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Environmental Law - When Does Section 102(2)(C) of NEPA Require the Preparation of a Regional Environmental Impact Statement? - Kleppe v. Sierra Club

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ENVIRONMENTAL LAW—When Does Section 102(2)(C) of NEPA Require the Preparation of a Regional Environmental Impact Statement? Kleppe v. Sierra Club, ____ U.S. ____, 96 S.Ct. 2718 (1976).

> NEPA's instruction that all federal agencies comply with the impact statement requirement—and with all the other requirements of § 102—"to the fullest extent possible," 42 U.S.C. § 4332, is neither accidential nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors should not be shunted aside in the bureaucratic shuffle.[1]

The Northern Great Plains region, as identified in *Kleppe v. Sierra Club*,[2] encompasses northeastern Wyoming, eastern Montana, western North Dakota and western South Dakota. The region is rich in coal, and interest is increasing in developing this coal. The region, in whole or in part, has been the subject of three resource related studies in the past decade.

Two projects, the North Central Power Study and the Montana-Wyoming Aqueducts Study, were never completed. In 1972 the Secretary of the Interior initiated the Northern Great Plains Resources Program, a massive federal-state, interagency study to assess the potential social, economic and environmental impact of resource development in Wyoming, Montana, North Dakota, South Dakota and Nebraska. The final interim report of the Program was issued shortly after the Circuit Court of Appeals handed down its decision in this case. In addition, in 1973 the Secretary announced a complete review of the Department's coal leasing policies. In conjunction with this review a "Coal Programmatic EIS" was prepared. The result was a new coal leasing program, the Energy Minerals Activity Recommendation System (EMARS),[3] which is now being implemented.[4]

Respondents, organizations interested in protecting the environment, brought suit against officials of the Depart-

1. Flint Ridge Development Co. v. Scenic Rivers Ass'n. of Oklahoma, ___U.S.___, 96 S.Ct. 2430, 2437 (1976).
2. ___U.S.___, 96 S.Ct. 2718 (1976). The Court noted that the respondents had identified this region in their brief.
3. 41 FED. REG. 22051-22054 (1976).
4. 41 FED. REG. 22133-22134 (1976).

ment of the Interior and other federal officers responsible for the development of coal in the region. Citing widespread interest in developing the region's coal and alleging this would threaten members' enjoyment of the region, respondents sought a declaratory judgment that Section 102(2)(C) of NEPA[5] had been violated in that an environmental impact statement for the entire region had not been prepared. Respondents also requested an injunction barring future development of the region until an impact statement had been prepared. The Government filed motions for summary judgment which were granted because the District Court found, *inter alia,* no existing or proposed plan or program on the part of the Government to develop the region as contemplated by Section 102(2)(C). The court also found that the individual projects in the region were not interrelated in such a manner as to necessitate the preparation of a region-wide impact statement.

Respondents appealed to the Circuit Court of Appeals for the District of Columbia[6] which held that the facts established that the Government contemplated development of the

5. PUB. L. No. 91-190, § 102(2)(C), 83 STAT. 853 (1970) (codified at 42 U.S.C. § 4332(2)(C) 1970) *as amended* PUB. L. No. 94-83, 89 STAT. 424 (1975)). In pertinent part Section 102(2)(C) provides:
(2) [A]ll agencies of the Federal Government shall:
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible officials on—
(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects 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
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes[.]

6. After oral argument, but before issuing an opinion on the merits, the Circuit Court issued an injunction against the Department of the Interior's approval of four mining plans in the Powder River Basin section of the region. Sierra Club v. Morton, 166 U.S. App. D.C. 200, 509 F.2d 533, (D.C. Cir. 1975).

region. The Court's analysis, however, proved inconclusive in determining whether the time was ripe for the preparation of an impact statement. Accordingly, the Circuit Court rversed and remanded for further consideration.[7]

The Government appealed to the United States Supreme Court, raising the issue "whether NEPA require[d] the petitioners to prepare an environmental impact statement on the entire Northern Great Plains region."[8] The Supreme Court held, *inter alia*, that, in the absence of proposed federal action for the entire region, NEPA did not require the preparation of a regional impact statement, and that, absent a showing of arbitrary action on the part of the petitioners, their decision not to prepare a regional impact statement must stand.

