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NEW NEPA PROBLEMS IN JOINT FEDERAL-STATE PROJECTS: DOES A STATE'S ISSUANCE OF A NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT REQUIRE AN ENVIRONMENTAL IMPACT STATEMENT?

The National Environmental Policy Act requires that an environmental impact statement be prepared for every "major federal action that significantly affects the quality of the human environment." Exactly when an activity constitutes such a "major federal action" has been a continuing problem with regard to programs which include activity from both state and federal levels. Recently, a United States District Court has ruled that an environmental impact statement is not required when a state issues a discharge permit in conjunction with the National Pollution Discharge Elimination System, a nationwide program mandated by the Federal Water Pollution Control Act. This Note analyzes the law regarding NEPA and its relation to joint federal-state projects and to environmental regulatory activities and examines the federal or state character of state-issued permits through a study of the legislative history of the Federal Water Pollution Control Act and its amendments. The author concludes that the law surrounding the question of whether such issuances require an environmental impact statement is ambiguous and argues that, due to the pervasive policies expressed by Congress in NEPA, any ambiguity should properly be resolved in favor of findings which will more adequately protect the environment, i.e., that state issuances of such permits should require an impact statement.



* The Plain Dealer, January 6, 1979, at 19-C; © 1979 by Jefferson Communications, Inc. and reprinted by permission of the Chicago Tribune-New York News Syndicate, Inc. Cf. Wall St. J., June 13, 1979, at 20, col. 1 ("Q: Why does it take five Americans to change a light bulb? A: One to turn the bulb and four to file the environmental impact statement.").

INTRODUCTION

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA)¹ is the seminal piece of legislation of the modern environmental movement.² NEPA established a national policy that environmental concerns be recognized in governmental decisionmaking;³ it furthered this policy by requiring that federal agencies prepare environmental impact statements (EIS) for "major federal actions significantly affecting the quality of the human environment."⁴

1. 42 U.S.C. §§ 4321-4361 (1976).

2. NEPA brought about "fundamental reform on all levels of the federal decision-making process . . . [I]t undeniably has made giant strides toward revitalization of the bureaucratic processes that have for so long neglected environmental values." Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 239 (E. Dolgin & T. Guilbert ed. 1974).

3. The Act contained a "Congressional declaration of national environmental policy" which stated that:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the federal government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

NEPA § 101(a), 42 U.S.C. § 4331 (1976).

4. *Id.* § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976), which provides:

The Congress authorizes and directs that, to the fullest extent possible: . . . (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 quality of the human environment, a detailed statement by the responsible official on—
- (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - (iii) alternatives to the proposed action,
 - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
 - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The environmental impact statement is the "heart of NEPA." W. RODGERS, ENVIRONMENTAL LAW § 7.4, at 725 (1977). It serves several functions. Not only is the EIS an "alarm bell" for environmental concerns, *id.* at 726, but it also serves as a verification of the "genuineness of the decisionmaking process." *Id.* at 730. The statement is designed for three audiences: the public; other government entities with applicable expertise or power over environmental issues; and other persons within the issuing agency. *Id.* at 726.

The impact statement must "include the results of the [agency's] own investigation

What constitutes a "major federal action," and thus requires an EIS, has been a recurring issue. Resolution of this issue has involved three separate inquiries: (1) what activities constitute "action" within the statutory framework; (2) how large or important must the subject matter of the action be to be "major" and "significantly affect" the environment; and (3) what kind and extent of federal participation is necessary for the action to be "federal."⁵ This Note does not specifically address the first two tests,⁶ rather, it focuses on the last test—the meaning of "federal"—in the context of joint state and federal activities.

In determining the requisite degree of federal nexus, judges and commentators have developed several tests,⁷ including: whether the project required substantial planning, time, and re-

and evaluation of alternatives so that the reasons for the choice of a course of action are clear; should 'explicate fully [the agency's] course of inquiry, its analysis and its reasoning,' and must 'go beyond mere assertions and indicate its basis for them.' *Id.* at 730 (footnotes omitted). The statement should also show who was consulted, what the consulted party said, and the preparing agency's response, if any. *Id.*

Most importantly, the EIS provides a substantive vehicle for judicial review of challenged governmental activities. It not only provides documentation of possible violations of environmental quality standards, but also may be shown to be inadequate itself. For example:

Environmental impact statements found inadequate by the courts customarily display serious lapses of disclosure and reasoned decisions. Thus, prominent indicia of a defective EIS include conclusions that are sweepingly vague, unsupported in fact, scientifically indefensible, wholly unquantified, unexplained in comprehensible terms, internally contradictory, basically flawed, obviously misleading or incomplete, excessively cryptic or perfunctory, argumentative, genuinely preposterous, dependent upon stale data or biased procedures, ignore important topics, delete telling information, exude arrogance, callousness or whimsy unresponsive to expert criticism, or demonstrate a reluctant, begrudging compliance.

