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THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969: IS THE FACT OF COMPLIANCE A PROCEDURAL OR SUBSTANTIVE QUESTION?

Roger M. Leed*

Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits.¹

While shared by four other circuits,² the Eighth Circuit's view expressed in the foregoing quotation, that the National Environmental Policy Act of 1969 (NEPA)³ authorizes substantive review

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1. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 298 (8th Cir. 1972).

2. Substantive NEPA review was approved in *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 492 F.2d 1123 [6 ERC 1513] (5th Cir. 1974); *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 371 F. Supp. 1291 [6 ERC 1305] (D.C. Cir. 1974); *Sierra Club v. Froehlke*, 486 F.2d 946 [5 ERC 1920] (7th Cir. 1973); *Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664 [4 ERC 2039] (4th Cir. 1973); *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 [2 ERC 1779] (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). See also Comment, *Judicial Review of Fact Issues Under the National Environmental Policy Act*, 51 ORE. L. REV. 408 (1972). For convenience to the environmental practitioner, citations to the *Environment Reporter (ERC)* are supplied where appropriate.

3. 42 U.S.C. § 4321 *et seq.* (NEPA) (1970), which provides in pertinent part:

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. [42 U.S.C. § 4331] (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions

of agency decisions, is not unanimous. Courts in the Second, Ninth and Tenth Circuits profess to be skeptical about the avail-

under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. [42 U.S.C. § 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(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 official 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 en-

ability of substantive review and focus instead on the procedural aspects of NEPA compliance.⁴

In analyzing NEPA, courts and commentators have tended to employ the conventional distinction between substance and procedure.⁵ Sections 101 and 102(1)—setting forth the broad remedial goals of the legislation—are considered the substantive portions, while section 102(2) is labeled procedural. The latter section is best known for its requirement that a detailed environmental impact statement (EIS) be prepared by any agency proposing a major federal project which may significantly affect the environment. The substantive portions of NEPA establish a commitment by the federal government to use all practicable means to enhance the quality of the environment. The broad goals of

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, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

4. See *City of New York v. United States*, 344 F. Supp. 929, 940 [4 ERC 1646] (E.D.N.Y. 1972) (three judge court), where the court said:

Once it is determined in any particular instance that there has been good faith compliance with those procedures [of NEPA], we seriously question whether much remains for a reviewing court.

Environmental Defense Fund v. Armstrong, 487 F.2d 814 [6 ERC 1068] (9th Cir. 1973):

We do not read the National Environmental Protection Act to give to the courts the ultimate authority to approve or disapprove construction of a properly authorized project where an adequate EIS has been prepared and circulated in accordance with the NEPA requirements.

487 F.2d at 822 n.13. *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233 [3 ERC 1418] (10th Cir. 1971), *vacated*, 409 U.S. 1021 (1972). *But see* *Jicarilla Apache Tribe v. Morton*, 471 F.2d 1275 [4 ERC 1933] (9th Cir. 1973). *See also* *Save Our Ten Acres v. Kreger*, 472 F.2d 463 [4 ERC 1941] (5th Cir. 1973); *Environmental Defense Fund v. TVA*, 468 F.2d 1164 [4 ERC 1850] (6th Cir. 1972), 371 F. Supp. 1004 [6 ERC 1008] (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 [6 ERC 1367] (6th Cir. 1974).

5. Garrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 SO. DAK. L. REV. 279 (1974); Note, *Judicial Review, Delegation, and Public Hearings Under N.E.P.A.*, 1974 DUKE L.J. 423; Comment, *National Environmental Policy Act: What Standard of Judicial Review?* 39 J. AIR. L. & COM. 643 (1973).

the substantive portions are to be incorporated into the activities of the federal government by means of the procedural requirements of the Act.⁶

Though it is arguable whether or not the distinction between substantive and procedural review makes a difference in the outcome of a given case, the willingness of a court to extend substantive review may be an index of judicial commitment to rigorous enforcement of NEPA. Those courts which approve judicial review of agency action on the merits base their position on the language of NEPA and on the underlying congressional policy.⁷

Some courts have carried out their reviewing function under NEPA as though they were employing "substantive" review, but have maintained they were confining themselves to procedural questions.⁸ Despite often conflicting pronouncements as to what will be reviewed under NEPA, and as to the scope of that review, it is apparent that courts have devised several different routes for reaching factual issues presented in NEPA suits, while paying lip service to the principles of deference to agency expertise and discretion.⁹

This article will examine both the scope and standard of judicial review under NEPA and will suggest that review of the *fact*

6. See *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). See Anderson, *NEPA IN THE COURTS* (1973) for an explanation of the procedural workings of NEPA and how a NEPA suit reaches the courts, as well as for extensive analysis of judicial interpretations of NEPA.

7. Section 102 [42 U.S.C. § 4332 (1970)] provides:

The Congress authorizes and directs that, *to the fullest extent possible*: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter [Emphasis added.]

See also U.S. CODE CONG. & AD. NEWS 2769-70 (91st Cong., 1st Sess. 1969). In *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289, 297 [4 ERC 1721] (8th Cir. 1972), the court stated:

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.

8. See, e.g., *I-291 Why? Ass'n v. Burns*, 372 F. Supp. 223 [6 ERC 1275] (D. Conn. 1974); *Sierra Club v. Froehke*, 359 F. Supp. 1289 [5 ERC 1033] (S.D. Tex. 1973); *Lathan v. Volpe*, 350 F. Supp. 262 [4 ERC 1487] (W.D. Wash. 1972), *aff'd in part, rev'd in part sub nom.* *Lathan v. Brinegar*, 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc).

9. See, e.g., *Environmental Defense Fund v. TVA*, 371 F. Supp. 1004 [4 ERC 1008] (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 [4 ERC 1367] (6th Cir. 1974); *Sierra Club v. Froehke*, 359 F. Supp. 1289 [5 ERC 1033] (S.D. Tex. 1973); *Lathan v. Volpe*, 350 F. Supp. 262 [4 ERC 1487] (W.D. Wash. 1972), *aff'd in part, rev'd in part sub nom.* *Lathan v. Brinegar*, 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc). See also Briggs, *NEPA as a Means to Preserve and Improve the Environment—The Substantive Review*, 15 B.C. IND. & COM. L. REV. 667 (1974); Comment, *National Environmental Policy Act; What Standard of Judicial Review?*, 39 J. AIR L. & COM. 643 (1973); Comment, *Judicial Review of Fact Issues Under the National Environmental Policy Act*, 51 ORE. L. REV. 408 (1972).

of section 101 and section 102(1) procedural compliance is the functional equivalent of substantive review. It will also suggest an analytical framework for rationalizing the results, but unfortunately not the language, of NEPA decisions.

JUDICIAL ENFORCEMENT OF NEPA: APPLICABILITY OF THE OVERTON PARK CASE

One of the most tantalizing questions posed by NEPA, a law characterized by one noted jurist as "broad, yet opaque,"¹⁰ is whether agency compliance is subject to judicial review. An argument against review may be made on policy grounds by asserting that courts are not equipped to deal with the complex scientific and engineering issues involved in the many projects subject to NEPA.