THE NATIONAL ENVIRONMENT POLICY ACT OF 1969

Through much of this nation's history "the goal of managing the environment for the benefit of all citizens has often been over-shadowed and obscured by the narrower and more immediate economic goals."[9] Environmental policy was often established by default and inaction. On those occasions when important decisions concerning the use and shape of man's future environment were made, they were "made in small but steady increments" which perpetuated rather than avoided past environmental mistakes.[10] The National Environmental Policy Act of 1969 (NEPA)[11] grew out of the recognition that the Nation's present state of environmental knowledge, established public policies and governmental institutions were inadequate in dealing with increasing environmental problems.[12] In rejecting past environmental decision-making practices, Congress enacted NEPA, the purposes of which are:

7. Sierra Club v. Morton, 169 U.S. App. D.C. 20, 514 F.2d 856, 882-883 (D.C. Cir. 1975).
8. Kleppe v. Sierra Club, *supra* note 2, at 2725.
9. 115 CONG. REC. 29069 (1969).
10. S. REP. No. 91-296, 91st Cong., 1st Sess. 5 (1969).
11. 42 U.S.C. § 4321 *et seq.* (1970), *as amended*, PUB. L. NO. 94-83, 89 STAT. 424 (1975).
12. S. REP. No. 91-296, *supra* note 10, at 4.

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[13]

As was brought out during the consideration of NEPA, something more than a "mere statement of desirable outcomes" was necessary for a "national defense against environmental degradation."[14] It was therefore recommended that certain "action-forcing" provisions be provided which would compel federal agencies to take protection of the environment into consideration in their decision-making processes.[15] Section 102 provides a number of such action-forcing provisions.[16]

The guidelines for the preparation of environmental impact statements promulgated by the Council of Environmental Quality clearly manifest Congress' rejection of an incremental approach to environmental action.[17] The CEQ guidelines direct agencies to give detailed consideration to the environmental impacts of legislative and other major federal actions prior to their decisions concerning recommendations of favorable reports on proposals.[18] The clause "major Federal action" is to be construed by the agencies with a view to the "overall, the cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated."[19] The guidelines further direct agencies to give careful attention to identifying and defining

13. 42 U.S.C. § 4321 (1970).
14. *Hearings on S.* 1075, *S.* 237, *S.* 1752 *before the Senate Committee on Interrior and Insular Affairs,* 91st Cong., 1st Sess., at 116 (1969).
15. *Id.*
16. 42 U.S.C. § 4332 (1970), *as amended,* PUB. L. No. 94-83, 89 STAT. 424 (1975).
17. 40 C.F.R. 1500.0-1500.14 (1975). It has been held that these guidelines are merely advisory and that the CEQ has no authority to prescribe regulations governing compliance with NEPA. Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412, 421 (2nd Cir. 1972), *cert. denied,* 409 U.S. 849 (1972); Hiram Clarke Civic Club Inc. v. Lynn, 476 F.2d 421, 424 (5th Cir. 1973).
18. 40 C.F.R. § 1500.2(a) (1975).
19. 40 C.F.R. § 1500.6(a) (1975).

the purpose and scope of the action. "In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographic area (e.g., coal leases)."[20] The guidelines also provide that the overall impact of a large-scale program or chain of contemplated projects could necessitate the preparation of a broad impact statement.[21]

The courts have identified two other major purposes which are embodied in the requirement that a detailed statement be prepared. First, the preparation of an impact statement ensures that environmental concerns will be made a "meaningful part of the agency decision making process, by requiring that the agency engage in a systematic and scientific analysis of the environmental pros and cons of a proposal before committing the government to it."[22] The second major purpose of an environmental impact statement is to implement NEPA's function as an "environmental full-disclosure law."[23] By compelling a formal impact statement, "NEPA provides evidence that the mandated decision making process has in effect taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own."[24]

THE COURT'S REASONING IN *Kleppe v. Sierra Club*

Section 102(2)(C) requires that an impact statement be included "in every recommendation or report on proposals for legislation or other major Federal actions significantly affecting the quality of the human environment." Since no legislation was proposed, the Court stated that the respondents could prevail only if it were shown there had been a report or recommendation on a proposal for major Federal actions with respect to the Northern Great Plains region. An

