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JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)¹ was a congressional attempt to force all federal agencies to be more conscious of our surrounding environment and its protection.² The statute was an attempt to insure that all federal agencies will develop the appropriate environmental concern by setting forth certain measures to be implemented in carrying out the policy of the Act.³ It directs all federal agencies to utilize a systematic, interdisciplinary approach in any planning or decision making which may have an impact on man's environment,⁴ to compile a detailed statement on the environmental impact of any proposed major federal action which significantly affects the quality of the human environment,⁵ and to develop alternative recommendations as to other possible uses of available resources.⁶ NEPA requires that all federal agencies develop methods and procedures to insure that environmental amenities and values are given appropriate consideration in future planning and decision making,⁷ that all federal agencies recognize the worldwide and long range character of environmental problems and attempt to maximize international cooperation in promoting man's environment,⁸ and that all federal agencies utilize ecological information in the planning and development of resource-oriented projects.⁹ Furthermore, each federal agency must assist the Council on Environmental Quality¹⁰ and make environmental advice and information available to states,

1. 42 U.S.C. §§ 4321-4347 (1970).

2. The eighth circuit in *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 294 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972) stated: "Thus the Act requires all administrative agencies of the federal government in the process of project development and decision making to consider the environmental impact of their actions." Quoted from 115 Cong. Rec. 40416 (1969).

3. 42 U.S.C. § 4332 (1970).

4. 42 U.S.C. § 4332 (2) (A) (1970).

5. 42 U.S.C. § 4332 (2) (C) (1970).

6. 42 U.S.C. § 4332 (2) (D) (1970).

7. 42 U.S.C. § 4332 (2) (B) (1970).

8. 42 U.S.C. § 4332 (2) (E) (1970).

9. 42 U.S.C. § 4332 (2) (G) (1970).

10. 42 U.S.C. § 4332 (2) (H) (1970).

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counties, municipalities, institutions, and individuals upon demand.¹¹

When any federal agency contemplates any type of major federal action, it must make the primary determination as to whether such action falls within the parameters of NEPA, and if so, then it must take appropriate action to comply with NEPA before the project can begin or continue. This decision of the administrative agency as to its compliance with NEPA is subject to judicial review upon appeal as are other types of administrative decisions.¹² The federal courts seem to be in agreement that an administrative agency's environmental impact statement may be judicially reviewed to determine if it is in compliance with the procedural requirements of NEPA;¹³ however, other questions concerning the interpretation of NEPA are not so simply answered and have led to a divergence of opinion among the federal courts.

STANDING TO SUE

The recent flood of NEPA cases coming before the federal courts is due to the willingness of these courts to grant standing to sue to private citizens and environmental protection organizations.

The U.S. Supreme Court has held that in general the question of standing depends upon whether the person has shown a "personal stake in the outcome of the controversy"¹⁴ which is sufficient to ensure that "the dispute sought to be adjudicated will be presented in adversary context and in a

11. 42 U.S.C. § 5332 (2) (F) (1970).

12. The Administrative Procedure Act, 5 U.S.C. § 701 (1970) states that actions by administrative agencies are reviewable by the courts unless specifically precluded by statute. *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962) and *Abbot Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) are in agreement that administrative action is exempt from judicial review only upon a showing of "clear and convincing evidence" of a contrary legislative intent. NEPA has no language indicating such intent.

13. See *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 8th Cir. 1972) *cert. denied*, 409 U.S. 1072 (1972); *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971); *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Conservation Council of North Carolina v. Froehle*, 473 F.2d 664 (4th Cir. 1973). Other federal cases have held that an administrative agency's decision not to file an environmental impact statement is procedurally reviewable. See *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Natural Helium Corporation v. Morton*, 455 F.2d 650 (10th Cir. 1971); and *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973).

14. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

form historically reviewed as capable of judicial resolution."¹⁵ However, where there is a statute which provides for judicial review of the actions of authorized public officials in a specific area, the question of standing falls under the Administrative Procedure Act.¹⁶ Section 10 of the Act provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

In 1970, the Supreme Court held, in *Association of Data Processing Service Organizations, Inc. v. Camp*¹⁷ and *Barlow v. Collins*,¹⁸ that a plaintiff had standing to obtain judicial review of agency action under the APA whenever such agency's action had caused him "injury in fact, economic or otherwise," if the injury alleged was to an interest "within the zone of interests to be protected" by the statute violated. However, the interests allegedly injured in both of these respective cases were economic in nature,¹⁹ so neither case actually gave standing to a plaintiff suing under the APA for injury of a noneconomic interest. The insertion of the statement in *Data Processing*, that standing could be had to redress an injury even if not economic in nature, may have been in recognition of a growing trend to allow such type of litigation in the federal courts.

This trend²⁰ ultimately culminated in the holding in

15. *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Neither this case nor *Baker v. Carr*, *supra* note 14, involved NEPA, but refer only to the general requirements for standing to sue in a federal court.

16. 5 U.S.C. §§ 701-706 (1970).

17. 397 U.S. 150 (1970).

18. 397 U.S. 159 (1970).

19. In *Data Processing*, *supra* note 17, the petitioners, who provided data processing services to various business entities, challenged a ruling by the Comptroller of Currency which allowed national banks to compete with petitioner by providing data processing services to bank customers. In *Barlow*, *supra* note 18, the petitioners were tenant farmers who challenged the validity of a regulation issued by the Secretary of Agriculture concerning the legality of assignments of future crops under the Soil Conservation and Domestic Allotment Act.