Id. at 731-33 (footnotes omitted). The remedy for an inadequate EIS is typically an injunction to preserve the status quo. *Id.* at 799.

5. See F. ANDERSON, NEPA IN THE COURTS 56-141 (1973). EIS preparation has been required in a broad range of activities or actions including detonating nuclear warheads, leasing submerged lands for oil development, canceling a national program to purchase irreplaceable helium, spraying colonies of fire ants with insecticide pursuant to a nine-state program, granting federal construction monies for building prison facilities in an historic area of Virginia, clearing oxygen-consuming vegetation from 55 miles of a river, issuing a construction permit for a pulp mill on National Forest land, granting HUD construction loans, constructing an incinerator at a federal hospital, opening a branch bank with the approval of the comptroller of the currency, and ICC suspending rail freight rates and thereby allowing surcharges to be imposed on shipments of recyclable metal scrap. *Id.* at 76-78.

6. For a discussion of these tests, see F. ANDERSON, *supra* note 5, at 56-141.

7. See generally Comment, *Environmental Law—National Environmental Policy Act—Procedural Requirements Applicable to the Threshold Agency Determination that an Environmental Impact Statement is Not Required; Tests for Actions Constituting "Major Federal Action Significantly Affecting the Quality of the Human Environment,"* Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973), 26 S.C. L. REV. 119 (1974).

sources;⁸ whether the federal government reserved significant discretionary powers;⁹ whether there was substantial federal funding;¹⁰ and whether the project required federal approval or license.¹¹ Defining the requisite degree of federal nexus is particularly difficult in cases involving joint federal and state activities since the actual role or involvement of the federal government may be somewhat obfuscated. Thus, the question of whether an EIS is required in joint federal and state projects has spawned numerous cases.¹²

One especially troublesome situation involves the National Pollution Discharge Elimination System (NPDES) mandated by section 402 of the Federal Water Pollution Control Act Amendments of 1972.¹³ This program involves issuing water pollution discharge permits to point discharges.¹⁴ The Administrator of the Environmental Protection Agency (EPA) has the power to manage the program and issue such permits.¹⁵ However, consistent with the congressional policy to decentralize environmental protection efforts,¹⁶ states may also issue NPDES permits, after obtaining EPA approval of a state permit program.¹⁷ Even after approval, however, EPA retains overall review power.¹⁸ Thus, the question arises whether a state's issuance of an NPDES per-

8. *See, e.g.*, *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972) (EIS required for a 66-mile stream channelization project conducted by the Soil Conservation Service of the Department of Agriculture).

9. *Jones v. Lynn*, 477 F.2d 885, 890-91 (1st Cir. 1973) (EIS required for construction of a housing project to be financed by HUD grants).

10. *Ely v. Velde*, 497 F.2d 252, 256 (4th Cir. 1974) (despite state rejection of federal funds to build a state penal hospital, EIS required because diversion of federal funds to other state penal system projects indicated the entire action was federal).

11. *See Scientists' Inst. for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973) (EIS required for the issuance of an AEC permit to construct a nuclear power plant); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) (approval by the Secretary of Interior of leases of Indian lands requires an EIS); *Izaak Walton League of Am. v. Schlesinger*, 337 F. Supp. 287, 291 (D.D.C. 1971) (EIS required for the issuance of AEC nuclear power construction and operating license). *See also* notes 61-75 *infra* and accompanying text.

12. *See generally* Brown, *Applying NEPA to Joint Federal and Non-Federal Projects*, 4 ENV'TL AFF. 135 (1975).

13. 33 U.S.C. § 1342 (1976).

14. A point discharge is a discharge which originates from a specific source, such as an industrial plant, a municipal sewage treatment plant, or an agricultural feedlot. Zener, *The Federal Law of Water Pollution Control*, in *FEDERAL ENVIRONMENTAL LAW*, *supra* note 2, at 682, 683.

15. Federal Water Pollution Control Act (FWPCA) § 402(a), 33 U.S.C. § 1342(a) (1976).

16. *Id.* § 101(b), 33 U.S.C. § 1251(b).

17. *Id.* § 402(b), 33 U.S.C. § 1342(b).

