SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 25 | Issue 4

1975

General Revenue Sharing, NEPA, and the Bureaucratic Paper Shuffle: Must the Federal Government Prepare Environmental Impact Statements Prior to Local Spending Decisions

Judith Harris Rawson

Recommended Citation

Judith Harris Rawson, *General Revenue Sharing, NEPA, and the Bureaucratic Paper Shuffle: Must the Federal Government Prepare Environmental Impact Statements Prior to Local Spending Decisions*, 25 Case W. Res. L. Rev. 797 (1975)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol25/iss4/5

Notes

GENERAL REVENUE SHARING, NEPA, AND THE BUREAUCRATIC PAPER SHUFFLE: MUST THE FEDERAL GOVERNMENT PREPARE ENVIRONMENTAL IMPACT STATEMENTS PRIOR TO LOCAL SPENDING DECISIONS?

And the Lord spake unto Moses, saying: "There is both good news and bad news. The good news is that plagues shall smite your Egyptian oppressors. The Nile shall be turned to blood, and frogs and locusts shall cover the fields, and gnats and flies shall infest the Pharaoh's people, and their cattle shall die and rot in the pastures, and hail and darkness shall visit punishment upon the land of Egypt! Then will I lead the children of Israel forth, parting the waters of the Red Sea so that they may cross, and thereafter strewing the desert with manna so that they may eat."

And Moses said, "O Lord, that's wonderful! But tell me, what's the bad news?"

*And the Lord God replied, "It will be up to you, Moses, to write the environmental impact statement."**

I. INTRODUCTION

IT WOULD be difficult for one to assert, when comparing the National Environmental Policy Act of 1969[1] (NEPA) and the State and Local Fiscal Assistance Act of 1972[2] (Revenue Sharing Act), that one piece of legislation is more important than the other. The goals of the two Acts—environmental protection and fiscal integrity of local governments—are both recognized as important foundations of a healthy society.

Yet, of necessity, one of these Acts must prevail over the other because they are presently on a collision course. The statutes are concerned with two national priorities that are so related that overlap between the Acts is inevitable. At the same time, the statutes spring from mutually exclusive philosophies and employ contradictory methods of execution. NEPA is designed to inject ecological considerations into national decisionmaking by requiring the preparation of an environmental impact statement by all federal agencies as a con-

* Originally appeared in PLAYBOY Magazine, Feb. 1975, at 106; copyright © 1975 by Playboy.

1. 42 U.S.C. §§ 4321-47 (1970).

2. 31 U.S.C. §§ 1221-63 (Supp. II, 1972).

dition precedent to any "major federal action significantly affecting the quality of the human environment."[3] In contrast, the Revenue Sharing Act was premised on a determined opposition to entangling federal stipulations. The legislation was designed to return control over spending decisions to state and local governments by returning tax dollars to those governments with a minimum of federal conditions.[4] Preparation of an impact statement by the Treasury Department prior to distribution of revenue-sharing monies is not one of the few conditions expressly required by the Act.[5]

As an overlay to this statutory stand-off, it should be observed that during the past five years Congress has greatly expanded the federal role in ensuring uniform national environmental standards.[6] It is ironic, then, that in 1972 Congress instituted revenue sharing without debating whether federal money should be spent in a manner consistent with federal environmental goals and without any express provision for environmental protection. Some commentators have argued that in order to preserve the federal role as guardian of the environment, NEPA should be applied to the Revenue Sharing Act on the basis of policy considerations and on the legislative intent behind NEPA itself.[7] The Department of the Treasury and the Council on Environmental Quality have countered with the assertion that NEPA is not applicable to projects where the only federal participa-

---

3. 42 U.S.C. § 4332(c) (1970). For a detailed discussion of the Act see notes 14-24 *infra* and accompanying text.

4. For an examination of the legislative intent underlying the Act see notes 94-127 *infra* and accompanying text.

5. For a description of the provisions of the Act see notes 34-37 *infra* and accompanying text.

6. First, in 1970 Congress tacitly approved President Nixon's Reorganization Plan No. 3, which centralized the federal operation of pollution control programs by establishing the Environmental Protection Agency. 42 U.S.C. § 4321 (1970); 35 Fed. Reg. 15623 (1970). Secondly, the 1970 amendments to the Clean Air Act directed the Administrator of the Environmental Protection Agency (EPA) to issue national air quality standards. Each state was to adopt, subject to EPA approval, a plan to implement the standards. 42 U.S.C. §§ 1857b *et seq.* (1970). Finally, the 1972 amendments to the Federal Water Pollution Control Act gave EPA broad powers to set water quality standards and to limit effluent discharges. 33 U.S.C.A. §§ 1251-1376 (Supp. 1975).

7. *See* Note, *The Application of Federal Environmental Standards to the General Revenue Sharing Program: NEPA and Unrestricted Federal Grants*, 60 VA. L. REV. 114 (1974); Westside Citizens Ass'n v. Shultz, No. C-C-74-16 (W.D.N.C., filed Jan. 14, 1974); Carolina Action v. Simon, 389 F. Supp. 1244 (M.D.N.C. 1975). *But see* 1972 DUKE L.J. 667, 668. *See also* Note, *The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act*, 23 CATH. U. L. REV. 547 (1974), de-

tion is in the distribution of revenue-sharing funds under the Revenue Sharing Act.[8] Two suits have been brought in federal district courts in North Carolina to test the relative strength of these conflicting arguments. One, *Carolina Action v. Simon*, was recently dismissed on the ground that NEPA does not apply to the Revenue Sharing Act. The other is still pending.[9]

A decision that the requirements of NEPA are applicable to the

---

scribing the extensive influence the guidelines have had on courts and agencies.

The Revenue Sharing Act confines the use of revenue-sharing funds to priority expenditures. *See* note 34 *infra*. Since the priority categories include all ordinary and necessary capital expenditures, such as the construction of buildings, sewage treatment systems, and highways, the use of revenue-sharing funds will frequently have broad environmental implications. The consequent need for environmental safeguards should not be underestimated.

8. William Sager, attorney for the Office of Revenue Sharing (a division of the Department of the Treasury), is reported to have explained that NEPA was not applicable to revenue sharing entitlement funds because, in the words of the reporter, the "Department of Treasury is not funding specific programs with revenue sharing but is rather providing general fiscal assistance. In contrast to other federal programs that provide aid to local and state governments, programs undertaken with revenue sharing funds are the recipient jurisdiction's own." *Effect of Other Laws on Revenue Sharing Doubted*, REVENUE SHARING BULL., Jan. 1973, at 10.

The Treasury Department's view has also been adopted by the Council on Environmental Quality (CEQ), an advisory group established by NEPA. CEQ's guidelines for the preparation of impact statements provide that the types of federal actions requiring the filing of an impact statement include

> [n]ew and continuing projects and program activities; directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance (except where such assistance is solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972 . . . with no Federal agency control over the subsequent use of such funds) . . . .

40 C.F.R. § 1500.5(a)(2) (1974).

The authority of CEQ to enforce these regulations may be open to challenge since NEPA does not specify that CEQ is to interpret and enforce the Act. *See* Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412, 421 (2d Cir. 1972); F. ANDERSON, NEPA IN THE COURTS, 102-03 (1973); Note, *The Application of Federal Environmental Standards, supra* note 7, at 119-20. Nevertheless, the interpretation of a statute by the agency most involved with the administration of the statute is probably entitled to great weight. This argument is made in Federal Defendants' Supplemental Motion to Dismiss at 3, Westside Citizens Ass'n v. Shultz, Civil No. C-C-74-16 (W.D.N.C., filed Oct. 4, 1974). *See* Comment, *The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act, supra* note 7, which discusses the great influence the guidelines have had on courts and agencies.

9. Both suits sought to enjoin the Secretary of the Treasury from disbursing revenue-sharing funds to Charlotte and Durham until environmental impact

Revenue Sharing Act might appear inevitable in view of the strong mandate of NEPA itself,[10] the steady ascendancy of ecological concern, and the dramatic extension of NEPA's reach by the judiciary. On the other hand, the Revenue Sharing Act involves a contradictory mandate, as well as serious administrative obstacles to the preparation of impact statements, and a lack of federal control over the money, which taken together may place revenue sharing beyond the limits of NEPA established by judicial precedent.

The proper balance between the conflicting policies of NEPA and the Revenue Sharing Act turns upon three crucial issues: First, do the judicial precedents that have extended the mandate of NEPA compel a holding that impact statements must be prepared prior to distribution of revenue-sharing funds?[11] Secondly, are additional, judicially imposed constraints consistent with the legislative history of the Revenue Sharing Act?[12] And finally, would the practical problems of preparing meaningful impact statements prior to federal dispersal of funds make filing of the statements futile?[13] The answers to these questions indicate that the requirements of NEPA should not be imposed upon the Revenue Sharing Act.

II. BASIC PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE STATE AND LOCAL FISCAL ASSISTANCE ACT

A study of NEPA and its interpretation reinforces the view that its procedural requirement of preparation of an environmental impact statement is a mandatory condition that attaches to all major

---

statements had been prepared on projects to be financed with these federal monies. Carolina Action v. Simon, 389 F. Supp. 1244 (M.D.N.C. 1975), concerned the proposed construction of a new Durham County Judicial Building and City Hall to be financed largely with revenue-sharing funds. In holding that NEPA did not apply, the court reasoned that CEQ's guidelines, which exempt general revenue sharing from the application of NEPA, are authoritative. (*See* note 8 *supra* for the text of the guidelines.) The court also interpreted the legislative intent behind the Revenue Sharing Act as precluding further federal controls. Westside Citizens Ass'n v. Shultz, No. C-C-74-16 (W.D.N.C., filed Jan. 14, 1974), is still pending. It concerns the planned transformation of Sugar Creek in Charlotte, North Carolina into a canal lined with hotels, shopping centers, apartment buildings, medical complexes, and restaurants. The project will be funded initially by revenue-sharing funds, and later by funds from either the Department of Housing and Urban Development (HUD) or the Department of the Treasury.

10. *See* notes 15-19 *infra* and accompanying text.

11. *See* notes 43-87 *infra* and accompanying text.

12. *See* notes 94-127 *infra* and accompanying text.

13. *See* notes 128-66 *infra* and accompanying text.

federal actions. Yet it is difficult to imagine how a meaningful environmental impact statement can be prepared under the Revenue Sharing Act in view of the minimal substantive role of the federal government in administering the Act. In addition, the no-strings philosophy underlying revenue sharing and the small number of conditions set forth in the Revenue Sharing Act belie an automatic assumption that NEPA applies to the Act.

A. *The National Environmental Policy Act of 1969*

The requirements of the National Environmental Policy Act of 1969 (NEPA) are not made applicable to the Revenue Sharing Act by express reference. It is arguable however, that they are superimposed on the Revenue Sharing Act by the force of NEPA's proclamation of its applicability to all federal agencies and laws. The force of NEPA's provisions and its power to compel compliance with its specifications are important in analyzing its relation to the Revenue Sharing Act.

NEPA essentially proclaims that an important goal of this nation is protection of the environment. The Act first sets forth a general, substantive policy aimed at preserving environmental balance and aesthetic values. The federal government is directed to use "all practicable means, consistent with other essential considerations of national policy" to achieve these aims.[14] But the strength of the Act lies in the procedural requirements of section 102,[15] often referred to as the action-forcing provision of NEPA. In section 102, Congress authorizes and directs that "to the fullest extent possible" all federal agencies shall consider formally the environmental impact of their actions and administer all public laws in accordance with the ecological policies of the Act.[16] Section 102 thus creates the now famous environmental impact statement (EIS). The House and Senate conferees specified that the phrase "to the fullest extent possible" in section 102 was designed to impose a strong standard

---

14. 42 U.S.C. § 4331(b) (1970).

15. *Id.* § 4332.

16. *Id.* The relevant part of § 102 reads:

> 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, and (2) all 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

of compliance under that section: "The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in . . . [Section 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."[17] This interpretation was incorporated in the guidelines promulgated under the Act[18] and has been adopted by the courts as the basis of strict judicial review.[19]

Probably the single most important force behind a full realization of NEPA's power was the decision of the United States Court of Appeals for the District of Columbia Circuit in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC.*[20] The court's holding that the regulations of the Atomic Energy Commission fail to comply with NEPA's procedural directives is overshadowed by Judge Skelly Wright's analysis of NEPA's mandate to federal agencies and of the judiciary's role in giving effect to the Act. The court acknowledged that the substantive policy of the Act is a flexible one, leaving room for agency discretion. But it emphasized that the procedural provisions in section 102, which were designed to ensure that agencies do in fact consider environmental values in reaching policy decisions, are not highly flexible.[21] After highlighting the House conferees' gloss on the words "to the fullest extent possible,"[22] Judge Wright

---

quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action. . . .