20. See *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1097 (D.C. Cir. 1970) (interest in public health affected by the decision of the Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Officer of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994, 1005 (D.C. Cir. 1966) (interest of television viewers in the programming of a local station licensed by the FCC); *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 615-616 (2d Cir. 1965) (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); *Reade v. Ewing*, 205 F.2d 630, 631-632

*Sierra Club v. Morton*²¹ in 1972. In this case the Sierra Club sued for an injunction to restrain federal officials from approving the construction of a ski resort in the Mineral King Valley of the Sequoia National Forest. The club claimed standing to sue on the basis that it had “a special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country . . .”²² and that the proposed development “would destroy or otherwise affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.”²³ The Court held that such an injury to aesthetic and environmental well-being could indeed amount to an “injury in fact” sufficient for standing to sue under § 10 of the APA,²⁴ but that the Sierra Club had suffered no such injury in fact in this particular case, primarily because the Club did not allege that individualized harm had been suffered by it or its members.²⁵

Finally, in *U.S. v. SCRAP*,²⁶ the plaintiffs sued to obtain an injunction to prevent the allowance of a 2.5% surcharge on all railroad freight rates by the Interstate Commerce Commission. SCRAP alleged that its members “used the forests, streams, mountains and other resources in the Washington Metropolitan Area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities.”²⁷ The Supreme Court held that this alleged injury to a noneconomic interest was sufficient to give the plaintiffs standing to sue since there was an allegation of actual individualized injury to the members of SCRAP. The court stated:

A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency ac-

(2d Cir. 1953) (interest of consumers of oleomargarine in fair labeling of product regulated by the Federal Security Administration); and *Crowther v. Seaborg*, 312 F. Supp. 1205, 1212 (D. Colo. 1970) (interest in health and safety of persons residing near the site of a proposed atomic blast in Colorado to recover natural gas.

21. 405 U.S. 727 (1972).

22. *Id.* at 730.

23. *Id.* at 734.

24. *Id.*

25. *Id.* at 740.

26. _____ U.S. _____, 93 S.Ct. 2405 (1973).

27. *Id.* at 2415.

tion, not that he can imagine circumstances in which he could be affected by the agency's action.²⁸

There are, then, two requirements for standing to sue in a case challenging administrative agency action under NEPA. First, as stated in *Sierra Club* and *SCRAP*, there must be an allegation of an "injury in fact" to one or all of the plaintiffs or there is no standing. It is now clear from the *SCRAP* decision that this interest can be economic or noneconomic, direct or remote, individual to a few or generally possessed by many, so long as an actual injury which has or will occur is alleged.

The second requirement, from the *Data Processing* and *Barlow* cases, is that the injury be to an interest within the zone of interests to be protected by the statute violated by the agency's action. This is where NEPA becomes of importance as a basis for judicial review under the APA. NEPA sets forth the guidelines and requirements against which the agency's actions are to be judged, and is the primary if not the only means available for a plaintiff to gain standing to redress noneconomic injury to the environment.²⁹

REVIEWABILITY OF AGENCY DECISIONS

1. Procedural Review

The decisions of federal agencies made under NEPA are generally reviewable by the federal courts.³⁰ The first decision that must be made by any federal agency contemplating an action is whether the requirements of NEPA apply to the proposed action. NEPA requires that the agency file an environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment."³¹ The agency's decision as to whether or not it must

28. *Id.* at 2416.

29. For a preliminary study of standing under NEPA, see Note, *The National Environmental Policy Act's Influence on Standing, Judicial Review, and Retroactivity*, 7 LAND & WATER L. REV. 115 (1972).

30. *Supra* notes 12, 13.

31. NEPA § 102, 42 U.S.C. § 4332 (2) (C) (1970). That section requires that the environmental impact statement include the following information:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity, and

comply with the procedural requirements of NEPA and file an impact statement is reviewable by the courts.

In *Ely v. Velde*³² the appellants brought suit to halt the proposed funding and construction of a penal facility in Virginia. They alleged that the Federal Law Enforcement Assistance Administration had violated the requirements of NEPA by allocating funds for the penal facility to the state of Virginia without first filing an environmental impact statement.³³ Appellees argued that the spending of federal money by a state and its officers was not a major federal action within the requirements of NEPA.³⁴ The fourth circuit reviewed the facts of the case and the actual physical attributes of the proposed penal facility, and came to the conclusion that this was a major federal action falling within the procedural requirements of NEPA.³⁵ The court then went on to say that federal agencies must follow the procedural requirements of NEPA since they are not discretionary.³⁶

In *National Helium Corporation v. Morton*³⁷ the Secretary of the Interior terminated federal contracts for the purchase of helium without filing an environmental impact statement, apparently on the basis that such action would have no effect on the human environment. Plaintiffs alleged that this cancellation of the contracts would cause helium to be vented into the atmosphere and be lost forever and thus have an effect on the human environment.³⁸ The tenth circuit held that this potential rapid depletion of the country's helium resources did have environmental consequences which the Secretary should have considered in the format of an environmental impact statement.³⁹ The court stated:

As we view it then the purposes of the NEPA are realized by requiring the agencies to assess environmental consequences in formulating policies, and

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

32. 451 F.2d 1130 (4th Cir. 1971).

