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ENVIRONMENTAL LAW—NATIONAL ENVIRONMENTAL POLICY ACT: The Fifth Circuit holds that a private citizen suffering economic injury due to rapid transit system's failure to adhere to its environmental impact statement does not have a private right of action under the National Environmental Policy Act. *Noe v. Metropolitan Atlanta Rapid Transit Authority,* 644 F.2d 434 (5th Cir. 1981).

The plaintiff in *Noe v. Metropolitan Atlanta Rapid Transit Authority*[1] owned a bookstore near the construction site of Atlanta's metropolitan area rapid transit system (MARTA). Noe claimed that the physical presence of the construction site and the noise levels it generated resulted in a loss to her business. Consequently, she filed suit against MARTA and its builders in federal district court seeking declaratory and injunctive relief and money damages. The plaintiff asserted that MARTA and its builders had violated the National Environmental Policy Act (NEPA)[2] because they had failed to comply with the environmental impact statement (EIS) prepared for the project prior to construction.[3] She also claimed that NEPA created an implied private right of action to enforce the statute. The district court dismissed the suit for lack of federal jurisdiction on the basis that NEPA did not require MARTA and its builders to adhere to their own EIS.[4]

Noe appealed to the Fifth Circuit court of appeals. She raised two issues on appeal. First, she claimed that NEPA required MARTA to comply with its own EIS. Second, she claimed that NEPA created an

1. 644 F.2d 434 (5th Cir. 1981).

2. 42 U.S.C. §§ 4322–4361 (1976).

3. 42 U.S.C. § 4332(c) (1976) requires that all agencies of the federal government shall "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. . . ." A state agency or official can prepare an EIS for a federal action funded under a program of grants to a state if the state agency has statewide jurisdiction and responsibility for the project and the responsible federal official participates in and approves the preparation of the plan under 42 U.S.C. § 4332(D)(i)(ii) and (iii) (1976).

4. Noe v. Metropolitan Atlanta Rapid Transit Sys., 485 F.Supp. 501, 504 (N.D. Ga. 1980). The court reasoned that MARTA had met NEPA's "twin goals" of consideration of the environmental effects of the construction and public knowledge of and participation in environmental decision making.

implied private cause of action for damages, declaratory, and injunctive relief. To reach the issue of whether NEPA created a private cause of action, the court assumed that MARTA was required to adhere to its own EIS. The court held that NEPA did not create an implied private cause of action, thereby affirming the trial court's dismissal for lack of subject matter jurisdiction.

The Fifth Circuit considered this issue within the context of the four prong test established by the United States Supreme Court in *Cort v. Ash*[5] to decide whether a federal statute creates an implied private cause of action. The test consists of the following four inquiries:

> (1) Is the plaintiff a member of the class for whose special benefit the statute was created?
> (2) Is there any indication of legislative intent either to create or deny the remedy sought?
> (3) Is it consistent with the underlying statutory purposes to imply a remedy such as that sought?
> (4) Is the cause of action one that is traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?[6]

Noe argued that all four factors needed to be considered to determine whether she had an implied private right of action under NEPA. The court, however, disagreed, concluding that the analysis in *Cort* was no longer the law. The Fifth Circuit noted that the Supreme Court had shifted the analysis in decisions subsequent to *Cort* to require a showing of legislative intent to create a private right of action before considering the remaining three criteria; *Cort* required a plaintiff to show merely that a federal statute granted certain rights to his or her class. In *Touche Ross & Co. v. Redington*,[7] the Supreme Court limited its inquiry to whether Congress had manifested an intent to create an implied private right of action under the statute involved. Similarly, in *Transamerica Mortgage Advisers, Inc. v. Lewis*,[8] the Supreme Court held that the plaintiff could not bring suit because it had not shown legislative intent to create an implied cause of action. Based on this case development, the Fifth Circuit held that Noe had failed to show legislative intent to create a private right of action under NEPA and therefore could not maintain her cause of action.