20. 40 C.F.R. § 1500.6(d)(l) (1975).
21. *Id.*
22. Rhode Island Comm. on Energy v. General Services Administration. 397 F.Supp. 41, 56 (D.R.I. 1975).
23. Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974).
24. Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

examination of the "relevant facts"[25] revealed there was no region-wide federal proposal. The Court did note there were a number of "local actions"[26] within the region and that there was a new coal leasing program being implemented; however, it found these developments were not "integrated into a plan or otherwise interrelated."[27] Since there was no proposed Federal action and the "statutory language requires an impact statement only in the event of a proposed action," the Court held the respondents' desire for a regional impact statement could not be met.[28]

The Court maintained that the legislative history of NEPA fully supported its reading as to when an impact statement is required. According to the Court, the Senate Committee "report made clear that the impact statement was required in conjunction with specific proposals for action."[29] The conference report, the Court stated, explained Section 102 (2) (C) in language that tracked the statute on the requirement of a proposal.[30]

Apart from the statutory language of NEPA, the Court held that for practical reasons the respondents' desire for a regional impact statement could not be met. It stated:

> Absent an overall plan for regional development, it is impossible to predict the level of coal related activity that will occur in respondents' region, and thus impossible to analyze the environmental consequences and the resource commitments involved in, and the alternatives to, such activity.[31]

The Court indicated that a regional plan "would define fairly precisely the scope and limits of the proposed development of the region."[32] Without such a regional plan, the Court

25. Kleppe v. Sierra Club, *supra* note 2, at 2725.
26. The Court defined "local actions" as the "decisions by the various petitioners to issue a lease, approve a mining plan, issue a right-of-way permit, or take other action to allow private activity at some point within the respondents' region." *Id.*
27. *Id.* at 2726.
28. *Id.*
29. *Id.* at n.12.
30. *Id.*
31. *Id.* at 2727.
32. *Id.*

reasoned, there would be no "factual predicate" upon which to base the production of an impact statement.[33]

The Supreme Court next turned its attention to the Circuit Court's decision. After holding that the Circuit Court erred in concluding that the Government was "contemplating" a regional development plan or program,[34] the Supreme Court focused on the Circuit Court's interpretation of NEPA. As was pointed out by the Court, the Circuit Court believed NEPA empowered a court to require the preparation of an impact statement to begin at some point prior to the formal recommendation or report on a proposal. To aid in the determination as to whether the time was "ripe" for the preparation of an impact statement, the Circuit Court devised a four-part balancing test.[35] The Supreme Court rejected the Circuit Court's interpretation as to the timing of the preparation of an impact statement and its balancing test. According to the Court, NEPA "clearly states when an impact statement is required," and this is when an agency makes a report or recommendation on a proposal for feredal action.[36] The Supreme Court went on to state that a court "has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.*"[37]

Finally, the Supreme Court addressed itself to the respondents' contention that, "even without a comprehensive federal plan for the development of the Northern Great

33. *Id.*
34. *Id.* at 2727-2728.
35. *See* text accompanying note 57, *infra.*
36. Kleppe v. Sierra Club, *supra* note 2, at 2728. The Court added in a footnote that "the time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." *Id.* at 2729, n.15.
37. *Id.* at 2729. Justice Marshall, joined by Justice Brennan dissented from the Supreme Court's rejection of the balancing test. Justice Marshall wrote:

> The Court today loses sight of the inadequacy of other remedies and the narrowness of the category constructed by the Court of Appeals, and construes NEPA so as to preclude a court from ever intervening prior to a formal agency proposal. This decision, which unnecessarily limits the ability of the federal courts to effectuate the intent of NEPA, is mandated neither by the statute nor by the various equitable considerations upon which the Court relies.

Id. at 2733.

