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THE NATIONAL ENVIRONMENTAL POLICY ACT'S INFLUENCE ON STANDING, JUDICIAL REVIEW, AND RETROACTIVITY*

Congressman Saylor said that Senate Bill 1075, which became the National Environmental Policy Act of 1969 (NEPA)¹ on January 1, 1970, "is a landmark in the history of conservation legislation."² Whether or not the Act has been a landmark is debatable, but it has managed to reach "every branch of the Government,"³ including the judicial branch. NEPA has provided broad environmental goals to preserve a healthful and aesthetically pleasing environment with maximum beneficial use development.⁴ Preservation and development must be the responsibility of the federal, state and local governments with cooperation from concerned public and private organizations. Section 102 lists agency directives to implement these goals.⁵ The Act provides that the impact on man's environment must be studied through natural and social sciences and environmental design arts. Recommendation of major Federal actions must be preceded by an environmental impact statement prepared by agencies with legal jurisdiction or special expertise. This statement will be submitted to the President, the Council on Environmental Quality, and the public. Accompanying a recommendation should be a detailed statement on the following:

- (1) the environmental impact of the proposed action;
- (2) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (3) alternatives to the proposed action;
- (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

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1. National Environmental Policy Act of 1969, §§ 101-105, 201-205, 83 Stat. 852, (codified at 42 U.S.C. §§ 4321, 4331-35, 4341-47) (1970). (Hereinafter referred to as NEPA.)

2. 115 CONG. REC. 40925 (1969) (remarks of Congressman Saylor).

3. 115 CONG. REC. 40928 (1969) (remarks and opinion of Congressman Harsha).

4. 42 U.S.C. § 4331 (1970).

5. 42 U.S.C. § 4332 (1970).

(5) any irreversible and irretrievable commitments of resources which would be in the proposed action should it be implemented.⁶

Also provided for is a Council on Environmental Quality which must compile information, recommend to the President environmental changes and assist him in an annual report to Congress.⁷ Environmentalists may have hoped such broad coverage would have eliminated their struggle for standing to appeal from agency action and for judicial review in seeking injunctions against agencies. To gain standing prior to the passage of NEPA, an individual or environmental group needed to show a legally protected environmental interest and not merely a property interest.⁸ NEPA altered these problems and posed a new one, i.e., the possibility the Act would not retroactively apply. The purpose of this comment is to consider the problems of standing, judicial review of agencies, and retroactive application facing conservation groups before and after the NEPA's enactment.

STANDING

Before NEPA's enactment, standing was not guaranteed to a conservationist or conservation group unless they had an economic interest or were joined with a local interest. An interested national group would probably be denied standing. Three important cases demonstrate the law of standing prior to NEPA.

In *Scenic Hudson Preservation Conference v. Federal Power Commission*⁹ a local conservation group and local towns were able to prevent the FPC's issuance of a license for a hydropower plant until alternatives to the project were considered. The court held that the Federal Power Act¹⁰ gave the petitioners a right to protect their special interests. The court said it would have allowed standing without the Federal Power Act since an "aggrieved" party under the "case" or "controversy" requirement of Article III, section 2, of the

6. 42 U.S.C. § 4332 (1970).

7. 42 U.S.C. §§ 4341-47 (1970).

8. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 615 (2d Cir. 1965).

9. *Id.* at 608.

10. 16 U.S.C. §§ 791-93, 795-97, 798-818, 820-25v (1970).

Federal Constitution need not have a personal economic interest.¹¹ However, this language was dictum since the parties involved had economic interests. The towns had private property interests which would have been injured by transmission lines, and the conservation group was organized by a group which had seventeen miles of trailways in the project area.¹² Since the dictum showed a recognition of conservation interests, the decision may have been a victory of sorts for conservation groups, but it was not a substantial one.

In another major case, the court in *Data Processing Service v. Camp*¹³ in dictum said:

[T]he Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute."¹⁴ That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well 'as economic values.'¹⁵

Plaintiffs here too, though not conservationists, were injured in fact economically.¹⁶

The court in *Sierra Club v. Hickel*¹⁷ denied standing to the Sierra Club, a non-profit organization, which asked for a declaratory judgment and preliminary and permanent injunctions to block permits for a highway to be constructed through Sequoia National Park and a commercial-recreational development in and near Mineral King Valley in Sequoia National Forest.¹⁸ The court in distinguishing *Scenic Hudson* stated "[t]hat there [was] no such Statute [Federal Power Act] involved in the present case to give standing."¹⁹ While noting the non-economic provisions for standing in *Data Processing*, the court said that the plaintiffs here were not "aggrieved" and that they would not be affected even though the actions would be distasteful to them.²⁰ The court required the conservation groups to have a local interest or to be joined

11. *Scenic Hudson Preservation Conf. v. FPC*, *supra* note 8, at 615.

