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The Environmental Cost of Filmmaking

Peter Flanigan*

I. INTRODUCTION

The process of filmmaking is often thought of as a “generally benign, clean industry.”¹ In fact, the medium of film is regularly used as a tool to further environmental ideals.² While there has been a paucity of case law³ and statutory law⁴ on the environmental impact of filmmaking, filmmakers have run into trouble with governments and protestors in the past as a result of the filmmaking process.⁵ These run-

* I would like to thank Michael Dellheim, Sarah Clark and everyone who offered me valuable insight into this problem.

¹ Audio tape: Telephone Interview with Michael Dellheim, Associate Director, New Mexico Film Office (Sept. 2000) (on file with author). Mr. Dellheim also indicated that New Mexico, like many states and countries, did not have any environmental guidelines for filmmakers looking to shoot in the state. The only regulations that could apply are Federal ones when shooting on public land.

² Christine Alice Corcos, “*Who Ya Gonna C(S)ite?*” *Ghostbusters and the Environmental Regulation Debate*, 13 J. LAND USE & ENVTL. L. 231 (1997). Ms. Corcos considers *Ghostbusters* a “thoughtful introduction to environmental law and policy, suitable for discussion in a law school class”. *Id.* at 232. The movie parallels the relationship between an independent thinking American and government’s overreaction to this “vigilantism”. *Id.* The characters themselves represent differing outlooks about the environment and Corcos spends the rest of the essay defining the parameters of governmental intervention that is permissible in a *Ghostbusters*-type situation. Obviously, film can explore the dynamics of environmental protection. Corcos’ article serves as a good template for policy considerations in regards to citizens taking their own initiatives and the government’s possible responses. This is instructive in the context of this Note if a filmmaker decides to create environmental polices outside the scope of the existing Lilliputian regulatory structure.

³ A Lexis-Nexis search turned up only three U.S. cases that dealt specifically with film companies going outside their permits.

⁴ States have very little regulation. California and the U.S. government do have some statutory guidelines.

⁵ The most notable example, discussed in detail in Section VIII of this Note, is the debacle that happened during the filming of *The Beach*. The use of bulldozers by the crew led to lawsuits and protests by environmental action groups at the film’s premiere.

ins can be costly to filmmakers who are looking to be as cost-effective as possible.⁶

This Note argues that laxity in regulations and permit granting has allowed filmmakers to disregard the environmental impact of their filming. Ignoring potential environmental consequences can carry quite significant costs from clean up⁷ and legal fees⁸ to negative publicity and bad film grosses.⁹ To avoid these potential financial risks as well as to avoid risks to the environment, filmmakers could benefit from a preproduction assessment of potential problems, similar to an Environmental Impact Statement (EIS).¹⁰ One case study shows it is possible to conduct a cost-effective film shoot that is environmentally friendly.¹¹

The Note will first outline the general environmental regulatory structure, including the underlying policy goals of environmental impact statements. The use of EPA assessment criteria and an EIS as a template to follow during shooting provides a filmmaker with information needed to assess whether a stunt can go forward. The report will detail what the possible consequences of the stunt will be, whether there may be a need to repair damage, and what steps are needed to actually accomplish the repairs. While this formalization of environmental risk assessment may increase liability for the studio¹², it ultimately is more cost effective if the assessment encourages studios to become more risk adverse.¹³

⁶ Alexander C. Kafka, *Seeing the Big Picture*, AM. PROSPECT, Dec. 17, 2001, at 44 (relating to the global financing of Hollywood films). See also Joe Schlosser, *Reinventing the Business: How Columbia TriStar is changing the way television is made*, BROAD. & CABLE, Jan. 14, 2002, at 22 (as budgets apply to television).

⁷ See *infra* text accompanying note 66 for California guidelines on cleaning up after filming.

⁸ Environmentalists are starting to sue film companies for breaching the scope of the permits granted to the filmmakers. While the subject of litigation will be broached later, it is safe to assume that the cost of defending the lawsuits will be higher than the cost of developing an Environmental Impact Statement or Environmental Assessment. For example, Fox would not comment on the legal costs associated with the lawsuits it faced in Thailand for *The Beach*, but any litigation undertaken today is a costly endeavor. See *infra* note 136.

⁹ See *infra* note 140.

¹⁰ Preferably, an EIS' benefit accrues before filming. However, there is no reason to prohibit drafting an EIS on location.

¹¹ See *infra* notes 180-89 and accompanying text.

¹² See Section VIII.

¹³ Richard J. Zeckhauser & W. Kip Viscusi, *Risk Management Strategies: The Risk Management Dilemma*, 545 ANNALS AM. ACAD. POL. & SOC. SCI. 144 (1996). The authors contend that while corporations pay for their risks and should decide their own values, the government often intervenes when there is a trading of risk for resources. *Id.* at 145. When the magnitude of risk is unclear, the authors suggest there should be a best-estimate risk assessment procedure to assess possible situations based on the likely scenario rather than a

Next, the note offers a basic overview of the process of granting of film permits and how that underlies the basic relationship between film studios and local government. While there are certain arguments for environmental conservation on a philosophical level,¹⁴ studios have wide discretion on whether to apply that philosophy to their film shoots. The reason for this latitude granted to filmmakers is twofold. One, many localities want a piece of the substantial revenue generated by film production in the United States. This causes localities to either relax or completely rescind the regulations and permits that govern filmmaking. Secondly, even though the remaining regulatory structure, whether it is federal, state or municipality based, provides at least adequate protection of the environment, filmmakers rarely face litigation or dire consequences from their violations of the statutes.

Despite these limitations, the regulatory structure does have some punitive power for violating the existing rules in both the United States¹⁵, most notably in California and abroad.¹⁶ However, as the note details, state and local regulatory bodies often have concurrent jurisdiction which can cause a filmmaker to be legally allowed to proceed with a stunt despite the objections of the local community.¹⁷

worse case outcome model. *Id.* at 155. What that means for a filmmaker is that any environmental assessment should focus on the likely impact on the environment as opposed to what could happen. This strategy is appealing but it fails to take into account planning for contingencies that arise if the likely scenario does not arise. This Note argues that risk assessment is crucial to properly plan stunts and environmental effects of film production. However, that assessment should not be based solely on the statistical probabilities that there will be a negligible impact on the environment. The review should present a risk adverse strategy to ensure the reasonable likelihood of negligible impact. In other words, studios should prepare a strategy that limits risky environmental behavior (such as pyrotechnics, importation of set dressing, etc.) and not a general assessment of the likely impact of those activities.

¹⁴ Alex Tynberg, *The Natural Step and Its Implication for a Sustainable Future*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 73 (2000). Tynberg argues that commercial practices are leading to unsustainable resource management, which is a threat to the "long-term prosperity of our environment and our economy." *Id.* at 74. He suggests that the key to sustainability is the just and efficient use of our natural resources. The government allows corporations to exist outside the scope of environmental and social responsibility. *Id.* at 75. This is, in effect, a subsidy for business to act irresponsibly. The basis of Tynberg's "Natural Step" theory is on four steps that can lead back to sustainability. For our purposes, his fourth step, "fair and efficient [use] enough to meet vital human needs" is most relevant. *Id.* at 77. Movies do serve a vital purpose to humanity but their production should not sacrifice the environment unduly in pursuit of artistry. There could be a balance achieved between sustainable development and movie production. It is just important to note that corporate activity does have an effect on the population as a whole and should be limited to a certain extent.

¹⁵ See *infra* Section III.

¹⁶ See *infra* Section IV.

¹⁷ See *infra* Section IV regarding overlapping permits.

Since filmmaking impacts not only the environment but also the surrounding town, the community's concerns with potential environmental damage take greater prominence in this risk assessment. These concerns are important because often the communities deal with the lasting effects of environmental damage after the filmmakers move on.¹⁸

The Note also details the few cases that directly address filmmaking and the environment. While small in number, their holdings certainly provide possible arguments for future environmental litigation. Most actions that are brought in court involve either the filmmaker breaking the permit or challenging the scope of the permit granted by the government. The lessons drawn from the cases suggest that litigation focuses primarily on whether the government was justified in granting the permit and not the conduct of the filmmaker. However, with the possibility of an injunction shutting down production, filmmakers are wise to fully comply with regulations to decrease that and other negative costs of litigation. The filming of *The Beach* exemplifies what can go wrong during a film shoot and the litigious consequences that may spring from the actions of the filmmakers.