33. *Id.* at 1132.

34. *Id.* at 1133.

35. *Id.* at 1133-1134.

36. *Id.* at 1138.

37. 455 F.2d 650 (10th Cir. 1971).

38. *Id.* at 653.

39. *Id.* at 656.

by insuring that the governmental agencies shall pay heed to environmental considerations by compelling them to carry out NEPA procedures.⁴⁰

*Save Our Ten Acres v. Kreger*⁴¹ involved an action to enjoin the construction of a federal office building on a downtown site in Mobile, Alabama. The General Services Administration did not file an impact statement concerning the proposed building on the basis of its determination that the human environment would not be affected.⁴² The fifth circuit remanded the case to the district court with instructions to determine if the agency's decision was correct:

[T]he court should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality.⁴³

In *Hanley v. Mitchell*⁴⁴ the General Services Administration began construction of a nine-story annex to a federal courthouse in New York City to be used as a federal jail. An environmental impact statement was not filed, and the General Services Administration argued that the proposed project did not significantly affect the human environment.⁴⁵ The GSA presented a memorandum in support of its position that the building would have no adverse effects on the environment.⁴⁶ The second circuit held that the memorandum was not sufficient to support the GSA's decision not to file an impact statement and remanded to the district court for further consideration to determine if an impact statement should be filed.⁴⁷

40. *Id.*

41. 472 F.2d 463 (5th Cir. 1973).

42. *Id.* at 465.

43. *Id.* at 467.

44. 460 F.2d 640 (2d Cir. 1972).

45. *Id.* at 642-644.

46. *Id.* at 645.

47. *Id.* at 648. Several other recent Circuit Courts of Appeal decisions have involved the review of an agency's threshold decision not to file an environmental impact statement. *First National Bank v. Richardson*, ___ F.2d ___, 5 ERC 1830 (7th Cir. 1973) upheld the General Service Administration's determination that the construction of a parking garage and detention facility in a nonresidential area of Chicago, Illinois, would not significantly affect the human environment. *Rucker v. Willis*, 484 F.2d 158, 5 ERC 1817 (4th Cir. 1973) upheld the Army Corps of Engineers in its determination that the granting of a permit for the construction of fishing piers and a boat

It is evident from the foregoing cases that a federal agency's threshold determination as to whether it must comply with the procedural requirements of NEPA by filing an impact statement is unquestionably reviewable by the federal courts. If the federal agency does decide to file an impact statement at the outset of the project, then this question of reviewability does not arise. The mere filing of an impact statement by the agency does not preclude further judicial review, however. The question before the federal courts then becomes one of determining whether the statement complies with the procedural requirements of NEPA set forth in § 102 (2) (c).⁴⁸

The purpose of the procedural requirements of § 102 is

to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent optimally beneficial decision will ultimately be made. Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial processes to evaluate and balance the factors on their own.⁴⁹

The courts must review the agency's impact statement to see if it fulfills the five requirements of § 102 of NEPA.⁵⁰ The eighth circuit in *Environmental Defense Fund v. Corps of Engineers*⁵¹ found that the defendant's impact statement did meet the procedural requirements and simply stated:

basin in North Carolina was not a major federal action significantly affecting the quality of the human environment. Wyoming Outdoor Coordinating Council v. Butz, _____ F.2d _____, 5 ERC 1844 (10th Cir. 1973) reversed the Forest Service's determination that road building and logging in the Grand Teton National Forest in Wyoming was not significantly affecting the quality of the human environment. Hiram Clarke Civic Club v. Lynn, 476 F.2d 421, 5 ERC 1177 (5th Cir. 1973) upheld the determination of the Department of Housing and Urban Development that the construction of a federally funded apartment complex in Houston, Texas, would not have a significant effect on the quality of the human environment.

48. 42 U.S.C. § 4332 (2) (C) (1970). See *supra* note 31.

49. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

50. 42 U.S.C. § 4332 (2) (C) (1970). *Supra* note 31.

51. 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972).

“We have read the statement and found it to contain a full and accurate disclosure of the information required by § 102 (2) (C).”⁵² In *Calvert Cliff’s Coordinating Committee v. U.S. Atomic Energy Commission*,⁵³ the District of Columbia Circuit Court stated that Section 102 of NEPA mandates a particular sort of procedural decision making process and if the agency fails to adhere to this process, it is the reviewing court’s duty to reverse.⁵⁴ In *Natural Resources Defense Council v. Morton*⁵⁵ the court stated that the impact statement must set forth the material contemplated by Congress in suitable form.⁵⁶ There seems to be no question that the federal courts can review an agency’s environmental impact statement to see if it complies with the procedural requirements of NEPA set forth in Section 102 (2) (C).

At this point it is clear that federal courts can and do review administrative agencies compliance with the procedural requirements of NEPA. The courts review the agency’s threshold decision as to whether or not NEPA is applicable to the proposed action, and if this question is answered affirmatively the court reviews the agency’s environmental impact statement to see if it complies with the procedural requirements of NEPA set forth in Section 102.

One line of federal decisions has held that this procedural review of agency action under NEPA is all that is available to the federal courts since the requirements of NEPA are only procedural in nature.