17. H.R. REP. No. 91-765, 91st Cong., 1st Sess. 9 (1969). *See* 115 CONG. REC. 39,702-03 (1969) for the Representatives' views. The Senators' views, set forth in 115 CONG. REC. 40,417-18 (1969), are less strict. They specify that each agency shall comply with the directive unless "the existing law applicable to such agency's operations does not make compliance possible." *Id.* at 40,418. *See* text accompanying note 93 *infra* for a further discussion of the language.

18. 36 Fed. Reg. 7724 (1971).

19. *See, e.g.*, Atlanta Gas Light Co. v. Federal Power Comm'n, 476 F.2d 142, 150 (5th Cir. 1973); Environmental Defense Fund v. TVA, 468 F.2d 1164, 1175 (6th Cir. 1972); Natural Resources Defense Council, Inc. v. TVA, 367 F. Supp. 122, 125 (E.D. Tenn. 1973).

20. 449 F.2d 1109 (D.C. Cir. 1971). The AEC had recently adopted regulations pursuant to NEPA to govern consideration of environmental matters as part of its procedure for issuing permits and licenses for the construction and operation of nuclear plants. In ruling that the regulations were insufficient the court opined that "the Commission's crabbed interpretation of NEPA makes a mockery of the Act." *Id.* at 1117.

21. *Id.* at 1112.

22. *See* text accompanying note 17 *supra.*

concluded with a summary of the court's duty to enforce the substantive and procedural stipulations in the Act.

> The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse. As one District Court has said of Section 102 requirements: "It is hard to imagine a clearer or stronger mandate to the Courts."[23]

Briefly, if NEPA were to apply to the Revenue Sharing Act and thus require the Secretary of the Treasury to prepare an EIS before disbursing federal monies, the courts would presumably enjoin disbursements at the beginning of each entitlement period until a procedurally adequate EIS had been prepared by the federal government. After reviewing an EIS substantively, a minority of courts might also enjoin the release of funds until a particular project had been modified to comply with NEPA's substantive objectives.[24] Whether such remedies conflict with the administrative mechanisms provided for in the Revenue Sharing Act and with its underlying legislative policy is difficult to answer. The initial step in resolving the question involves a brief examination of the Act's provisions and structure.

B. *State and Local Fiscal Assistance Act of 1972*

The State and Local Fiscal Assistance Act of 1972[25] (Revenue

23. *Id.* at 1115 (footnotes omitted). Thus, where federal agencies have failed to recognize their duty under NEPA, courts have usually enjoined the agency action in question until a procedurally valid impact statement has been filed. In the words of one commentator, however, courts have more recently "examined the reality, not just the procedural formality, of the consideration accorded environmental factors by the agencies. It now appears that the courts will review the correctness of the final decisions made under NEPA's substantive provisions, sometimes finding on the merits that proposed actions are not permitted under NEPA." Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 303 (E. Dolgin & T. Guilbert eds. 1974). For a more complete discussion, see *id.* at 303-11. *See also* Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735 (1975).

24. *See, e.g.*, Conservation Council v. Froehlke, 473 F.2d 664 (4th Cir. 1973); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972); Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972)). The cases are discussed in Anderson, *supra* note 21, at 304-11 and F. ANDERSON, NEPA IN THE COURTS 258-65 (1973).

25. 31 U.S.C. §§ 1221-63 (Supp. II, 1972).

Sharing Act) authorized $30.2 billion to be allocated among the states over a 5-year period,[26] on the basis of a formula that reflects each state's population, tax effort, and income.[27] Each state government is entitled to one-third of the amount allocated to the state for each entitlement period;[28] the remaining two-thirds of the state's allocation is distributed directly to local governments of the state according to a formula set forth in the Act.[29] The Secretary of the Treasury distributes the money automatically[30] upon receipt of (1) a planned use report from the units of government outlining their probable use of the money;[31] and (2) assurances from the states and local units that they will use accounting procedures specified by the Secretary[32] and will use the funds in compliance with the provisions of the Act.[33]

The Act imposes only three express prohibitions on state and local governments. First, recipients cannot use entitlement funds, directly or indirectly, to match federal funds under any federal program.[34] Secondly, discrimination based on race, color, national origin, or sex is forbidden in any program or activity funded in whole or in part with entitlement funds.[35] Finally, government employees

26. *Id.* § 1224.

27. *Id.* § 1225. The state share for each entitlement period is obtained by computing two formulas and choosing the larger result. The first "formula multiplies the population of the State by its general tax effort, multiplies this product by the relative income of the State and then compares the resulting product for the State with the sum of the products similarly determined for all of the States." S. CONF. REP. No. 92-1229, 92d Cong., 2d Sess. 4-5 (1972). The second formula is a five-factor formula under which

> the annual rate at the start of the program was (1) $3,500,000,000 divided among the States one-third on the basis of population, one-third on the basis of urbanized population, and one-third on the basis of population inversely weighted for per capita income and (2) $1,800,000,000 divided among the States one-half on the basis of individual income tax collections by State governments and one-half on the basis of the general tax effort of the State and local governments.

Id.

28. 31 U.S.C. § 1226 (Supp. II, 1972).

29. *Id.* §§ 1226-27.

30. *Id.* § 1221.

31. *Id.* § 1241(b). The one-page planned use reports, which contain the only substantive information the Treasury Department receives before it releases funds, are extremely limited in content. *See* notes 144-166 *infra* and accompanying text, which discusses the impracticalities of preparing an environmental impact statement or enforcing it under the Revenue Sharing Act's current administrative procedures.

32. 31 U.S.C. § 1243(a)(5)(A) (Supp. II, 1972).

33. *Id.* § 1243(a)(3).

34. *Id.* § 1223.

35. *Id.* § 1242. To this end, the enforcement remedies of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1970), are expressly made

whose salaries are paid with revenue-sharing funds must be paid at least the prevailing wage for similar work, and laborers and mechanics employed on construction projects where 25 percent or more of the cost is borne by revenue-sharing funds must be paid at the prevailing wage under the Davis-Bacon Act.[36] In addition, units of local government may use their funds only for certain priority expenditures.[37] There is no similar "priorities" restriction for state governments.

The Act contemplates retrospective enforcement of the above prohibitions after the initial receipt and use or misuse of money.[38] As a simple first step, the chief executive officer of each recipient government must certify to the Secretary of the Treasury that entitlement funds have not been, or will not be, used as matching funds or for programs paying substandard wages.[39] Local governments must also certify that the money has been used only for priority expenditures.[40] To reinforce these certifications, the Act also provides for spot check audits or reviews of individual programs.[41] If the Secretary determines that a unit of government has failed to comply substantially with the restrictions of the Act, then, after giving its

---

available to the Secretary. 31 U.S.C. § 1242(b) (Supp. II, 1972).

36. *Id.* §§ 1243(a)(6), (7).

37. *Id.* § 1222(a). Priority expenditures means only:

(1) ordinary and necessary maintenance and operating expenditures for—
   (A) public safety (including law enforcement, fire protection, and building code enforcement),
   (B) environmental protection (including sewage disposal, sanitation, and pollution abatement),
   (C) public transportation (including transit systems and streets and roads),
   (D) health,
   (E) recreation,
   (F) libraries,
   (G) social services for the poor or aged, and
   (H) financial administration; and

(2) ordinary and necessary capital expenditures as authorized by law.

Id.

38. In contrast, an environmental impact statement is useful only if prospective remedies, such as delaying funds or vetoing a particular project, are available. *See* notes 164-66 *infra* and accompanying text for an elaboration of this point.

39. 31 U.S.C. §§ 1223(e), 1243(a)(6) (Supp. II, 1972).

40. *Id.* § 1222(b).

41. *Id.* § 1243(c)(1). A mandatory standard auditing procedure by recipients facilitates federal review of the recipients' records.

chief executive officer reasonable notice and opportunity for a hearing, he must notify the governmental unit that unless corrective action is taken within 60 days, further payments will be withheld until the Secretary is satisfied compliance has been permanently secured.[42]

III. JUDICIAL INTERPRETATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

A. *Degree of Control as a Determinative Factor*

The simple language of NEPA belies the far-reaching influence of the Act on federal procedures for decisionmaking.[43] Although the current judicial momentum behind the extension of NEPA's EIS requirement[44] initially counsels that the EIS condition will inevitably apply to revenue sharing, the factual patterns of the cases to date suggest that an outer judicial boundary may be drawn which will exclude the Revenue Sharing Act from NEPA. The critical factor found in these cases is substantive federal control or veto power over the specific program. If this factor is absent from general revenue sharing, NEPA might not apply. An absence of sufficient federal control might place a revenue sharing project outside the definition of "major federal action," and thus eliminate the need for filing an EIS at all.[45] Such an argument has merit. The guidelines published by the Council on Environmental Quality (CEQ) state that for an activity to qualify as a major federal action, there must be "sufficient Federal control and responsibility to constitute 'Federal action' *in contrast to cases where such Federal control and responsibility are not present*, as, for example, when Federal funds are distributed in

---

42. *Id.* § 1243(b).

43. By September 1973, 4,462 impact statements had been prepared, and over 70 departments, agencies, or subagencies had published formal implementing procedures. Few agencies have been unaffected by the Act. Anderson, *supra* note 23, at 246.

44. A recent case, Natural Resources Defense Council v. SEC, No. 409-73 (D.D.C. Dec. 9, 1974), demonstrates the extent to which NEPA has been extended. Plaintiffs claimed that in order to implement NEPA to "the fullest extent possible" the SEC should require corporations to disclose both adverse and beneficial effects that their activities have on the environment. Such disclosure would provide necessary investment data for "ethical investors" who are interested not merely in making money, but also in acting in a socially responsible manner. The district court remanded to the SEC, noting that the proposals are "non-onerous," appear to have merit, and should receive serious consideration.

45. *See* 42 U.S.C. § 4332(c), *quoted in* note 16 *supra*.

the form of general revenue sharing . . . ."[46] Although it may be argued that the guidelines are not definitive because CEQ is only an advisory body,[47] the courts so far have followed this standard either explicitly or implicitly. With one possible exception,[48] neither money alone nor nonbinding federal advice has provided a sufficient basis for finding a major federal action. Detailed analysis of additional criteria used in defining "major federal action" is difficult because until recently courts have not measured the facts of individual cases against a generally applicable test. Rather, cases have been grouped by a characterization of the federal activity, such as issuance of a license, substantial federal involvement in a project, or initial federal research.[49] A theme of causation is present in all the cases; "but for" the federal activity, a project would not be started or carried through. However, reliance upon the causation, or "but for," test would include too many activities within the concept of "major federal action." Furthermore, this test is not always consistent with the purposes of requiring an EIS.

Causation is not the only theme underlying factual patterns found by the courts to be major federal actions. The theme of control and agency veto power is also present. This concept, which emphasizes federal agency power to redirect or modify particular programs is also more consistent with the purposes behind the EIS requirement. One goal of NEPA is to protect the environment by educating the decisionmakers. The assumption behind the procedural EIS requirement is that if alternatives beneficial to the environment are considered before project implementation, decisionmakers are likely to make wiser decisions. Under that assumption, it only makes sense to educate the true decisionmakers—those with control over a project's existence and direction. Requiring an EIS from an agency whose participation is essential (the "but for" test), but that has no control over decisionmaking, would not be directly related to NEPA's

46. 40 C.F.R. § 1500.6(c) (1974) (emphasis added). These guidelines also exempt disbursement of revenue-sharing funds from the definition of action. *Id.* § 1500.5(a)(2).

47. *See* note 8 *supra.*

48. McLean Gardens Residents Ass'n v. National Capital Planning Comm'n, 2 ENVIRONMENTAL LAW REPORTER [hereinafter cited as E.L.R.] 20,659 (D.D.C.), *motion for stay of injunction and summary reversal denied,* 2 E.L.R. 20,662 (D.C. Cir. 1972). *See* notes 57-60 *infra* and accompanying text for a discussion of this case.

49. For a detailed analysis of the factual tests used in defining "major federal action" see F. ANDERSON, NEPA IN THE COURTS 57-95 (1973). *See also Comment,* 26 S.C.L. REV. 119, 132 *et seq.* (1974).

goals. An analysis of some frequently cited prototypical cases demonstrates that courts have taken this pragmatic approach.

In *Scientists' Institute for Public Information, Inc. v. AEC,*[50] the Atomic Energy Commission was engaged in a long-term research program to develop the necessary technology for the Liquid Metal Fast Breeder Reactor (LMFBR). The element of control was present because in 1967 the AEC's Report to the President on Civilian Nuclear Power had singled out the LMFBR as a priority program among the fast breeder reactor alternatives. The Commission admitted that one of the results of its commitment to the LMFBR was to retard development of alternative breeder reactor programs. The court held that an EIS was necessary at the research stage. Although AEC itself had not built a particular facility, by developing the technology it had made a decision which would permit utility companies to engage in action affecting the environment through building nuclear power plants.[51]

Jones v. Lynn[52] involved a complex area renewal project in Boston. The United States Court of Appeals for the First Circuit remanded the suit for injunction with instructions that if any of three tests were met, an EIS was required. One of the tests was whether HUD possessed sufficient discretion under the contract to alter the future course of the project. In explanation of the policy behind its holding, the court said: "We would be reluctant not to find a continuing major federal involvement so long as it was established that HUD retained any significant discretionary powers as might permit it to effect an alteration of building or design plans to enhance the urban living environment."[53]

The two cases frequently cited for finding a major federal action despite minimal federal participation are *Davis v. Morton*[54] and *McLean Gardens Residents Association v. National Capital Planning Commission.*[55] However, the theme of control is present in both opinions. In *Davis,* Indian lands were owned by the Pueblo, subject

50. 481 F.2d 1079 (D.C. Cir. 1973).