One court, in an early decision, ventured that NEPA simply was not susceptible of judicial enforcement.¹¹ But it was soon settled that NEPA creates obligations which are judicially enforceable.¹² Courts which regularly deal with the complexities of patent, antitrust, and government contract litigation cannot be intimidated by dam projects and freeways, nor do courts operate under the illusion that administrative agencies have a monopoly on expertise.¹³ Also, the mandate of Congress contained in section 102(1) of NEPA is addressed to the courts as well as to other agencies, and therefore requires the courts to afford review,¹⁴ although it leaves open the question of the standard to be applied.

A second question, which is still unsettled, is whether environmental protection is of such importance to the public

10. *City of New York v. United States*, 337 F. Supp. 150, 159 [3 ERC 1570] (E.D.N.Y. 1972) (three judge court, Friendly, J.).

11. *Bucklein v. Volpe*, 2 ERC 1082 (N.D. Cal. 1970). *Cf. San Francisco Tomorrow v. Romney*, 342 F. Supp. 77, 81 [4 ERC 1065] (N.D. Cal. 1972), *aff'd in part, rev'd in part*, [4 ERC 2028] (9th Cir. 1973); *Sherry v. Algonquin Gas Co.*, [4 ERC 1713] (D. Mass. 1972).

12. *See, e.g., Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

13. Judge Oakes (dissenting) observed, in *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463, 484 [3 ERC 1232] (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972):

[W]hile judicial deference to administrative expertise is required, not every agency is expert in every aspect of science, technology, aesthetics or human behavior. *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 476 (1951) . . . ; *see L. Jaffe, Judicial Control of Administrative Action 576 et seq.* (1965). As Professor Jaffe has said, ' . . . expertness is not a magic wand which can be indiscriminately waved over the corpus of an agency's findings to preserve them from review.'

14. 42 U.S.C. § 4332 (1970) provides, in part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter. . . .

interest that NEPA necessitates the application of a stricter standard of judicial scrutiny than is usually applied to administrative actions.¹⁵ Many courts have treated NEPA review as founded on the Administrative Procedures Act (APA).¹⁶ As announced in *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹⁷ judicial review under the APA is governed by the "substantial inquiry" test.

As a general matter, a court may review an administrative action unless there is a statute forbidding review or the action falls within the narrow exception for matters committed to agency discretion. The test for agency discretion is whether the statute in question is "drawn in such broad terms that . . . there is no law to apply."¹⁸ While NEPA is broad, it is certainly not so broad that courts cannot find "law to apply." All agency action is subject to the "generally applicable standards of section 706," which

15. As one commentator has written:

[I]t can be safely said that the standard of review applied by the district courts has in most cases been more searching than in other areas of administrative law.

Yarrington, *The National Environmental Policy Act*, 4 ENVIRONMENT REPORTER MONOGRAPH No. 17 at 40. On the other hand, a district court recently observed:

The passage of NEPA has yet to be shown by authoritative construction to have broadened this limited grant of power to the judiciary to review the substantive merits of agency action.

I-291 *Why? Ass'n v. Burns*, 372 F. Supp. 223, 240 [6 ERC 1275, 1286-87] (D. Conn. 1974).

16. 5 U.S.C. § 701 *et seq.* (1970). Of particular relevance is section 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(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.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

17. 401 U.S. 402 (1971). The plaintiffs in *Overton Park* challenged the Secretary of Transportation's decision to bisect Overton Park in Memphis, Tennessee with Interstate I-40. Though the case predates NEPA, the interpretation of the APA and judicial review of agency decisions via the APA is of critical importance to NEPA's enforcement.

18. *Id.* at 410, citing S. REP. 752, 79th Cong., 1st Sess. 26 (1945).

"require the reviewing court to engage in a substantial inquiry."¹⁹ The Supreme Court described this inquiry as "a thorough, probing, in depth review."²⁰

In invoking the section 706(2)(A), (B), (C), or (D)²¹ substantial inquiry test, the reviewing court must first decide whether the agency acted within the scope of its authority. This determination involves inquiry as to the extent of the agency's authority, and then into the matter of whether the agency decision is within the established boundaries of that authority.²² The arbitrary and capricious standard of section 706(2)(A) next requires a court to "consider whether the decision was based on a consideration of the relevant factors and whether there has been clear error of judgment."²³ Finally, review entails a determination as to whether necessary procedural steps were followed.²⁴

Under section 706 of the APA, administrative action may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,"²⁵ or "if the action fail[s] to meet statutory, procedural, or constitutional requirements."²⁶ Broader review is available, under the section 706(2)(E)²⁷ substantial evidence test, for agency rulemaking and actions based on a public adjudicatory hearing.²⁸ Broader yet is *de novo* review provided for under section 706(2)(F).²⁹ Such review is appropriate only if the agency action is adjudicatory in nature and agency fact finding procedures are inadequate, or if a case arises where issues not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.³⁰

In setting forth guidelines for agency review under the APA, the Supreme Court has extended to agencies the benefit of a "presumption of regularity,"³¹ and has cautioned reviewing courts that the "ultimate standard of review is a narrow one," which does not empower the court "to substitute its judgment for that of the agency."³²

19. 401 U.S. at 415.

20. *Id.*

21. See text accompanying notes 25-26 *infra*.

22. 401 U.S. at 415-16.

23. *Id.* at 416.

24. *Id.* at 417.

25. 5 U.S.C. § 706(2)(A) (1970).

26. *Id.* §§ 706(2)(B), (C), (D).

27. See note 16 *supra*.

28. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971).

29. See note 16 *supra*.

30. 401 U.S. at 415.

31. *Id.* at 415.

32. *Id.* at 416.

To courts which view actions arising under NEPA as governed by the APA, *Overton Park*, read together with *Camp v. Pitts*,³³ ordains the scope and the standard of review. The scope of the "plenary review"³⁴ under the "substantial inquiry" test prescribed by *Overton Park* is to a certain extent discretionary, but at a minimum it must include "the full administrative record."³⁵ Additionally, a court may require agency officials to give testimony explaining their actions.³⁶

Some courts have found it unnecessary to look to the APA for reviewing authority, and instead have viewed NEPA as presenting a federal question, reviewable under Title 28 U.S.C., section 1331.³⁷ It has been suggested that the *Overton Park* criteria do not apply to review founded on section 1331.³⁸

The courts seldom attempt to distinguish between the underlying substantive agency action and the administrative steps involved in procedural compliance with NEPA. Such a distinction was made by the Tenth Circuit, however, in *National Helium Corp. v. Morton*.³⁹ In that court's view, *Overton Park* does not govern the scope and standard of review when the issue is compliance with section 102(2)(C) of NEPA (the environmental impact statement provision).⁴⁰

33. 411 U.S. 138 (1973) (per curiam). The Comptroller of the Currency's administrative decision to deny an application for certification of a new federal bank was reviewed in *Camp* by the Supreme Court under the APA. In this process, the Court again had occasion to interpret the scope of review of agency action under the APA.

34. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

35. *Id.*

36. *Id.*

37. *See, e.g.,* *Silva v. Lynn*, 482 F.2d 1282 [5 ERC 1654] (1st Cir. 1973); *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404 [5 ERC 1283] (W.D. Va. 1973), *aff'd*, 484 F.2d 453 [6 ERC 1336] (4th Cir. 1973).

38. *See, e.g.,* *National Helium Corp. v. Morton*, 486 F.2d 995 [6 ERC 1001] (10th Cir. 1973), *cert. denied*, 416 U.S. 993 [6 ERC 1622] (1974). The actions of the Secretary of the Interior in terminating contracts with helium-producing plants were challenged as failing to comply with NEPA. While the court found NEPA applicable, it decided there had been compliance—at least as far as any court was permitted to review the agency's actions.

39. 486 F.2d 995 [6 ERC 1001] (10th Cir. 1973), *cert. denied*, 416 U.S. 993 [6 ERC 1622] (1974).

40. The court conceded that *Overton Park* governs review of agency actions, but reasoned that review of an EIS for adequacy is not review of an agency's action. Thus the court concluded that it was free under NEPA to devise its own standard of review and proceeded to do so:

This case [*Overton Park*] did not, however, involve the preparation of an environmental impact statement. This was a review of the decision of the Secretary of Transportation in respect to the building of a highway through a park. This was in truth 'agency action'

In assessing the adequacy of the impact statement, we are not here reviewing . . . agency action within the meaning of section 706 of the APA. Rather, we are concerned with the NEPA requirement which is,

Thus, despite *Overton Park*, the courts have developed divergent positions—as evidenced by the *National Helium* case—on the scope and standard of review under NEPA. Courts which have declined to apply the *Overton Park* standards in NEPA cases have done so for apparently contradictory reasons. It has been suggested, on the one hand, that those standards are too restrictive⁴¹ and, on the other hand, that they invite excessive judicial intervention.⁴² Thus, *Overton Park* is not the end of this discussion, but rather the point of departure.

DISCRIMINATING BETWEEN PROCEDURAL AND SUBSTANTIVE CHALLENGES

In approaching the question of judicial review under NEPA, it is helpful first to classify the NEPA decisions according to the types of issues presented. The earliest cases frequently involved claims that, as a matter of law, NEPA did not apply to the particular agency action in question.⁴³ However, NEPA litigation soon began placing increasing emphasis on factual questions.⁴⁴ NEPA suits today may involve a number of complex issues of law or fact, or both. On an imaginary continuum between issues of law and issues of fact the following way stations may be identified:

A. *The agency contends compliance with section 102(2)(C) is not required because the action does not "significantly" affect the quality of the environment.* Section 102(2)(C) requires that an environmental impact statement be filed when an agency proposes action "significantly affecting the quality of the

to be sure, a prerequisite for agency action, but is not agency action itself. The trial court's conclusion that it was required by *Overton Park* to apply the arbitrary and capricious standard was, in our view, erroneous. . . . The rule of reason is a more appropriate standard where the sufficiency of the statement is being tested.

486 F.2d at 1001-02.

The Tenth Circuit's reasoning may be criticized, since *Overton Park* was concerned with review of the Secretary of Transportation's procedural compliance with section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1970), and section 18(a) of the Federal Aid Highway Act of 1968, 23 U.S.C. § 138 (1970).

41. See, e.g., *Wyoming Outdoor Coord. Council v. Butz*, 484 F.2d 1244 [5 ERC 1844] (10th Cir. 1973).

42. See, e.g., *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463 [3 ERC 1232] (2d Cir. 1971).

43. See, e.g., *Brooks v. Volpe*, 319 F. Supp. 90 [2 ERC 1004], 329 F. Supp. 118 [2 ERC 1571] (W.D. Wash. 1971) (defendants successfully claimed advanced stage of construction bars NEPA applicability), *rev'd*, 460 F.2d 1193 [3 ERC 1858] (9th Cir. 1971); *Kalur v. Resor*, 335 F. Supp. 1 [3 ERC 1458] (D.C. Cir. 1971) (defendants' contention that Refuse Act permit issuance was exempt from NEPA rejected).

44. See, e.g., *Sierra Club v. Froehlike*, 359 F. Supp. 1289 [5 ERC 1033] (S.D. Tex. 1973), which may be the most factually detailed (and longest) NEPA opinion to date. The court observed that the record reviewed was contained in thirteen book boxes containing some 246 items.

human environment."⁴⁵ The key word here is "significantly." In *Hanly v. Kleindienst*,⁴⁶ the Second Circuit perceived the meaning of "significantly" as presenting both a question of law for the court, and a question of fact committed to agency discretion,⁴⁷ both of which are reviewable under the "arbitrary and capricious" standard discussed in *Overton Park*.⁴⁸ The Tenth and Fifth Circuits have opted for a "standard of reasonableness" which imports little if any deference to agency threshold decisions that no EIS is necessary. In general, the courts tend to scrutinize carefully an agency decision not to prepare an EIS.⁴⁹

B. *The agency's environmental impact statement, or the action itself, is challenged on procedural grounds.* Paragraphs (2)(A), (2)(B) and (2)(D) of section 102 establish procedural requirements which are in addition to, and independent of, the environmental impact statement requirement of paragraph (2)(C). Besides calling for an EIS when major actions significantly affecting the environment are proposed, section 102 mandates that federal agencies "utilize a systematic, interdisciplinary approach to insure integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment."⁵⁰ To achieve this objective, the section directs that methods and procedures be developed "to insure that unquantified environmental amenities will be considered in the agency decision-making process,"⁵¹ and that alternatives to the proposed action be studied, developed and described. Failure to comply with these additional requirements may be assigned as grounds for overturning agency actions.⁵²

It is well established that an EIS is subject to procedural challenge for failure to comply with section 102(2)(C)⁵³ and the

45. 42 U.S.C. § 4332(C) (1970).

46. 471 F.2d 823 [4 ERC 1785] (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

47. *Id.* at 829. *See also* Wyoming Outdoor Coord. Council v. Butz, 484 F.2d 1244 [5 ERC 1844] (10th Cir. 1973); *Hanly v. Mitchell*, 460 F.2d 640 [4 ERC 1152] (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

48. 471 F.2d at 830.

49. *See* Wyoming Outdoor Coord. Council v. Butz, 484 F.2d 1244 [5 ERC 1844] (10th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463 [4 ERC 1941] (5th Cir. 1973). *See text accompanying notes 92-94 infra.*

50. 42 U.S.C. § 4332 (1970); *see note 2 supra.*

51. *Id.*

52. *See, e.g.,* Environmental Defense Fund v. TVA, 371 F. Supp. 1004 [6 ERC 1008] (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 [6 ERC 1367] (6th Cir. 1974).