In *Environmental Defense Fund v. Hardin*⁵⁷ the plaintiffs sued to enjoin the Secretary of Agriculture from undertaking a program of chemical extermination of fire ants in the southeastern United States.⁵⁸ The court stated:

[I]n reviewing the Department of Agriculture program under consideration here, the Court will not substitute its judgment for that of the Secretary on the merits of the proposed program but will require

52. *Id.* at 295.

53. 449 F.2d 1109 (D.C. Cir. 1971).

54. *Id.* at 1115.

55. 458 F.2d 827 (D.C. Cir. 1972).

56. *Id.* at 836.

57. 325 F. Supp. 1401 (D.D.C. 1971).

58. *Id.* at 1402.

that the Secretary comply with the procedural requirements of the NEPA. . . .⁵⁹

In *National Helium Corporation v. Morton*,⁶⁰ the plaintiff sued to enjoin the Secretary of the Interior from terminating the government's contract for purchase of the helium in Kansas without filing an environmental impact statement under the requirements of NEPA.⁶¹ The tenth circuit agreed with the district court that NEPA applied in this situation and upheld the injunction until the Secretary complied with the requirements of NEPA by filing the requisite impact statement.⁶² In passing, the tenth circuit stated that the requirements of NEPA pertain only to procedure and do not undertake to control decision making within the departments.⁶³ This statement is pure dictum, however, since it was not a necessary part of the holding in the case.⁶⁴

These courts hold that the true purpose of NEPA is to inform the public, other governmental agencies, the Council on Environmental Quality, the President, and Congress of the environmental effects of proposed governmental actions.⁶⁵ It is felt that this information will alert the appropriate decision makers of the potential environmental damage and that they can respond by abandoning or modifying the proposed project.⁶⁶ Under this view of NEPA, the function of a reviewing court is only to ascertain if all procedural requirements were met by the agency and not to review the agency's decision on its merits.⁶⁷

59. *Id.* at 1404.

60. 455 F.2d 650 (10th Cir. 1971).

61. *Id.* at 652.

62. *Id.* at 657.

63. *Id.* at 656.

64. The tenth circuit took the same position in *Upper Pecos Association v. Stans*, 452 F.2d 1233 (10th Cir. 1971). The court stated at 1236: "The mandates of N.E.P.A. pertain to procedure and not to substance, that is, decision-making in a given agency is required to meet certain procedural standards, yet the agency is left in control of the substantive aspects of the decision. The N.E.P.A. creates no substantive rights in citizens to safe, healthful, productive and culturally pleasing surroundings." This holding was later vacated by the U.S. Supreme Court at ____ U.S. ____, 93 S.Ct. 458 (1972).

65. *Sierra Club v. Froehkle*, 345 F. Supp. 440, 444 (W.D. Wis. 1972).

66. *Conservation Council of North Carolina v. Froehkle*, 340 F. Supp. 222, 226 (M.D.N.C. 1972) *remanded for further consideration* at 473 F.2d 664 (4th Cir. 1973) and *Environmental Defense Fund v. Corps of Engineers*, 342 F. Supp. 1211, 1216-1217 (E.D. Ark. 1972) *aff'd.* at 470 F.2d 289 (8th Cir. 1972) *cert. denied*, 409 U.S. 1072 (1972).

67. The court in *National Forest Preservation Group v. Butz*, 343 F. Supp. 696 (D. Mont. 1972) accepted this position somewhat reluctantly at 704: "It

2. Substantive Review on the Merits

Several federal courts have gone beyond this procedural view of NEPA and have reviewed the merits of a substantive agency decision to determine if it was in compliance with NEPA. This substantive view of NEPA is best exemplified by *Environmental Defense Fund v. Corps of Engineers*.⁶⁸ The first event in a long chain of events leading up to this decision occurred when Congress passed the Flood Control Act of 1958,⁶⁹ which in part authorized the construction of seven dams in the Little River Basin in Arkansas. One of these dams was to be the Gillham Dam located on the Cossatot River to provide flood control, water supply, and water quality control for the area. Funds for construction were made available in the Public Works Appropriation Act of 1963⁷⁰ and construction began immediately. Congress continued to fund the project regularly, including a 1.5 million dollar appropriation for the fiscal year 1973.⁷¹ In the fall of 1970, the dam was approximately two-thirds completed at a cost of 9.8 million dollars. On October 1, 1970, the plaintiffs filed a complaint in U.S. District Court, seeking an injunction to stop construction of the Gillham Dam on the grounds, *inter alia*, that the Corps of Engineers had failed to comply with requirements of the National Environmental Policy Act (NEPA)⁷² by failing to file the requisite environmental impact statement.⁷³ The federal district court dealt with the case over a period of one and one-half years and issued six memorandum opinions.⁷⁴ In its fourth memorandum opinion,

appears that the plaintiffs are dissatisfied with the action taken by the Forest Service and the Secretary of Agriculture. However much the court may agree with this dissatisfaction it is no basis for overturning acts of the Secretary which are committed to his discretion by statute.

68. 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972).

69. Act of July 3, 1958, Pub. L. No. 85-500, § 203, 72 Stat. 305.

70. Act of October 24, 1962, Pub. L. No. 87-880, 76 Stat. 1216.

71. Public Works for Water and Power Development and Atomic Energy Commission Appropriation Act, Pub. L. No. 92-405, 86 Stat. 621.

72. 42 U.S.C. §§ 4321-4347 (1970).

73. 42 U.S.C. § 4332 (1970).

74. 325 F. Supp. 728 (E.D. Ark. 1970).