51. *Id.* at 1088.

52. 477 F.2d 885 (1st Cir. 1972).

53. *Id.* at 890.

54. 469 F.2d 593 (10th Cir. 1972). *See* Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412 (2d Cir. 1972), and Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971) for other examples of "licensing cases."

55. 2 E.L.R. 20,659 (D.D.C. 1972), *motion for stay of injunction and summary reversal denied,* 2 E.L.R. 20,662 (D.C. Cir. 1972).

to a restraint on alienation without the approval of the Secretary of the Interior. Officials from the Interior Department approved a lease of the land to a commercial developer. Subsequently, they approved a master plan for the development of the total acreage, a plat, deed restrictions, and the make-up of an architectural and engineering review board. On the basis of these approvals, the court found that the government was more than an "impartial, disinterested party to the contract."[56] As a practical matter, the Department of the Interior could have conditioned its approval on improvements in the development plan and thus controlled the direction of the project.

In *McLean Gardens* the National Capital Planning Commission (National Commission), a federal administrative agency, gave a favorable report to an application for a private planned unit development in the District of Columbia. The report was given to the District of Columbia Zoning Commission, an administrative agency of the District of Columbia government, possessing the statutory authority to grant variances from general zoning regulations that would be necessary to the development of this planned unit development. Under the statutes, the National Commission's role is purely advisory.[57] The District of Columbia Zoning Commission must coordinate its activities with the National Commission, but the authority to make the final decision is vested solely in the Zoning Commission.[58] Nevertheless, the court held that an EIS was required prior to advisory approval by the National Commission. The case appears to undercut the pattern of control seen in the other cases. However, a closer examination of the court's opinion suggests that either the court mistakenly thought the National Commission had veto power over the applications, or the District of Columbia Zoning Regulations go further then their authorizing statute by requiring positive approval of an application by the National Com-

56. 469 F.2d at 596.

57. 40 U.S.C. § 71g(d) (1970). The relevant part of the section reads:

> Any proposed change in or addition to the regulations or general orders regulating the platting and subdividing of lands and grounds in the District of Columbia shall first be submitted to the Commission by the District of Columbia Council for report and recommendation prior to adoption by such Council. Should the Council not concur in the recommendations of the Commission, it shall so advise the Commission with its reasons therefor and the Commission shall submit a final report within thirty days. After consideration of this final report, the Council may proceed to take action in accordance with its legal responsibilites and authority.

58. 5 D.C. CODE §§ 413, 417 (1973).

mission. According to the opinion, "The D.C. Zoning Regulations call for the review and *approval* of the National Capital Planning Commission before the D.C. Zoning Commission disposes of a preliminary application for a planned unit development."[59] The term "approval" connotes control. The court next observed that the National Commission's procedures fail to require an EIS in those instances "when the Commission's *approval and concurrence* is required for District of Columbia action on planned unit development applications . . . ."[60] Thus, the court seemed to believe that the National Commission did, in fact, have control over the direction of the project.[61]

One final case demonstrates that absent agency control courts might not require an EIS. In *Kings County Association v. Hardin*[62] plaintiffs sought to enjoin the payment of farm subsidies to users of pesticides and fertilizers known to cause pollution of drinking water. Plaintiffs argued that the Secretary's payment of these subsidies was a major federal action significantly affecting the environment and thus required an EIS. The court rejected the argument:

> But [that payment of farm subsidies is a major federal action] is simply not so. Payment of the subsidies is mandatory under the Agricultural Act of 1970 . . . . The recipient is free to use the money in any way he sees fit. The fact that it (or other money of the recipient) was put to a use affecting the environment cannot convert that private use into federal action.[63]

This case bears a close relationship to those involving automatic

---

59. 2 E.L.R. at 20,661 (emphasis added).

60. *Id.* (emphasis added).

61. The degree to which an agency actually participates in the decisionmaking process may provide another useful perspective from which to view these cases. When an agency has control, its participation in the ultimate decision is implicit. As control decreases, participation may decrease, but it need not. Agencies that have merely advisory roles still may have significant input into the ultimate decisions. The structure of the decisionmaking mechanism that was at issue in *McLean* makes it clear that the Planning Commission, although primarily an advisor, played an integral role in the process. Each application was reviewed by the Planning Commission before any decision could be made by the Zoning Commission. The responsibility for evaluation undertaken by the Planning Commission stands in stark contrast to the ministerial duties of the Treasury Secretary under NEPA. In addition, it should be noted that at the time of the *McLean* decision the District of Columbia did not have home rule. Because the Zoning Commission was a creature of Congress, it could be expected to be strongly influenced by the congressionally created Planning Commission. Thus the policy considerations that recommend an EIS when a federal agency has control would be applicable.

62. 5 ENVIRONMENT REPORTER—CASES 1383 (9th Cir. 1973).

63. *Id.* at 1384.

revenue sharing payments. The Treasury Secretary's limited ability to deny revenue sharing funds, coupled with his lack of supervisory control over the use of those funds, may distinguish the revenue-sharing program from all others to which NEPA applies.[64]

B. *Ely v. Velde*

The factor of control also was emphasized in *Ely v. Velde*,[65] a case whose facts present the most convincing analogy to general revenue sharing. The case held that an EIS had to be prepared prior to federal funding of the construction of a prisoner center in Virginia. The federal funds made available under the Omnibus Crime Control and Safe Streets Act of 1968[66] (Safe Streets Act) were to be contributed under the auspices of the Law Enforcement Assistance Administration's[67] (LEAA) block grant program. Some have argued that the similarities between a block grant and general revenue sharing funding are sufficient to warrant the extension of the *Ely* court's reasoning to a case involving general revenue sharing.[68]

In general there are three categories of federal grants: project grants, block grants, and general revenue sharing. Project grants, also known as categorical grants in aid, usually contain numerous federal standards and conditions. Local governments seeking the funds under such grants prepare detailed project applications justifying their need for federal assistance; the responsible federal agency then chooses the most promising projects and disburses funds for those projects in particular.[69] Under block grant programs and general revenue sharing, money is distributed to states and communities by a congressionally established formula based on factors such as population, tax effort, and need. The LEAA program and special revenue sharing[70] are referred to as block grants because fed-

64. *See* notes 25-42 *supra* and accompanying text.

65. Ely v. Velde, 321 F. Supp. 1088 (E.D. Va.), *rev'd in part*, 451 F.2d 1130 (4th Cir. 1971), *on remand*, 363 F. Supp. 277 (E.D. Va. 1973), *rev'd* 497 F.2d 252 (4th Cir. 1974).

66. 42 U.S.C. §§ 3701-95 (1970).

67. The LEAA is an agency created by the Safe Streets Act.

68. *See* F. ANDERSON, NEPA IN THE COURTS 60-61 (1973); Note, *The Application of Federal Environmental Standards*, *supra* note 7.

69. *See* Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-In-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600 (1972).

70. One example of special revenue sharing is The Housing and Community Development Act of 1974. *See* notes 168-75 *infra* and accompanying text.

eral funds are generally available to communities for a broad range of programs; each community then decides specifically how to allocate the money among specific projects. With block grants a state normally must submit a long-range plan to the administering federal agency; agency approval of the plan is a prerequisite to release of that state's fund allocation. Often a plan is not approved until revisions are made to satisfy the federal administrator. In contrast, under general revenue sharing, money is released automatically after receipt of a simple report from local communities. No federal approval of the report is contemplated.[71]

Four decisions are involved in *Ely v. Velde*: the original district court and court of appeals decisions (referred to as *Ely I*), and the second district court and court of appeals decisions made after remand (referred to as *Ely II*). Prior to *Ely I*, the Commonwealth of Virginia applied for $870,000 in federal funds under the Safe Streets Act to be used for the construction of a medical and reception center for state prisoners. Plaintiffs sought an injunction against the administrators of LEAA to prevent the allocation of federal funds for construction of the center until an EIS had been prepared. District Judge Mehridge denied the injunction. He found that the anti-federal strings policy of the Safe Streets Act took precedence over the more discretionary "to the fullest extent possible" language of NEPA.[72] The court of appeals reversed in part[73] and remanded on the ground that the Safe Streets Act was not irreconcilable with NEPA. According to the court, "[w]hen two statutes present an apparent conflict, the proper approach is to ascertain the purposes underlying both enactments" in an attempt to harmonize them.[74] The court of

71. *See* notes 25-33 *supra* and accompanying text.

72. 321 F. Supp. 1088 (E.D. Va. 1971). The court reasoned as follows:

> The Court is of the opinion that the conflict between [The Safe Streets Act] and [NEPA] can be resolved. [The Safe Streets Act] speaks in non-discretionary terms. "The Administration *shall* make grants . . . ." (Emphasis added). However, while the Congress did not intend the clause in NEPA, "to the fullest extent possible," to be an escape provision, it is still discretionary. When two statutes of equal efficacy conflict, one non-discretionary and one discretionary, the non-discretionary one must prevail.

Id. at 1093 (footnotes omitted).

73. Plaintiffs had also sought an injunction against the responsible state official forbidding the placement of the medical center in its proposed location until the state had considered the environmental impact. The court affirmed the district court's dismissal of this claim since NEPA imposes no duties on state agencies. It reversed the entire companion claim against federal officials. 451 F.2d at 1139.

74. 451 F.2d 1130, 1135 (4th Cir. 1971), *quoting* Fanning v. United Fruit

appeals reasoned that the congressional prohibition of federal strings under the Safe Streets Act was based upon a fear that "overbroad federal control of state law enforcement could result in the creation of an Orwellian 'police force.' "[75] This limited fear precludes only particular federal controls. Since there is no danger of fostering a police force by requiring an environmental impact statement, the court of appeals in *Ely I* held that NEPA's mandate must be followed by LEAA.[76]

Following the analysis suggested in *Ely I*, study of Congress' reasons for limiting the federal strings applicable under the General Revenue Sharing Act is crucial. During congressional debate, the no-strings theme was founded not upon the fear of particular federal controls, but on a broad philosophical conception of federalism coupled with a general purpose to increase local flexibility by discarding the types of limitations which had abounded in categorical aid programs.[77] The advocates of no-strings under the Revenue Sharing Act were not opposed simply to particular federal strings, but to the limiting effect any restriction whatsoever would have on local discretion. Consequently, the Revenue Sharing Act and NEPA cannot be harmonized in the same manner as LEAA and NEPA were in *Ely I*.[78]

Even if the Revenue Sharing Act and NEPA could be harmonized, it is not clear from the discussion in any of the *Ely* opinions whether the simple distribution of funds under revenue sharing constitutes a major federal action. In *Ely I*, the court of appeals assumed *arguendo* that since the LEAA block grant provided only 20 percent of the construction funds for the prisoner center, the grant in and of itself was not a "major federal action." However, the court continued: "[I]n view of the LEAA's overall involvement in the promotion and planning of the Center, as well as the cumulative impact of the proposed federal action, the NEPA definition of 'major federal action' has been satisfied."[79]

Co., 355 F.2d 147, 149 (4th Cir. 1966).

75. 451 F.2d at 1136.

76. *Id.* at 1137.

77. *Hearings on the Subject of General Revenue Sharing Before the Comm. on Ways and Means*, 92d Cong., 1st Sess., pt. 1, at 47-48, 52 (1971); S. REP. No. 92-1050, 92d Cong., 2d Sess., pt. 1, at 10-11, 16 (1972).

78. This argument presupposes that the bias against federal strings is strongly reflected in the Act; if it were not, the additional condition of NEPA would not be contrary to legislative intent. *See* notes 111-22 *infra* and accompanying text.

79. 451 F.2d at 1137-38 & n.22 (citations omitted).

After the initial court of appeals decision, Virginia withdrew its request for federal funds and made plans to construct the center with state funds. Thus, on remand, the district court was faced with the question whether the initial approval by the LEAA of federal funds for the center made the project irrevocably federal so that an EIS would still be required for what was now a state funded project. The court assumed that a project would become irrevocably federal once a state received or spent federal funds. However, since federal funds were never transferred to the state, there was "virtually no evidence of federal contacts, significant or otherwise, with the Medical and Reception Center."[80] The court went on to say:

> The whole nature of LEAA block grants leads to the conclusion that there was never a federal aura surrounding the Center. As described previously, LEAA funds are designed to be administered with a minimum of conditions attached and with very little federal control. Programs originally proposed can be altered, amended and substituted. The various programs specified are independent from one another, such that an entire comprehensive plan, for example, should not be considered as a single project within the meaning of applicable federal law.[81]

Significantly, each court's final judgment whether this particular project was a "major federal action" turned on the degree of participation and control exercised by the federal government, not on the amount of money involved. The circuit court of appeals' opinion in *Ely II* reinforces the theme of federal controls. The court argued that if the state were to retain federal funds that were originally earmarked for the prisoner center, but were later to transfer them to less controversial projects, it would have to comply with federal environmental laws (NEPA) in constructing the prisoner center. The courts stated: "A block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached. The state voluntarily requested federal participation in the center and in this manner obtained construction funds conditioned upon compliance with NEPA and NHPA."[82] This gratuitous comparison between block grants and revenue sharing is dictum, but the consistent emphasis of the court on federal control and supervision establishes a standard against which any comparison between block grants and revenue sharing must be measured.