Plains, a 'regional' impact statement" nevertheless was required on all coal-related projects in the region because they were "intimately related."[38] After determining that the respondents' contention was an attack upon the Government's decision not to prepare a single comprehensive impact statement,[39] the Supreme Court stated its general agreement with respondents' premise that in certain situations,[40] Section 102 (2) (C) requires a comprehensive impact statement. Specifically,

> [W]hen several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.[41]

The Court stated that the determination as to whether a comprehensive impact statement is necessary "requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility."[42] With deference to agency expertise, the Court believed that responsible agencies exercising their informed discretion were equipped to make this decision. As a result, absent a showing of arbitrary action

38. The respondents had made this argument at the circuit court, basing it upon the Council of Environmental Quality's guideline for the preparation of an impact statement. Respondents viewed these guidelines as requiring a comprehensive impact statement whenever a group of individual federal projects are related geographically, environmentally, or programmatically. Their analysis of federal activity in the Northern Great Plains led them to conclude that the coal development was related in the above three ways. In reply, the Government argued that an impact statement is required only when the Government itself has designated the activities at issue a "program." Sierra Club v. Morton, *supra*, note 7, at 873. The Court of Appeals did not reach this issue because it believed the facts established that the Government contemplated development of the region. *Id.* at 875.

39. Kleppe v. Sierra Club, *supra*, note 2, at 2730. The Court noted that the respondents' contention could also be viewed as an attack upon the sufficiency of an impact statement which had already been prepared by the petitioners. The Court, however, did not consider this view because the case was not brought as a challenge to a particular impact statement and there was no impact statement in the record. *Id.*

40. The Court stated that, by requiring an impact statement, Congress intended to assure that all agencies consider the environmental impact of their action in decision-making. "A comprehensive impact statement may be necessary in some cases for the agency to meet this duty." *Id.*

41. *Id.*

42. *Id.* at 2731.

on the part of the agency, the Court would assume the agency properly exercised this discretion.[43]

In *Kleppe* the Court held there was no showing of arbitrary action on the part of the Government in refusing to prepare a regional impact statement. The respondents had argued that the coal-related development in the region was "programmatically, geographically, and environmentally" related, thereby necessitating the preparation of a comprehensive impact statement. The alleged "programmatic" and "geographic " relationships, according to the Court, resolved ultimately into an argument that the region was ripe for a comprehensive impact statement because the petitioners had approached the study of the area on a regional basis. The respondents relied primarily upon the Northern Great Plains Resources Program in support of their position. The Court, however, accepted the Secretary's position that studies such as this were aimed at gathering information and seldom coincide with the areas covered by impact statements. Therefore, the Program was held to be irrelevant in delineating the appropriate area for an impact statement.[44] As to the "environmental" relationship of the coal-related projects in the region, it is for the appropriate agencies to determine when their cumulative impacts require the preparation of a regional impact statement.[45] The Court concluded by stating that even if "environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements."[46]

ANALYSIS OF THE *Kleppe* DECISION

The Timing Issue

There were two major components to the Supreme Court's *Kleppe* decision, the timing issue and the problem of determining circumstances under which a comprehensive

43. *Id.*
44. *Id.* at 2732.
45. *Id.*
46. *Id.*

impact statement is required. This section of the note will examine the timing issue.

The problem of determining at what time NEPA requires the preparation of an impact statement has arisen in a number of cases. The first major case to discuss this issue was *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission.*[47] The petitioners in *Calvert Cliffs'* had brought suit challenging rules adopted by the Atomic Energy Commission to govern its consideration of environmental matters. It was their contention the rules failed to satisfy the requirements of NEPA. In reviewing the AEC hearing rules, the court stated that the requirement that the impact statement "accompany" the proposal must be read in light of the congressional intent that environmental factors, as compiled in the impact statement, be considered through the agency review process.[48] Simply put, the court's interpretation required that the environmental impact statement be prepared prior to the report or recommendation on the proposal so that environmental factors could be considered throughout the agency's review of the proposal. The court then examined the requirement that agencies consider the environmental impact of their actions to the "fullest possible extent." It stated:

> Compliance to the "*fullest*" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.[49]

The *Calvert Cliffs'* decision was widely followed as the correct formulation of NEPA's requirements regarding the timing of impact statement preparation.[50] The decision recognized that in order for an impact statement to have any

47. 449 F.2d 1109 (D.C. Cir. 1971).
48. *Id.* at 1117-1118.
49. *Id.* at 1118.
50. ANDERSON, *NEPA* IN THE COURTS 180 (1973).

effect upon an agency's ultimate decision, it must be prepared early in that agency's consideration of the proposal. As one commentator noted:

> Inasmuch as the environmental impact statement was intended to act as a tool in the decision-making process, preparation of such a statement should be completed prior to a final decision to proceed with any given project. Moreover, the statement ideally should be available early enough in the planning of a project so that it can be used to explore alternatives, including the alternative of abandoning the project altogether.[51]

Accepting the position that Section 102(2)(C) required the early preparation of an impact statement, the courts then had to determine just how early in the agency's review process the statement had to be prepared. This problem involves a determination as to whether the proposal has sufficiently evolved as to necessitate the preparation of an impact statement.[52] In making such a determination, the courts are "pulled into two directions."[53] On the one hand the statement must be prepared late enough in the development process to contain meaningful information. On the other hand the statement "must be written early enough so that whatever information is contained can practically serve as an input into the decision making process."[54]

In *Scientists' Institute for Public Information*, the Circuit Court of Appeals for the District of Columbia developed a four-factor balancing test to be used in determining if the time was "ripe" for an impact statement.[55] "With minor modifications to make the factors applicable to all federal

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51. YARRINGTON, THE NATIONAL ENVIRONMENTAL POLICY ACT 24 (BNA Env. Rep. Monograph 17, 1974). The effectiveness of the impact requirement in furthering NEPA's purpose has been the subject of a great deal of debate. *For* a recent discussion of this topic *see Symposium on Environmental Impact Statements*, 16 NATURAL RESOURCES J. 243-356 (1976).
52. FEDERAL ENVIRONMENTAL LAW 327 (E. Dolgin & T. Guilbert eds. 1974).
53. Scientists' Institute For Public Information, Inc. v. Atomic Energy Comm'n, 145 U.S.App.D.C. 395, 481 F.2d 1079, 1094 (D.C. Cir. 1973) [hereinafter referred to as *SIPI*].
54. *Id.*
55. *Id.*

actions," this balancing test was restated in *Sierra Club v. Morton.*[56] The test is as follows:

> How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?[57]

Shortly after the *Morton* decision, the Supreme Court first reached the NEPA impact statement timing issue in *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II).*[58] *SCRAP II* was the culmination of an extended challenge against a freight rate increase proposed by the railroads, and the Interstate Commerce Commission's approval of the increase.[59] The facts relevant to the timing issue, however, can be briefly stated. An oral hearing was conducted on the proposed rate increase, but an impact statement was not available at the time. Later, on October 4, 1972, the ICC issued an order allowing the rate increase to go into effect.[60] The District Court found that the oral hearing which the ICC conducted was part of an agency review process during which an impact statement should have been available, and therefore ordered the ICC to reconsider the rate increase.[61] The United States Supreme Court reversed.

The Supreme Court noted that NEPA provides that the environmental impact statement "shall accompany the *proposal* through the existing agency review process." This sentence, according to the Court, does not effect the time when

56. Sierra Club v. Morton, *supra* note 7, at 880.
57. *Id.*
58. 422 U.S. 289 (1975).
59. For a thorough discussion of *SCRAP II*, *see* Nolan, *The National Environmental Policy Act of 1969 After SCRAP: The Timing Question and Substantive Review*, 4 HOFSTRA L. REV. 213 (1976).
60. Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Procedures, 422 U.S. 289 (1975). [hereinafter referred to as *SCRAP II*].
61. Students Challenging Regulatory Agency Procedures v. United States, 371 F.Supp. 1291, 1306 (D.D.C. 1974).

the statement must be prepared. "It simply states what must be done with the 'statement' once it is prepared—it must accompany the proposal."[62] Next, the Court discussed the (2)(C) requirement that a detailed statement be included in every recommendation or report on a proposal for a major federal action. The Court stated:

> Under *this* sentence of the statute, the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action.[63]

The Supreme Court recognized that its interpretation of Section 102(2)(C) differed from that reached by other courts. To the extent that these courts had read the requirement that the statement accompany the proposal through the existing agency review process differently than it had, the Supreme Court stated that the other courts' interpretation "would appear to be in conflict with the statute."[64]