325 F. Supp. 732 (E.D. Ark. 1970).

325 F. Supp. 737 (E.D. Ark. 1971).

325 F. Supp. 741 (E.D. Ark. 1971).

325 F. Supp. 749 (E.D. Ark. 1971).

342 F. Supp. 1211 (E.D. Ark. 1972).

the court held that NEPA was applicable not only to contemplated agency actions but also to ongoing federal projects.⁷⁵ The case was tried on its merits before the court in February 1971,⁷⁶ and the court found that the Corps of Engineers had not complied with the requirement of NEPA that a detailed statement of environmental impact must be filed.⁷⁷ The court then enjoined the Corps of Engineers from continuing construction on the dam until NEPA was complied with.⁷⁸ On January 13, 1972, the Corps of Engineers filed an environmental impact statement with the court and moved for summary judgment.⁷⁹ The court found that the impact statement was sufficiently in compliance with the NEPA requirements, granted summary judgment for the defendants and dissolved the injunction.⁸⁰

In the course of its opinion, the court held that it could review the defendants' actions only to determine if the procedural requirements of NEPA had been complied with, and that it could not reverse or modify any good faith decision concerning the construction of the dam as long as the procedural requirements of NEPA were met.⁸¹ Appellants appealed this final order to the Eighth Circuit Court of Appeals on the basis that the administrative determination by defendants that the dam should be constructed was reviewable by the court on the merits. The eighth circuit agreed that the courts can review administrative decisions on the merits and that

75. 325 F. Supp. 741 (E.D. Ark. 1971). The Council on Environmental Quality Guidelines, § 1500.13, 38 Fed. Reg. 20549, 20556 (1973) agrees with this holding.

Agencies have an obligation to reassess ongoing projects and programs in order to avoid or minimize adverse environmental effects. The section 102 (2) (C) procedure shall be applied to further major federal actions having a significant effect on the environment even though they arise from projects on programs initiated prior to enactment of the Act on January 1, 1970. While the status of the work and degree of completion may be considered in determining whether to proceed with the project, it is essential that the environmental impacts of proceeding are reassessed pursuant to the Act's policies and procedures and, if the project or program is continued, that further incremental major actions be shaped so as to enhance and restore environmental quality as well as to avoid or minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

76. 325 F. Supp. 749 (E.D. Ark. 1971).

77. 42 U.S.C. § 4332 (2) (C) (1970).

78. 325 F. Supp. 749, 763 (E.D. Ark. 1971).

79. 342 F. Supp. 1211 (E.D. Ark. 1972)

80. *Id.* at 212.

81. *Id.* at 1216-1217.

judicial review of administrative agency action is not limited solely to procedural compliance with statutory requirements.⁸² The court thus upheld the contention of the defendants and held that the language of NEPA indicates that it creates substantive rights which can be subjected to judicial review.⁸³

The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking.⁸⁴ The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.⁸⁵

The courts also referred to NEPA's legislative history in support of its decision and quoted from the report of the Senate's Committee on Interior and Insular Affairs:

A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation. But, if goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain 'action-forcing' provisions and procedures which are designed to assure that all federal agencies plan and work toward meeting the challenge of a better environment.⁸⁶

In addition, Senator Henry M. Jackson, the bill's principal sponsor in the Senate, stated on the Senate floor:

If an environmental policy is to become more than rhetoric, and if the studies and advice of any high-level advisory group are to be translated into action, each of these agencies must be enabled and directed to participate in active and objective oriented environmental management. Concern for environmen-

82. *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972).

83. *Id.* at 297.

84. *Id.*

85. *Id.* at 298.

86. S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) quoted in *Environmental Defense Fund v. Corps of Engineers*, *supra* note 82, at 298 n. 13.

tal quality must be made part of every phase of federal action.⁸⁷

The eighth circuit placed great emphasis on the words "action forcing" and interpreted them to mean that NEPA sets forth substantive requirements which the agency decision must meet, above and beyond the purely procedural requirement of filing an impact statement.⁸⁸

In holding that NEPA creates substantive duties which are subject to review on the merits by the court, the eighth circuit cites several similar holdings as precedent.

One such holding was *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*.⁸⁹ In *Calvert Cliffs'* the petitioner argued that the procedural rules adopted by the Atomic Energy Commission to govern its consideration of environmental matters did not satisfy the requirements of NEPA.⁹⁰ The District of Columbia Circuit held that the federal courts have the power to require agencies to comply with the procedural directions of NEPA.⁹¹ The court then went on to state that the reviewing court can reverse an agency's decision on its merits under NEPA if it is shown that "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."⁹² However, this statement seems to be mere dictum since the basis for the court's decision was apparently only that the Atomic Energy Commission's procedures did not comply with the procedural requirements of NEPA set forth in Section 102.⁹³

The D.C. Circuit later reiterated this position in *Natural Resources Defense Council v. Morton*,⁹⁴ in which three conservation groups sued to enjoin the Secretary of the Interior from selling oil and gas leases to submerged lands off the

87. 115 CONG. REC. 29087 (1969) quoted in *Environmental Defense Fund v. Corps of Engineers*, *supra* note 82, at 298 n. 13. Senator Jackson also stated: "The bill directs that federal agencies conduct their activities in accordance with these goals and provides action-forcing procedures to insure that these goals and principals are observed." 115 CONG. REC. 19009 (1969).