53. *See, e.g.,* I-291 Why? Ass'n v. Burns, 372 F. Supp. 223 [6 ERC 1275] (D. Conn. 1974); *Sierra Club v. Froehke*, 359 F. Supp. 1289 [5 ERC 1033] (S.D. Tex. 1973); *Lathan v. Volpe*, 350 F. Supp. 262 [4 ERC 1487] (W.D. Wash. 1972), *aff'd in part, rev'd in part sub nom. Lathan v. Brinegar*, 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc).

courts are beginning to fashion per se criteria for invalidity, including: (1) failure to disclose relevant information;⁵⁴ (2) failure to consider reasonable alternatives;⁵⁵ (3) lack of adequate detail (indicated by a perfunctory statement which contains too much conclusory language, is superficial, or is merely a justification for the proposed action);⁵⁶ (4) failure to respond adequately to agency and public comment;⁵⁷ (5) failure to include responsible opposing scientific views;⁵⁸ (6) failure to specify and include information recognized as appropriate for particular types of projects;⁵⁹ and (7) failure to demonstrate adequate "consideration" of pertinent factors.⁶⁰

C. *The agency's EIS is challenged on substantive grounds.*

There may be no room for a meaningful distinction between a substantive and a procedural challenge to an EIS.⁶¹ The Ninth Circuit seems specifically opposed to such a distinction, finding that the "detailed" statement required by section 102(2)(C) of NEPA compels an agency to file a "substantively" complete EIS

54. See I-291 Why? Ass'n v. Burns, 372 F. Supp. 223 [6 ERC 1275] (D. Conn. 1974).

55. Monroe County Conservation Council v. Volpe, 472 F.2d 693 [4 ERC 1886] (2d Cir. 1972); Natural Resources Defense Council v. Morton, 458 F.2d 827 [3 ERC 1558] (D.C. Cir. 1971); I-291 Why? Ass'n v. Burns, 372 F. Supp. 223 [6 ERC 1275] (D. Conn. 1974); Montgomery v. Ellis, 364 F. Supp. 517 [5 ERC 1790] (N.D. Ala. 1973).

56. Students Challenging Regulatory Agency Procedures (SCRAP) v. United States, 371 F. Supp. 1291 [6 ERC 1305] (D.C. Cir. 1974); Environmental Defense Fund v. Froehlike, 473 F.2d 346 [4 ERC 1829] (8th Cir. 1972); City of New York v. United States, 337 F. Supp. 150 [3 ERC 1570] (E.D.N.Y. 1972); Daly v. Volpe, 350 F. Supp. 252 [4 ERC 1481] (W.D. Wash. 1972).

57. Students Challenging Regulatory Agency Procedures (SCRAP) v. United States, 371 F. Supp. 1291 [6 ERC 1305] (D.D.C. 1974). See Lathan v. Volpe, 350 F. Supp. 262 [4 ERC 1487] (W.D. Wash. 1972), *aff'd in part, rev'd in part sub nom.* Lathan v. Brinegar, 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc).

58. Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 [3 ERC 1126] (D.C. Cir. 1971).

59. *E.g.*, Montgomery v. Ellis, 364 F. Supp. 517 [5 ERC 1790] (N.D. Ala. 1973); Lathan v. Volpe, 350 F. Supp. 262 [4 ERC 1487] (W.D. Wash. 1972), *aff'd in part, rev'd in part sub nom.* Lathan v. Brinegar, 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc).

60. See, *e.g.*, I-291 Why? Ass'n v. Burns, 372 F. Supp. 223 [6 ERC 1275] (D. Conn. 1974); Keith v. Volpe, 352 F. Supp. 1324 [4 ERC 1350] (C.D. Cal. 1972), *rev'd in part on other grounds sub nom.* Keith v. California Highway Comm'n, [6 ERC 1097] (9th Cir. 1973).

61. See Comment, *Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline*, 81 YALE L.J. 1592 *passim* [hereinafter cited as Comment, *Evolving Judicial Standards*]. Judge Breitenstein apparently recognized such a distinction in National Helium Corp. v. Morton, 486 F.2d 995, 1006 (10th Cir. 1973) (concurring opinion). Joining the majority in rejecting the contention that an EIS is reviewable on its merits, Judge Breitenstein stated:

The courts should not second-guess the scientists, experts, economists, and planners who make the environmental statement.

Id. at 1006.

in order to comply with this procedural requirement of NEPA.⁶²

It would seem, nonetheless, that an impact statement which is in full compliance with NEPA's minimum procedural requirements, but contains a material factual misstatement or omission, should be rejected. The fact that an EIS has been filed and circulated in procedural compliance with NEPA does not guarantee that the environmental impact has been thoroughly studied and candidly disclosed. Thus, some courts have examined the agency's EIS on its merits.⁶³

D. *The agency action itself is challenged on substantive grounds.* Although failure to comply with section 101 of NEPA could be characterized as a procedural rather than a substantive violation, the courts have elected to use the substantive terminology.⁶⁴ Regardless of whether they treat section 101 compliance as reviewable, these courts have said that what is at stake in section 101 review is the agency's substantive decision to carry out a project.⁶⁵ As a result, the circuits have disagreed over the scope of, and standard to be applied to, section 101 review, making uniform application of NEPA impossible.⁶⁶ It is the premise of this article that a uniform approach to section 101 review could be reached if review of agency compliance with section 101 were characterized as procedural, not as "substantive."

A recent en banc decision of the Ninth Circuit, *Lathan v. Brinegar*⁶⁷ indicates that the courts are beginning to appreciate that all questions of NEPA compliance may be characterized as procedural. *Lathan* involved the proposed construction of a major freeway, I-90, across Lake Washington, and through the Central Area of Seattle. One issue at stake was whether the district court

62. See *Lathan v. Brinegar*, 506 F.2d 677 [7 ERC 1048, 1058] (9th Cir. 1974) (en banc).

63. See, e.g., *I-291 Why? Ass'n v. Burns*, 372 F. Supp. 223 [6 ERC 1575] (D. Conn. 1974).

The adequacy of an EIS prepared by the Connecticut Department of Transportation for a portion of I-291 around Hartford was challenged. The court reviewed the EIS in great detail and ordered an injunction until the statement could be brought up to the standards required by NEPA. See also *Montgomery v. Ellis*, 364 F. Supp. 517 [5 ERC 1790] (N.D. Ala. 1973). The EIS on file for a stream channelization project of the Soil Conservation Service of the United States Department of Agriculture was examined by the court and found to be inadequately prepared.

