, which authorizes a 2-point enhancement:

> [i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense.[143]

The court in *Technic Services* said that the victims of the obstruction offenses were the federal government and the public. The contractor did not hold a "position of trust" with respect to either public victim.[144]

Judge Fletcher thought otherwise. She believed that EPA's "direct entrustment" of the contractor with monitoring levels and the state licensing requirements meant that the contractor was "not merely an employee of a private contractor."[145] Accordingly, she concluded:

> The majority, in essence, decides that the fact that a defendant is an employee of a private company means that he or she does not hold a position of public trust and, alternatively, that the enhancement is ambiguous and therefore its application violates the rule of lenity. I disagree with both conclusions.[146]

C. In the Remedy

Judge Fletcher's views on full, complete, and unstinting compliance were expressed earlier in her judicial career. The

136. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
137. Carson Harbor Village, Ltd. v. Unocal Corp, 270 F.3d 863, 32 ELR 20180 (9th Cir. 2001) (en banc) (McKeown, J., joined by Schroeder, C.J., and Hug, Kozinski, Nelson, Hawkins, Berzon, and Tallman, JJ.). The Fletcher opinion *concurring in part and dissenting in part* is joined by Pregerson and Paez, JJ..
138. *Id.* at 889-90 (Fletcher, J., dissenting).
139. *Id.* at 890.
140. 34 F.3d 918, 35 ELR 20020 (9th Cir. 1994) (opinion joined by Circuit Judges Canby and Hall).
141. Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867, 872, 26 ELR 20359 (9th Cir. 1995) (interpreting Pub. L. No. 104-06).
142. 314 F.3d 1031, 33 ELR 20147 (9th Cir. 2002). Conviction on one count was reversed for lack of evidence.
143. *Id.* at 1048 (quoting U.S. Sentencing Guidelines Manual §3B1.3).
144. *Id.* at 1049.
145. *Id.* at 1054, 1059 (Fletcher, J., dissenting in part).
146. *Id.* at 1054.

court, in *United States v. Holtzman*,[147] holds that a defendant is entitled to Rule 60(b) relief against a permanent injunction prohibiting him from importing motor vehicles into the United States without a prior certificate of conformity. The decree was overbroad because "conditional importation" of special vehicles is sometimes allowed under prevailing regulations if the vehicles are later brought into conformity.

Judge Fletcher dissented, insisting that the score for violating the CAA was not entirely settled:

> I dissent from the majority's view that because paragraph 1 of the injunction is unlimited in time it must necessarily be vacated. I agree that an injunction against otherwise legal activity should not be continued indefinitely. However, it should continue until its original purpose of preventing the legal activity from contributing to the illegal activity has been served. The record is a vacuum. There has been no hearing to determine whether Alonim has conformed his importation practices to the requirements of the Clean Air Act or whether he has continued his blatant disregard of the law-importing nonconforming automobiles and selling them without bringing them into compliance. Because the termination of the injunction at this time may be premature, I would remand to allow the district court to determine whether Alonim's post-injunction behavior warrants the continuance or discontinuance of the injunction. In light of the total absence of any record as to Alonim's recent compliance, no other decision seems possible. No one, including Alonim, suggests that an injunction was not warranted initially. If the district court found the injunction was still required, it could limit the prospective application of the injunction to some reasonable period.[148]

D. *In Lending Encouragement to Citizen Suits*

Judge Fletcher's fondness for full enforcement appears also in her stance toward citizen suits. Unlike many of her colleagues, she seemed to welcome them as a perky reinforcer of public enforcement. As one might expect, she landed on the tolerant end of the spectrum in the debate over "notice pleading" in the citizen suit context. The case was *Waterkeepers Northern California v. AG Industrial Mfg., Inc.*,[149] where the citizens declared that industrial discharges contaminated stormwater during "every rain event over 0.1 inches."[150]

Judge Fletcher used the vehicle of the citizen suit in *Natural Resources Defense Council v. U.S. EPA*,[151] to give a good going over to the agency's rulemaking on toxic pollutants under §304(l) of the Act.[152] And she wrote a strong opinion in *West v. Secretary of Dep't of Transportation*,[153] which was a NEPA challenge to a highway interchange project in DuPont, Washington. She gives short shrift to mootness and categorical exclusion claims and gives her usual full honor to NEPA. Her magnanimity to the agency is expressed this way:

> While we decline to order the interchange torn down, we direct the district court to order the requisite environmental review for Stage 1. We vacate the district court decision as it relates to Stage 2.[154]

Circuit Judge Sidney R. Thomas dissented in this case. The matter was brought pro se, though you never could tell from the attention it received and the result it wrought.

E. *In the Suspicion of a Political Fix*

The intensity of the "hard look" always received an extra jolt in the courtroom of Judge Fletcher when evidence was afoot that players were making an end-run around the judicial process. The crowning example is the Navy's pursuit of the "emergency circumstances" NEPA exemption[155] from the Council on Environmental Quality (CEQ) in the midst of the *Winter* case. The Navy got the exemption it wanted, of course, and it also got a barrage of heavy fire in the form of impressive scholarship from the Hon. Betty B. Fletcher.[156] Judge Fletcher affirmed the district court's invalidation of the CEQ's interpretation of 40 C.F.R. §1506.11 as unsubstantiated by the context and language of the measure.[157] The Supreme Court steered clear of this one. Judge Fletcher will have the next word when the issue arises againm because she has claimed it with the power of her scholarship and the poignancy of her language.

IV. Conclusion

Federal judges live in the rarest of atmospheres, and they have the most unusual of rooting constituencies. They speak for many causes and for many people who cannot speak for themselves. They never know if people are listening or if they strike the right tone. On the hot topic of environmental law, people have long listened to Judge Fletcher, and they have appreciated her careful and diligent presence and the boldness and daring that guide her to say these things at that time on this occasion. She has long been the voice of environmental law. And if that voice is softened or shunned or set aside, it is not due to the shining example she set. It is because her voice and her message have become momentarily unpopular in the darkened corners of today's political economy.

147. 762 F.2d 720 (9th Cir. 1985) (Wallace and Reinhardt, JJ.).
148. *Id.* at 727 (Fletcher, J., dissenting).
149. 375 F.3d 913, 34 ELR 20056 (9th Cir. 2004).
150. *Id.* at 917-18 (citing San Francisco Baykeeper, Inc. v. Tosco Corp., 309 F.3d 1153, 33 ELR 20098 (9th Cir. 2002), *cert. dismissed,* 539 U.S. 924 (2003) (where the notice said that Tosco Corp. illegally discharged petroleum-coke "on each day when the wind was sufficiently strong to blow coke")).
151. 915 F.2d 1314, 20 ELR 21372 (9th Cir. 1990).
152. 33 U.S.C. §1341(l).
153. 206 F.3d 920, 30 ELR 20444 (9th Cir. 2000).
154. *See id.* at 931.
155. 40 C.F.R. §1506.11.
156. Natural Res. Def. Council v. Winter, 518 F.3d 658, 677-87, 38 ELR 20057 (9th Cir. 2005).
157. *See id.* at 687.