---

80. 363 F. Supp. at 286.
81. *Id.* at 287.
82. 497 F.2d at 256.

LEAA block grants and revenue sharing are similar in that a statutory allocation formula determines each state's share of money; the two programs differ dramatically, however, in the degree of supervision exercised by the responsible federal agency. Under the Safe Streets Act, LEAA must approve a state's comprehensive plan for use of the money before releasing funds allocated to the states by population. The *Ely II* court summarized this procedure:

> The evidence before the Court is that LEAA spends two or three months reviewing the plans before approving them. During this period, there may be considerable dialogue between LEAA and the state agency concerning various aspects of a given plan, with changes being made in the plan to satisfy LEAA.[83]

Each time the state alters its comprehensive plan it must secure LEAA approval of the adjustment. At the time of the *Ely II* district court decision, Virginia had already secured approval for two alterations of its plan[84] and would have had to do so a third time in order to retain the funds that had been allotted originally to the medical center, but that the state later decided to use for other purposes.[85] In contrast, under revenue Sharing, although the state does have to submit planned use reports and assurances that it will use the funds in accordance with the conditions of the Act, release of the allotted funds is dependent upon the Treasury Department's mere receipt of those reports, not upon the Department's approval of the plans.[86]

LEAA's veto power is not limited to the initial stages of approving a comprehensive plan. Under the block grant program, LEAA extends a letter of credit upon which states can draw as they need funds.[87] LEAA can halt a state's activity in the event of noncompliance with the statute, regulations, or comprehensive plan by simply suspending the letter of credit in the middle of an allotment period.[88] Under revenue sharing, the Treasury Department transfers all entitlement funds to the states at the beginning of each allotment period. If there is a violation of the Act after the transfer, the Department can initiate administrative hearings in an effort to impose a financial penalty or can refuse to transfer future allotments. The Department

83. 363 F. Supp. at 281.
84. *Id.* at 282.
85. *Id.* at 282-83.
86. *See* note 30 *supra* and accompanying text.
87. 263 F. Supp. at 281.
88. *Id.*

cannot, however, automatically stop an ongoing project or retrieve any unused funds in that particular allotment period.[89]

C. *Is Disbursement of Revenue-Sharing Funds a Major Federal Action?*

General revenue sharing incorporates less federal control than does the block grant program; because of this fundamental distinction, *Ely v. Velde* is not binding precedent for revenue sharing. The question remains, however, whether general revenue sharing therefore fails to reach the level of a "major federal action." Since the EIS requirement is beneficial only if those preparing the statement have the power to make adjustments in a project to reflect the results of their EIS, revenue sharing does not involve sufficient control to trigger an EIS. The Secretary has no substantive power over the direction of a program prior to the release of funds.[90] The role of the federal government as little more than a conduit helps to explain why CEQ's guidelines exclude revenue sharing from the definitions of "action" within the meaning of "major federal action."[91]

Indeed, the lack of federal control raises a real question whether general revenue sharing is federal at all. The Treasury Department is simply a conduit for returning income taxes to the states that generated the income. Local recipients direct the money into local projects controlled largely by local law. The money does not become associated with any project having a significant effect on the environment until it is well beyond the federal domain. Although there are no precedents directly on point, the underlying control theme of the case law suggests that general revenue sharing programs may not qualify as federal actions. This conclusion is bolstered by the legislative history of the Revenue Sharing Act, which indicates that Congress did not assume that federal stipulations other than those contained in the bill would be applied to general revenue sharing.[92]

Of course, if the Revenue Sharing Act had been in effect at the time NEPA was passed, legislative intent probably would be irrelevant because the NEPA conferees from the House allowed an exemption for agencies only if "existing law applicable to such agency's operations *expressly* prohibits . . . full compliance."[93] However, the

89. *See* notes 25-42 *supra* and accompanying text.

90. *See* text accompanying notes 38-42 *supra.*

91. *See* note 46 *supra* and accompanying text.

92. *See* notes 94-127 *infra* and accompanying text.

93. Note 17 *supra* (emphasis added).

term "existing" in that interpretation signals Congress' recognition in 1969 that future laws might be passed to which they would not want NEPA to apply. Whether the Revenue Sharing Act was such an exception depends on the legislative intent behind that particular statute.

IV. Legislative Intent Underlying the Revenue Sharing Act

The concept of returning tax dollars to local communities has had a long history,[94] which makes it difficult to summarize succinctly the varied and sometimes conflicting goals that have been advanced by champions of the concept.[95] During congressional debate over the Revenue Sharing Act, the advantages of reinvigorating the federal system by giving local governments sufficient financial resources and

---

94. *See generally* Stolz, *Revenue Sharing—New American Revolution or Trojan Horse?*, 58 Minn. L. Rev. 1, 5-9 (1973), which presents a history of revenue sharing proposals.

95. Walter Heller, as chairman of the Council of Economic Advisors during the Kennedy and Johnson Administrations, was a strong advocate of revenue sharing for economic reasons. *See* W. Heller, New Dimensions of Political Economy (1966). In 1967 Richard Goodwin argued against the trend of centering more power and authority in the federal government, saying, "Decentralization is not abdication. . . . [T]he guiding principle should be the transferring to local government or private groups of the needed resources, and the responsibility for decision, action, and policy in accordance with national standards of varying degrees of specificity." 43 Commentary, June 1967, at 37.

Nelson Rockefeller, as the nation's senior Governor, observed in 1972, "All three levels of government—federal, state and local—are involved in most of the major programs, each with regulations, each providing money, and therefore no one can individually clean the [bureaucratic tangle] up." National Journal, Dec. 16, 1972, at 1915.

In a message to Congress, former President Nixon stated:

> While effective in many instances, this rapid growth in Federal grants has been accompanied by:
> —Overlapping programs at the State and local level.
> —Distortion of State and local budgets.
> —Increased administrative costs.
> —Program delay and uncertainty.
> —A decline in the authority and responsibility of chief executives, as grants have become tied to functional bureaucracies.
> —Creation of new and frequently competitive state and local governmental institutions.
>
> Another inevitable result of this proliferation of Federal programs has been a gathering of the reins of power in Washington. Experience has taught us that this is neither the most efficient nor effective way to govern; certainly it represents a radical departure from the vision of Federal-State relations the nation's founders had in mind.

flexibility to solve their own problems was generally recognized.[96] However, the official records chronicle an unusually philosophical debate over the wisdom of separating the taxing and spending powers by giving federal tax funds to local governments. The House Ways and Means Committee, and particularly its Chairman, Representative Wilbur Mills, insisted that some federal control be maintained. According to the House Committee report:

> The basic purpose of the new assistance program is to help State and local governments finance their vital needs. In keeping with this objective, it is essential that the funds, in fact, be spent for high priority purposes. In its consideration of the problem, your committee studied a number of different approaches. On the one hand, it would theoretically have been possible for the legislation to insure that the aid funds are spent for desirable high-priority purposes by setting down minute and detailed specifications as to how the funds are to be spent. Your committee rejected this procedure, however, because it would defeat a major purpose of the new program, namely, to fill in a gap in the present categorical aid programs by providing a more flexible system of assistance.
>
> On the other hand, the opposite approach would permit the local governments to spend the assistance funds as they saw fit without any strings attached to the use of the funds. Your committee rejected this approach also on the ground that it is wrong in principle for the Federal Government to collect taxes and hand them over to the local governments to spend without any guidelines as to how the funds are spent. In effect, this procedure would divorce completely the responsibility for raising revenue from the

H.R. Doc. No. 91-148, 91st Cong., 1st Sess. 2 (1969), set forth in 115 CONG. REC. 23,746 (1969) (Message from the President). See National Tax Association Seminar, *Balancing Our Federal-State-Local Fiscal System*, 24 NAT'L TAX J. 278-399 (1971), for a variety of other viewpoints.

96. S. REP. No. 92-1050, 92d Cong., 2d Sess., pt. 1, at 16 (1972); H. REP. No. 92-1018, 92d Cong., 2d Sess., pt. 1, at 7 (1972). Some argued, however, that even if Congress did intend to return power to local governments under general revenue sharing, the federal government would gradually reassert control over its own money and thus over recipients of the money. Dissenting members of the House Committee on Ways and Means stated:

> This bill takes the unprecedented step of underwriting, at the federal level, the general governmental expenditures of state and local governments. The dependence of state and local governments on federal largess to meet their basic governmental responsibilities will result in the federal government eventually prescribing how state and local governments must meet their responsibilities. The Chairman [Wilbur Mills] pinpointed the true nature of revenue sharing with a very apt metaphor last year when he stated that revenue sharing is more

> spending of revenue. This would have meant no balance of priorities between taxing and spending.[97]

Reflecting the Chairman's view, the House bill imposed limited "priority expenditure" categories on local governments. Federal funds could be used for necessary maintenance and operating expenses in only three areas: safety, environmental protection, and public transportation.[98] In addition, funds could be used for capital expenditures only in the areas of sewage collection and treatment, refuse disposal systems, and public transportation.[99]

On the other hand, the Senate Finance Committee, under the chairmanship of Senator Russel B. Long, did not attach any strings through the use of priority categories to limit how the funds could be spent. The bill did, however, prohibit discrimination on the grounds of race, color, national origin, or sex, and banned the use of federal revenue sharing monies as matching funds for other federal programs.[100] The Administration supported the Senate in advocating a no-strings approach.[101] The House and Senate bills were passed by their respective houses without substantial changes.

Both Chairman Long and Chairman Mills described the conference report as a compromise between the two positions in the Senate

---

> in the nature of a Trojan horse from which at the appropriate time will spring new rules and strictures on the activities of those very governmental bodies who are being wooed by this gift from Troy.

H.R. Rep. No. 92-1018, 92d Cong., 2d Sess. 91 (1972) (views of dissenting members).

97. H.R. Rep. No. 92-1018, 92d Cong., 2d Sess. 11 (1972) (views of dissenting members).

98. 118 Cong. Rec. 35,896 (1972).

99. *Id.*

100. S. Rep. No. 92-1050, 92d Cong., 2d Sess., pt. 1, at 3 (1972). The Senate Report explained:

> The House bill would have required the funds to be used only for a limited number of so-called high-priority purposes. On the other hand, the committee believes that one of the principal virtues of revenue sharing is the fact that this program is different from the categorical grant programs. If "no strings are attached," the funds may be spent by the local government for what the local citizenry recognize as their high priority purposes, rather than having priorities established by the Federal Government for them which could conflict with their own interests.

Id.

101. In a letter from the Secretary of the Treasury to Senator Long, the Department opposed priority expenditure categories. "A third aspect of the bill that the Department recommends change in involves the high-priority expenditure categories that the localities must spend within. The Department recommends that these categories be eliminated to allow them sufficient flexibility in setting their own priorities." *Printed in Hearings on H.R. 14370 Before the Senate Comm. on Finance*, 92d Cong., 2d Sess. 91, 92 (1972).

and House bills.[102] An examination of the provisions in the conference bill suggests, however, that the philosophy of the Senate in fact prevailed. As Senator Long put it, "we have expanded the list of eligible priority expenditures to the point where they now include the bulk of the items on which the local governments ordinarily spend their money."[103]

Under the conference bill and the final Act, federal funds can be spent for ordinary and necessary maintenance and operating expenses in five new areas in addition to the three areas permitted by the House bill. These new areas were health, recreation, libraries, social services for the poor or aged, and financial administration.[104] Even more significantly, the conferees expanded the permissible capital expenditures from the three areas allowed by the House bill[105] to all ordinary and necessary capital expenditures authorized by law.[106] Even without the large increase of permissible priority expenditure categories, both the Senate Committee and members of the House Committee acknowledged that the limiting effect of priority categories was largely illusory. Since the Revenue Sharing Act contains no requirement that local governments maintain previous levels of expenditures in the priority categories, federal funds could be used to replace local funds in the priority categories, thus releasing local funds for use in nonpriority categories.[107] Indeed such substitution

---

102. 118 CONG. REC. 35,895 (1972) (Senate); 118 CONG. REC. 35,496-98 (1972) (House).

103. 118 CONG. REC. 35,896 (1972).

104. *See* note 37 *supra*.

105. *See* text accompanying note 99 *supra*.