88. 470 F.2d 289, 298 (8th Cir. 1972).

89. 449 F.2d 1109 (D.C. Cir. 1971).

90. *Id.* at 1111.

91. *Id.* at 1115.

92. *Id.*

93. 42 U.S.C. § 4332 (2) (C) (1970).

94. 458 F.2d 827, 838 (D.C. Cir. 1972).

coast of Louisiana until the requirements of NEPA were complied with.⁹⁵ However, this statement by the court again seems to be mere dictum, since the issue in the case was only whether or not the agency's impact statement was sufficient to comply with the procedural requirement of Section 102 of NEPA.⁹⁶

The eighth circuit in *Environmental Defense Fund*⁹⁷ also refers to holdings by the second and fourth circuits in support of its decision. In *Scenic Hudson Preservation Conference v. Federal Power Commission*,⁹⁸ the second circuit reviewed the decision of the Federal Power Commission to grant a license to construct a pumped storage hydroelectric plant under the Federal Power Act,⁹⁹ but did not overturn the decision since it was based on substantial evidence.¹⁰⁰ The court did not question the correctness of FPC's decision on the merits under NEPA, however, but only reviewed the facts to see if the FPC had complied with the procedural directives set out in Section 102 of NEPA.¹⁰¹ The court explained:

[T]he Act does not require that a particular decision be reached but only that all factors be fully explored. The eventual decision still remains the duty of the responsible agency.¹⁰²

In *Ely v. Velde*¹⁰³ residents of Virginia sued to enjoin the allocation of funds to the state of Virginia to construct a penal facility. The plaintiffs alleged a failure on the part of the defendants to comply with the requirement of NEPA Section 102 that an environmental impact statement be filed.¹⁰⁴ The fourth circuit stated:

The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure so that in the event of a later challenge to the agency's procedure, the courts

95. *Id.* at 829-830.

96. 42 U.S.C. § 4332 (2) (C) (1970).

97. 470 F.2d 289 (8th Cir. 1972), *cert denied*, 409 U.S. 1072 (1972).

98. 453 F.2d 463 (2d Cir. 1971), *cert denied*, 407 U.S. 926 (1972).

99. 16 U.S.C. § 797(e), 803(a), 8251(b), 470 f (1970).

100. 453 F.2d 463, 470 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

101. *Id.* at 481.

102. *Id.*

103. 451 F.2d 1130 (4th Cir. 1971).

104. *Id.* at 1132.

will not be left to guess whether the requirements of . . . NEPA have been obeyed.¹⁰⁵

The requirement that the agency must actually take account of the environmental factors specified seems to imply that judicial review on the merits of the agency decision is available. However, the holding in this case was entirely procedural, *i.e.*, that the defendants had not adhered to the procedural requirement of NEPA that an impact statement be filed,¹⁰⁶ so the foregoing requirement must, by necessity, be dictum.

The eighth circuit in *Environmental Defense Fund*¹⁰⁷ ultimately places much reliance on the holding of the U.S. Supreme Court in *Citizens to Preserve Overton Park v. Volpe*.¹⁰⁸ In *Overton Park*, the Secretary of Transportation approved the route of a new highway to be constructed in Tennessee. Construction of the highway along this approved route would destroy 26 acres of Overton Park, and plaintiffs sued, challenging the Secretary's decision.¹⁰⁹ The Supreme Court remanded the case to the district court for a plenary review of the Secretary's decision.¹¹⁰ This case did not involve NEPA, but was decided under other statutory language, similar to NEPA, requiring an agency to consider certain environmental factors in the decision making process.¹¹¹

It is evident that the holding of the eighth circuit in *Environmental Defense Fund*¹¹² is somewhat revolutionary in that it went beyond holding a federal agency merely to the procedural requirements of NEPA and held that the agency's substantive decision to continue or abandon the proposed action can be reversed by the reviewing court even if the procedural precepts of NEPA have been complied with.¹¹³ Since this decision was handed down, the fourth circuit has

105. *Id.* at 1138.

106. *Id.* at 1139.

107. 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972).

108. 401 U.S. 402 (1971).

109. *Id.* at 406.

110. *Id.* at 420.

111. *Id.* at 404-405. The statutes involved were the Department of Transportation Act of 1966, 49 U.S.C. § 1653 (f) (1970) and the Federal Aid Highway Act of 1966, 23 U.S.C. § 138 (1970).

112. 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972).

113. The eighth circuit reiterated this position in *Environmental Defense Fund Inc. v. Froehlke*, 473 F.2d 346, 353 (8th Cir. 1972).

also accepted the substantive view of NEPA. In *Conservation Council of North Carolina v. Froehlke* the district court¹¹⁴ determined that the Corps of Engineers had complied with the procedural requirements of NEPA by filing an adequate impact statement and could proceed with a proposed dam.¹¹⁵ The fourth circuit¹¹⁶ reversed and held that the district court also had an obligation to review the merits of a substantive agency decision to determine if it is in accord with NEPA.¹¹⁷

SCOPE OF REVIEW

When an action of a federal agency is challenged in federal court, the court must determine if the agency action is judicially reviewable, and if so, what scope of review is applicable. The common standards for review of administrative agency actions and decisions are set forth in the Administrative Procedure Act.¹¹⁸ The standard of review to be applied is determined at least in part by the type of agency action being reviewed.