64. See, e.g., *Conservation Council v. Froehle*, 473 F.2d 664 [4 ERC 2039] (4th Cir. 1973); *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289, 297-98 [4 ERC 1097] (8th Cir. 1972), cert. denied, 412 U.S. 908 (1973); *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 [2 ERC 1779] (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

65. See, e.g., *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

66. See note 2 and accompanying text *supra*.

67. 506 F.2d 677 [7 ERC 1048] (1974).

had erred in finding the EIS legally insufficient. The Ninth Circuit affirmed that finding, saying:

. . . NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA, 42 U.S.C. § 4332(2)(c), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging, *pro forma* compliance will not do.⁶⁸

Judicial perceptions of the appropriate standard for judicial review may differ depending upon which of the above situations is before the court. The extent of the procedural formalities attending the preparation of the administrative record also has a bearing on the standard of review employed. Where a full adjudicatory proceeding is involved, as in *Scenic Hudson Preservation Conference v. Federal Power Commission*,⁶⁹ it is necessary for the court to address the standard of review in terms of the statute underlying the proceeding, an approach which blurs the significance of the decision as far as NEPA is concerned. Where the agency action does not involve an adjudicatory hearing, but is informal or *ex parte*, a court may apply the *Overton Park* standard,⁷⁰ or it may search NEPA for guidance in devising a different standard.⁷¹

The particular *standard* of review settled upon may be less important to effective judicial supervision of agency action than the *scope* of review. It will be an unusual situation indeed when an agency prepares an EIS which so indicts its proposed action that the EIS itself will convince a court that the agency has committed a "clear error of judgment."⁷² If the agency has overlooked important facts or scientific opinion, or ignored significant environmental impacts, or failed to weigh reasonable alternatives, the court can hardly find a NEPA violation, unless it is willing to expand the scope of review beyond the EIS and accept proof of such shortcomings from outside the record.

68. *Id.* at 693 [7 ERC at 1058].

69. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463 [3 ERC 1232] (2d Cir. 1971) (FPC hearings and compliance with NEPA were challenged as plaintiffs opposed the construction of the Storm King power project on the Hudson River in New York).

70. *E.g.*, *Sierra Club v. Lynn*, 364 F. Supp. 834 [5 ERC 1737] (W.D. Tex. 1973), *aff'd in relevant part*, 502 F.2d 43, 64 [7 ERC 1033] (5th Cir. 1974) (testing decision by Secretary of Housing and Urban Development to guarantee bonds to be floated to finance a proposed Title VII new community).

71. This is the approach taken by the Tenth Circuit in *National Helium Corp. v. Morton*, 486 F.2d 994 [6 ERC at 1008] (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1973).

72. 401 U.S. at 416.

THE SCOPE OF REVIEW UNDER NEPA

Overton Park's direction that the court consider the full administrative record has generally been respected by courts reviewing agency actions for NEPA compliance.⁷³ If NEPA itself is to be regarded as establishing jurisdiction for judicial review, then logically the scope of review may be *broader*, but certainly not more restricted, than that authorized by *Overton Park* for APA review.

Review confined exclusively to the environmental impact statement will seriously inhibit judicial supervision of the agency decision-making process. Looking only at the EIS, a court would be hard put to determine, for example, whether the agency was acting within the scope of its authority or whether it had ignored important adverse environmental effects. Neither the arbitrary and capricious test, nor any stricter standard of judicial review, can meaningfully be applied to an agency decision unless the court receives evidence as to how the decision-making process was conducted. The scope of review must be broad enough to embrace evidence which will impeach a "pro forma" administrative record.

Review of section 101 compliance cannot be based on the EIS alone. An EIS can hardly be received as evidence with respect to substantive issues affecting the agency action unless the hearsay rule is disregarded.⁷⁴ But if a court nonetheless accepts an EIS as proof of the matters asserted it must also receive contradictory evidence which meets traditional standards of trustworthiness.

An EIS may not be received as evidence of the nature of and reasons for the agency decision. The EIS is a decision-making document, a "working paper"⁷⁵ and not the equivalent of agency findings and conclusions.⁷⁶ Since the agency must make its decision with the statement before it, the statement must precede, not follow, the agency decision. The administrative record offered to the reviewing court thus must contain not only the EIS

73. *E.g.*, *Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664 [6 ERC 1063] (4th Cir. 1973) (per curiam); *Silva v. Lynn*, 482 F.2d 1283 [5 ERC 1654, 1655] (1st Cir. 1973).

74. In *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938), the Supreme Court observed that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." See *Camero v. United States*, 345 F.2d 798 (Ct. Cl. 1965).

75. *Environmental Defense Fund v. Armstrong*, 352 F. Supp. 50, 55 [4 ERC 1760] (N.D. Cal. 1970).

76. See *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 371 F. Supp. 1291, 1299-3000 & n.25 [6 ERC 1305, 1311 & n.25] (D.C. Cir. 1974); *but cf.* *Ely v. Velde*, 451 F.2d 1130, 1138 [3 ERC 1280, 1286] (4th Cir. 1971) (where the court said that in an EIS, an agency must "explicate fully its course of inquiry, its analysis and its reasoning").

and all supporting documentation, but also the agency decision, and whatever record exists to support that decision.

When the agency decision is not based on a formal record, the scope of review must extend even beyond the "full administrative record."⁷⁷ That record often will be brief or non-existent for informal, *ex parte* actions. Even when it contains environmental assessments, reports and studies, the record will usually not reflect the full course of the agency's reasoning and decision-making process. When this is the case, the reviewing court will have to receive *de novo* evidence in order to determine whether the agency engaged in full and good faith "individualized consideration and balancing of environmental factors."⁷⁸

Even where the agency has held an adjudicatory hearing to which all litigants were parties, the full record will ordinarily not suffice to enable the court to reach both procedural and substantive NEPA issues. While the hearing record may touch on some fact questions relevant to agency compliance with NEPA, it may not deal with all the procedural or substantive issues pertaining to the process of drafting an environmental impact statement, and probably should not do so. To date there has been little judicial inclination to respect without question an agency's determination that it has complied with NEPA.⁷⁹ Evidence outside the administrative record will usually be essential to make out even *per se* deficiencies in an EIS, such as failure to consider reasonable alternatives, failure to discuss opposing scientific views, omission of adverse data and views, and failure to list all adverse environmental impacts. Only the expectation that a court will admit and consider such evidence will force agencies to adhere to the strict standard of NEPA compliance mandated by Congress. If agencies can ex-

77. This phrase is from *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). In *National Helium Corp. v. Morton*, 361 F. Supp. 78 [5 ERC 1545] (D. Kan. 1973), *rev'd on other grounds*, 486 F.2d 995 [6 ERC 1001] (10th Cir.), *cert. denied*, 416 U.S. 993 (1973), the Court defined the scope of review under NEPA to include all relevant material in agency files, whether or not disclosed in the EIS, and all relevant material readily available to the agency "had it fulfilled its statutory responsibilities." 361 F. Supp. at 95.

78. *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d at 1115 [2 ERC 1779] (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). In *Brown v. United States*, 396 F.2d 989, 994 (Ct. Cl. 1968), the Court observed that receipt of evidence *de novo* "should depend . . . on the insight gained from a hard look at the judicial function vis-à-vis the administrative role in that particular category of case."