However, filmmakers may object to a proposed EA statement because of time and budget constraints, or perhaps based on their perceived liability for drafting such a document. Companies may argue that the cost and delay to a project attributable to creating an EIS report are not justifiable. Secondly, if an EIS report is drafted, it may open the filmmakers to increased liability. This Note will demonstrate that these concerns are not valid and that a utilitarian calculus will show that costs associated with environmental filmmaking are less than the costs of ignoring potential environmental problems. In fact, two authors have shown that environmental filmmaking can be accomplished without a dramatic increase in price or time.¹⁹

Finally, this Note outlines a system of filming in an environmentally friendly manner, drawing from the examples found in the statutes, case law and the case study. As stated above, a filmmaker should develop a plan akin to an environmental impact statement as a strategy before beginning the shoot. Coupled with this assessment must be meetings with local officials to determine the actual disposition of the environment and the specific hardships that could possibly affect the community. Once filming begins, the filmmaker should make every effort to have the entire crew aware of the environmental concerns and

¹⁸ See *infra* note 53.

¹⁹ See discussion *infra* Section IX.

the environmental impact statement. If any unforeseeable damage does occur, there should be someone designated within the company to coordinate remedial efforts.

It is important to note that law requires none of these propositions. This Note represents an attempt to convince filmmakers and studios to develop an environmental strategy based on utilitarian calculations. The Note will conclude with suggestions and considerations on the subject of filming with an environmental conscious, but ultimately, it is the filmmaker's choice of how environmentally responsible he or she wants to be.

II. ENVIRONMENTAL IMPACT STATEMENTS

Both an EIS and an Environmental Assessment ²⁰ (EA) are rather straightforward documents. ²¹ An EIS mainly details the purpose of the land use and follows with the positive and negative impacts that could accrue through that use.²²

Part of a filmmaker's plan for an upcoming shoot should include an assessment like an EIS to properly frame the environmental issues that could arise. This EIS could be environmentally beneficial because a filmmaker would be aware of the effect certain actions like pyrotechnics or car chases would have on the environment. An EIS could also lead to thinking about alternative ways to get a shot without disrupting the environment.²³ This document would have a "stop and think" effect on how filmmaking should proceed.²⁴

The National Environmental Policy Act (NEPA) of 1969 established the procedure for drafting an EIS.²⁵ NEPA required federal agencies to assess the environmental impact of their policies.²⁶ NEPA envisioned the widest possible use for the environment without degra-

²⁰ Jon C. Cooper, *Broad Programmatic, Policy and Planning Assessments Under the National Environmental Policy Act and Similar Devices: A Quiet Revolution in an Approach to Environmental Considerations*, 11 PACE ENVTL. L. REV. 89, 92-93 (1993). An agency usually produces an Environmental Assessment to see if there will be a significant impact on the environment because of a proposed action. If there is, an EIS formulates a detailed plan to limit the environmental damage.

²¹ An example is available at <http://www.csa.com/csa/factsheets/eis.shtml>.

²² *Id.*

²³ See *infra* note 167 and accompanying text.

²⁴ Heather N. Stevenson, *Environmental Impact Assessment Laws in the Nineties: Can the United States and Mexico Learn from Each Other?*, 32 U. RICH. L. REV. 1675, 1682 (1999).

²⁵ 42 U.S.C. § 4331.

²⁶ Edward A. Fitzgerald, *The Rise and Fall of Worst Case Analysis*, 18 DAYTON L. REV. 1 (1992).

dation of that environment.²⁷ In order to prevent needless environmental destruction, NEPA deemed an EIS would be an effective means of facilitating communication.²⁸

However, does drafting this document expose a filmmaker to increased liabilities from environmental action groups if the studio fails to follow the plan or is negligent in its application? There certainly is the possibility that the EIS statement creates potential liability for the filmmaker. Citizens have sued the federal government to force compliance with an EIS.²⁹ It would stand to reason that if a filmmaker did have knowledge of the environmental risks and then negligently caused damage, there could be a tort suit using the EIS as evidence.³⁰ Conversely, there could be a tort suit without the use of an EIS if the filmmakers reasonably should have known their actions would cause damage.

Despite the potential added liability, a filmmaker should proceed with an EIS to mitigate possible damage to the environment. What factors should be included in this EIS or EA to properly prepare for a shoot? Providing a good guide are the factors the government weighs when assessing a possible impact.

The Environmental Protection Agency (EPA) has guidelines about the standards of ecological risk assessments (ERA) which forms the basis of assessment for EIS reports.³¹ The EPA suggests there should be considerable interaction between the risk assessor (the filmmaker)

²⁷ *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981) (citing National Environmental Policy Act § 101(b), 42 U.S.C. § 4331(b)).

²⁸ See Melaney Payne, *Critically Acclaimed but not Critically Followed- The Inapplicability of the National Environmental Policy Act to Federal Agency Actions: Douglas County v. Babbitt*, 7 VILL. ENVTL. L.J. 339, 348-49 (1996) (the primary purpose of the EIS is to detail the economic and environmental impact of an action and to afford feedback channels between the government and interested parties).

²⁹ Harold Feld, *Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141, 147 (1994). Feld contends that Congress encourages citizen's suits because "Federal agencies have been notoriously laggard in abating pollution".

³⁰ See discussion on arguments against drafting an EIS or EA *infra* Section VIII. A plan would clearly be better than having none in terms of possible litigation. If a filmmaker totally disregards any ecological risk and then proceeds to cause severe damage, then the filmmaker faces liability for gross negligence and may incur punitive damages. Having a plan could be useful as evidence of having some regard for the risks and thus possibly mitigating a negative judgment.

³¹ Available at <http://www.epa.gov/eims>. This is not to suggest that a filmmaker or studio cannot make their own type of assessment of ecological risks. Indeed, perhaps an alternative assessment might include just a listing of the types of activities that would occur on location. The benefits are maximized when an EIS or EA is a formalized document which clearly enunciates the possible environmental damages and serves as a "story board" to avoid ecological risks.

and interested parties (who for this purpose would be not only environmental groups but local officials).³² After meeting with officials and interested groups, the filmmaker's scope of concern focuses on specific ecological entities (such as forests or streams) and on the clear risks of the shoot.³³

The EPA denotes three phases in the process of an ERA.³⁴ The first phase is problem formation where the assessor "identify[ies] goals and assessment endpoints, preparing a conceptual model, and developing an analysis plan."³⁵ For a filmmaker, this would most likely include a basic plan of what is going to occur on location, the time structure of the shoot and the mechanics of accomplishing the shoot. For example, if a filmmaker were using pyrotechnics, the risk assessment plan would include the purpose of the pyrotechnics, the period of their use, and technically, how the effect sequence will proceed.

The second part of the risk assessment is the analysis phase that assesses the interaction between the "stressors" and the environment.³⁶ Continuing with the above example, the filmmaker would try to gauge the effects of pyrotechnics on the land. This includes whether the land is extremely dry, the possibilities of a wayward spark and a contingency plan should something go wrong and the environment catch fire. Additionally, the filmmaker would also have to explore the impact of the

³² *Id.* The EPA indicates that this interaction is critical in ensuring that an assessment's use is productive. A narrower scope allows the filmmaker to concentrate on specific issues in later sections, the interaction between local officials and the filmmaker helps to establish what the specific environmental concerns are for the area. For example, there could be coordination about waste disposal and bringing in set dressing in regards to the specific ecological framework.

³³ *Id.* The EPA suggests that through this assessment process, the risks would become "clear, transparent, reasonable".

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* For the purpose of the Note, "stressors" are anything brought in by the crew that could cause a harmful effect on the environment. This would include vehicles brought into the environment, set dressing, trailers used by the cast and crew, explosives, paint and anything associated with the filming process. Of course, filmmakers have limited time and budgets and to do an EIS or EA for all of these factors in detail would be too time and resource consuming and would create little incentive for adherence by the filmmaker. Instead, the addressable issues are the "major" intrusions (e.g. explosives, water contamination). Other effects may be discussed but not in great detail. For example, there is less of a need to excruciatingly explore the ecological risk of the size of the crew. The size of the crew should merely be explored to show whether the size of the crew can be paired down to a minimum level. If the location shoot only requires 10 cast members, then the EIS should reflect that only that number is needed. When shooting actually begins, this number will help to establish an environmentally sensitive framework in which the shoot will take place.

explosives on the ground and whether there might be any ecological risks associated with that particular area.³⁷

The third part of the analysis takes the initial stressor analysis and makes a full risk calculation by preparing a detailed report on the possible ecological adversity.³⁸ Going back to the above example, the assessment of the usage of pyrotechnics balances the pyrotechnics potential positive and negative impacts. This would be helpful in planning a “worst case scenario” for the use of the pyrotechnics. If something untoward were to happen, then the EIS would serve as a blueprint of what to do next.

This is ultimately the benefit of going through the exercise of risk assessment before filming. While a risk assessment causes minor losses in time and money, having a game plan for on-location shooting helps the filmmaker prepare for any contingencies that may arise. By already having considered the risks of a particular action, the filmmaker will be more prepared if something does happen. The environmental risks become clearer, perhaps leading to more environmentally conscious filmmaking.