In judicial review of an agency's threshold decision as to whether or not NEPA is applicable and hence whether an environmental impact statement need be filed, the traditional arbitrary or capricious action test¹¹⁹ is sometimes applied,¹²⁰ but more often a special standard of review is applied. In *Ely v. Velde*¹²¹ the court stated that the agency's decision

114. 340 F. Supp. 222 (M.D.N.C. 1972) remanded with instructions at 473 F.2d 664 (4th Cir. 1973).

115. *Id.* at 228.

116. 473 F.2d 664 (4th Cir. 1973).

117. *Id.* In *Sierra Club v. Froehlke*, _____ F.2d _____, 5 E.R.C. 1920 (7th Cir. 1973), the seventh circuit also held that the federal courts have an obligation to review an agency's substantive decision under NEPA on the merits.

118. 5 U.S.C. § 706 (1970). The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

119. Administrative Procedure Act, 5 U.S.C. § 706 (2) (A) (1970).

120. See *Rucker v. Willis*, 484 F.2d 158, 5 ERC 1817, 1820 (4th Cir. 1973); and *First National Bank v. Richardson*, _____ F.2d _____, 5 ERC 1830, 1839 (7th Cir. 1973).

121. 451 F.2d 1130 (4th Cir. 1971).

could not be arbitrary or perfunctory, but that furthermore, the agency is under a heavy burden to show that there has been a genuine compliance with NEPA.¹²² Other circuit courts have applied a reasonableness standard to the agency's threshold decision and require not only that the decision not be arbitrary or capricious, but that it be a reasonable decision under the circumstances of each particular case.¹²³

This standard of reasonableness is also applied by some courts in the area of judicial review of an agency's environmental impact statement to determine if it complies with procedural requirements of NEPA set forth in Section 102. In *Calvert Cliffs*¹²⁴ the court stated that an agency's procedural compliance with NEPA must be conducted fully and in good faith.¹²⁵ In *Natural Resources Defense Council v. Morton*¹²⁶ the court held that in listing alternatives in its impact statement, an agency need not discuss alternatives which were remote from reality, but that the "requirement as to alternatives is subject to a construction of reasonableness,"¹²⁷ implying that all reasonable alternatives should be listed.

The courts viewing NEPA as having created substantive rights review the ultimate decision of the agency on its merits. The court in *Calvert Cliffs*¹²⁸ stated that in this type of judicial review, the reviewing court is to first apply the traditional arbitrary or capricious action test set forth in the Administrative Procedure Act¹²⁹ and to then determine whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."¹³⁰

In actual application this "clearly improper weight" test allows a reviewing court to reverse on the merits under

122. *Id.* at 1139.

123. See *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *Hiram Clark Civic Club v. Lynn*, 476 F.2d 421, 5 ERC 1177, 1179 (5th Cir. 1973); and *Wyoming Outdoor Coordinating Council v. Butz*, _____ F.2d _____, 5 ERC 1844, 1846, (10th Cir. 1973).

124. 449 F.2d 1109 (D.C. Cir. 1971).

125. *Id.* at 1115.

126. 458 F.2d 827 (D.C. Cir. 1972).

127. *Id.* at 837.

128. 449 F.2d 1109 (D.C. Cir. 1971).

129. 5 U.S.C. § 706 (1970).

130. *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

NEPA if the court finds that the agency gave insufficient weight to environmental factors.¹³¹ This suggests that the court could initiate a *de novo* review of the evidence and substitute its judgment for that of the administrative agency. However, few courts seem willing to go this far. In *Overton Park*,¹³² the U.S. Supreme Court stated that "although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."¹³³ In *Environmental Defense Fund*, the eighth circuit, after holding that the decision of the Army Corps of Engineers was reviewable on the merits and that the *Calvert Cliffs'* "clearly insufficient weight" test was applicable,¹³⁴ the court then went on to review and uphold the Corps of Engineers decision, apparently under the traditional "arbitrary and capricious" standard.¹³⁵ Thus it would seem that "clearly insufficient weight" test set forth in *Calvert Cliffs'* may often in actual application differ little from the more traditional "arbitrary and capricious test" set forth in the Administrative Procedure Act.¹³⁶

ALTERNATIVE STATUTORY PROVISIONS

Although many states have enacted environmental legislation similar to NEPA,¹³⁷ a few state legislatures have tried different forms of legislation to avoid the necessity of interpretation by the courts which is common to a general NEPA-type statute.

Pennsylvania approached the problem in 1971 by amending the state's constitution to give all citizens a constitutional right to a pure environment:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic

131. *City of New York v. United States*, 344 F. Supp. 929, 940 (D.N.Y. 1972).

132. 401 U.S. 402 (1971).

133. *Id.* at 416.

134. 470 F.2d 289, 300 (8th Cir. 1972).

135. *Id.* at 301.

136. 5 U.S.C. § 706 (1970).