79. Recently there has been evidence of a judicial attitude to approach section 102(2) compliance strictly as a procedural question. *See, e.g., Lathan v. Brinegar*, 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974). *See also* cases cited at note 36 *supra*. *But cf. Morningside Renewal Council v. Atomic Energy Comm'n*, 482 F.2d 234, 238 [5 ERC 1707] (2d Cir. 1973), where the court declined to overrule an agency determination that no EIS was necessary, finding that the decision was supported by substantial evidence.

pect that courts will refuse such evidence, NEPA requirements might well be rendered ineffectual.

In *Overton Park*, the Supreme Court called for a "plenary" hearing, involving the full administrative record plus such additional evidence as is necessary fully to explain the agency action.⁸⁰ This scope of review may be too restrictive for NEPA, however. Under NEPA, a reviewing court should be concerned with more than an explanation of agency reasoning, since it must determine if the record before it is inaccurate or deficient, and whether there have been procedural shortcomings not reflected in that record. The reviewing court should require appropriate testimony, subject to cross-examination, in order to establish whether or not there has in fact been compliance with NEPA.

If NEPA is entirely a procedural mandate, as suggested in *Lathan v. Brinegar*,⁸¹ a broad scope of review is certainly in order, since the reviewing court will not be confined to applying the arbitrary and capricious test to the agency record.

If NEPA is to be truly viable, reviewing courts should not apply any rigid formula to limit the scope of review under NEPA. Setting unduly restrictive limits on plaintiffs' proof of procedural or substantive deficiencies can serve no purpose except to hamstring the courts. Full, good-faith compliance with NEPA, encouraged by strict judicial supervision, is best assured if the courts are receptive to any relevant evidence of a violation.

The scope of review should assist, and not prevent, the conduct of "a thorough, probing, in-depth review"⁸² of the facts in each case. It is therefore submitted that the conventional standards of relevancy are the appropriate boundary for the scope of NEPA review. For example, when the sole question before the court is one which concerns the procedural regularity of the EIS—that is, whether all of the procedural requirements for drafting and circulating the EIS have been met—the court may not require any evidence beyond the document itself in order properly to resolve the matter. However, in cases which raise broader questions, particularly under section 101 of NEPA, a lengthy and full scale evidentiary hearing may be essential to effective judicial review.⁸³

80. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

81. 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc).

82. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

83. The court authorized such a hearing in *Environmental Defense Fund v. Froehke*, 368 F. Supp. 231 [6 ERC 1074] (W.D. Mo. 1973). The Army Corps

It appears that the courts generally have been flexible in defining the scope of NEPA review. Many have conducted evidentiary hearings which go beyond the full record plus explanation suggested in *Overton Park*.⁸⁴ They have received de novo evidence when it seemed appropriate to resolve the issues raised. In other words, these courts have determined the scope of review "by an evaluation of the individual factors converging on the problem of review in that specific kind of suit."⁸⁵

In summary, it is plain that a court should not hesitate to accept de novo evidence, when appropriate, in a NEPA case. If a broad and flexible scope of review bounded only by traditional principles of relevancy is employed, there will be no need to evolve separate rules for the scope of review in procedural and substantive challenges. An additional consideration is that limiting the scope and nature of review, and thereby shielding NEPA violations, would offend the congressional policy articulated in section 102(1).⁸⁶

If the *scope* of judicial review is to be governed by established rules of relevancy, the next question that arises is, what should be the *standard* of judicial review?

of Engineers' decision to proceed with a hydraulic plant at the Truman Dam and the adequacy of the EIS filed were challenged by EDF. The court conducted plenary evidence hearings before finding the EIS adequate and the decision to proceed with the project not violative of NEPA.

84. *E.g.*, *Environmental Defense Fund v. Froehle*, 368 F. Supp. 231 [6 ERC 1074] (W.D. Mo. 1973); *Environmental Defense Fund v. TVA*, 371 F. Supp. 1004 [6 ERC 1008] (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 [6 ERC 1362] (6th Cir. 1974); *Sierra Club v. Lynn*, 364 F. Supp. 834 [5 ERC 1737] (W.D. Tex. 1973). In *Sierra Club v. Lynn*, the court had ruled that "the facts would be assembled in a hearing more nearly resembling a trial *de novo* than a substantial evidence proceeding. . . ." *Id.* at 837-38. F. ANDERSON, *NEPA IN THE COURTS* 105 (1973) [hereinafter cited as ANDERSON], argues that de novo review under NEPA "is appropriate . . . because a practical need exists for impartial review."

85. *Brown v. United States*, 396 F.2d 989, 994 (Ct. Cl. 1968). The Fifth Circuit exemplified this approach when it instructed the district court on remand that its inquiry

must not necessarily be limited to consideration of the administrative record, but supplemental affidavits, depositions and other proof concerning the environmental impact of the project may be considered if an inadequate evidentiary development before the agency can be shown.

Save Our Ten Acres v. Kreger, 472 F.2d at 467 [4 ERC 1941] (5th Cir. 1973).

In *Sierra Club v. Hardin*, 325 F. Supp. 99 [2 ERC 1385] (D. Alas. 1971), the court refused to allow trial de novo of all issues, but approached the questions of standing, laches, and the applicability of NEPA de novo. It also received de novo evidence on the issues of whether the agency failed to consider relevant factors and whether it gave weight to irrelevant factors. *Id.* at 115 n.34. Furthermore, the court implied that full trial de novo might be available in a proper case. *Id.* at 114-15.

86. See note 3 *supra*.

THE STANDARD OF REVIEW UNDER NEPA

If failure to comply with a plain statutory command is the gravamen of an alleged NEPA violation, then the reviewing court need not search for the appropriate standard of review.⁸⁷ The court simply announces that it has found a patent NEPA violation, such as a failure to prepare an EIS. The courts are continually expanding the definition of NEPA *procedural* violations,⁸⁸ and, as suggested above, may eventually view all NEPA violations as procedural, and therefore as questions of law for the courts. However, as long as courts treat NEPA as authorizing *substantive* judicial review,⁸⁹ reviewing courts must settle upon the appropriate standard of review to apply. The courts must also resolve the question of what standard of review to apply to the "threshold determination," that is, an agency decision that no EIS is necessary.

Substantive judicial review is hedged with statutory and judge-made limitations, presumably erected in order to discourage judicial activism. Yet since NEPA is susceptible of being interpreted as a procedural statute (as seen in *Lathan v. Brinegar*⁹⁰), a court viewing it as such can largely avoid the troublesome question of defining the limits of judicial review. Procedural compliance is a question of law, reviewable *de novo*. A court which acknowledges the availability of substantive review may be in no better position to reach factual questions under NEPA than the court which maintains that NEPA is only a procedural law and defines compliance with sections 101 and 102(1) as a procedural issue.⁹¹ Furthermore, the court engaging in substantive review labors under the restriction imposed by the rule requiring deference to the agency's factual determinations. If the court will receive evidence of a NEPA violation, then it is of little moment whether that violation, if found, is characterized as substantive or procedural.