106. *Id.*

107. Members of the Ways and Means Committee who had cosponsored the Administration bill observed:

> The Committee bill, unlike the Administration bill, does specify certain high priority purposes for which the local government allocations must be used. However, the absence of any "maintenance of effort" requirements with respect to local government expenditures should assure that these limitations will not operate in an unduly restrictive manner.

H.R. REP. No. 92-1018, 92d Cong., 2d Sess. 83 (1972).

As the Senate Committee put it,

> The committee believes that the State and local governments will be able to make the most efficient use of the aid funds if they are given the authority to determine how these funds are to be used. . . . [T]he adoption of high priority items in the House bill merely results in substantially complicating the mechanics of the aid program without any real substantive effect on spending by the local governments. A complicated and elaborate procedure would be required to determine that the local governments spend the aid funds only on the high priority items. However, since the local governments are not re-

of funds has apparently been occurring fairly frequently.[108]

The other major focus of the strings versus no-strings debate was the desirability of requiring state and local governments to comply with federal statutes when using federal revenue-sharing funds. Both the Senate and the House generally agreed that the Revenue Sharing Act should require conformity with Title VI of the Civil Rights Act,[109] and with minimum wage standards of the Davis-Bacon Act.[110] Although the details of these particular provisions in the Revenue Sharing Act are not critical to the discussion of legislative intent,[111] debate in the Senate concerning the provisions is important in establishing that at least the Senate believed that the Civil Rights Act and appropriate minimum wage protections were the only federal provisions that should be applicable to revenue sharing.

During the Senate debate Senator Vance Hartke introduced amendments to guarantee a certain wage level for government employees and construction workers whose salaries are paid with revenue-sharing funds.[112] The fact that these amendments were supported by labor[113] and by the administration,[114] and that one had been approved by the House,[115] although eliminated in Senate committee, may explain Senator Long's eventual willingness to allow a compromised version to become law.[116] Both amendments

---

> quired to maintain the level of their own prior expenditures on the high priority items, (*i.e.*, expenditures financed out of their own revenue sources), as a practical matter, they could arrange to use the aid funds to increase their spending for other than high priority items. As a result, provision of the high priority categories, at best, is illusory.

S. REP. No. 92-1050, 92d Cong., 2d Sess. 16 (1972). *See also* text accompanying note 147 *infra*.

108. *See* notes 148-50 *infra* and accompanying text.

109. 42 U.S.C. § 2000(d) (1970).

110. 40 U.S.C. §§ 276a through a-5 (1970).

111. See Stolz, *Revenue Sharing—New American Revolution or Trojan Horse?*, 58 MINN. L. REV. 1, 82-92 (1973), for a more detailed discussion of these provisions.

112. 118 CONG. REC. 29,511, 29,519 (1972). *See* Stolz, *supra* note 111, at 82-85 for a more extensive legislative history of these amendments.

113. *See Hearings on H.R. 14370 Before the Senate Comm. on Finance*, 92d Cong., 2d Sess. 208 (1972) (testimony of Jerry Wurf, President, American Federation of State, County, and Municipal Employees, AFL-CIO, July 21, 1972).

114. 118 CONG. REC. 29,520 (1972).

115. H.R. 14370, 92d Cong., 2d Sess. § 105(a)(6) (1972).

116. It should be noted, as indicative of Senator Long's bargaining strength and the importance of his views, that the provision that came out of conference was less strict than the provisions that had been passed by either the House

were passed[117] subject to the proviso, outlined by Senator Hubert Humphrey in response to Senator Long's criticism, that the wage provisions would apply only when 25 percent of the salaries of the governmental employees or 25 percent of construction costs of a project were paid with revenue-sharing funds.[118] The purpose of the 25 percent limitation was to ensure that federal wage standards would not be imposed unless substantial federal funds were used. Otherwise, as Senator Long had pointed out, where the proportion of revenue sharing used in a project was small, the increased costs of complying with the Hartke wage standards might have exceeded the federal contribution, and thereby undercut the fiscal relief purposes of revenue sharing.[119]

Senator Long's opposition to the imposition of further federal standards received Senate support when another Hartke amendment was defeated. This amendment would have applied labor standards in the 1964 Urban Mass Transportation Act[120] to urban mass transit systems acquired by local government units with federal revenue-sharing funds.[121] Before the vote on that amendment, Senator Long made his most forceful argument against federal strings:

> Mr. President, under the Senator's logic we can take every desirable condition that has been put on aid to education from the kindergarten to a postgraduate degree and say if 1 nickel of revenue-sharing money finds its way into the schools, colleges, or kindergartens, they must comply with all of those conditions. When you put those conditions on, they must pay the cost to comply. Here we say if even 1 nickel of revenue sharing gets into the hospital, for instance, it must comply with all of the conditions of the Hill-Burton Act; if 1 nickel gets into the highway program, all of the conditions of Federal aid to highways must be met. We have standards for the construction of sewers. The county would have to comply with all the Federal standards for the construction of a sanitary system. If they want to put in a day care center, they would have to comply with all the Federal conditions for day care centers. The problem is there are so many conditions that the local governments could not comply with all of them without a

---

or the Senate.

117. 118 CONG. REC. 29,526 (1972).

118. *Id.* at 29,517, 29,525. Senator Humphrey's original proposal was for a 50 percent limit. The 25 percent limit was adopted at Senator Long's suggestion.

119. *Id.* at 29,519.

120. 49 U.S.C. §§ 1601-12 (1970).

121. 118 CONG. REC. 29, 531 (1972).

> tremendous burden, if they were to get even 1 nickel of revenue sharing money.
>
> Those examples are just as logical as someone's union rights. There is no end to the conditions the minds of men could conceive along this line. If Senators are against the bill, they should vote for the amendment. These are the kinds of things that everybody agrees will kill revenue sharing—or the sort of conditions that local governments would find it difficult to comply with.[122]

Of course, it can be argued that if Congress had not wanted NEPA to apply to the Act, it would have specifically exempted it. The fact that Congress has made four statutory exceptions[123] to NEPA's mandate lends credence to the argument that, in the absence of an express dispensation, Congress intended NEPA's unusually strong mandate to apply to the Revenue Sharing Act. There are two weaknesses in this argument. First, three of the four statutory variations in NEPA's coverage were enacted after the Revenue Sharing Act.[124] Therefore, they fail to raise a presumption that Congress was following a pattern in 1972. The Revenue Sharing Act was passed only one year after the *Calvert Cliffs'*[125] court announced the broad application of NEPA to all other federal actions. Although the *Calvert Cliffs'* opinion was theoretically arresting, only time and the repeated application by other courts of NEPA's provisions to unlikely federal agencies impressed the public as well as Congress with the unusual force behind the statute. It is certainly arguable, then, that in 1972, Congress had not concluded that an

---

122. *Id.* at 29,530-31.

123. The four exceptions are: (1) a provision in the Water Pollution Control Act Amendments of 1972 which exempted most of the Environmental Protection Agency's water pollution control activities from NEPA's EIS requirement, 33 U.S.C. § 1371(c)(1) (Supp. II, 1972); (2) § 203(d) of the Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C.A. § 1652(d) (Supp. 1975), which authorized construction of the trans-Alaska oil pipeline without further administrative or judicial action under NEPA; (3) a special provision in the Federal-Aid Highway Act of 1973, which specified that the San Antonio Expressway in Texas was no longer a federal project, thereby permitting its completion despite failure to comply with NEPA, Pub. L. No. 93-87, 87 Stat. 250; and (4) the Housing and Community Development Act of 1974, which allowed local recipients to assume the Department of Housing and Urban Development's duty to prepare impact statements, Pub. L. No. 93-383, 88 Stat. 633. See notes 168-75 *infra* and accompanying text for a discussion of this last exception.

124. Only the Water Pollution Control Act Amendments of 1972 were enacted before revenue sharing. See note 123 *supra* for the dates of the statutes.

125. 449 F.2d 1109 (D.C. Cir. 1971).

express exemption was required to prevent the application of NEPA to other enactments.

Secondly, the argument favoring application of NEPA to the Revenue Sharing Act by implication ignores the treatment given by the Congress to another far-reaching statute, the Civil Rights Act. The Civil Rights Act, which not only enunciates a strong congressional priority, but reflects a basic constitutional policy to eliminate racial discrimination,[126] has like NEPA been broadly construed to apply to many federal statutes.[127] As a result, title VI of that Act is as likely to apply to the Revenue Sharing Act without an express reference as is the National Environmental Policy Act. The fact that Congress, aware of both Acts, chose to include the former explicitly while omitting all reference to the latter presents a strong argument that Congress intended only those federal statutes that it expressly included in the bill to apply to the Revenue Sharing Act. The principle of statutory construction, *expressio unius est exclusio alterius*, is particularly appropriate in this situation.

In conclusion, while there is no clear evidence that in 1972 Congress specifically analyzed the interrelation of NEPA and revenue sharing, there is ample evidence that Congress considered and rejected as a general proposition the application of any federal standards other than those in the bill. For the courts to elevate NEPA over all other nondiscretionary statutory requirements and hold that it alone applies to the Revenue Sharing Act without express inclusion would infringe on Congress' legislative prerogative.

V. Practicality of Preparing Environmental Impact Statements Under the Revenue Sharing Act

The NEPA conferees stated that "compliance to the fullest extent possible" means that each agency is to comply with the section requiring an EIS "unless the existing law applicable to such agency's operations . . . makes full compliance with one of the directives impossible."[128] Thus, a conclusion that preparation by the Treasury Department of a meaningful EIS would be an impossible or futile

126. U.S. Const. amends. V, XIII, XIV & XV.

127. *See, e.g.*, Joy v. Daniels, 479 F.2d 1236, 1240-41 (4th Cir. 1973); United States v. Medical Soc'y, 298 F. Supp. 145, 151-52 (D.S.C. 1969), and cases cited therein.

128. See text accompanying note 17 *supra* for the complete quotation of the House conferees' views. The Senate conferees did not use the same language; however, their meaning is substantially the same. *See* note 17 *supra*.

task would exempt the Revenue Sharing Act from NEPA on two separate grounds. First, the lack of an administrative mechanism for preparing an EIS would reinforce the view that drafters of the Revenue Sharing Act did not intend NEPA to apply; and second, the impossibility of other than pro forma compliance would bring the Revenue Sharing Act within one of the exceptions allowed by NEPA itself.

A crucial issue, then, is when is compliance considered "impossible"? In *Calvert Cliffs'* the court stated, "[C]onsiderations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance."[129] Although this language has been quoted in subsequent decisions as a standard of strict compliance,[130] it also can be read to mean that mere inconvenience does not reach the level of impossibility. This alternative interpretation seems to have been adopted by a line of cases in which courts have modified the "no exceptions" standard of compliance when faced with counterproductive delays or a likelihood of infeasibility.

In *Natural Resources Defense Council, Inc. v. Morton*,[131] the court stated that in interpreting NEPA's section 102 requirement of compliance "to the fullest extent possible," the courts must consider "that the resources of energy and research—and time—available to meet the Nation's needs are not infinite."[132] NEPA is subject to a "construction of reasonableness."[133] Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia Circuit has emphasized that this case stands for limitations on the demands that may legitimtely be drawn from NEPA:

> [*Natural Resources Defense Council, Inc. v. Morton*] . . . does not undercut *Calvert Cliffs'* insistance that environmental consequences be given consideration. It rather ensures that such consideration will be provided in the context of a viable decisionmaking process, a process not throttled with burdens that are unproductive or counter-productive. The two decisions in composite stand for the two sides of the coin of judicial review—to ensure

129. 449 F.2d at 1115.

130. *E.g.*, Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972); I-291 Why? Ass'n v. Burns, 372 F. Supp. 223, 238 (D. Conn. 1974); Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167, 169 (D.D.C. 1971).

131. 458 F.2d 827 (D.C. Cir. 1972).

132. *Id.* at 837.

133. *Id.*

> supervision of the agencies and to refrain from excessive intrusion.[134]

Louisiana v. Federal Power Commission,[135] in which oil companies sued to require the Commission to issue impact statements before approving plans to allocate natural gas deliveries in times of shortage, echoes the rule of reason set forth in *Morton*. The United States Court of Appeals for the Fifth Circuit held that impact statements were required for permanent, but not interim, curtailment plans. The court advised that the Federal Power Commission "should not pour an inordinate amount of its resources into environmental forecasting" since "the statute itself requires compliance to the fullest extent possible, recognizing that some situations are more conducive to environmental analysis than others."[136] These two cases, while recognizing limits on the reach of NEPA, still required impact statements of some kind. A balance was thus struck between the mandate of NEPA and the integrity of the federal program in question.