Environmental Impact Statements force federal agencies to think about the environmental consequences of their actions.³⁹ Private companies do not escape scrutiny because federal law clearly states that there must be environmental respect for public land.⁴⁰ Additionally, an EIS may encourage a filmmaker to consider alternatives for the location shoot. For example, if the pyrotechnics would scar environmentally sensitive material, then perhaps the explosion could be filmed somewhere else and then crosscut within the film to maintain continuity.⁴¹

³⁷ Perhaps the ground contains vital or rare plants or certain types of soil. The damage caused by explosive stressors could be mitigated if the damage is located on grounds that would suffer limited ecological damage.

³⁸ See *supra* note 31.

³⁹ *Id.*

⁴⁰ 36 C.F.R. § 2.50(a)(1). That is why government agencies require private individuals to pay a bond in case of clean-up or rehabilitation due to any destruction. § 2.50(c)(1). 36 C.F.R. § 2.38 regulates the use of explosives. Regulation of private land is an entirely different matter, which gives a studio more leeway in the usage of that land. The goal of this Note is only to address damage inflicted by filmmakers on permit-granted public land.

⁴¹ There are many alternatives to shooting a scene to give it realism. With the effects created by today’s CGI (computer generated imagery), the need for explosions and risky environmental behavior becomes less of a consideration. Will Marlow, *Movies to get Animated About*, NEWSLETTER, Feb. 7, 2002. “CGI is good because it saves money that would be spent in filming real shots and a lot of directors just accept this benefit.” *Id.* CGI has been used in movies as diverse as *The Abyss* to *Beauty and the Beast*. *Id.* This is not to limit a director’s auteur thinking and need for filming in a realistic location. Certainly, there is great power in a scene such as the carpet-bombing scene in *Apocalypse Now*. It is just the

The goal of this Note is to encourage filmmakers to film with an environmental conscious. An EIS would help frame environmental issues for a filmmaker's consideration and create the possibility of alternatives to mitigate damage. While this report would take some expense and time, the benefits of decreasing the likelihood of litigation⁴² and preservation the environment⁴³ ultimately outweigh the initial investment.

III. FILM'S RELATION TO GOVERNMENT

The process of filmmaking creates over fifteen billion dollars a year for the County of Los Angeles and other areas in the country want a stake in this financial opportunity.⁴⁴ Cities and counties lure these "run-away"⁴⁵ productions out of Los Angeles by streamlining the per-

intention of this Note to point out that there are either computer generated alternatives or alternative locations that lessen the damage to public lands. See *infra* note 167 and accompanying text.

⁴² The possibility of litigation decreases because if there is an environmental game plan in place, there will be less likelihood of damage. Additionally, a filmmaker could avoid spending time and money on the back end of production cleaning up spills and damage if there were measures in place to prevent damage from occurring.

⁴³ Many consider the benefits of having biodiversity crucial. One author has even stated "the loss of biodiversity is generally agreed to be among the top environmental crises facing humanity today." Edward J. Heisel, *Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future*, 25 *ECOLOGY L.Q.* 229, 233 (1998). By having the private sector contribute to resource conservation, it allows for sustainable ecological activities. Ian Bowles et al., *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 *DUKE ENV. L. & POL'Y F.* 209, 210 (1998). Perhaps the government can help induce filmmakers to film with conservation in mind via tax reductions or exemptions. *Id.* at 220. Of course, the bond that is required to be put up by the filmmaker is also seen as an incentive to be ecologically sensitive. *Id.* at 230-31. Although, some people feel that environmental conservation negatively affects free trade in a global economy. See Corrine Sam, *World Trade Organization Caught in the Middle: Are TEDS the Only Way Out?*, 29 *ENVTL. L.* 185 (1999).

⁴⁴ Florida has had huge success in luring filmmakers with its enticements of free film permits and other economic incentives. Jon Garon, *Star Wars: Film Permitting, Prior Restraint & Government's Role in the Entertainment Industry*, 17 *Loy. L.A. ENT. L.J.* 1, 26 (1996). This has paid off in recent years as Garon notes that production revenue in South Florida rose from \$400 million in 1991 to \$450 million by 1994. *Id.* at 25. Conversely, New York City was in decline due to union problems and perceptions about local politicians taking filming for granted. *Id.* at 28. However, New York is on the rebound thanks to many free services including the free use of public property. *Id.* at 29. This trend of deregulation to lure the lucrative film industry can be detrimental to the environment if cities bypass environmental regulations in their pursuit of film money.

⁴⁵ It was reported by the *Los Angeles Times* that Governor Gray Davis is proposing a tax credit to save producers \$50 million the first year, \$80 million the next and \$100 million the third year (starting in 2004) to lure back runaways. Available at <http://www.showbizdata.com/contacts/picknews.cfm?id=28140>.

mit granting process as part of an incentive package to filmmakers.⁴⁶ These incentive packages benefit the filmmaker by creating easier processes⁴⁷ to allow filmmakers to enter and spend their money⁴⁸ while creating the appearance that their presence is only a slight “intrusion”.⁴⁹

Despite communities bending over backwards to bring filmmakers into their jurisdiction, there are still environmental statutes⁵⁰ and permit considerations that a filmmaker is required to be aware of so the “intrusion” does not become more egregious.⁵¹ What Jon Garon emphasizes in his article is the need for flexibility from both filmmakers and the community when determining whether a particular shot should occur.⁵² A good, flexible working relationship with the community will help the filmmaker make an EIS assessment that not only assesses the proposed stunts but tailors the filming to the local communities’ concerns. As seen below, there is very little federal or state regulation of the environment in conjunction with filmmaking. Perhaps the best way to proceed is to have this current flexibility with the permit granting structure so as to allow communities to retain the economic benefit from filmmaking yet be able to protect the environment at the same time.⁵³

⁴⁶ New Mexico has a tax incentive program that exempts filmmakers from paying a 6% gross receipts tax. E-mail from Michael Dellheim, Assistant Director, New Mexico Film Office (Sept. 29, 2001) (on file with the author).

⁴⁷ Garon, *supra* note 44, at 34. Garon argues there is a balance between maximizing the opportunity to attract filmmakers and minimizing the impact on citizenry. *Id.* at 34. To minimize the impact, Garon suggests that filmmakers work around the community but also that the community has to be courteous. *Id.* at 37.

⁴⁸ A recent television show, *The Untouchables*, generated \$25 million for the city of Chicago in only a two year run. *Id.* at 17.

⁴⁹ *Id.* at 35.

⁵⁰ The standard for governmental regulation is usually one of reasonableness. *Id.* at 55. There is some balancing between governmental regulation and arguments of free speech and denial of permits usually only occurs on the grounds of inconvenience or a safety risk. *Id.* at 56. The denial of a permit leaves a filmmaker with little recourse in appealing the decision.

⁵¹ Garon continually emphasizes the need to take into consideration the desires of the local residents because “[m]any will perceive. . . a loss of local control and regulation”. *Id.* at 36 (quoting a letter from the former mayor of Pasadena rejecting One-Stop permits). For more information on “one-stop” permits, see *infra*, note 65 and accompanying text.

⁵² *Id.* at 37 (“The permit ordinance should always provide for discretion”).

⁵³ Of course, this assumes that the need to minimize the intrusion on people’s homes and lives by filmmaking is applicable to the environment. Many people only assess the impact on their piece of property and well being without extending it to the wider environment. This situation is analogous to a NIMBY syndrome towards film. See generally ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, “NOT IN MY BACK YARD,” REMOVING BARRIERS TO AFFORDABLE HOUSING (1991). Garon even emphasizes that within this flexible framework there should be ample coordination between the filmmakers and local departments (such as traffic, police, fire, etc.) to ensure safety in the event

The federal government has the power to regulate the usage of lands under its control.⁵⁴ This regulatory power manifests itself in the permit granting process of the Bureau of Land Management (BLM).⁵⁵ The BLM's decision to grant a permit for federal lands rests on several factors concerning the environmental impact of the filming process.⁵⁶ If the filmmaker goes outside the scope of the permit, the BLM has the power to revoke or suspend the permit and shut down filming.⁵⁷ This revocation may occur to protect the "health and safety of the environment".⁵⁸ Thus, not only must a filmmaker consider the environmental impact of the filmmaking while applying for the permit but always must be conscious of his or her responsibilities because of possible revocation that could substantially delay the shoot.⁵⁹

In other countries, while there are few regulations, several offer guidelines for planning an environmental friendly shoots.⁶⁰ The guidelines, *inter alia*, suggest that vehicle use be kept to a minimum, water be conserved, and strict litter management.⁶¹ Additionally, there should be geographical planning for power generators and controlled burning to minimize the impact on the environment.⁶²

When working with state and local governments, the permit process and environmental concerns are usually less formal. New Mexico's permit application process, akin to many other states, is only one page and not very taxing. New Mexico has no regulations regarding the en-

of car chases or pyrotechnics. See Garon, *supra* note 44, at 41 ("DO NOT BE AFRAID TO GET INVOLVED!"). Minimization of impact equally applies to environmental considerations. This is easily integrated with the flexible coordination of the local constituency.