In conducting review of an agency's "threshold determination" a court will always be confronted with a choice between re-

87. See *Wyoming Outdoor Coord. Council v. Butz*, 484 F.2d 1244 [5 ERC 1844] (10th Cir. 1973). Since failure to obey a statutory command was characterized as a purely legal question, the court simply directed the agency to comply. "Our function as a reviewing court is to determine *de novo* 'all relevant questions of law'. . . ." *Hanly v. Kleindienst*, 471 F.2d 823, 828 [4 ERC 1785] (2d Cir. 1972).

88. See cases cited at notes 54-60 *supra*. In *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 371 F. Supp. 1291 [6 ERC 1305] (D.D.C. 1974), the court held that failure to alter an EIS in response to agency comments is a violation of NEPA.

89. As in *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972).

90. 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc) *rev'g in part and aff'g in part* *Lathan v. Volpe*, 350 F. Supp. 262 [4 ERC 1487] (W.D. Wash. 1972); see also Comment, *Evolving Judicial Standards*, *supra* note 61.

91. See Comment, *Evolving Judicial Standards*, *supra* note 63, at 1606-08.

specting agency discretion, which means using the arbitrary and capricious test, and fashioning a more liberal standard. The trend thus far has been to give little weight to an agency's "threshold determination" that no EIS is necessary. In *Hanly v. Kleindienst*, the Second Circuit undertook what amounts to de novo review of a "threshold determination," reasoning that the meaning of "significantly"⁹² is a question of law.⁹³ The Fifth and Eighth Circuits measure agency threshold determinations by a standard of "reasonableness," not by the arbitrary and capricious rule, since the threshold decision is a "jurisdiction-type" question, necessitating more searching review.⁹⁴

Judicial scrutiny of NEPA procedural deficiencies must be strict and all-embracing, notwithstanding lip service paid to a "presumption of regularity."⁹⁵ There are some courts which apparently believe that less than full procedural compliance is required. However, these decisions which implicitly repudiate the "strict standard of compliance" called for in *Calvert Cliffs*,⁹⁶ and which run counter to the majority of NEPA decisions, are of doubtful authority.⁹⁷ They reflect a willingness to defer to agencies on questions of law, which the courts cannot do.

92. 42 U.S.C. § 4332(2)(C) (1970) provides in part:

[All agencies of the Federal Government shall—] [i]nclude 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. . . . (emphasis added).

93. *Hanly v. Kleindienst*, 471 F.2d 823, 828-31 (2d Cir. 1972). The court noted that the interpretation of "significantly" presents a mixed fact-law question, and that the rational basis standard of review employed in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), might therefore be appropriate. However, it thought that *Overton Park* required the use of the APA's arbitrary and capricious test, which involves de novo review of questions of law.

See Comment, *NEPA, Environmental Impact Statements and the Hanly Litigation: To File or Not to File*, 48 N.Y.U.L. REV. 522 (1973). Several district courts have held that the threshold decision of whether or not an EIS is required will be reviewed de novo, since it is entirely a question of law. See *Kisner v. Butz*, 350 F. Supp. 310 [4 ERC 1692] (N.D.W. Va. 1972); *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 [3 ERC 1883], modified, 4 ERC 1657 (E.D.N.C. 1972), remanded, 4 ERC 1659 (4th Cir. 1972), *aff'd on rehearing* 355 F. Supp. 280 [5 ERC 1001] (E.D.N.C. 1973); *Scherr v. Volpe*, 336 F. Supp. 882, 886 [3 ERC 1586, 1588] (W.D. Wis. 1971), *aff'd*, 466 F.2d 1027 [4 ERC 1435] (7th Cir. 1972) (in affirming, the circuit court did not find it necessary to pass on the correctness of the trial court's holding that de novo review of the threshold determination is appropriate).

94. See, e.g., *Minnesota PIRG v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *Save Our Ten Acres v. Kreger*, 472 F.2d 466 [4 ERC 1941, 1943] (5th Cir. 1973); *accord*, *Wyoming Outdoor Coord. Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973); *United States v. Three tracts of Land*, 7 ERC 1060 (N.D. Ala. 1974).

95. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

96. *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

97. E.g., *Life of the Land v. Volpe*, 363 F. Supp. 1171 [5 ERC 1413] (D.

By accepting the notion that all NEPA questions are "procedural" the courts can eliminate the present uncertainty about which standard of review is appropriate. Since the duties imposed by sections 102(2)(A), (2)(B) and (2)(D), to use interdisciplinary methods to give appropriate consideration to environmental values, and to develop and describe alternatives, are "action-forcing,"⁹⁸ failure to comply is a procedural violation, presenting a question of law.⁹⁹ Failure to prepare an adequate EIS has also been approached as a question of law. Thus, the next logical step would be judicial recognition that, for purposes of review, the duty of the agency "to consider and give effect to the environmental goals set forth"¹⁰⁰ in NEPA is a procedural question. Treating section 101(b) and 102(1) compliance as a procedural question could give a court at least as much room to consider fact issues as would the substantive review approach, since in rendering decisions involving NEPA, courts have tended to conduct de novo review of procedural questions.¹⁰¹

It is consistent with sound construction of the statute to classify both sections 101(b) and 102(1) as procedural. Although the duties prescribed under section 101(b) are much broader in

Hi. 1973), *aff'd*, 485 F.2d 460 [5 ERC 1780] (9th Cir. 1973); *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404 [5 ERC 1283] (W.D. Va. 1973), *aff'd*, 484 F.2d 453 [6 ERC 1336] (4th Cir. 1973).

ANDERSON, *supra* note 84, at 52, explains the results in *Bucklein v. Volpe*, [2 ERC 1082] (N.D. Cal. 1970), *Citizens to Preserve Foster Park v. Volpe*, 335 F. Supp. 873 [3 ERC 1031] (N.D. Ind. 1971), *aff'd*, 466 F.2d 991 [4 ERC 1522] (7th Cir. 1972), and *Sierra Club v. Hardin*, 325 F. Supp. 99 [2 ERC 1385] (D. Alas. 1971), by saying: "These cases may best be seen as exemplifying the uncertainty that surrounded early efforts at implementation. . . ."

The Ninth Circuit seems reluctant to insist on strict NEPA compliance. In *National Forest Preservation Group v. Butz*, 5 ERC 1863 (9th Cir. 1973), the court refused to overturn a land exchange, although conceding a NEPA violation, because the violation was not "prejudicial." *Id.* at 1865. *Cf. Jicarilla Apache Tribe v. Morton*, 471 F.2d 1275 [4 ERC 1933] (9th Cir. 1973). *But see, Lathan v. Brinegar*, 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc), *rev'g in part, aff'g in part Lathan v. Volpe*, 350 F. Supp. 262 [4 ERC 1487] (W.D. Wash. 1972); *City of New York v. United States*, 337 F. Supp. 150, 159-60 (E.D.N.Y. 1972).

Oddly enough, the only authority cited by the Ninth Circuit in support of its invocation of a prejudicial error rule was *Calvert Cliffs'*. The result in *National Forest Preservation Group* may be explained by the court's reluctance to upset an executed transaction, but it cannot be harmonized with *Calvert Cliffs'*.