Other courts have exempted particular programs from the EIS requirement entirely. In *Cohen v. Price Commission*[137] the court held that NEPA did not apply to the Price Commission because the Commission's effectiveness under the Economic Stabilization Act of 1970[138] required speedy action. In *Gulf Oil v. Simon*[139] the Federal Energy Office was not required to prepare an EIS before promulgating mandatory crude oil allocation regulations because of the critical time limitations imposed by the Emergency Petroleum Allocation Act of 1973.[140] Exemptions have not been based only on emergency conditions. A number of circuit courts have exempted various pro-

134. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 521 (1974). In *Calvert Cliffs'*, Judge Wright declared, "Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority." 449 F.2d 1115 (emphasis original). See text accompanying notes 20-23 *supra* for a more detailed discussion of the case.

135. 503 F.2d 844 (5th Cir. 1974).

136. *Id.* at 877.

137. 337 F. Supp. 1236 (S.D.N.Y. 1972). The case involved a challenge to the Price Commission's authorization of a 5-cent fare increase on New York subway and buslines, a toll increase on bridges and tunnels, and parking rate increases.

138. 12 U.S.C. § 1904, n. § 202 (Supp. II, 1972).

139. 373 F. Supp. 1102 (D.D.C.), *aff'd per curiam*, 502 F.2d 1154 (Emer. Ct. App. 1974).

140. Pub. L. No. 93-159, 87 Stat. 629. Noting that the Petroleum Allocation Act contemplated that regulations would take effect 30 days after enactment and that compliance with NEPA would require a minimum of 120 days after enactment, the court concluded, "In light of the exhaustive analytical con-

grams administered by the Environmental Protection Agency from NEPA on the ground that either the program's own authorizing statute required the functional equivalent of a NEPA impact statement,[141] or there was no need for such a statement because of EPA's independent responsibility for protecting the environment.[142]

Although the Revenue Sharing Act certainly does not provide a functional equivalent to a NEPA statement and probably does not constitute emergency legislation that would bring general revenue sharing within the exemption precedents, the Act may offer grounds for a new exception. The evolving modification of the *Calvert Cliffs'* standard and the outright exemption of particular agencies for practical reasons suggests that courts might hold that compliance "to the fullest extent possible" does not require a disruptive or futile impact statement.

---

tent required of impact statements, it would be illogical, indeed virtually impossible, to demand a statement in this instance." 373 F. Supp. at 1105.

141. The leading case on this point is Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), which held that EPA was not obliged to file an EIS before promulgating stationary source standards for new or modified cement plants under § 111 of the Clean Air Act, 42 U.S.C. § 1857c-6 (1970). *See also* Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973), in which NEPA was held to be inapplicable to the EPA's approval of state implementation plans under the Clean Air Act.

In Anaconda Copper Co. v. Ruckelshaus, 352 F. Supp. 697 (D. Colo. 1972), *rev'd* 482 F.2d 1301 (10th Cir. 1973), the district court held that the EPA was required to file an EIS, but the court of appeals, citing *Buckeye Power, Inc., Duquesne Light Co.*, and *Appalachian Power Co.*, reversed.

Environmental Defense Fund v. EPA, 489 F.2d 1247 (D.C. Cir. 1973), offers an analogous holding with respect to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135-135k (1970). The court held that no EIS was required prior to EPA's cancellations of registrations for most uses of DDT. As the court wrote:

> In this particular case, lengthy hearings were held, during which public comment was solicited, and a wide scope of environmental aspects were considered. Thus the functional equivalent of a NEPA investigation was provided, for all of the five core NEPA issues were carefully considered: the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long- and short-term uses and goals, and any irreversible commitments of resources—all received attention during the hearings and decision-making process. The law requires no more.

Id. at 1256 (footnotes omitted).

142. In International Harvester Co. v. EPA, 478 F.2d 615 (D.C. Cir. 1973), the court of appeals stated, "Although we do not reach the question whether EPA is automatically and completely exempt from NEPA, we see little need in requiring a NEPA statement from an agency whose *raison d'être* is the protection of the environment . . . ." *Id.* at 650 n.130.

Under this approach the pivotal question is just how impractical is the preparation of an EIS under the Revenue Sharing Act. The answer depends on whether the Department of the Treasury can obtain, prior to disbursement of funds, meaningful and accurate information about a recipient's projected use of the funds. Under the Revenue Sharing Act, each state or local unit of government must submit a so-called planned use report to the Secretary, setting forth the amounts and purposes for which it plans to spend or obligate its entitlement funds during the forthcoming period.[143] A duplicate must be published in a newspaper of general circulation in the state.[144] Originally, the planned use report was one page in length. However, according to the first annual report of the Office of Revenue Sharing (ORS), ORS has had to simplify the form even further because a number of small governments found it difficult to comply with requirements.[145] If the Department of the Treasury were required to prepare a detailed environmental impact statement before releasing funds, the planned use reports would have to be lengthened considerably, making participation by small governmental units considerably more difficult.

Additionally, representations made by local governments in the planned use reports would have to be final. This would lock local governments into a particular use for the funds and thus further undermine the congressional goal of increased flexibility in local spending decisions.[146]

There is a more serious problem. Even if one were to conclude that planned use reports should be expanded to permit the preparation of detailed impact statements, evidence indicates that those planned use reports would not accurately reflect the true use of revenue-sharing funds by local governments. Mr. Richard P. Nathan of the Brookings Institution, who is part of a team conducting a 5-year monitoring study of the State and Local Fiscal Assistance Act of 1972, testified before a Senate subcommittee in June 1974. He stated that the Brookings study indicates that many local governments have substituted revenue-sharing monies for local revenue in the priority categories under the Act and then used the released local money

143. 31 U.S.C. § 1241(b) (Supp. II, 1972).

144. *Id.* § 1241(c).

145. U.S. DEPT. OF THE TREASURY, ANN. REP. OF THE OFFICE OF REVENUE SHARING 22 (1974).

146. S. REP. No. 92-1050, 92d Cong., 2d Sess., pt. 1, at 16 (1972); H. Rep. No. 92-1018, 92d Cong., 2d Sess., pt. 1, at 7 (1972).

ority categories under the Act and then used the released local money

for other projects, including projects that could not have been funded directly with revenue-sharing money.[147] According to the study, the average local government used 42.2 percent of its revenue-sharing money to replace local money in existing programs; statistics were not offered on the percentage of released local money that was then used for nonpriority expenditures. The findings of the Brookings study upon the substitution effect have been reinforced, though not documented so thoroughly, by a Government Accounting Office report,[148] direct testimony of one Governor,[149] and a report by the Ad-

---

147. *Hearings on Revenue Sharing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations,* 93d Cong., 2d Sess., pt. 1, at 424 (1974).

> Mr. Nathan: . . . For instance although a given recipient government may "attribute" shared revenue to police protection, if it does not spend any more money for police than it would have anyway, then the real uses—or what we have called the net fiscal effects of revenue sharing—must be sought somewhere else. Our data indicates that there has been a substantial substitution effect in the use of shared revenue. That is to say, significant amounts of these funds have been used—not for new spending—but to cut taxes, hold down taxes, balance the budget, or avoid borrowing which otherwise would have been undertaken. . . .
>
> Senator Muskie: Could they also be used to fund programs which could not be funded directly by revenue sharing under the law?
>
> Mr. Nathan: . . . You are right. The so called fungibility of public money permits state and local officials to use these financial resources interchanageably, and in doing so, because—and this is a phrase we have highlighted—because all money is green, there are opportunities for them to assign or attribute shared revenue to particular functions among the priority expenditure categories in the act, but not to add expenditures to that category and then to use shared revenue for some other purpose.

148. COMPTROLLER GEN., U.S. GOV'T ACCOUNTING OFFICE, REVENUE-SHARING: ITS USE BY AND IMPACT ON STATE GOVERNMENTS (1973). The GAO reported:

> The actual impact of revenue sharing on a State may be quite different from and more elusive than the apparent impact indicated by the use a State makes of its funds. When a State uses the funds to wholly or partially finance an activity which the State's own revenues previously financed, it becomes difficult to objectively identify the actual impact.

Id. at 2.

149. Political reporter David Broder of the *Washington Post* has written,

> Maryland's Gov. Marvin Mandel was one of the . . . Governors urging the congressional Democrats not to rely on the official accounting reports to gauge where revenue-sharing money really went. Mandel said he had reported planning all of Maryland's allotment in the bond annuity fund, simply to avoid any administrative problems, "but that has nothing to do with how the money was really spent."

Broder, *Governors Get Warning About Tax Sharing,* Washington Post, June 25, 1974, *as reprinted in* HEARINGS ON REVENUE SHARING, note 147 *supra,* at 131.

visory Commission on Intergovernmental Relations.[150]

If substitution is legal, preparation of a meaningful environmental impact statement will be virtually impossible. Local governments will channel all federal funds into projects having a minimal environmental effect and will redirect the released local funds for highways and other environmentally related projects. The Department of the Treasury could either prepare a useless report on the projected direct use of federal funds in the innocuous programs or could require detailed projected budgets and attempt to gauge the probable real impact of the federal funds. Such an attempt would pit the Department of the Treasury against state and local governments in a costly and time-consuming shell game.

This problem may be mitigated by *Matthews v. Massell*,[151] the only federal revenue-sharing case to date, which holds the substitution pattern described by Mr. Nathan to be violative of the Revenue Sharing Act. In *Matthews* the United States District Court for the Northern District of Georgia found that the use of $4.5 million in revenue-sharing funds to pay firemen's salaries (a legitimate priority expenditure), which thus freed $4.5 million in local funds that the City of Atlanta proposed to disburse in the form of a water/sewer rebate, was a sham transaction, circumventing the congressional intent that federal funds should be used only for priority expenditures. Despite the apparently broad holding, a close reading of the opinion suggests that the court objected to the dispersal of released funds in the form of a limited tax rebate rather than to the simple substitution of federal funds for local general revenues. The court referred to the former as a sham transaction, while recognizing that in other circumstances some local funds might be legitimately freed-up by the infusion of revenue-sharing funds.[152]

The difficulty with the opinion is that the court failed to differ-

---

150. The Commission reported, "[G]overnors, legislators, mayors, county officials, and city managers who appeared at Commission hearings have testified that they have experienced little or no difficulty in getting the money to where their government most needed it." Again, the "lack of revenue and expenditure maintenance requirements and the virtual impossibility of distinguishing revenue sharing dollars" explains the easy avoidance of federal strings. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, GENERAL REVENUE SHARING: AN ACIR REEVALUATION 3-4 (1974).

151. 356 F. Supp. 291 (N.D. Ga. 1973).

152. The court observed:

> It is true that the Revenue Sharing Act does not specifically impose any restrictions upon the use of legitimately freed-up funds. Thus the Act seems clearly to have contemplated that the infusion

entiate clearly between a sham transaction and legitimate substitution. The *Matthews* court recognized that there was no case law under the Revenue Sharing Act to guide it in discerning sham transactions, but noted that "[i]n the areas of federal income taxation, securities law, and antitrust statutes the courts have consistently refused to exalt artifice over reality or to ignore the actual substance of a particular set of transactions."[153] A similar position was propounded recently in a student note: "The courts have had little trouble in distinguishing legitimate financial transactions from those entered into for the purpose of avoiding a particular regulation or statutory prohibition."[154] This view seems overly optimistic, however, and presents further problems in the context of revenue sharing. In the tax cases, for example, the criteria for determining whether a particular transaction is a sham have been far from clear. In discussing

---

> of Revenue Sharing funds into state and local governments would permit future tax relief to the hard-pressed taxpayers of those governments. Further, there is no requirement that a local government maintain at pre-Revenue Sharing levels its spending on "priority expenditures." *There is a clear difference, however, between funds which are legitimately freed up by the designation of federal Revenue Sharing funds to provide municipal services* which otherwise would have to have been paid for out of general City funds, *and funds which are transferred from one account to another simply to avoid the restrictions* imposed by section 102(a) of the Act. The actions of defendants, the public statements made by defendant Mayor Massell and the affidavits of three of the defendant members of the Board of Aldermen, show clearly that *the stops taken by defendants were designed to carry out a plan to return $4.5 million in Revenue Sharing funds to certain taxpayers,* the defendants having decided to confer such tax relief by way of rebates on the water/sewer accounts.

Id. at 299 (emphasis added; footnotes omitted).

In contrast to the court's reasoning, the language of the Act suggests that all substitutions of funds may be valid. Section 103 specifies simply that "funds received by units of local government under this subtitle may be used only for priority expenditures." 31 U.S.C. § 1222(a) (Supp. II, 1972). Since the funds actually received by Atlanta were used for priority purposes, the facts of *Matthews* appear to meet this straightforward requirement. By precluding an indirect use of federal funds for nonpriority expenditures, the court has, in effect, incorporated into § 103 language found in a separate section. Section 104 provides: "No State government or unit of local government may use, directly or indirectly, any part of the funds it receives under this subtitle . . ." as matching funds. 31 U.S.C. § 1223 (Supp. II, 1972). Congress' omission of "directly or indirectly" in § 103 appears to reflect a decision to adopt a less stringent standard for that section.

153. 356 F. Supp. at 299-300.

154. Note, *The Application of Federal Environmental Standards to the General Revenue Sharing Program: NEPA and Unrestricted Federal Grants,* 60 VA. L. REV. 114, 133 (1974).