18. *Id.* § 402(d), 33 U.S.C. § 1342(d).

mit—an action taken by a state agency, yet done in conjunction with a federal program—is a major federal action requiring EIS preparation.¹⁹

There are several distinctions between issuances of NPDES permits and other joint federal and state projects that have received judicial scrutiny. First, most prior NEPA cases have involved federal funding, a factor not present in NPDES programs.²⁰ Second, the joint federal–state project cases involve an analysis of an individual case as opposed to the determination of the generic issue of federal action involved in the class of cases

19. The only reported case decided prior to 1979 on the issue of NEPA applicability to state-issued NPDES permits is *Chesapeake Bay Foundation v. Virginia State Water Control Bd.*, 453 F. Supp. 122 (E.D. Va. 1978). *Chesapeake* arose when two environmental citizens' groups challenged the issuance of a discharge permit by Virginia's State Water Control Board (the Board) to Hampton Roads Energy Company (HREC). The Board's NPDES program had been approved by EPA in 1973. HREC sought to build a petroleum refinery that would discharge processing wastes into Chesapeake Bay. HREC had filed an application for a new source discharge permit on October 19, 1976. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 6 [hereinafter cited as Plaintiff's Memorandum].

EPA had some involvement in the HREC permit proceeding. It agreed to vary the permit review procedure, waiving its right to review and comment on the proposed permit prior to publication of a draft but reserving the right to comment at the permit hearing and to object thereafter. *Id.* at 7. EPA tendered technical assistance, responding to HREC requests for information on refinery treatment processes. *Id.* EPA informally suggested several permit changes before the draft permit was published, and EPA representatives testified at the permit hearing. *Id.* EPA subsequently informed the Board that it would not object to the permit. *Id.* at 8.

20. A majority of those cases defining "federal action" in joint federal-state projects have involved state construction of highways in conjunction with the Federal Works and Highways Administration's Interstate Highway Construction Program. (It is not surprising that most joint federal–state project cases have involved highways since this program is the most prolific federal public works program.) The most liberal courts have found "federal actions" to exist under circumstances in which the federal involvement was extremely remote. Specifically, state highway construction has been held to be federal action merely because of Federal Works and Highways Administration approval, notwithstanding the subsequent rejection of federal funds by the state. *Named Individuals of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1027 (5th Cir. 1971). Reasons for such a finding are twofold. First, courts have found (and commentators have noted) that through voluntary compliance with federal standards in order to gain federal funding approval, states have voluntarily submitted themselves to federal jurisdiction and thus must adhere to federal environmental requirements. *E.g., id.* See generally Lynch, *Complying with NEPA: The Tortuous Path to an Adequate Environmental Impact Statement*, 14 ARIZ. L. REV. 717 (1972); Note, *Federal Courts—To Enforce Federal Environmental Laws, a Federal Court Can Declare a State Highway Project to be "Federal" and Enjoin the State From Proceeding on Its Own*, 50 TEX. L. REV. 381 (1972). Second, courts have held that the federal highway program, in particular a state's application process, is so imbued with federal participation because of federal approval at various project stages and substantial "interim" federal funding that a state's rejection of final funding is irrelevant. *E.g., Scottsdale Mall v. Indiana*, 549 F.2d 484 (7th Cir. 1977).

of all state-issued NPDES permits.²¹ Third, issuances of NPDES permits constitute environmental regulatory activities,²² and, with respect to NEPA, such activities receive different treatment than other joint federal-state projects.²³ Furthermore, the question of NEPA's applicability to state-issued NPDES permits is distinguishable from other NEPA cases involving environmental regu-

21. Cases involving joint federal and state projects are distinguishable from those concerning state-issued NPDES permits because of the nature of the inquiry involved. For example, the main question in the highway cases is when, in the continuum of a state highway planning and construction program, does the federal government's participation make the program a federal action. Brown, *supra* note 12, at 138. In such cases, the federal action designation follows initiation of state action. In contrast, with NPDES permits, EPA approval and other review powers must be present prior to any issuance by the state. Therefore, if approval or other related federal activities make state NPDES permit issuances federal actions, such designation would precede initiation of state activity. Thus, the difference in the inquiry is one between finding the federal-state character of each individual project in the highway context and finding per se or generic federal-state character in the permit context.