98. 115 CONG. REC. 40416 (1969).

99. See cases cited in notes 54-60 *supra*.

100. *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289 [4 ERC 1721] (8th Cir. 1972).

101. See cases cited at notes 54-60 *supra*, and *cf. Wyoming Outdoor Coord. Council v. Butz*, 484 F.2d 1244, 1248 [5 ERC 1844, 1846] (10th Cir. 1973) where the court said:

The Court's ultimate determination that the statute's requirements had not been violated must be reviewed on appeal as essentially a legal conclusion, and not a fact finding subject to the clearly erroneous rule.

scope than the requirements of section 102(2), they are equally mandatory. The fundamental question should be whether the reviewing court deems itself capable of policing the broad goals of section 101, not whether section 101 involves agency discretion. This very question has been answered affirmatively by courts which label compliance with sections 101 and 102(1) as a "substantive" issue.¹⁰²

Why then have most courts stopped short of categorizing section 101 as procedural? Surely, as the Ninth Circuit has recognized in *Lathan v. Brinegar*,¹⁰³ the language of the statute does not stand in the way. The architecture of the statute, which not only imposes specific procedural requirements, such as those prescribed in section 102(2)(C), but also requires agencies to amend their decision-making processes and even their rules and regulations,¹⁰⁴ is consistent with a procedural characterization of section 101.

Perhaps the explanation is simply that in the technical and rapidly expanding field of environmental law, the courts are still reluctant to accept responsibility for broad review under sections 102(1) and 101. The courts may detect a more substantial component of agency discretion in these provisions than in section 102(2), not enough to trigger the exemption for "agency action . . . committed to agency discretion by law,"¹⁰⁵ but sufficient to counsel more deference to the agency decision than is necessary in the case of section 102(2) review. But as the courts acquire more experience with NEPA review, they should become less hesitant to hold agencies to strict compliance with all of NEPA.

A court taking the next logical step of classifying these provisions as procedural will enjoy *more* latitude in examining the fact of compliance, than if it were to employ the APA arbitrary and capricious standard. And the real goal of judicial review under NEPA—whether labeled substantive or procedural—is, after all, to ascertain the fact of agency compliance.

CONCLUSION

The *Overton Park* formula gives a court ample room to reject environmentally unwise decisions, even though the court must be careful not "to substitute its judgment for that of the

102. *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289 [4 ERC 1721] (8th Cir. 1972).

103. 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc).

104. 42 U.S.C. § 4332 (1970); see note 3 *supra*.

105. 5 U.S.C. § 701(a)(2) (1970).

agency."¹⁰⁶ Review which extends to an examination of whether all relevant factors have been duly considered and given proper weight, and whether any irrelevant factors have entered into the agency's decision, is broad indeed. Many agency decisions involving major federal projects are probably vulnerable to attack under this test.¹⁰⁷

NEPA affords the courts an opportunity to apply even broader standards of review to agency decisions. Under NEPA, the judiciary has claimed for itself a major role in shaping agencies' decision-making processes relating to "major federal actions significantly affecting the quality of the human environment."¹⁰⁸ The courts have done so by reviewing compliance with NEPA procedures de novo, and by reading sections 101 and 102(1) as supporting substantive review. Whether the courts will continue to play this role depends upon their willingness to broaden the definition of those elements of NEPA which are regarded as procedural, and their willingness to go behind the administrative record to scrutinize the real workings of decisionmaking. As discussed in this article, a major step in this direction was taken by the Ninth Circuit in *Lathan v. Brinegar*.¹⁰⁹ It is submitted that much of the present confusion and uncertainty surrounding NEPA could be alleviated if the Ninth Circuit's suggestion that NEPA is entirely "procedural" were to be accepted by the other federal courts.

De novo judicial review of the fact of NEPA compliance is, of course, both appropriate and necessary, regardless of whether such review is labeled substantive or procedural. Reviewing courts must be prepared to pierce the formal agency record, and even to disbelieve it,¹¹⁰ in searching out NEPA violations. The

106. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

107. This is so because it is apparent that agencies by and large have not yet been able to overcome institutional biases which predispose them to give too little weight to the environment in their decisionmaking, and too much weight to other factors. For example, the Federal Highway Administration tends to make its decisions on the basis of what is best for the automobile, the Corps of Engineers is preoccupied with flood control, the Forest Service thinks in terms of commercial timber harvest, and the Federal Power Commission believes it must facilitate the exploitation of energy resources. These biases of mission-oriented agencies are the result of Congressional directives, administrative policy, and time-honored habit. They are well-insulated by inertia.

108. 42 U.S.C. § 4332(2)(C) (1970).

109. 506 F.2d 677 [7 ERC 1048] (9th Cir. 1974) (en banc).

110. The decision in *Natural Resources Defense Council v. Grant*, 355 F. Supp. 280 [5 ERC 1001] (E.D.N.C. 1973) is an example of vigilant judicial policing of NEPA. The court found that the EIS (1) failed to consider important environmental effects, (2) misrepresented the nature of other environmental effects, and (3) failed to disclose and discuss alternatives; it therefore concluded: "This court finds as a fact that the final Chicod Creek Watershed Environmental

judiciary must closely scrutinize not only the methodology of the agency, but also the thought processes that resulted in its decision. Judicial policing of agency compliance also requires that courts examine the propriety of the weight given to various factors, and the "balance struck"¹¹¹ by the agency. The courts' willingness to resolve these fact issues pertaining to compliance, more than anything else, will determine the future effectiveness of judicial review under NEPA. The courts have the responsibility, and the means at their command, to see to it that agencies fully comply with NEPA. Congress may pass environmental legislation, but the workings of government are such that only sustained judicial vigilance can guarantee that the mandate of law is translated into agency action. The courts should not sacrifice NEPA's effectiveness by relying on the nice, but artificial distinction between "procedural" and "substantive" to draw back from judicial review of the fact of NEPA compliance.

Statement does not fully and adequately disclose the adverse environmental effects of the . . . Project; nor . . . adequately disclose or discuss reasonable alternatives to the Project. . . ." (emphasis added). *Id.* at 289. But some courts have been reluctant to go behind the record other than for the limited purpose of applying the arbitrary and capricious test. *See, e.g.,* Environmental Defense Fund v. Armstrong, 356 F. Supp. 131 [5 ERC 1153] (N.D. Cal. 1973), *aff'd*, 487 F.2d 814 [6 ERC 1068] (9th Cir. 1973). One court refused to weigh the evidence contradicting an EIS, saying:

It is simply unrealistic for plaintiffs in this case to assume that this or any other court is going to make findings of fact which would attempt to resolve the conflicts between data contained and relied upon in the final EIS which may conflict with data which plaintiffs believe is more reliable.

Environmental Defense Fund v. Froehlke, 368 F. Supp. 240 [6 ERC 1079] (8th Cir. 1973).

111. Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 [2 ERC 1779] (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).