Gregory v. Helvering[155] Randolph Paul observed, "The trouble with dependence upon free or liberal statutory interpretation of a taxing statute, is that no one can be sure when it will be employed."[156] In analyzing *Knetsch v. United States*[157] Professor Walter Blum concluded that courts would "get little comfort or guidance from the *Knetsch* case."[158] He went on to say, however, that "judicial vagueness" might be of value in the tax avoidance area because of its *in terrorem* effect.[159] Such a judicial attitude would be antithetical to the goals of revenue sharing, however, since it would limit local flexibility and raise a constant spector of federal intervention. Likewise, the liberal construction given to the antitrust[160] and securities[161] laws to provide broad protection in order to implement their important remedial purposes is anomalous in the context of revenue sharing, where federal intervention is intended to be minimal.

In a letter ruling on the subject, the Department of the Treasury appears to have attempted to limit the effect of *Matthews* by confining the decision to the facts of that case. The Department takes the position that "neither the Act nor the regulations prohibit a recipient government from amending its budget to place revenue-sharing funds within a priority expenditure category and thereby 'free-up' funds to be used for other purposes."[162] Thus the problem of

155. 293 U.S. 465 (1935).

156. R. PAUL, STUDIES IN FEDERAL TAXATION 265 (1937). For a discussion of the problems courts have had in determining the criteria which characteirze a sham, see Chirelstein, *Learned Hand's Contribution to the Law of Tax Avoidance*, 77 YALE L.J. 440 (1968).

157. 364 U.S. 361 (1960).

158. Blum, *Knetsch v. United States: A Pronouncement on Tax Avoidance*, 1961 SUP. CT. REV. 135, 158.

159. *Id.*

160. *See, e.g.*, Simpson v. Union Oil Co., 377 U.S. 13, 16-17 (1964); Sugar Institute, Inc. v. United States, 297 U.S. 553, 600 (1936).

161. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); SEC v. North American R. & D. Corp., 424 F.2d 63, 71 (1970).

162. U.S. DEPARTMENT OF THE TREASURY, ONE YEAR OF RULINGS ON GENERAL REVENUE SHARING: A DIGEST IV-4 (1974), *as reprinted in Hearings on Revenue Sharing*, note 125 *supra*, at 264. The relevant text of the letter ruling reads:

> F. DISPLACEMENT OF LOCAL REVENUES TO A NON-PRIORITY EXPENDITURE AND REPLENISHMENT WITH REVENUE SHARING FUNDS.
>
> *Generally*
>
> Matthews v. Massell . . . is known as the "Atlanta Case." At issue in that case was whether local funds, freed-up by the appropriation of general revenue sharing funds to a priority category, could be used for non-priority purposes. Under the facts of that case, the Court enjoined the City of Atlanta from implementing its plan to expend its freed-up money for nonpriority purposes.

shifting funds to avoid an EIS remains a real and serious impediment to the application of NEPA.[163]

Even assuming that the Department could prepare realistic impact statements, the final problem of practicality stems from the Secretary's lack of power under the Act to do anything prospectively about a planned misuse of funds.[164] Since the Secretary's powers are all retrospective, triggered by an actual violation of the Act, a predisbursement impact statement would be of limited utility. As the Department of the Treasury has argued:

> The Secretary's responsibility is to pay revenue sharing entitlements (31 U.S.C. § 1221) to those governments who provide the assurances set out at 31 U.S.C. § 1243 (a). Once these assurances are received, payment is automatic, without any act of approval whatsoever. Compliance by recipients with 31 U.S.C. § 1222, as well as the antidiscrimination provisions of 31 U.S.C. § 1242, and the anti-matching provisions of 31 U.S.C. § 1223, is not a precondition of payment, but rather those statutes are conditions, the violation of which can result in sanctions being imposed after exhaustion of the administrative remedies process.[1] This automatic payment procedure is consistent with the intent of Congress that revenue sharing provide aid to state and local governments without the attachment of strings. S. Rept. 92-1050, 1972 U.S. Code Cong. and Adm. News at 3874.
>
> 1. The reports submitted to the Secretary, pursuant to 31 U.S.C. § 1241, are not to give the Secretary an opportunity to give advice on or consent to the substantive nature of projects using revenue sharing money but are merely to aid in determining when violations of the Act occur, and to aid in notifying the citizenry of how revenue sharing funds are being used. S. Rept. 92-1050, 92d Cong., 2d Sess. (Aug. 16, 1972), found at 1972 U.S. Code Cong. and Adm. News 3874, 3907.[165]

> The District Court's decision deals with the facts of that case. The Office of Revenue Sharing will continue to view such transactions on a case-by-case basis. Displacements of local funds which are merely shams will be set aside.
>
> *Amending the Budget*
>
> Neither the Act nor the regulations prohibit a recipient government from amending its budget to place revenue sharing funds within a priority expenditure category and thereby "free-up" funds to be used for other purposes.

Id.

163. For an analysis of other practical obstacles to effective federal supervision, see *The Revenue Sharing Act of 1972: Untied and Untraceable Dollars from Washington*, 10 HARV. J. LEGIS. 276 (1973).

164. *See* note 38 *supra* and accompanying text.

165. Defendants' Supplemental Motion to Dismiss at 4, Westside Citizens Ass'n v. Shultz, Civil No. C-C-74-16 (W.D.N.C., filed Oct. 4, 1974).

Presumably, if a court were to hold that the Treasury Secretary must prepare an EIS prior to dispensing revenue-sharing monies, that court could also give the Secretary the necessary powers to collect the information for the statements and to ensure that local governments would prepare honest reports. However, in order to make possible a meaningful impact statement under the Revenue Sharing Act of 1972, a court would have to change substantially the relationship as defined in the Act between the federal and local governments by dramatically increasing federal powers and supervision. Such a judicial reworking of the Act would seriously conflict with the manifest legislative intent.

VI. DELEGATING PREPARATION OF IMPACT STATEMENTS: A METHOD OF SECURING ENVIRONMENTAL PROTECTION UNDER REVENUE SHARING?

In the 94th Congress the State and Local Fiscal Assistance Act is due for congressional renewal.[166] At that time, the question of NEPA's applicability to revenue sharing may well arise, compelling Congress either to end academic debate by unambiguously stating its legislative intent, or to devise a new environmental protection mechanism designed to appease both the no-strings supporters of the Revenue Sharing Act and the pro-strings ecology advocates. If Congress seeks a compromise between these opposing positions, one possible approach will be to require local recipients of federal funds, rather than the federal government itself, to prepare impact statements. This administrative mechanism has already been adopted by Congress in the Housing and Community Development Act of 1974.[167] Because of its high visibility as an apparent compromise it deserves some analysis as a possible modification of the Revenue Sharing Act.

A. *The Housing and Community Development Act of 1974*

Title I of the Housing and Community Development Act of 1974 (Community Development Act) was designed to provide local government with a consolidated block grant program for community development to replace 10 categorical grant programs. The Act provides for allocation of 3-year block grants for formula. As a prerequisite to allocation, local applicants must submit a 3-year summary

166. *Hearings on Revenue Sharing, supra* note 147, at 2.
167. Pub. L. No. 93-383, 88 Stat. 633.

of planned activities and a 1-year specific application including a detailed plan for housing assistance programs.[168] The application must receive approval of the Secretary of the Treasury.[169] The Secretary must approve an application unless he determines that the applicant's statement of community development needs is inconsistent with available information, its proposed activities are plainly inappropriate to meet the stated needs, or the application does not comply with the requirements of the Act.[170]

A statement by Senator William Proxmire, second ranking Democrat on the Subcommittee on Housing of the Banking, Housing, and Urban Affairs Committee, suggests that the congressional purpose behind this block grant proposal was quite similar to that behind general revenue sharing in the State and Local Fiscal Assistance Act of 1972. According to Senator Proxmire, "[u]nder the block grant approach, it is anticipated that much of the red tape and delay associated with the present programs will be eliminated. Local governments will be given more flexibility and responsibility to deal with the problems of their own community."[171]

Depending on one's perspective, it was either in conflict or in keeping with this legislative policy that Congress elected in the Community Development Act to authorize the delegation of responsibility for preparing an EIS to local recipients.[172] The House Report explained the purposes of this provision as follows:

> The committee [on Banking and Currency] recognizes that adjustments must be made between the review pro-

168. *Id.* §§ 104(a), 106(a).

169. *Id.* § 103(a)(1).

170. *Id.* § 104(c).

171. 120 CONG. REC. 3350 (daily ed. Mar. 11, 1974). See text accompanying note 96 *supra* for the similar intent of general revenue sharing.

172. Pub. L. No. 93-383 § 104(h), 88 Stat. 633. Section 104(h) reads:

> (h)(1) In order to assure that the policies of the National Environmental Policy Act of 1969 are most effectively implemented in connection with the expenditure of funds under this title, and to assure to the public undiminished protection of the environment, the Secretary, in lieu of the environmental protection procedures otherwise applicable, may under regulations provide for the release of funds for particular projects to applicants who assume all of the responsibilities for environmental review, decisionmaking, and action pursuant to such Act that would apply to the Secretary were he to undertake such projects as Federal projects. The Secretary shall issue regulations to carry out this subsection only after consultation with the Council on Environmental Quality.
>
> (2) The Secretary shall approve the release of funds for projects

> cedures utilized to carry out the purposes and requirements of the National Environmental Policy Act of 1969, and the simplified and streamlined application and review process contemplated by the bill. The environmental protection provided by NEPA must be preserved, notwithstanding the elimination of detailed Federal review of applications for grants under the block grant program.[173]

Section 104(h) of the Act provides that if an applicant assumes all responsibility for environmental review under NEPA that ordinarily would be required of the Secretary, and if that applicant certifies to the Secretary that NEPA's procedural requirements have been met, then the Secretary's approval of such certification shall be deemed to satisfy his responsibilities for filing impact statements under NEPA.[174] Any applicant who prepares an EIS on behalf of the Secretary must also accept the jurisdiction of the federal courts for purposes of enforcement of NEPA.[175] The Secretary does not have any power to review the impact statements.[176]

---

subject to the procedures authorized by this subsection only if, at least fifteen days prior to such approval and prior to any commitment of funds to such projects other than for purposes authorized by section 105(a)(12) or for environmental studies, the applicant has submitted to the Secretary a request for such release accompanied by a certification which meets the requirements of paragraph (3). The Secretary's approval of any such certification shall be deemed to satisfy his responsibilites under the National Environmental Policy Act insofar as those responsibilities relate to the applications and releases of funds for projects to be carried out pursuant thereto which are covered by such certification.

(3) A certification under the procedures authorized by this subsection shall—

(A) be in a form acceptable to the Secretary,

(B) be executed by the chief executive officer or other officer of the applicant qualified under regulations of the Secretary,

(C) specify that the applicant has fully carried out its responsibilities as described under paragraph (1) of this subsection, and

(D) specify that the certifying officer (i) consents to assume the status of a responsible Federal official under the National Environmental Policy Act of 1969 insofar as the provisions of such Act apply pursuant to paragraph (1) of this subsection, and (ii) is authorized and consents on behalf of the applicant and himself to accept the jurisdiction of the Federal courts for the purpose of enforcement of his responsibilities as such an official.

173. H.R. REP. No. 93-1114, 93d Cong., 2d Sess. 10 (1974).

174. Pub. L. No. 93-383, § 104(h)(2), 88 Stat. 633.

175. *Id.* § 104(h)(3)(D).

176. *See* note 187 *infra* and accompanying text. For a detailed analysis of HUD's past record with respect to NEPA see Durchslag & Junger, *HUD and the Human Environment: A Preliminary Analysis of the Impact of the National Environmental Policy Act of 1969 Upon the Department of Housing and Urban Development*, 58 IOWA L. REV. 805 (1973).

It should first be noted that the Community Development Act is a special revenue sharing statute,[177] analogous to the LEAA block grant program to which NEPA was applied in *Ely v. Velde.* Thus, the delegation of EIS responsibilities in the Community Development Act represents a modification and perhaps a weakening of the general principle enunciated by the court of appeals in *Ely I* and *II.*[178] Congress' rejection of a pure application of NEPA to a special revenue sharing program, which as a general rule has a higher tolerance for federal conditions than does general revenue sharing,[179] strongly reinforces the view that Congress does not favor a pure application of NEPA to the Revenue Sharing Act. In view of the similar legislative policies of the two Acts, Congress would not choose a method any more intricate than the one it chose under the Community Development Act for intertwining NEPA with the Revenue Sharing Act. In view of the additional factor that the administrative mechanism under the Revenue Sharing Act is relatively more automatic, Congress would be more likely to choose a less intricate method if it were to choose one at all.