⁵⁴ 43 U.S.C. § 1732(b) (1986).

⁵⁵ 60 Fed. Reg. 7878 (proposed Feb. 9, 1995) (to be codified at 43 C.F.R. § 290.7).

⁵⁶ *Id.* at pt. 2921.7(b). These factors include the use of pyrotechnics; disturbances to soil, wetlands, relict environments or areas of environmental concern; critical wildlife habitats which may be affected. In essence, if the filming will cause a substantial change to the environment either through explosives or just the physical presence of the filmmakers, then the permit may be denied by the BLM. This shows the importance of the filmmaker to form environmental assessments simply to get permission to film. This environmental consideration should remain throughout the shoot.

⁵⁷ 43 U.S.C. § 1732(c).

⁵⁸ *Id.*

⁵⁹ See *infra* note 77 and accompanying text.

⁶⁰ For example, different film regions in the U.K. publish pamphlets detailing the considerations of having an environmentally friendly shoot. South West Film Commission, *Conserving the Countryside*. (hereinafter "Film Commission").

⁶¹ *Id.* The Film Commission also suggests using biodegradable litter and checking with the English Environmental Agency to ensure that filming will not influence the ground water.

⁶² *Id.* The Film Commission advises to plan the logistics of the shoot to decrease the possibility of environmental damage. The Film Commission even reminds filmmakers that the land takes time to recover which limits indiscriminate activities such as burning. *Id.*

vironmental impact of filmmaking.⁶³ For example, it does not cap the number of people, vehicles or activities on the set. Instead, it asks about the “Max. # of people” and requires a brief description of the filmmaker’s activities.⁶⁴

The state of California, not surprisingly, has more literature and guidelines for filming on state lands than most states. However, even the California statutes set the tone for potentially streamlined permits by devoting the first sentence of the statute to recognizing that motion pictures provide “significant contributions to the economy of California”.⁶⁵ At first blush, statements like these would lead an observer to think that filmmakers have carte blanche regarding regulations because of their economic importance to the local community.

However, the California permit system is slightly more intensive. There is a “check the box” section of the permit, which includes the use of low voltage lights in fire weather conditions, no construction of structures, no shrubs being cut, and no overnight storage of vehicles or equipment.⁶⁶ Like the federal government restrictions, any damages must be rectified within seven days.⁶⁷ The regulations are also very strict about bringing in set dressing. For example, no flowers can have adult seeds because the goal is to preserve native plants.⁶⁸

California also has guidelines for filming in its state parks.⁶⁹ These guidelines provide some direction for trying to film without causing

⁶³ Recorded statement of Michael Dellheim, Associate Director, New Mexico Film Office (Sept. 2001) (on file with author). The BLM permit is very straightforward with questions like: “Do you need access to the land?” and “What do you propose to use the lands for?”. Land Use Application and Permit Sec. 392(b) of P.L. 94-579, Oct. 21, 1976, 43 U.S.C. 1732, Form 2920-1 (Oct. 1992).

⁶⁴ Commercial Filming Application, available at <http://www.edd.state.nm.us/FILM/RULES/npsperm.htm>.

⁶⁵ CAL. GOV'T CODE § 14998.1. The legislative findings of the statute go on to state that the recent trend of “runaway” film production (productions going to other more cost-efficient locales) has forced the legislature to make California laws “as close to a ‘one-stop permitting’ approach as possible.” *Id.* This further shows how the regulatory environment permits filmmakers to ignore the environmental impact of their filmmaking. If the regulatory structure generally is this streamlined then there is less consideration towards any regulations dealing with the environment.

⁶⁶ *D.P.R. 245A Motion Picture Activity Information*, in TED C. HILLIARD, CAL. DEPT. OF PARKS AND RECREATION, GUIDELINES FOR FILMING IN CALIFORNIA STATE PARKS app. (1998).

⁶⁷ *Id.* § 12(C).

⁶⁸ *Id.* § 10.

⁶⁹ TED C. HILLIARD, CAL. DEPT. OF PARKS AND RECREATION, GUIDELINES FOR FILMING IN CALIFORNIA STATE PARKS (1998).

damage to the environment.⁷⁰ For example, there must be advanced approval of all fires⁷¹, the fires must be monitored by a Fire Safety Officer⁷² and the film company must provide the water trucks.⁷³ Film companies must also be mindful of vehicle usage to protect the plant life immediately on the sides of the road.⁷⁴ Once filming is complete, the film crew has a maximum of three hours to clean up the set.⁷⁵

The California guidelines provide a good regulatory framework to help minimize the impact of filmmaking on the environment. The guidelines also provide direction during shooting and suggest that ideally, there should be a walk-through to highlight special environmental concerns before shooting occurs.⁷⁶ The consequences to the filmmaker of not following these guidelines can be severe.⁷⁷

IV. OVERLAPPING PERMITS IN THE UNITED STATES

Despite a local government's willingness to minimize the impact on both the environment and the local citizenry, there are occasions when the permit process of state and local governments come into conflict. The case that Garon cites occurred in 1986 when Cannon Films wanted a permit to explode a boat in Newport harbor.⁷⁸ While the city of Newport refused to grant the permit, the California Fish and Game Department granted the destruction just outside Newport's jurisdiction.⁷⁹ The boat had too much dynamite and the stunt hurled debris into Newport homes and closed the Orange County airport for a few hours.⁸⁰ Newport could not pursue any recourse because Cannon had received permission from the Fish and Game department.⁸¹ This re-

⁷⁰ *Id.* at 1 ("The following guidelines will help to ensure. . . that all resources will be protected"). Ted Hilliard mentions that while the guidelines are general, some state lands have specific needs, which may not be addressed by his guidelines.

⁷¹ *Id.* § 2(A)(1).

⁷² *Id.* § 2(A)(3). The number of monitors is based on the size of the company. For example, less than 50= 1 monitor, 51 to 89= 2 monitors and over 90= 3 monitors. *Id.* § 1(A).

⁷³ *Id.* § 2(E).

⁷⁴ *Id.* § 5(A). The guidelines provide many other regulations regarding the environment. For example, there are very strict guidelines regarding helicopter flights over state lands (must maintain an altitude of at least 500 feet in non-congested areas). *Id.* § 7(B). No geological features or plants can be changed or affected. *Id.* §§ 9(A) and 10(A). Not all of the limitations are geared towards an environmental conscience. Set construction is generally not allowed because of the visual impact on park visitors. *Id.* § 8(A).

⁷⁵ *Id.* § 11(B) (24 hours to strike the set completely).

⁷⁶ *Id.* § 12(E).

⁷⁷ Replacement of or repair to damaged items within state land must be completed within seven working days or the State Park monitor may halt production. *Id.* §§ 12(C), (E).

⁷⁸ Garon, *supra* note 44, at 35.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

sulted in Newport “increasing its involvement in the planning process”, led to increased film production, and decreased complaints.⁸²

What the Newport Bay example demonstrates is that state and local permit restrictions can often conflict with damaging consequences. Newport learned the involvement of local governments often results in incurring less damage. This also makes sense on an environmental level. Local governments are more attentive to local environmental conditions. Even if the same “one-stop” permit granting process continues, local governments can still protect environmental concerns if they continue to be involved with the production.

This involvement could include pre-production consultations with the local fire and police departments in order to create a dialogue regarding environmental concerns and the impact of proposed stunts and pyrotechnics. While filmmakers should embrace the lax regulatory structure when making a decision where to film, filmmakers should be aware of the local environmental concerns and should actively seek out consultations with local governing bodies even if a permit is granted by a superceding authority. This avoids the negative publicity and costs that are associated with events like Newport Bay or *The Beach* discussed in the following section.⁸³

V. GOING OUTSIDE THE SCOPE OF THE PERMIT IN A FOREIGN JURISDICTION

The filming of *The Beach* in Thailand is another example of conflict caused by disagreements over the scope of a permit. When the filmmakers sought permission to film, tensions arose because the filmmakers wanted to make temporary changes to the landscape.⁸⁴ These alterations required approval from the Royal Forestry Department (RFD) because the beach was part of a national park.⁸⁵ Like many local US towns, the lure of Hollywood money relaxed the permit process in favor of the filmmakers.⁸⁶

⁸² *Id.* at 35-36.

⁸³ Even in the U.K., the Film Commission strongly urges that “early contact with the local community is a good idea as they will be much more supportive if they are kept informed.” See Film Commission *supra* note 60. The Film Commission also commands that any additions to the water or existing structures necessitates clearance with the national Environmental Agency which can best advise on environmentally safe ways to remove toxic substances from the shoot. *Id.*

⁸⁴ *Environmental Issues in Thailand*, available at <http://thaistudents.com/thebeach/environment.html>. These temporary changes included bringing in 60 palm trees and shifting two 10-meter sections of a dune to obtain easier access to the beach.