12. *Id.*

13. *Data Processing Serv. v. Camp*, 397 U.S. 150 (1970).

14. 5 U.S.C. § 702 (Supp. IV, 1964), as quoted in *Data Processing Serv. v. Camp*, *supra* note 13, at 153-54.

15. *Data Processing Serv. v. Camp*, *supra* note 13, at 153-54.

16. *Id.* at 152.

17. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

18. *Id.* at 27.

19. *Id.* at 30.

20. *Id.* at 33.

with local residents for standing. The court in *Sierra Club v. Hickel* took a rather strained position by not considering 27,000 Sierra Club members as local residents. Even though these members had resided in San Francisco, they had taken a special interest in the Sierra Nevadas. Arguably this interest could be considered a sufficient local interest to qualify the member for standing.²¹ This, however, did not prevail, and thus in *Sierra Club v. Hickel* plaintiffs without an economic interest were denied standing. Neither were they given standing under NEPA, which had been passed earlier in 1970. Perhaps this was because plaintiffs had not claimed standing under NEPA, and the court declined to refer to it.

The legislative history of NEPA demonstrates congressional awareness of the conservationists' plight in regard to standing. Senate bill 1075,²² as passed by the Senate, stated that "each person has a fundamental and inalienable right to a healthful environment."²³ It was amended in conference to state that "each person should enjoy a healthful environment."²⁴ Although the resulting language was weaker, arguably Congress still intended to provide the individual with an environmental interest which should be legally protected. Senator Jackson, who sponsored the bill, intended that an individual should be able to protect his right to a healthful environment and stated he would propose an amendment to clarify the provision.²⁵ An amendment was also added under Section 101(a) so that "public and private organizations" should have a responsibility to ensure a healthful environment.²⁶

Arguably Congress by these sections intended to give an individual or public organization a non-economic interest in a healthful environment. Congress provided environmental groups a basis for standing if courts chose to follow it. Perhaps through broader language Congress gave courts wider discretion to grant standing.

21. Note, *Concern of Conservationist Group Held Not Sufficient to Confer Standing To Challenge Agency Action*, 71 COLUM. L. REV. 172, 175 (1971).

22. S. 1075, 91st Cong., 1st Sess. (1969).

23. 115 CONG. REC. 40415 (1969) (remarks of Senator Jackson).

24. *Id.*

25. *Id.* at 40416.

26. 115 CONG. REC. 39702 (1969).

A rash of decisions has followed NEPA's enactment. Virtually all have granted standing to conservation groups and individual conservationists under NEPA.²⁷ Probably the most significant decision for environmentalists was *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*.²⁸ Plaintiffs were non-profit corporations from New York and Arkansas and several individuals. Plaintiffs sought to enjoin the making of a contract or any work in furtherance of the Gilham Dam Project over the Cassatot River in Arkansas. No construction had begun on the Gilham Dam, which was a part of a larger project, the Milwood Reservoir and Alternate Reservoir, Little River, Oklahoma and Arkansas. The total project was two-thirds complete.²⁹ The court granted the plaintiffs standing, stating that it would rely on the rationale of the *Scenic Hudson* and *Data Processing* cases, even though the language there was dicta.³⁰ Whether or not the court would have given standing on the basis of those cases alone is difficult to say, since it was able to supply standing under NEPA. The court said Congress intended to give private organizations a role to further the Act.³¹

As indicated by the majority of cases decided after NEPA, the standing problem is practically non-existent for conservation groups. *Pennsylvania Environmental Council, Inc. v. Bartlett*³² summarized the holdings by saying:

[I]f the statutes involved in the controversy are concerned with the protection of natural, historic and scenic resources, then a congressional intent exists to

