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Report or Recommendation Necessary to Trigger EIS

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REPORT OR RECOMMENDATION NECESSARY TO TRIGGER EIS

ENVIRONMENTAL LAW—Scope of Environmental Impact Statements to include only that geographical area for which there has been a report or recommendation on a proposal for major federal action; Environmental Impact Statements due only when the recommendation or report is made. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

Congress, in 1969, passed the National Environmental Policy Act (NEPA) "to create and maintain conditions 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."[1] The act, in order to encourage full and continuing consideration of environmental factors in policy-making, requires a detailed statement of environmental impact for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . . ."[2] This case concerns two key issues: the point during an agency's formulation of a proposal that an impact statement must be issued and the proper scope of that statement.

Plaintiffs (environmental groups) brought this action for declaratory and injunctive relief claiming that defendant federal agencies could not allow further coal development in the Northern Great Plains region without preparing a "comprehensive environmental impact statement." The District Court granted summary judgment to the defendants, concluding that the complaint stated no claim upon which relief could be granted.

Before hearing oral arguments, the Court of Appeals granted an injuncting pending appeal on the case.[3] One judge (in an opinion foreshadowing his dissent on the merits) dissented, finding no explicit or implicit program encompassing the region in question. The Court of Appeals reversed the summary judgment, finding that the time was ripe for a regional impact statement since the federal agencies "contemplated" a regional plan or program. The Court of Appeals adopted a four-fold balancing test to determine the ripeness

1. National Environmental Policy Act of 1969, § 101(a), 42 U.S.C. § 4331 (1970).
2. National Environmental Policy Act of 1969, § 102(C), 42 U.S.C. § 4332(C) (1970).
3. *Sierra Club v. Morton*, 509 F.2d 533 (D.C. Cir. 1975).

of the requirement to prepare impact statements, and finding the record unclear as to two of the elements, remanded the case, instructing the agencies to define their role in the development of the region. In the meantime, the Court of Appeals continued the injunction.

The Supreme Court, granting certiorari, found the test applied by the Court of Appeals had no basis in the language or the legislative history of NEPA. The Court, reading NEPA strictly, found that no plan existed to develop the region or to encourage such development. The Court relied upon the statement in the preface of an interim report on coal development in the region issued after the Court of Appeals opinion, that the alternatives presented were "for study and comparison only; they do not represent specific plans or proposals."[4] The Supreme Court, however, ignored the implementing order for this report by the Secretary of the Interior:

> It is important that we not lose this opportunity by engaging in single purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.[5]

Moreover, the Supreme Court rejected the balancing test proposed by the Court of Appeals because of its deviation from the strict wording of NEPA and because it posed several practical problems. First, to require preparation of impact statements prior to a formal proposal would leave the affected agencies uncertain as to their procedural duties under NEPA. Secondly, such a requirement would invite judicial involvement in the daily decision-making processes of the agencies. Finally, the Court reasoned that this requirement would result in preparation of many needless impact statements.

The Supreme Court addressed a question raised by the plaintiffs which the appellate court did not reach, namely, whether an impact statement for the entire region is required because the coal-related projects in that region are intimately related. The underlying consideration was whether the *cumulative* impact of several proposals, each of which may be supported by its own impact statement, may be such that the environmental impact must be studied *in toto* rather than piecemeal. The Supreme Court agreed, in principal, that these studies might be required in some circumstances. It held, however, such determination on the part of an agency can be overturned only if the agency is shown to have acted arbitrarily in its decision and thus abused its discretion. The Supreme Court did not find that the

4. *Kleppe v. Sierra Club,* 427 U.S. 390, 404 (1976).
5. *Sierra Club v. Morton,* 514 F.2d 856, 863 (D.C. Cir. 1975).

agency decision, that the cumulative effect of coal mining in the Northern Great Plains did not require a separate EIS, was arbitrary.

Justice Marshall, joined by Justice Brennan, strongly dissented on the point at which an impact statement should be required. The dissent focuses on the manifest intent of Congress that early "consideration of environmental consequences through production of an environmental impact statement is the whole point of NEPA. . . ."[6] When the remedy may be brought only at the terminal point of the proposal, the remedy is ineffectual in securing compliance with the intent of early consideration and often merely leads to post-hoc rationalizations of the proposal.

Thus, the dissent would approve of the four-part balancing test of the appellate court "in the small number of cases where the need for work to begin on an environmental impact statement is clear and the agency violation blatant."[7] The dissent points out that, although the test is not explicitly formulated in the statute, the statute was vaguely drafted so as to catalyze development of a common law in the area. Moreover, the practical objections against an early requirement of impact statements is challenged head-on in the dissent. First, the requirement would not invite confusion in the agencies as to their duties; those duties are clear and the requirement would merely enforce compliance with those duties. Secondly, the possible intervention of the courts in the decision-making of agencies would be limited to the question of whether an impact statement was timely. Also, since any right envisions litigation, the possibility of litigation can hardly be objectionable. Finally, the test would not create needless impact statements since its proposal is to eliminate undesirable proposals at an earlier stage than they would otherwise be eliminated.

This case severely limits the ability to challenge agency action affecting the environment. Except in very narrow circumstances agency processes may not be challenged until they attain the status of formal proposals or plans. Since much agency action is piecemeal and the ultimate effect is not formalized into an overall plan, the unarticulated cumulative effect may not be challenged, especially in light of the holding that the scope of the required impact statements is a matter of agency discretion.

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6. *Kleppe v. Sierra Club*, 427 U.S. 390, 417 (1976).
7. *Id.* at 418-19.