⁸⁵ *Id.*

⁸⁶ *Id.* The government allowed alterations to the state park because of the potential \$10 million that would have been spent by the filmmakers in Thailand. This allowed the RFD to

The permit itself was rather straightforward.⁸⁷ The permit allowed the filmmakers to enter the public park with their equipment and crew.⁸⁸ Additionally, a section of the permit allowed the Thai government to recover for damages not cured by the filmmakers.⁸⁹ In one especially interesting provision of the permit, the filmmakers agreed to hand over 4,000,000 baht⁹⁰ for the government to use in restoring the marine environment after completion of filming.⁹¹ This led to charges of corruption by the locals.⁹²

Initially, the filming was very popular with the inhabitants of Thailand.⁹³ Controversy occurred when the bulldozers began moving sand dunes and changing other natural fauna.⁹⁴ Suddenly there were protestors everywhere.⁹⁵ The protestors alleged that the permit was outside

relax the rules of the National Parks Act (1961), which would have denied this action. *Id.* This pattern of relaxing permit regulations to attract film money is very familiar. However, most states usually do not experience the problems that this shoot experienced.

⁸⁷ The English translation of the Thailand permit is available at <http://thaistudents.com/thebeach/agreement.html>. This represented the agreement between Royal Forestry Department and Santa International Film Production Co. Ltd. in 1998. Item 2 of the permit allowed filming as long as it abided by the RFD's regulations. Item 3 specifically addresses the possibility of damage to the beach from the filming. Item 5 notes the possible prosecution under the National Parks Act of 1962 (BE 2504).

⁸⁸ *Id.* at Item 1.

⁸⁹ *Id.* at Item 3. The RFD gave the filmmakers 30 days to restore any damage back to its "original state". If the filmmakers failed to cure in 30 days, the RFD had the right to retrieve the guaranty of 5,000,000 baht as stipulated in Item 4.

⁹⁰ Approximately \$100,000 US dollars.

⁹¹ *Id.* While film permits can include guarantee bonds in case there is damage, this provision could be interpreted as a payoff for the access to a publicly protected land.

⁹² See *infra* note 135 and accompanying text.

⁹³ Roy Hamric, *Between East and West: New Film Puts the Spotlight on Bangkok's Khao San Road*, DALLAS MORNING NEWS, Feb. 6, 2000, at 16. See also Atiya Achakulwisut, *Face to Face with Leonardo*, BANGKOK POST, Jan. 26, 2000.

⁹⁴ E-mail from Sarah Clark (May 28, 2002) (on file with author). Fox moved sand dunes and planted 60 new coconut trees. According to Fox, the plans for changing the natural conditions "were checked vigorously to make sure no long term environmental damage occurred." *Id.* No mention is made whether Fox executives assessed potential damage according to an EIS or EA standard of review or what the assessment actually entailed. Once filming began, Fox hired Ross Palmer, a horticulturalist and Marine Team Ltd. to prevent damage to the coral. *Id.* Along with these preventive measures, Fox claims that a large amount of the location budget went to restoring the area to its original condition. They even hired a team to oversee the withdrawal of the production crew and to limit the environmental damage. *Id.* While these steps are admirable, one wonders if things might have gone differently if Fox had an environmental plan in place, for filming and environmental clean-up, before shooting instead of reacting to problems and protests that arise.

⁹⁵ Atiya Achakulwisut, *Oceans Apart*, BANGKOK POST, Nov. 25, 1998. Achakulwisut gives a good overview about the beginning of the protests and the arguments that several leading intellectuals and government made about the filming.

the scope of Thailand's Environmental Act⁹⁶ and that the permit was granted through scurrilous means.⁹⁷

As a result of these protests, the film production became a very contentious issue in Thailand⁹⁸ and the United States.⁹⁹ While some said the filmmakers were just taking advantage of a situation that was already present¹⁰⁰, it is clear it was not to Fox's advantage to exploit the laxity in the permit granting process.¹⁰¹ The negative publicity and resulting litigation make clear why filmmakers should consider the environmental impact of their actions despite allowances made by the permit.¹⁰²

VI. CASES

It is an understatement to say there is not much US case law regarding the impact of filming on the environment.¹⁰³ The few cases there are mainly deal with filming outside the permit granted for public lands. Interestingly, the multiple suits filed against Fox for *The Beach* occurred in foreign courts.¹⁰⁴ What the US case law does show is that the Interior Board of Land Appeals (IBLA) splits on upholding the

⁹⁶ Prasit Tangprasert & Nakhon Ratchasima, *The Beach- Move to Take Action Against Film Crew- Action Over Shooting in National Park*, BANGKOK POST, Feb. 7, 1999. If convicted, Fox could have faced up to five years imprisonment and no more than a 500,000 baht fine. The argument was essentially that the permit granted by the RFD was outside the scope of the National Park Act and the Environment Act (1992).

⁹⁷ See *infra* note 135 and accompanying text.

⁹⁸ See Achakulwisut, *supra* note 95.

⁹⁹ See Press Release, Robert Benson, DiCaprio's "The Beach" Hit by Environmental Protest at Hollywood Premiere (Feb. 3, 2000), available at <http://thaistudents.com/thebeach/release13.html>.

¹⁰⁰ See *supra* note 86 and accompanying text.

¹⁰¹ See *infra* text accompanying notes 136-40. While *The Beach* did well overseas, it did not do well in America. Richard Natale, *A Record Year at the Box Office, but with Qualifiers*, L.A. TIMES, Jan. 3, 2001, at F1. In fact, it was called a "box office disaster". Hugh Davis, *Murdoch Turns the Screw on Straight-talking Mechanic Saturday Premiere*, THE DAILY TELEGRAPH, June 24, 2000. The statistics are telling. *The Beach* premiered on 2,581 screens. Its second weekend was down 50% from the first weekend with a ten-day take of only \$27.5 million dollars. Richard Natale, *'Nine Yards', 'Hang Up' Leading a Crowded Field*, L.A. TIMES, Feb. 21, 2000, at F2.

¹⁰² Indeed, the negative results from the filming truly act as incentives for filmmakers to act environmentally responsible.

¹⁰³ A Lexis-Nexis search only turned up three cases.

¹⁰⁴ There were several lawsuits to halt or hamper the filming of the Beach. The Thailand civil court rejected efforts to enjoin filming by allowing the defendants to present their case regarding the destruction of the beach and the uprooting of vegetation. Uamdao Noikorn, *The Beach/ 'Let the Cameras Roll'*, BANGKOK POST, Jan. 13, 1999.

Bureau of Land Management's (BLM) decisions on granting permits.

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The Southern Utah Wilderness Alliance (SUWA) is an organization that is very active in environmental conservation.¹⁰⁶ The organization brought two suits to the IBLA on the basis that the filmmakers exceeded the scope of the permits granted to them by the Utah BLM.¹⁰⁷ SUWA achieved standing in these cases by arguing that the permits involved were detrimental to the environment and that they were allowed to challenge the granting of the permits under the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP) and the National Environmental Policy Act (NEPA).¹⁰⁸

SUWA appealed a decision by the Utah BLM who granted a permit authorizing commercial filmmaking in the Colorado River.¹⁰⁹ SUWA claimed that the BLM violated policy by stating there would be no other "environmental analysis or public notification".¹¹⁰ SUWA claimed the environmental impact assessment by BLM does not meet the eight criteria for filming within the Colorado River area.¹¹¹ The eight criteria include: (1) cast and crew size will not exceed 30 people; (2) the activity will not create surface disturbance or involve permanent placement of structures; (3) filming is proposed in conjunction with a BLM permit to float through Westwater Canyon; (4) the company will advise other boaters of the filming activity, when appropriate; (5) all filming activity will remain in the river corridor, with no filming on the canyon rims or cliff faces above the Precambrian (black) granites; (6) no camping is required with the exception of one watchman when equipment is left on location overnight; (7) the company will post a

¹⁰⁵ The court reversed the BLM's decision in the Colorado River case while upholding the BLM's decision in the DreamWorks case. These two cases are distinguishable because in the Colorado River case, the court, while not expressly ruling on whether the filming would be outside the scope of the 8 criteria test, focused more on the time allowed for public notice of the filming while in the DreamWorks case the court found that the impact of the filming was not outside the minimum impact permit granted by the BLM.

¹⁰⁶ SUWA is located in Salt Lake City, Utah and has been in existence for nearly 20 years. See About SUWA, available at, <http://www.suwa.org/about.php>. Their goals include an increase in activities, defeating anti-wilderness proposals and obtaining support for America's Redrock Wilderness Act. *Id.*

¹⁰⁷ Southern Utah Wilderness Alliance et al., 135 IBLA 138, 138 (1998); Southern Utah Wilderness Alliance, 151 IBLA 237, 239, (1999).

¹⁰⁸ *Id.* at 139.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* SUWA argued inadequate notice noting that with nine previous permits to film in the area, requests to film were made only a few days before the start of filming. Usually, 30 days of notice is required by the BLM. *Id.* at 140.