27. *Alameda Conservation Ass'n. v. California*, 437 F.2d 1087 (9th Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army*, 325 F. Supp. 728 (E.D. Ark. 1970); *Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army*, 325 F. Supp. 737 (E.D. Ark. 1970); *Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army*, 325 F. Supp. 741 (E.D. Ark. 1971). (The foregoing cases are separate memo decisions and henceforth shall be referred to as one case.) *Sierra Club v. Hardin*, Civil No. A-16-70 (D. Alas., March 25, 1971), 2 ENV. REP. 1385; *Cape May County Izaak Walton League v. Macchia*, 40 U.S.L.W. 2001 (D.N.J. June 16, 1971); *Brooks v. Volpe*, 319 F. Supp. 90 (W.D. Wash. 1970); *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970); *Wilderness Soc'y v. Hickel*, No. 928-70 (D.D.C. April 23, 1970), 1 ENV. REP. 1335.

28. *Environmental Defense Fund, Inc. v. Corps of Eng'rs of the United States Army*, 325 F. Supp. 728 (E.D. Ark. 1971).

29. *Id.* at 744.

30. *Id.* at 735.

31. *Id.* at 736.

32. *Pennsylvania Environment Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.³³

The court in *Sierra Club v. Hardin*³⁴ recognized that the policy behind allowing class actions is the sanction of meritorious actions which would otherwise be denied.³⁵ A small number of individuals or one individual alone would not have the funds to sustain a suit for which no damages are given.

JUDICIAL REVIEW

Before NEPA's enactment one major case, *Parker v. United States*,³⁶ granted judicial review of agency action when a statute fixed guidelines for the agency to follow.³⁷ However, if unfortunate plaintiffs had no statute upon which to rely, the court could not ensure full consideration of environmental values. In *Parker*, conservation groups and local residents sought a declaratory judgment that a timber sale was unlawful. They also sought to enjoin the Government from selling timber until investigations were made regarding the propriety of the sale under the Wilderness Act.³⁸ The court granted standing. The court then held that even though the Secretary of Agriculture had the discretion to sell the timber, he must first consider the relative values of various resources. Whether "the Secretary made this consideration is a matter that the Court can review."³⁹

The legislative history of NEPA shows that judicial review could apply to the Act. The conference committee added to Section 102 the provision that all federal agencies should comply with Section 102 "to the fullest extent possible."⁴⁰ The conference report interpreted the language to mean that "no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid compliance."⁴¹ Even

33. *Id.* at 245.

34. *Sierra Club v. Hardin*, Civil No. A-16-70 (D. Alas., March 25, 1971).

35. *Id.* at 1404, 2 ENV. REP. 1385.

36. *Parker v. United States*, 307 F. Supp. 685 (D. Colo. 1969), *aff'd*, 40 U.S.L.W. 2202 (10th Cir. 1971).

37. *Id.*

38. 16 U.S.C. § 1131-36 as referred to in *Parker v. United States* *supra* note 36, at 687.

39. *Parker v. United States*, *supra* note 36, at 688.

40. 115 CONG. REC. 39703 (1969).

41. *Id.*

though an agency would have discretion to make a final decision, a court might require an agency to submit an indefinite amount of material, according to the phrase "to the fullest extent possible." A court's power could be arbitrarily exercised.

After NEPA's enactment in two of the latest cases, the courts have used their judicial review power to require agencies to consider further environmental impacts and alternatives. In *Environmental Defense Fund, Inc.* the court held that the defendants did not comply fully with Section 102(c) since statements did not set forth all the environmental effects, alternatives, irreversible and irretrievable commitments, and comments and views of all appropriate state and local agencies.⁴² Although the court may have been requiring compliance with the Act, arguably the court was exercising discretion under the guise of judicial review. The court could prevent project progression merely by deciding that one more alternative course must be considered.

In other decisions, the courts have been willing to require agencies to satisfy the directives under Section 102. To what extent these are satisfied, however, is discretionary with the courts. In *Wilderness Society v. Hickel*,⁴³ the Secretary of the Interior was found to have failed to meet all the procedural requirements of NEPA with respect to the application for an oil pipe line right-of-way.⁴⁴ As a result, he was enjoined from issuing a permit. He was ordered to file a detailed statement, but what the statement was required to say was not specified.

However, in *Sierra Club v. Hardin* the court determined that the completed research and planning were sufficient to satisfy NEPA's requirements.⁴⁵ Courts have inconsistently required agencies to conform "to the fullest extent possible." Thus environmentalists are not *guaranteed* any specified result and sometimes no substantial result, even though judicial review is granted.