In *Kleppe v. Sierra Club* the court reiterated its *SCRAP II* interpretation of Section 102(2)(C), stating that the "moment at which an agency must have a final impact statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action.' "[65] This reading of the detailed statement provision, while it is literally correct, does present some difficulties in light of the intent behind the statute and does not do justice to the other provisions of the Act. The requirement that a detailed impact statement be prepared, as previously mentioned, is one of the "action-forcing" provisions of the Act. These action-forcing provisions were incorporated into NEPA to assure that the agencies took into consideration the environmental effects of their actions during their decision making.[66]

62. *SCRAP II*, *supra* note 60, at 2356.
63. *Id.*
64. *Id.* at n.20. The Supreme Court cited the following cases: Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, *supra* note 24; Greene County Planning Bd. v. Federal Power Comm'n, 445 F.2d 412 (2nd Cir. 1972), *cert. denied*, 409 U.S. 849 (1972); and Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2nd Cir. 1974).
65. Kleppe v. Sierra Club, *supra* note 2, at 2728.
66. 115 CONG. REC. 40415 (1969).

By requiring the agencies to have an impact statement only at the time of their recommendations or reports on proposals, the Court has weakened this assurance. It is quite possible for an agency to consider a proposal, delaying consideration of its environmental impact until after the major decisions with regard to that proposal have been made. In such a situation there is the danger that the information derived in the preparation of the impact statement will have little input into the decision-making process.[67] In addition, an impact statement drafted after the major decisions have been made is very likely to serve as nothing more than a rationalization for a *fait accompli.* This is the very thing the impact statement requirement was designed to prevent. As was stated in *Silva v. Lynn,*[68] "the requirement of a detailed statement helps to insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."

The position taken by the lower courts, and rejected by the Supreme Court, that the preparation of an impact statement precede the recommendation or report on a proposal, best effectuates the intent of NEPA. By requiring the preparation of an impact statement early in the decision making process, the information as compiled in the statement can be utilized "through the existing agency review process."

The Cumulative Environmental Impact Issue

Another principle underlying NEPA is the rejection of an incremental approach to environmental decision-making. This approach, which was characterized by isolated decisions made with regard to any environmental goals, perpetuated environmental decay rather than providing a mechanism with which the problem could be solved.[69] In place of the incremental approach, all agencies shall:

> [U]tilize a systematic, interdisciplinary approach which will insure the integrated use of the natural

67. Rhode Island Comm. on Energy v. General Services Administration, *supra* note 22, at 56.
68. 482 F.2d 1282, 1285 (1st Cir. 1973).
69. *See* the text accompanying notes 9 to 12.

> and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment[.][70]

This section requires the comprehensive consideration of the environmental effects of all federal actions.[71] However, it is difficult to discern the content of this comprehensive approach from the vague language of the Act and the scant legislative history on this point.

The definition of the successor to the incremental approach has arisen in the context of two distinct, albeit closely related, problems. One problem is determining when a given project should be divided into smaller segments so as to allow filing an impact statement for the smaller actions.[72] A second problem requires the determination as to whether a number of individual actions are related in such a way as to necessitate the preparation of a comprehensive impact statement. The latter problem, which was reached in *Kleppe*, had been faced by some of the circuit courts.

In *Nucleus of Chicago Homeowners Association v. Lynn*[73] plaintiffs alleged that the Department of Housing and Urban Development (HUD) had failed to consider the comprehensive impact of a 1500 unit scattered-site housing project when it confined its analysis to eighty-four units which had already been proposed. The court held HUD did not have to "aggregate several projects" if, in its judgment, evaluation of the aggregate was not feasible.[74] The court noted that the housing sites had been scattered by design and this would counsel separate consideration of the sites. The court also stated that the determination of whether a comprehensive impact statement was required was a matter for the agency to decide and to be disturbed only if the agency acted arbitrarily.

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70. 42 U.S.C. § 4332(2)(A) (1970).
71. Sierra Club v. Morton, *supra* note 7, at 870.
72. *Id.* at n.20.
73. 524 F.2d 225 (5th Cir. 1975), *cert. denied*, ___U.S.___, 96 S.Ct. 1462 (1976).
74. *Id.* at 230.