¹¹¹ *Id.* at 138-39.

reclamation bond; and (8) the company will provide funds for the monitoring of the filming activity by BLM.¹¹²

BLM countered by arguing it based its evaluation on an Environmental Assessment which stated there would be no “significant impact”.¹¹³ The court held that the habits of the film industry are not an “adequate justification” for granting a permit without sufficient notice to the public and reversed the BLM’s decision to grant the permit.¹¹⁴

The IBLA followed this decision with another involving SUWA a few months later.¹¹⁵ SUWA argued that the permit allowing DreamWorks Production LLC to film *Galaxy Quest* in a state park in Utah did not meet the minimum impact regulations and that by allowing filming to commence while the case was still on appeal did not render the issue moot.¹¹⁶ DreamWorks had authorization for “7 days of site cleanup and setup, 4 days of filming, and 3 days of cleanup and reclamation.”¹¹⁷ An EA, prepared by the BLM¹¹⁸, stated that the proposed action “would not cause any additional impact” in the environment.¹¹⁹ SUWA argued DreamWorks’ permit “did not meet the requirements of the regulations and should not have been issued as a minimum impact permit.”¹²⁰ SUWA argued that the issue was not moot despite that cleanup was already progressing in the affected areas, they were hand raked¹²¹ and about to be reseeded.¹²² The board held the “DreamWorks project clearly was not one which would cause appreciable damage/or disturbance to the public lands or their resources.”¹²³ In any event, the IBLA affirmed the BLM’s decision because DreamWorks had rendered SUWA’s argument moot by al-

¹¹² *Id.*

¹¹³ *Id.* at 139.

¹¹⁴ *Id.* at 141-42.

¹¹⁵ The first SUWA case was filed on April 8, 1996, while the second was filed on December 16, 1999.

¹¹⁶ Southern Utah Wilderness Alliance, 151 IBLA 237, 239, (1999) (SUWA claimed that the filming would and did cause appreciable harm and that the State Office—which tracks proposed actions on state lands—should have been reviewing the case).

¹¹⁷ *Id.* at 240.

¹¹⁸ The BLM derived its authority to consider the DreamWorks proposal under section 302 of the Federal Land Policy and Management Act. 43 U.S.C. § 1732 (1994).

¹¹⁹ Southern Utah Wilderness Alliance, 151 IBLA at 237. The permit was granted because the land had previously been used for camping and off-highway vehicles. The DreamWorks team cleaned up the site of all garbage and tire marks.

¹²⁰ *Id.* at 239. (“Appellant claims that the film proposal did not conform to the BLM San Rafael Resource Management Plan (RMP) because the filming actions ‘would and did cause appreciable damage’ to the public resources.”)

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 242.

ready cleaning up the damage done by its helicopters and pyrotechnics.¹²⁴

In *Johnson v. Barker*, a film crew appealed a decision dismissing their claims that the local prosecutor committed false arrest and defamation due to a series of charges and dropped charges revolving around an alleged violation of permits.¹²⁵ The film crew went to film on a volcano and allegedly went into a restricted access zone around the volcano.¹²⁶ The prosecutor originally cited the filmmakers for entering the restricted zones, then dropped the charges and resubmitted the charges as attempting to access the zones.¹²⁷ The court dismissed the due process and malicious prosecution claims brought by the filmmakers because the prosecutor's actions were not egregious enough to uphold due process violations.¹²⁸

The significance of this case is to highlight the possibility of criminal prosecution if one films outside the scope of the permits granted by a land management agency. Not only must filmmakers be concerned about civil liability¹²⁹ but also criminal liability.¹³⁰ What all three of these rulings show is that courts take into account the scope of the permits and whether the scope was realistic in relation to what the filmmaker was going to do on the land. Rather than the actions of the filmmaker, the holdings seem to be based on BLM's justification for granting the permit.

Does this put the burden on the permit-granting agency instead of the filmmaker? The cases certainly seem to focus on BLM's mismanagement rather than any misdeeds by the filmmakers. This does not mean a filmmaker should not weigh litigation into a risk calculation. There is a real possibility of an injunction prohibiting a film from shooting during judicial review of the permit.

VII. THE LESSONS DRAWN FROM LITIGATION

What can a filmmaker draw from the case law to help him or her decide how to film environmentally? First, as the Colorado River case

¹²⁴ *Id.* at 243-44. The Board held that the film project was reasonable and that it was in conformance with the BLM's plans. *Id.* at 241.

¹²⁵ *Johnson v. Barker*, 799 F.2d 1396, 1398 (9th Cir. 1986).

¹²⁶ *Id.*

¹²⁷ *Id.* The volcano was Mt. St. Helens. The filmmakers pressed on even after a major explosion a few days before.

¹²⁸ *Id.* at 1400.

¹²⁹ The DreamWorks court states that if the permit were filed under the new regulations it would not have been granted because of DreamWorks' use of pyrotechnics and helicopters. Southern Utah Wilderness Alliance, 151 IBLA at 242.

¹³⁰ The original prosecution was akin to a trespass charge. See *Johnson*, 799 F.2d at 1398.

showed, filmmakers should forego the traditional process of applying for the permit a few days before the shoot. The timing of the application should allow for regulatory standards to be enforced and for dissent to surface. Additionally, the benefits of addressing grievances privately certainly outweighs a court action,¹³¹ especially if shooting is generally on a tight, budgeted schedule¹³² that cannot afford an injunction shutting down production for a few months.

Additionally, filmmakers should be very careful to recognize the scope of the permit and what that means in the actual location. The director and location coordinator should make the scope of the permit available to all of the cast and crew to allow for as much compliance as possible. What all of these cases suggest is that a filmmaker should do everything he or she can to comply with the permit and to allow for dissent to surface in order to avoid the negative publicity that comes with litigation.¹³³

VIII. AN EXAMPLE OF COSTLY LITIGATION

A perfect example of the potential high costs of litigation, both in terms of money as well as bad publicity, is *The Beach*. In Thailand, there were multiple lawsuits over 20th Century Fox's alleged breach of its permit with Thailand's Forestry Department.¹³⁴ There were even civic groups within Thailand who petitioned the U.S. government to investigate bribery charges because the nature of the permit was itself

¹³¹ John M. A. DiPippa, *How Prospect Theory can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81 (2001). Prospect theory states that a plaintiff and defendant are willing to either proceed with litigation or settle based on how they frame their options. *Id.* at 83. The duration of litigation changes the cost-benefit analysis of the plaintiff and makes them become more risk adverse. *Id.* at 100. DiPippa then suggests how lawyers can frame the issues to encourage settlement. Certainly this presses home the point that settlement, within the American system, is so encouraged that there are theories developed to suggest the best way of ensuring that a settlement happens.

¹³² See *infra* text accompanying notes 142-45.

¹³³ The idea that litigation brings negative publicity is not a new one. It has been detailed in areas like HMOs. *Securing Access to Care in Health Maintenance Organizations: Towards a Uniform Model of Grievance and Appeal Procedures*, 94 COLUM. L. REV. 1674, 1689 (1994) ("HMOs likely share with patients a desire to avoid litigation wherever possible because of its costly, risky nature and the potential harm to business through negative publicity."). This also comes up in employment termination cases. Rachel H. Yarkon, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOT. L. REV. 165, 187 (1997) ("[E]mployers may wish to avoid the negative publicity associated with litigation to protect supplier, consumer, and employee relations.").

¹³⁴ Tangprasert & Ratchasima, *supra* note 96. One lawsuit was a joint suit with local Thai officials and Thai villagers for \$2.6 million against Fox, its Thai agent (Santa International) and the Forestry Department. Specifically, the 19 Plaintiffs were mostly provincial and district administrators from the district of Krabi. *Id.*

outside the scope of the 1962 Thailand National Parks Act.¹³⁵ The costs of these lawsuits were threefold. First, there was substantial cost to 20th Century Fox in defending these lawsuits.¹³⁶ Second, because of the controversy, Fox had to put up substantially more in bonds to act as a guarantee against environmental damage.¹³⁷ Third, negative publicity both in Thailand¹³⁸ and at the film premiere in the United States¹³⁹ arguably decreased film revenue.¹⁴⁰

Questions about the legitimacy of the Thailand permit caused lawsuit and publicity problems for 20th Century Fox. If Fox had more consideration for the environmental impact of the filming, despite the issuance of the permit, perhaps Fox could have averted the subsequent problems. While the scope of the Thai permit allowed for bulldozers, decorating the beach etc., it did provide a clause for reparations for damages to the environment.¹⁴¹ Since all of these cases deal with the scope of the permit granted to a filmmaker, the filmmaker should be extra sensitive to what he can do within the scope of the granted permit contrasted with the public perception of those acts.