137. See CALIF. PUB. RES. CODES §§ 21000 to 21107 (Supp. 1973); MONT. REV. CODES ANN. §§ 69-6501 to -6517 (Supp. 1973). N.M. STAT. ANN. §§ 12-20-1 to 12-20-8 (Supp. 1973); N.C. GEN. STAT. §§ 113 A-1 to -20 (Cum Supp. 1971); WASH. REV. CODE ANN. §§ 43.21C.010 to .060 (Supp. 1972); and WIS. STAT. ANN. § 1.11 (Cum. Supp. 1973).

and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustees of these resources, the commonwealth shall conserve and maintain them for the benefit of all the people.¹³⁸

This type of statute does not require that any agency taking action which may affect the environment must prepare an environmental impact statement or be conscious of the effect its actions may have on the surrounding environment.¹³⁹ The constitutional amendment does, however, provide another basis for enforcing environmental consciousness in all types of actions in Pennsylvania. Any action which is detrimental to the state's clean air, pure water, or natural, scenic, historic and esthetic values of the environment is a violation of any person's constitutional right to a clean and pure environment. Any person within the state has standing to sue to terminate any action detrimental to the environment and all that must be alleged is that his constitutional rights have been violated. No problem will arise as to whether the injury was economic or non-economic, since a violation of constitutional rights need not cause economic injury to be re-dressable. This amendment is clearly substantive in nature and gives the courts power to terminate any agency action which is violative of the people's right to a pure and clean environment. This eliminates the interpretation problems inherent in a NEPA-type statute as to whether it is substantive or merely procedural in nature.

The major drawback to this type of legislation is that it does not provide for the filing of an environmental impact statement before the project begins and does not specifically require that any administrative agency decision be made with due regard to the effect of the decision or proposed action on the surrounding environment. The sole remedy is to sue for an injunction after it is apparent that the action undertaken is detrimental to the environment. A pre-determination of

138. PA. CONST. art. I, § 20 (1969).

139. Any major federal action significantly affecting the quality of the human environment within the state of Pennsylvania must still comply with the requirements of NEPA, however.

potential environmental effects at the planning stage of any particular project or action is not required.

Michigan has also enacted an Environmental Protection Act,¹⁴⁰ which on its face eliminates many of the problems of interpretation found in a NEPA-type statute. It allows standing to sue for injury of a non-economic nature.

The attorney general, any political subdivision of the state, any instrumentality or agency thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust herein from pollution, impairment or destruction.¹⁴¹

There is also no doubt that the Michigan statute is substantive in nature and gives the state courts the power to review agency decisions concerning environmental matters on the merits.

In granting relief provided by subsection (1) where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

(a) Determine the validity, applicability and reasonableness of the standard.

(b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.¹⁴²

This specific type of statute may very possibly be easier to apply and demand less interpretation by the courts than a more general type of statute such as NEPA would require.

140. Thomas J. Anderson, *Gordon Rockwell Environmental Protection Act of 1970*, MICH. COMP. LAWS ANN. §§ 691.1201 to .1207 (Cum. Supp. 1973).

141. MICH. COMP. LAWS ANN. § 691.1202 (1) (Cum. Supp. 1973).

142. MICH. COMP. LAWS ANN. § 691.1202 (2) (Cum. Supp. 1973).

However, this type of statute allows the court to totally substitute its judgment for that of the administrative agency. Under this statute every agency action is totally reviewable on its merits by the court; thus it would seem that the court may in actual application "make" every decision and entirely pre-empt the agency's discretionary powers.

CONCLUSION

NEPA was a congressional attempt to insure environmental concern on the part of all federal administrative agencies. Whether the federal agencies exhibit the appropriate amount of such environmental concern in their decision-making processes is a question for the federal courts to resolve through the application of judicial review. It becomes apparent that this judicial review of the agency's decision under NEPA involves a basic four-step questioning process.

1. Whether the plaintiffs challenging the agency decision have standing to sue.
2. Whether the threshold decision by the administrative agency was correct (*i.e.*, whether or not the proposed actions is a "major federal action significantly affecting the environment"). If the threshold decision has been answered affirmatively by the agency or the court, then an environmental impact statement must be filed and Step 3 becomes relevant.
3. Whether the agency's environmental impact statement sufficiently complies with the informational requirements of NEPA § 102 (2) (c).
4. If the agency's environmental impact statement does procedurally comply with the requirements of NEPA, then the court may go on to review the agency's substantive decision on the merits. Although this type of review is not extremely prevalent at the present time, it may, given the environmental consciousness of many federal courts,¹⁴³ be much more common in the future.

143. The environmental consciousness of the federal courts has extended to the point where at least one federal district court has granted attorney's fees to the plaintiffs in an action under NEPA. In *Sierra Club v. Lynn*, _____ F. Supp. _____, 42 LW 2172, 5 ERC 1745 (D.Tex. 1973) the Sierra Club alleged that the defendant's environmental impact statement concerning a proposed housing development was insufficient to comply with the requirements of NEPA. The district court found that NEPA had been complied

The interpretation of NEPA by the federal courts has been and will continue to be no easy task due to the general language used in this statute and due to the emotional overtones implicit in any dispute over environmental values. At least two states have enacted differing types of legislation apparently intended to overcome this interpretation problem. Although their objective may have at least partially been fulfilled by the use of more explicit statutory language, it is clear that these statutes are not the ideal substitute for NEPA. The real strength of NEPA may lie in its general language and need for interpretation. Through unending interpretation of NEPA brought about by today's flood of environmental suits, the federal judiciary will hopefully be able to maintain a fine balance between the demands of a highly productive, industrialized society, on the one hand, and the conscience of a nation concerned for its environment on the other.

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with, but allowed the Sierra Club to collect attorney's fees on the basis that the suit had been brought about public consideration of the proposed project's environmental effects and had insured that adequate measures were taken to protect the area's water resources.