42. *Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army*, *supra* note 28, at 758.

43. *Wilderness Soc'y v. Hickel*, No. 928-70 (D.D.C. April 23, 1970), 1 ENV. REP. 1335.

44. *Id.* at 1337.

45. *Sierra Club v. Hardin*, *supra* note 34, at 1404.

RETROACTIVITY OF NEPA

A third problem which faced conservationists was whether NEPA would retroactively apply. An agency's project might have begun before the restrictive act was passed. If so, as a general proposition, retroactivity will not apply unless that application was the "manifest intention of the legislature."⁴⁶

Although the legislative history of the Act itself does not mention possible retroactive application, the Council of Environmental Quality issued guidelines on April 30, 1970.⁴⁷ These state that to the "maximum extent practicable" the Act should be applied to major federal actions, even though the projects may have been initiated prior to January 1, 1970.⁴⁸ If it will not be possible to "reassess the basic course of action", still, actions should minimize adverse environmental consequences.⁴⁹ However, in spite of these guidelines, most courts have denied retroactive application.⁵⁰

One case which allowed retroactive application was the *Environmental Defense Fund, Inc.* case. Even though \$9,496,000 had been expended on the project, which was estimated would ultimately cost \$14,800,000,⁵¹ the court did not handle the retroactivity question with kid gloves. Although the court found nothing specific in the legislative history about retroactivity, the court said that from NEPA's language a retroactive application was intended. The court cited Section 101(a) regarding the "continuing policy of the federal government" to protect the environment and Section 102 which requires the agencies to follow the section to "the fullest extent possible." The court said these passages, coupled with the interim guidelines, could not be ignored.⁵²

46. *Union Pacific R.R. v. Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913).

47. *Guidelines For Federal Agencies Under the National Environmental Policy Act*, Fed. Laws Vol., ENV. REP. 71:0301 (1970).

48. *Id.* at 71:0304.

49. *Id.*

50. *Cape May County Izaak Walton League v. Macchia*, 40 U.S.L.W. 2001 (D.N.J. June 16, 1971); *Siera Club v. Hardin*, *supra* note 34; *Brooks v. Volpe*, 1319 F. Supp. 90 (W.D. Wash. 1970); *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1308 (D. Ore. 1970).

51. *Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army*, *supra* note 28, at 744.

52. *Id.*

Although a conservation group has gained standing and although judicial review has been applied, environmental factors may not be considered under NEPA because the Act may not retroactively apply to a contested project. Several cases have emphatically said the NEPA will not so apply.

*Brooks v. Volpe*⁵³ followed precedent and did not allow a retroactive application unless the Act's language clearly indicates Congress so intended. *Sierra Club v. Hardin* did not allow a retroactive application and only expressed qualms when it said:

The rule that N.E.P.A. should not be given retroactive effect to frustrate activities to which the Government had committed itself prior to the passage of the Act is, in principle, sound The difficult question involves pinpointing that moment in time when the Federal Government can be said to have committed itself.⁵⁴

The decision in *Investment Syndicate, Inc. v. Richmond*⁵⁵ denying retroactivity was based on the percentage of completion of a project on the date NEPA was enacted. In his opinion the judge stated:

I cannot believe that Congress intended that the NEPA apply to 'major Federal actions' which had reached this stage of completion as of the date of enactment. It was not the intention of Congress to negate all of the work which had gone into this project.⁵⁶

The conclusion of most of the courts has been to ignore the interim guidelines and to deny retroactive application. The decisions and the trend thereby developed have impeded the progress environmentalists have made through gaining standing and judicial review. However, denial of retroactivity will only apply to those projects begun before NEPA's enactment and these will be limited. Even if a conservation group were given standing and even if every impact statement, which included every alternative, was filed, environmentalists

53. *Brooks v. Volpe*, 319 F. Supp. 90, 92 (W.D. Wash. 1970).

54. *Sierra Club v. Hardin*, *supra* note 34, at 1403-04 n. 52.

55. *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1308 (D. Ore. 1970).

56. *Id.* at 1039.

are not *guaranteed* environment preservation.⁵⁷ The Act only requires consideration of environmental factors. If the goal of the environmentalist has been to preserve the environment in status quo form, this goal is not guaranteed by NEPA.

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57. Note, *The National Environmental Policy Act: A Sheep In Wolf's Clothing?* 37 BROOKLYN L. REV. 139, 150 (1970).