IX. OBJECTIONS TO ENVIRONMENTAL FILMMAKING

There are two main objections to filming with an environmental conscious incorporating an EIS. The first is that studios have tight timing and budgetary concerns and that the cost and time in having to draft an EA or EIS would not be worth the effort. The second argument is that if a studio drafts an EIS statement, it opens them to lawsuits if the plan is not followed or environmental damage occurs.

¹³⁵ *Activists want Film Studio Investigated- Claims Officials were Bribed to get Permit*, BANGKOK POST, Jan. 31, 1999. This is very similar to SUWA's allegations that the BLM's permit was outside the scope of its authority.

¹³⁶ The lawsuit filed in Thai courts was for \$ 2.6 million. Benson, *supra* note 99. It has been very difficult in discovering the resolution of this lawsuit. At the time of this writing, attempts to gain answers from Fox and the producers of *The Beach* have not resulted in any additional information.

¹³⁷ *Hollywood Film- Protestors Gather at Hotel- Banners Waved from Two Fishing Vessels*, BANGKOK POST, Jan. 17, 1999. 20th Century Fox put up a bond of 100 million baht bond instead of its initial bond of four million.

¹³⁸ See generally *supra* note 95.

¹³⁹ Benson, *supra* note 136.

¹⁴⁰ See *supra* note 101. While there are no hard numbers that show the decreased gross box office was directly attributable to the protests, the grosses were certainly below industry expectations. Negative publicity can often damage a film's revenues even before it is released.

¹⁴¹ Permission for the Beach Productions to Film in Maya Bay, available at <http://thais-tudents.com/thebeach/agreement.html>. It was executed on October 27, 1998 between The Royal Forestry Department and Santa International Film Production. For more comments on this permit, see *supra* notes 87-89.

In 1995, the average cost of making a film (including marketing) was \$34.4 million dollars.¹⁴² The costs of filmmaking have increased thirty percent over the last five years.¹⁴³ People who are proficient with production schedules and cost analysis are considered valued members of the entertainment industry.¹⁴⁴ Analysts do not have a favorable view of entertainment companies.¹⁴⁵ All of these factors suggest a high premium on trying any method possible to avoid costs. The costs of researching, drafting and implementing a voluntary EIS or EA are not high on the list for funding with studios.

However, the gross income from movies last year was \$8 billion dollars.¹⁴⁶ Digital filmmaking is quickly leading to an era where costs of production may be greatly minimized.¹⁴⁷ There are consultants already established to handle requests such as EIS reports¹⁴⁸ and the process shouldn't involve extensive time or expense.¹⁴⁹

Responding to the increased liability claim is the maxim that corporations are encouraged to adopt codes of conduct when there is little to no benefit to the corporation.¹⁵⁰ Tort law suggests that by holding corporations vicariously liable for the acts of their agents, the potential liability helps to shape corporate conduct because corporations are in the best position to anticipate harm.¹⁵¹ However, as a studio might argue, these codes and internal investigations are hardly confidential¹⁵², have been used against corporations in tort liability cases¹⁵³, and would

¹⁴² Jeffrey Daniels, *Studio Pic Costs up 14 Percent*, HOLLYWOOD REPORTER, Mar. 8, 1995.

¹⁴³ *Film Industry Faces Financial Instability*, BUS. RECORDER, Aug. 27, 2000. For example, the cost of sophisticated digital filmmaking has been averaged out to \$1 million dollars a minute. Paula Parisi, *Move Over "Titanic." Back off, "Batman & Robin." Disney's "Dinosaurs" is on the fast track to become one of the most expensive films of all time, quite possibly the most expensive*, HOLLYWOOD REPORTER, Jan. 5, 1999.

¹⁴⁴ Eric Hansen & Stuart Kemp, *Constantin Sets 2 U.S. Ventures*, HOLLYWOOD REPORTER, May 8, 2000.

¹⁴⁵ Guy Halverson, *Profiting from our Playtime*, CHRISTIAN SCIENCE MONITOR, June 4, 2001. Halverson notes that movies like *The Mummy Returns* and *Pearl Harbor* both had huge opening weekends yet led to the loss of stock prices.

¹⁴⁶ See Scott Hettrick, *The Marquee Attraction*, VIDEO BUS., Jan. 28, 2002, at 40.

¹⁴⁷ Diana Barnum, *Going Hollywood*, COLUMBUS DISPATCH, July 16, 2001. Barnum argues that digital filmmaking has reduced the costs to as little as \$100 dollars.

¹⁴⁸ One such company is Impact Sciences. The company website is available at <http://impactsciences.com>.

¹⁴⁹ See Section IX for discussion of how environmental filmmaking can be achieved for at or below the cost compared to today's filmmaking.

¹⁵⁰ Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1560 (1990).

¹⁵¹ *Id.* at 1564-65.

¹⁵² Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 5 (1997).

¹⁵³ Pitt & Groskaufmanis, *supra* note 150, at 1607. See also, *Reese v. Seaboard Coastline R.R.*, 360 So. 2d 27, 29 (Fla. Dist. Ct. App. 1978) ("The reason most commonly assigned in

be used against the studio if they were negligent in using pyrotechnics or damaging the land.

This Note argues that while drafting an EA or EIS might increase civil liability, instituting this type of plan could also help protect the corporation.¹⁵⁴ Courts have avoided penalizing corporations if they have adopted codes¹⁵⁵ and many corporations view the codes as preventative measures for employee conduct.¹⁵⁶

There is no regulatory structure in place to which studios adhere while contemplating a potential environmental impact.¹⁵⁷ However, by having self-regulating guidelines in place (due to a creation of an EIS for a particular film), the corporation is more likely to monitor the filmmakers to insure that environmental damage outside of those guidelines does not occur, thus the codes may help protect the corporation in a civil litigation context.¹⁵⁸ The increased threat of litigation caused by drafting an EIS is very small and in no way should dissuade a film studio from creating one.

X. ENVIRONMENTAL FILMMAKING

Filmmakers clearly have little responsibility to film with an environmental conscious.¹⁵⁹ A filmmaker can make the choice to film more

support of the theory or doctrine of admissibility is, while not conclusive of the question, constitutes some indication of the care required under the circumstances, and may properly be considered by the jury in determining the question of negligence.”)

¹⁵⁴ Protection comes in the form of a showing of good faith on the corporation's part by adopting the codes of conduct. Goldsmith & King, *supra* note 152, at 13.

¹⁵⁵ Pitt & Groskaufmanis, *supra* note 150, at 1608.

¹⁵⁶ *Id.* at 1634-37.

¹⁵⁷ There is no regulatory structure outside general environmental guidelines that apply to all people and businesses. These regulations (which include CERCLA, the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (ToSCA) and the Resource Conservation and Recovery Act (RCRA)) impose extensive regulations on corporate environmental behavior. The point is that there are not specific regulations that apply to the film industry or its specific effect on the environment. In recent years, scholars have argued for corporations to adopt Valdez Principles, which encourage corporations to protect the environment aggressively. Valerie Ann Zondorak, *A New Face in Corporate Environmental Responsibility: The Valdez Principles*, 18 B.C. ENVTL. AFF. L. REV. 457, 457 (1991). These Principles suggest that corporations consider the following goals 1) Protection of the Biosphere 2) Sustainable Use of Natural Resources 3) Reduction and Disposal of Waste 4) Wise Use of Energy 5) Risk Reduction 6) Marketing of Safe Products and Services 7) Damage Compensation 8) Disclosure 9) Environmental Directors and Managers 10) Assessment and Annual Audit. *Id.* at 471-73. For the purposes of this Note, risk reduction and environmental assessments are the most relevant.

¹⁵⁸ Reiterating again the fact that for public policy reasons, courts are willing to be more lenient on corporate liability in order to encourage corporate entities to adopt and follow internal codes of conduct.

¹⁵⁹ This is aside from the restrictions placed upon filmmakers by permits and statutes. Filmmakers face very few restrictions either here or abroad.

responsibly because of personal convictions or because he or she has completed a cost-benefit analysis.¹⁶⁰ Regardless of the reasoning behind the choice, how does a filmmaker go about environmental filmmaking?

The first step should be to create an EIS or EA describing what will be occurring on location and what, if any, problems are with the site chosen.¹⁶¹ The report's development hinges upon interactions with local officials who have a better sense of specific environmental concerns for their community.¹⁶² Once the report is completed, how does a filmmaker go about the actual process of environmental filmmaking?

Larry Fessenden and Michael Ellenbogen have written the only treatise on environmentally sound film production.¹⁶³ They present environmentally friendly options dealing with all aspects of filmmaking from scripts¹⁶⁴ to a listing of companies that sell environmentally friendly set dressing.¹⁶⁵ Certainly, they provide many concrete suggestions for filmmakers on location.

The first consideration is choosing the actual location for the shoot. While the studio is an ideal location,¹⁶⁶ the location of the shoot is workable. One alternative to filming outside the studio but not in an environmentally sensitive area is a military base.¹⁶⁷ Military bases not only make good logistical sense¹⁶⁸ but also minimize the impact on the environment.¹⁶⁹

Once on location, there are many ways to minimize the environmental impact of the physical process of filming. If you are shooting in

¹⁶⁰ See *supra* note 13.