A second approach focuses on the independence of the various components of a large-scale program. In *Trout Unlimited v. Morton*,[75] plaintiffs brought suit against the Secretary of the Interior and other federal officials responsible for the Teton Dam and Reservoir Project. The Project was comprised of two phases, the first phase involving the actual construction of the dam and the disposition of 100,000 acre feet of active reservoir capacity. A second phase calling for the disposition of another 100,000 acre feet of active reservoir capacity was authorized if the Secretary would find it feasible. An impact statement was prepared for just the first phase. The plaintiffs challenged the sufficiency of the impact statement in that it did not take into consideration the second phase. They argued that a series of interrelated steps constituting an integrated plan must be covered in a single impact statement. The court held that a more comprehensive impact statement was not needed because the phases were "substantially independent" from each other. A comprehensive statement is necessary only when the "dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken."[76] Similarly, in *Sierra Club v. Callaway*[77] the court stated:

> [T]he Wallisville and Trinity River Projects are not interdependent. The nexus between the projects is not such as to require an EIS evaluation of the Trinity Project as a condition precedent to an EIS evaluation of Wallisville. The Wallisville EIS should speak for itself. Wallisville is a separate viable entity. It should be examined on its own merits. Although it has been made compatible in certain of its features with Trinity it is not a mere component, increment, or first segment of Trinity.

In the above cases, the court found that the projects before them could be studied individually rather than as a part of a more comprehensive impact statement. These determinations were based upon a review of the facts presented

75. 509 F.2d 1276 (9th Cir. 1974).
76. *Id.* at 1285.
77. 499 F.2d 982, 990 (5th Cir. 1974).

in each case. For example, in *Nucleus of Chicago* the court pointed out that the sites were to be scattered throughout the city, and that most of the sites had not been chosen. In *Trout Unlimited* the court noted that the first phase was to be constructed without regard as to whether or not the second phase was to be undertaken.[78] In situations such as these it would be far simpler for an agency to make environmental determinations as the work progressed on the individual projects. However, this approach "neglects the very real problem of the total environmental impact of the project as a whole."[79] As one author has stated:

> In the light of the intent of NEPA that considerations of environmental impact inform the planning process as early as possible so as to leave open the fullest range of options, decisions that require early consideration of the plan as a whole appear to state better view of the law.[80]

A different approach was utilized in *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation.*[81] Improvement was planned for a twenty-mile segment of the Route 7 corridor which is 280 miles long. There were no plans to develop the remainder of the corridor. However, the District Court ordered that an impact statement be prepared for the twenty-mile segment, and that within six months after the completion of the first statement, a second one concerning transportation for the entire corridor be prepared. The Court believed it would be undesirable if each isolated increment of an undertaking would be approved when the decision-makers were unaware of the cumulative environmental impact of their fragmented action.[82] The circuit court affirmed on appeal, holding it was appropriate for the judge to order a more comprehensive impact statement even though there was no existing plan as of then to develop the entire corridor. Following the reasoning in *SIPI*,[83] the

78. Trout Unlimited v. Morton, *supra* note 75, at 1285.
79. 2 GRAD, TREATISE ON ENVIRONMENTAL LAW 9-56 (1975).
80. *Id.* at 9-59.
81. 508 F.2d 927 (2nd Cir. 1974), *vacated*, __U.S.__, 96 S.Ct. 19 (1976).
82. *Id.* at 934.
83. *Id.* at 935.

court stated "that developments presently occuring required the 'irreversible and irretrievable commitments of resources', and that these commitments would curtail *subsequent* broad-scale assessment of alternatives."[84]

The *Conservation Society* approach best effectuates the intent of NEPA. First, it clearly manifests NEPA's rejection of incremental environmental decision making. Secondly, this approach recognizes that an impact statement is a more effective decision making tool if it is prepared early in the consideration of a proposal. Finally, *Conservation Society* recognizes that the range of alternatives available to an agency after it has expanded a considerable amount of its resources on a project is limited. Early and comprehensive study of the environmental effects of a project before "irreversible and irretrievable commitments of recourses" have been made would leave a broader range of alternatives open to the agency.

The *Conservation Society* decision was subsequently vacated by the Supreme Court in light, *inter alia*, of the *SCRAP II* decision.[85] On remand the circuit court used the Supreme Court's interpretation of the timing of the preparation of an impact statement in reversing its prior decision.[86]

In *Kleppe v. Sierra Club* the Supreme Court recognized that in certain situations NEPA called for the preparation of a comprehensive impact statement. However, the Court did not articulate any guidelines in this respect other than the "cumulative or synergistic" impact criteria. The Supreme Court was clearly willing to defer to the judgment of the responsible federal authorities in determining when comprehensive impact statements were to be prepared.