It is possible to conclude that this recent modification of NEPA's application to a program less pristine than general revenue sharing foreshadows certain rejection in 1976 of any proposal to apply NEPA's requirements to the Revenue Sharing Act. Senator Jackson's reaction to the recent alteration of NEPA's procedures, however, is edifying in this regard. During Senate debate on the Community Development Act, Senator Henry Jackson, the author of NEPA, objected strongly to the delegation of responsibility for impact statements in that bill. He pointed out that neither delegation under the Community Development Act nor the exemption in the Water Pollution Control Act Amendments of 1972[180] had been debated by the Senate[181] and announced he would attempt to block any weaken-

177. *See* text accompanying note 10 *supra.*

178. *See* notes 73-78 *supra* and accompanying text.

179. Under the LEAA block grant program in *Ely,* a mandatory federal involvement, including approval of the final state plan, was a concomitant of receipt of a block grant. By comparison, general revenue sharing programs are virtually unencumbered.

180. 33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972).

181. Senator Jackson observed,

> In the 92nd Congress, we were forced to accept without debate and discussion a NEPA provision inserted at the last moment in the conference report of the Water Pollution Control Act Amendments of 1972. This provision, which exempted virtually all of the Environmental Protection Agency's water pollution control activities from NEPA's environmental impact statement requirements, was drafted in

ing of NEPA in subsequent bills.[182]

Despite Senator Jackson's distress over the lack of Senate debate prior to its taking action that might result in the dilution of NEPA, his position on the merits of delegating impact statement preparation appears flexible, if skeptical. On the one hand, he stated that local governments might be able to draft meaningful impact statements;[183] but on the other, he stressed the lack of a compliance track record at the local level, the greater resources in the federal government, and the federal government's statutory responsibility under NEPA for ecological protection.[184] Senator Jackson's analysis suggests that after proper study and debate he might favor delegation of EIS responsibilities as a method of protecting the environment under general revenue sharing.

Adoption of a delegation mechanism under general revenue sharing would probably alleviate the administrative tangles inherent in federal preparation of an EIS based on minimal information from local governments.[185] Whether it would present an irreconcilable

---

> the conference committee, inserted in the conference report, and sent to the Senate as a fait accompli. . . .
>
> . . . .
>
> . . . Once again [in the Community Development Act] the exemption has been thrust upon the Senate without benefit of study and debate. S. 3066, as we passed it in the Senate, made no reference to NEPA whatsoever. The NEPA exemption first appeared in H.R. 15361, which the House passed 3 months after we had acted on S. 3066.

120 CONG. REC. 14,883-84 (daily ed. Aug. 13, 1974).

182. One such bill, the Federal Mass Transportation Act of 1974, H.R. 12859, 93d Cong., 2d Sess. (1974), had already been reported out of a House committee. According to Senator Jackson, the bill exempted all projects under the bill from the EIS requirement of NEPA. Jackson's promised challenge to that bill did not occur because the bill died in Senate committee.

183. According to Senator Jackson,

> State and local governments may be capable of doing an adequate job of environmental assessment; this might be particularly true in the case of HUD, given its past, spotty record of NEPA performance. Yet, where is the analysis which supports this argument? There has been no in-depth study or evaluation of the capacity of State and local governments to assume the most basic NEPA responsibility.

120 CONG. REC. 14,884 (daily ed. Aug. 13, 1974).

184. "Granted, there are notable benefits to be derived from reducing Federal red tape, but the no-strings-attached concept must stop short of delegating the Federal responsibility for assuring that environmental factors are considered in governmental decisions. . . ." *Id.*

185. Local governments could be required to prepare an EIS before they irrevocably committed federal funds to particular projects, rather than at the beginning of each entitlement period, when they might not have completed detailed plans for the use of revenue-sharing money. In addition, local govern-

conflict with the legislative intent behind the State and Local Fiscal Assistance Act is a more difficult question. The answer depends on whether Congress, in adopting the Revenue Sharing Act, wished to avoid all red tape or simply those administrative requirements that would allow the federal agencies to make daily substantive decisions about what local priorities should be. Since delegation of EIS responsibility to local governments would require statutory authorization in any event,[186] Congress could define its legislative intent more clearly in the process of debating the delegation procedure.

B. *Evaluation of Delegating Impact Statements Under Revenue Sharing*

Two critical questions in an evaluation of any delegation scheme in relation to general revenue sharing are whether the particular scheme is consistent with the no-strings philosophy underlying revenue sharing and whether the deputized EIS drafters will protect the environment as effectively as federal watchdogs would. As for the first question, the EIS transferal provisions of the Community Development Act essentially impose on local governments a condition precedent to receiving funds, but do not give federal agencies any environmental veto power over a project once an impact statement has been prepared. Local governments have full discretion in utiliz-

---

ments would be made responsible for policing themselves; thus the Secretary's lack of prospective enforcement powers would not present a problem. If local governments failed to comply with NEPA, the remedy would be provided by the courts, not the Treasury Department.

186. If NEPA does not apply to revenue sharing as now written, the Treasury Department could not gratuitously impose an EIS requirement on recipients of federal funds. If NEPA does apply, recent cases suggest that the Treasury Department could not delegate its responsibility without congressional action.

Until 1972, a number of federal agencies did require local recipients of funds to draft the NEPA statement. For example, a majority of courts permitted such delegation by the Federal Highway Administration. Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 368-70 (E. Dolgin & T. Guilbert eds. 1974).

However, in 1972 the Supreme Court denied certiorari in Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972), which held that the FPC had to file its own impact statement prior to any formal hearings; the FPC was not permitted to use the local applicant's draft impact statement as a substitute for its own. The court explained, "The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY [Power Authority of the State of New York] for its own. . . . The danger of this procedure and one obvious shortcoming, is the potential, if not the likelihood, that the ing the results of an EIS; persons aggrieved can turn to the courts but not to the Department of Housing and Urban Development to plead for ecological preservation.[187] Thus, federal decisionmaking about the details of local projects has been avoided.[188] However, a significant administrative burden has been delegated to local recipients, who must now prepare an EIS. Some small local governments have already claimed that the one-page planned use reports required by the Revenue Sharing Act are too onerous.[189] The far larger bureaucratic burden connected with actually preparing an EIS may diminish the value of funds received and hamper the efficient administrative mechanism which the drafters of the Revenue Sharing Act sought to preserve.

Another potentially severe obstacle is presented by the possibility that numerous suits might be brought by local citizens under NEPA. The hope of any local government for a quick, easy infusion of federal dollars into underfinanced local projects could easily be dashed by the initiation of such NEPA-related litigation. Essentially, the delegation mechanism would substitute judicial delay for administrative encumbrances. Moreover, courts have recently demonstrated a willingness to review impact statements substantively as well as procedurally.[190] Local decision makers would be compelled to share responsibility for balancing adverse ecological effects against their community's need for a particular project. In view of the importance attached by members of Congress to autonomous local decisionmaking under revenue sharing, any potential "interference" by courts applying federal environmental standards would seem to be inconsistent with the expressed goals of revenue sharing.[191]

As for the second question, it is impossible at this point to compare realistically the relative merits of placing responsibility for the preparation of a revenue sharing EIS on the federal government or the affected local government. Neither alternative has been tested. A theoretical evaluation is also difficult since most of the potential

applicant's statement will be based on self-serving assumptions." 455 F.2d at 420.

The holding in *Greene* was echoed in Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972), later that year, signalling a significant shift from the previous cases, which had allowed the Federal Highway Administration to delegate the preparation of impact statements.

187. *See* 40 Fed. Reg. 1399 (1975).

188. *But see* notes 190-91 *infra* and accompanying text.

189. *See* note 123 *supra* and accompanying text.

190. *See* notes 23-24 *supra*.

191. *See* notes 96-97 *supra* and accompanying text.

advantages of delegating this responsibility to state and local governments carry corollary disadvantages.[192] For instance, delegation of the responsibility for preparing impact statements under revenue sharing would permit a meaningful integration of long-range planning and an anticipation of foreseeable environmental effects of those plans. Ideally, local planners could spot possible problems early and plan accordingly. On the other hand, coordination of planning and evaluation also permits crafty decisionmaking designed to avoid the delays caused by the filing of a complicated impact statement. Local EIS drafters might also be blinded by their own self interest in a project. Devices such as full participation by the public would be needed to minimize overly cozy coordination at the local level.

Delegation of environmental review might also impart a more sophisticated understanding of subtle environmental problems to local decisionmakers. The EIS procedure is designed not only to catch clear environmental blunders, but also to upgrade the general decisionmaking processes in general by educating and coordinating the decisionmakers themselves.[193] On a more realistic note, however, local governments can avoid drafting detailed or sophisticated impact statements by simply earmarking revenue-sharing funds for policemen's salaries, library operating expenses, and other programs having minimal environmental effect, while transferring local money that does not require an EIS to sewage disposal, highway construction, or other projects with clear ecological impact.[194] Indeed, as long as state and local governments can continue to substitute local funds for federal funds, it may not make much difference whether impact statements are required at all under revenue sharing, let alone whether they are the responsibility of the federal or state governments.

---

192. For an elaboration of the disadvantages of total delegation and an argument favoring partial delegation of responsibility for impact statements, see Anderson, *supra* note 186, at 372-75; Note, *The Application of Federal Environmental Standards to the General Revenue Sharing Program: NEPA and Unrestricted Federal Grants*, 60 VA. L. REV. 114, 128-31 (1974).

193. Senator Jackson, Senate manager of NEPA, stated, "Section 102(b) requires the development of procedures designed to insure that all relevant environmental values and amenities are considered in the calculus of project development and decisionmaking." 115 CONG. REC. 29,055 (1969).

According to the court in *Calvert Cliffs*' "[t]he apparent purpose of the 'detailed statement' is to aid in the agencies' own decisionmaking process, and to advise other interested agencies and the public of the environmental consequences of planned federal action. . . . Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made." 449 F.2d at 1114.

194. *See* notes 147-51 *supra* and accompanying text.

The strongest argument for delegating the responsibility for EIS preparation to the local level is that a number of states have indicated a willingness and an ability to undertake environmental protection by passing their own "mini-NEPA" acts.[195] Delegation of environmental evaluation under revenue sharing would presumably strengthen this trend, thus protecting nonfederal as well as federal projects. The difficulties of tracing federal money would be less serious if all state projects were receiving environmental review.

In sum, the advantage of delegating the responsibility for preparing impact statements to local governments is that delegation is administratively more practical than leaving that responsibility at the federal level. But the device still seems to conflict with the Revenue Sharing Act and is not certain to encourage meaningful consideration of the environment. Therefore, the delegation mechanism should be considered for its ease of execution but not for any illusion that it might present of protecting the environment without imposing federal strings on local governments.

VII. CONCLUSION

The National Environmental Policy Act and the State and Local Fiscal Assistance Act are both strong statutes, founded on definite but conflicting philosophies of governmental coordination. One statute must bend to accommodate the other. Although the courts have been fairly consistent in extending NEPA's application to federal agencies and to other statutes, no precedent compels an automatic extension of NEPA to cover general revenue sharing. Therefore, the two statutes can be compared on a clean slate in an effort to reach the most harmonious accommodation.

Basic to a harmonious accommodation is a comparison of the legislative philosophies of the two Acts. When NEPA was passed, Congress indicated that, with only two exceptions, it was to apply to all statutes existing at that time. Only the legislative policy underlying the Revenue Sharing Act can indicate whether Congress recognized a third exception to NEPA's coverage when it passed the State and Local Fiscal Assistance Act. An analysis of the limited number of federal conditions in the final bill and the Senate's support of Senator Long's stand against further federal strings presents convincing evi-

195. *See* Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 E.L.R. 50,090 (1973). *See, e.g.*, CAL. PUB. RES. CODE §§ 21000 *et seq.* (West Supp. 1974); IND. ANN. STAT. §§ 35-5301 *et seq.* (Burns Supp. 1972); N.C. GEN. STAT. §§ 113A-1 *et seq.* (Supp. 1972).

dence that Congress did not intend any federal stipulations to apply to revenue-sharing money other than those expressly contained in the bill.

Perhaps the most crucial determinant of the appropriate balance between the two Acts is the feasibility of requiring the Secretary of the Treasury to prepare an environmental impact statement prior to disbursing revenue-sharing money to local recipients. The impossibility of accurately tracing federal funds through local coffers, and the Secretary's lack of prospective enforcement powers, which could be exercised to redirect local spending decisions, indicate that preparation of an impact statement by the federal government would be an empty exercise. Thus, the direct conflict with the no-strings philosophy of the Revenue Sharing Act, coupled with the probable futility of requiring a federal environmental impact statement, leads one to conclude that the most amicable balance between the two Acts requires a modification of NEPA's mandate.

However, those interested in ensuring that environmental alternatives are considered before governmental action is taken will probably seek a new device to inject ecological protection into the decisionmaking process under general revenue sharing. One such device—that of imposing responsibility for preparing impact statements on local rather than national government—was adopted by Congress in 1974 under a special revenue sharing statute. Although this alternative presents fewer practical obstacles than does a direct extension of NEPA's requirements, realistically, it imposes just as many federal strings and conditions. Thus, its adoption would require a dilution of Congress' initial predilection for local autonomy under general revenue sharing.

JUDITH HARRIS RAWSON