¹⁶¹ See *supra* note 37.

¹⁶² See the Newport Bay example in Section IV for reasons why consulting with local officials is a good idea.

¹⁶³ LARRY FESSENDEN & MICHAEL ELLENBOGEN, *LOW IMPACT FILMMAKING* (1992).

¹⁶⁴ *Id.* at 8 (2 pages of script can fit on one page when reduced 64%).

¹⁶⁵ *Id.* at 77 (listing includes companies that provide alternative energy services and milk based paint).

¹⁶⁶ *Id.* at 24. It is considered ideal because "it is self contained[,] . . . transportation to and from the location will be limited and equipment such as the generator will not have to be portable."

¹⁶⁷ *Id.* at 7. This strategy was practical in a pre-September 11th America because multiple base closings allowed filmmakers access. Given that President Bush has now proposed a \$48 billion dollar increase in military spending, it is possible that these revitalized bases will cut off access to filmmakers. John Hall, *Defense Transformation Poses Little Threat to Outmoded Weapons and Bases*, TAMPA TRIB., Feb. 7, 2002 (Hall argues that the increase in funding will prompt bases scheduled for closure to remain open [which would deny filmmakers access to these bases to film]).

¹⁶⁸ FESSENDEN & ELLENBOGEN, *supra* note 163, at 7. *Fessenden* notes that a military base allows all the crew to be housed and allows for both interior and exterior shots if the hangers are converted to sound stages.

¹⁶⁹ *Id.*

a country location, establish some guidelines for the crew: specific paths where the least grass will be destroyed and so on. Be respectful of trees, don't break off healthy branches just to get a shot or block a light. Have a production assistant oversee the cleaning up of the grounds after the shoot: not only the garbage, but if the location has been used for several days, some replanting of grass might be in order.¹⁷⁰

Additionally, there are environmental choices regarding transportation, catering and the set dressing. For example, the use of fewer vehicles means a smaller impact on the environment.¹⁷¹ Fessenden suggests that the cars used by the crew either should be rentals or "ecologized".¹⁷²

Catering introduces outside elements into the natural environment.¹⁷³ There should be a "carry in-carry out"¹⁷⁴ policy for all food brought into the location. As part of the general game plan, there should be contemplation of recycling possibilities.¹⁷⁵ The cleanup effort itself should be part of the daily routine to ensure its accomplishment.¹⁷⁶

Set dressing that is imported to add touches to the existing scenery is subject to many restrictions.¹⁷⁷ A critical ecological eye finds many potential environmental problems with the construction of set dressing. For example, many paints have toxic chemicals that, when improperly disposed¹⁷⁸, could damage the environment.¹⁷⁹

Mr. Fessenden shared his own experiences of environmental filmmaking with his shoot of *No Telling*.¹⁸⁰ Fessenden hired an environmental consultant to coordinate with environmentally sensitive

¹⁷⁰ *Id.* at 24.

¹⁷¹ *Id.* at 25 ("one gallon of gas puts 22 pounds of CO₂ into the air").

¹⁷² *Id.* (Fessenden also suggests carpooling as an alternative).

¹⁷³ *Id.* (Certainly soda and chips do not occur in nature).

¹⁷⁴ A Texas act demonstrates this type of policy by prohibiting littering in the public parks. Litter Abatement Act 4477-9a(2.01(a)) (1996).

¹⁷⁵ FESSENDEN & ELLENBOGEN, *supra* note 163, at 31. Fessenden denotes several categories of recyclable material including scripts, different types of glass and certain plastics.

¹⁷⁶ *Id.* at 29. There should also be consideration of materials used for cleaning. For example, "many soaps are toxic to our water supply. . . [y]ou should buy biodegradable cleaners".

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 34. Disposing of the material is almost more important than which chemicals are being used. There are companies (including Material for the Arts and The Shooting Gallery) that will accept material that can be used as a tax write-off.

¹⁷⁹ *Id.* at 32. Oil paints and plastic modeling material are very difficult to discard. Fessenden suggests using chemical free paints that are available through companies such as AFM Enterprises and Livos.

¹⁸⁰ *Id.* at 55.

companies to provide ecological products.¹⁸¹ The cast and crew constantly engaged environmental issues and deliberated what would be necessary on the shoot.¹⁸² There was an assessment of the environmental impact of all the products used on the shoot.¹⁸³ Makeup, craft services and recycling were all areas where the filmmakers tried to be ecologically sensitive.¹⁸⁴ Fessenden suggests that while the crew had some problems adjusting,¹⁸⁵ the experience was essentially positive.¹⁸⁶

One scene in the movie called for the burning of a field. The burning took place under the supervision of local officials who assured Fessenden that field burning was routine.¹⁸⁷ To that end, Fessenden did a control burn with gasoline because gas will burn off before it seeps into the ground.¹⁸⁸ There was no need for damage control after the shot because the field quickly grew back two weeks later.¹⁸⁹

By adopting this type of game plan¹⁹⁰ and carrying it through during production, the filmmaker helps ensure that there will be little impact on the environment. This is, of course, as long as the filmmaker stays within the scope of the permit granted to him or her. This is relatively easy to do if there is an EIS statement in place to serve as a blueprint for all production filming.

¹⁸¹ *Id.* Fessenden also suggests that the director should meet with the production designer to discuss environmental ways to achieve the "look" of the film. *Id.* at 33. This is another example of the needed interaction between the crew to concoct environmental ideas during pre-production.

¹⁸² *Id.* at 56.

¹⁸³ *Id.* at 57-58.

¹⁸⁴ *Id.* The makeup and soaps were all non-toxic. The company also used plates and mugs instead of plastic utensils.

¹⁸⁵ *Id.* at 61. Fessenden found that the crew was slightly resistant due to their "inability to understand the over-all implications of the environmental movement". This may not be the case for all productions. Certainly though, there may be resistance on bigger budget movies because being environmentally sensitive seems to indicate a slightly less level of "gloss" to the production. Despite spending millions on a film, companies are always looking to save money. If for no other reason, using renewable sources will cut down on the cost of buying disposable products (such as kitchen wares).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 60. This proves this Note's contention that part of environmentally responsible filmmaking is coordination with local officials to determine the impact on the local environment. Fessenden only continued after assurances that the controlled field burning would not be harmful to the environment.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 61. There was no need for the damage to be rectified immediately after wrapping the shoot. See discussion regarding California, *supra*, notes 75 and 77. In other words, there is leniency when working with local officials about how and when to rectify damage that is caused by the shoot.

¹⁹⁰ Preferably expressed by an EIS or EA and with the input of local officials.

XI. CONCLUSION

What this Note has attempted to show is that there are real costs associated with ignoring the environment from the pre-production process of filmmaking. These costs can come in the form of lawsuits, work stoppages and/or negative publicity. These costs are avoidable if a filmmaker creates a document similar to an EIS in order to limit the possibility of environmental damage. While this document's cost, time consumption and possible liability seems initially unjustifiable, it can lead to a reduction of negative costs after damage has already occurred. Additionally, creating an EIS-type document would help facilitate a better relationship between the film company and the local community by giving the community a forum for addressing possible grievances.¹⁹¹

Movies play a significant role in our culture.¹⁹² In an increasingly balkanized country, the film experience is often one which remains to connect diverse spheres of society.¹⁹³ Celebrities account for a tremendous amount of news coverage.¹⁹⁴ Filmmaking also brings in billions of dollars to communities that allow filming.¹⁹⁵ This situation has prompted few regulations governing the actual aspects of filmmaking. The studios should not take advantage of their good fortune at the expense of the environment. Corporations share environmental responsibility at least as much as the average citizen and it is beneficial to their bottom line if they adopt policies that favor environmental conservation instead of degradation.

Creating an EIS and fully integrating it into shooting can ultimately lead to a reduction of negative costs and an increase in beneficial environmental conservatism. Studios might not fully adopt a document like an EIS but certainly thinking about the possibility of negative environmental impacts will only be beneficial to a studio during any particular shoot.

¹⁹¹ One could envision the filmmakers and local residents sharing information about proposed stunts and potential environmental hazards. This would better inform the filmmaker in making an EIS and the residents a chance to settle their potential problems with the filmmakers outside the courtroom.

¹⁹² THE OXFORD HISTORY OF WORLD CINEMA xx-xxii (Geoffrey Nowell-Smith ed., Oxford University Press, 1996).

¹⁹³ *Id.* at xix (film draws "its strength from an ability to connect to the needs, interests and desires of a large, massified public.")

¹⁹⁴ A recent Lexis-Nexis search turned up 723 articles regarding Jennifer Aniston written between January 1, 2000 and February 1, 2002.

¹⁹⁵ In 2001, the film industry made a record eight billion dollars. Hettrick, *supra* note 146, at 40.