There are two underlying reasons why the Supreme Court, along with a number of the lower courts, is unwilling to order an agency to prepare a comprehensive impact statement. First, the Act requires the agencies to give comprehen-

84. *Id.*
85. ___U.S.___, 96 S.Ct. 19 (1976).
86. 531 F.2d 637, 639-640 (2nd Cir. 1976).

sive consideration to the environmental effects of their actions; however, it offers little guidance to the agencies as how this is to be done. Secondly, there is the fear that the courts could become too involved in the agencies' decision making processes. Judge Wright expressed this concern in his opinion in the circuit court decision. He wrote:

> Use of NEPA to force a comprehensive plan on an unwilling agency as a means to force that agency to undertake a comprehensive impact statement might intrude unduly on agency discretion, while overly involving the courts in the day-to-day business of running the Government.[87]

In light of these concerns, the Court is willing to defer to the agencies, and unless it can be shown that they acted arbitrarily,[88] the Court will not upset their determinations.

RECOMMENDATIONS

The "plain language" of NEPA, as interpreted by the Supreme Court, requires that an impact statement be ready at the moment the agency makes a recommendation or report on proposal. However, to fulfill the intent of the Act, it is necessary that the impact statement be prepared early in the decision-making process. In this way the information compiled in the impact statement can be utilized by the responsible decision makers. Given the unlikelihood that the Supreme Court will alter its interpretation of the "plain language" of the Act, it is submitted that the statute will have to be amended if the language is to conform with the intent of Congress when NEPA was first considered.

87. Sierra Club v. Morton, *supra* note 7, at 875.
88. This resolves a conflict in the circuit courts as to what is the proper standard of judicial review of agency decisions not to prepare an impact statement. The Second Circuit has held the appropriate criterion to be the "arbitrary and capricious" standard. Hanley v. Kleindiest, 471 F.2d 823, 829 (2nd Cir. 1972) *cert. denied*, 412 U.S. 908 (1973). The Fifth, Eighth and Tenth Circuits have used a reasonableness standard. Save Our Ten Acres v. Kreger, 472 F.2d 463, 465 (5th Cir. 1973); Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974); and Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1249 (10th Cir. 1973). *See generally* Note, *Environmental Law—Eighth Circuit Applies Reasonableness Standard to Review Agency Decision Not to File Environmental Impact Statement*, 43 FORDHAM L. REV. 655 (1975).

In drafting such an amendment it must be made unequivocally clear that the impact statement be prepared early in the decision making process. Congress should not set a hard rule as to when an impact statement is required. A flexible approach, reflecting the diversity of the federal agencies and the variety of programs which are proposed, is needed. An approach such as the four-factor balancing test developed by the Circuit Court of Appeals for the District of Columbia would provide the needed flexibility and at the same time assure early preparation of the environmental impact statement.

The *Kleppe* decision indicates that the Supreme Court is unwilling to develop standards as to when a number of individual actions are to be considered in a single impact statement. This is a matter which should properly be decided by Congress. In *Kleppe* it was mentioned that the Department of the Interior considers the following factors in determining whether a comprehensive impact statement: basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries and areas of economic interdependence. Congress should consider these and other factors in developing standards to guide the agencies in complying with the requirement that comprehensive consideration be given to the environmental effects of their actions.

CONCLUSION

NEPA is a broad statement of Congressional intent that federal agencies, to the fullest extent possible, take environmental factors into consideration throughout their decision making processes. Action-forcing provisions such as the impact statement requirement were included in the Act to insure compliance with this Congressional intent. The *Kleppe* decision undermines the intent of Congress by interpreting Section 102(2)(C) as requiring an impact statement only at the time a report or recommendation on a proposal is made by a Federal agency. The incongruity between the intent of Congress and the Supreme Court's interpretation of NEPA will have to be remedied by amending the Act.

The requirement that agencies give comprehensive consideration as to the environmental effects of their actions presents a different problem. Here the intent of Congress is clear, however, both the statute and the legislative history offer little guide as to how this intent is to be carried out. This matter must also be addressed by Congress.

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