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5. 422 U.S. 66 (1975).
6. Noe v. Metropolitan Atlanta Rapid Transit Authority, 644 F.2d 434, 436 (5th Cir. 1981).
7. Cort v. Ash, 422 U.S. 560 (1979).
8. 444 U.S. 11 (1979). The plaintiff in *Lewis* was within the class Congress intended to benefit as required under the first *Cort* criterion, but that was immaterial to the Court's decision to deny plaintiff's claim.

Although it had determined that application of the four pronged *Cort* test was no longer necessary, the court nonetheless considered Noe's claims in light of all four *Cort* criteria and found that she failed under the remaining standards. Initially, Noe claimed that she fell within the class of citizens the act intended to benefit because NEPA required MARTA to prepare an EIS covering the construction which produced the injury to her business. The Fifth Circuit responded that the alleged violation had merely injured Noe incidentally and that her injury was not of the type NEPA legislation protected. Congress intended to prevent uninformed decision making by enacting NEPA. The act "was designed to promote the protection of the environment and to the extent it was intended to aid individuals, to promote the general welfare of all members of society."[9]

Under the second *Cort* criterion, Noe argued that *Cort* and *Cannon v. University of Chicago*[10] did not require her to show congressional intent to create the remedy sought, but only to show that the statute had granted a class of persons a certain right. The Fifth Circuit found again that *Lewis* requires a determination that Congress intended to create a private right of action under NEPA before considering whether Congress had granted Noe's class a certain right.

The court also found that the protection Congress provided under NEPA did not include a remedy for a private citizen injured by a NEPA violation. The Fifth Circuit instead discerned a specific congressional desire evidenced by the legislative history not to create a private right of action. The Senate version of the NEPA bill stated that "the Congress recognizes that 'each person had a fundamental and inalienable right to a healthful environment.' "[11] The House Conference Committee deleted this statement because it was uncertain of the "legal scope" of the Senate provision.[12] The court found this to be an indication that Congress specifically did not intend for citizens to be able to use NEPA to redress private injuries, and Noe could not therefore satisfy the second *Cort* criterion.

The Fifth Circuit determined that to imply a private right of action would be inconsistent with the underlying purposes of NEPA, according to the third *Cort* criterion. The underlying purpose of NEPA is to provide decision makers with reasonably accurate information about the environmental impact of a specific project.[13] The court reasoned that allowing a private right of action whenever the ultimate result of a project differed

9. 644 F.2d 434, 438 (5th Cir. 1981).

10. 441 U.S. 677 (1979).

11. CONFERENCE REPORT NO. 91-765, 91st Cong., 2d Sess. 2, *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 2751, 2768.

12. *Id.* at 2769.

13. Noe v. Metropolitan Atlanta Rapid Transit Authority, 644 F.2d 434, 439 (5th Cir. 1981).

from the EIS would lead those preparing the EIS to hedge their environmental predictions so as to insure that the ultimate result would not be worse than those predictions. This hedging would lead decision makers to rely on inaccurate information, inconsistent with the informed decision making required by NEPA.

Finally, the Fifth Circuit found that Noe's claim was essentially a cause of action based on nuisance. The court noted that state law traditionally controls nuisance claims. Thus, Noe's claim was one generally relegated to state law, and failed to satisfy the fourth criterion in *Cort*.

The Fifth Circuit concluded that the Supreme Court in *Lewis* had overruled the *Cannon* and *Cort* standard that a plaintiff need only fall into a class of persons a statute intends to protect to assert a private right of action. The standard is now much stricter. Under *Noe's* interpretation of current law, the four prong test in *Cort* is reduced to a two-tiered analysis. A plaintiff must first show that Congress intended to create the remedy sought, and only then may a court consider the other three *Cort* factors.

The Fifth Circuit held that Congress intended NEPA to benefit the general public, and that Congress had specifically rejected enforcement by individuals through a private right of action under the act.

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