Cases not involving highway projects have adopted both broad and narrow definitions of federal actions. Some courts have found federal action where there was only slight federal involvement. *E.g.*, *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971) (federal action found for issuance of a "no strings" block grant under the Law Enforcement Administration Act, 42 U.S.C. § 3733 (1976)). Other courts have developed more conservative tests which have emphasized the degree of federal involvement, giving meaning to "major" in "major federal action." Under the "final decision" test, *i.e.*, when a federal agency makes the final decision regarding the project, the action becomes a federal action. *City of Boston v. Brinegar*, 6 ENVIR. REP. (BNA) 1961 (D. Mass. 1974). According to the "partnership nexus" test, *i.e.*, there is federal action when a partnership exists between state and federal governments. *E.g.*, *Silva v. Romney*, 473 F.2d 287, 289-90 (1st Cir. 1973). In addition, these courts have usually shunned broad application of any test and insisted upon federal action analysis on a case-by-case basis as in the highway cases. *E.g.*, *Transcontinental Gas Pipeline Co. v. Hackensack Meadowlands Dev. Comm'n*, 464 F.2d 1358, 1366 (3rd Cir. 1972). See also Brown, *supra* note 12, at 138-40.

22. There have been many cases involving federal licenses, permits and other environmental regulatory activities. *E.g.*, *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973) (no EIS necessary for construction permits issued by the Army Corps of Engineers); *Scientists' Inst. for Public Information, Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973) (EIS required for AEC permit for construction of a nuclear plant); and *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) (EIS required for Corps of Engineers discharge permits issued pursuant to the Refuse Act of 1899, 33 U.S.C. § 407 (1976)). For a discussion of federal approval, see notes 60-75 *infra* and accompanying text. For a discussion of environmental regulatory activities, see notes 76-90 *infra* and accompanying text.

23. Section 511(c)(1) of the 1972 Federal Water Pollution Control Act Amendments provides an exemption from NEPA for most water pollution control activities:

Except for the provisions of federal financial assistance for the purpose of assisting the constructing of publicly owned treatment works . . . , and the issuance of a permit . . . for the discharge of any new source . . . , no action of the Administrator taken pursuant to the Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969

33 U.S.C. § 1371(c)(1) (1976) (emphasis added). See notes 76-90 and 176-85 *infra* and accompanying text.

latory activities.²⁴ These cases did not consider the 1972 and 1977 Water Act Amendments²⁵ or the issue of joint federal–state activities. Thus, the applicability of NEPA to state–issued NPDES permits²⁶ is a unique hybrid issue involving both a joint federal–state activity and an environmental regulatory activity.

Recently, a federal district court held that a state's issuance of an NPDES permit was a state and not a federal action.²⁷ This Note proposes an alternative view. Relying on the policy underlying NEPA and an expansive reading of its terms,²⁸ the Note argues that the existence of federal control, whether or not exercised, is sufficient federal involvement to constitute a major federal action.²⁹ Thus, in the NPDES context, EPA's discretionary power to object to the issuance of permits by a state gives rise to a sufficient federal nexus to make such issuances federal actions.

Second, this Note discusses the problems arising from implied and express exemptions from NEPA for environmental regulatory activities.³⁰ It concludes that whether NEPA should be applied to permits ultimately depends on the federal–state character of such permits as gleaned from the 1972 and 1977 amendments to the Federal Water Pollution Control Act. After concluding that, contrary to decided cases, the language and legislative history give rise to no clear indication of the federal–state character of state–issued NPDES permits,³¹ the Note proposes that any ambiguity be decided in favor of the federal character of state permits in light of the pervasive policies of NEPA.³² Thus, this Note concludes that environmental impact statements are required before the issuance of NPDES permits by the states.

24. See note 22 *supra*.

25. For a discussion of the 1972 amendments, Pub. L. No. 92–500, 86 Stat. 816 (codified in scattered sections of 33 U.S.C.), see notes 107–33 *infra* and accompanying text. For a discussion of the 1977 amendments, see notes 165–75 *infra* and accompanying text (Clean Water Act of 1977), Pub. L. No. 95–217, 91 Stat. 1566 (codified in scattered sections of 33 U.S.C.A.).

26. This Note will use the term permit to refer to the entire process involved in issuing a permit and not only the permit itself.

27. *Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Bd.*, 453 F. Supp. 122, 126 (E.D. Va. 1978). The facts of this case are set out at note 19 *supra*.

28. See notes 33–47 *infra* and accompanying text.

29. See notes 48–75 *infra* and accompanying text.

30. See notes 76–90 *infra* and accompanying text.

31. See notes 91–175 *infra* and accompanying text.

32. See notes 186–201 *infra* and accompanying text.

I. NEPA AND "MAJOR FEDERAL ACTION"

A. "To the Fullest Extent Possible"

Section 102 of NEPA states that "Congress authorizes and directs that, to the fullest extent possible . . . 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" ³³ Much emphasis has been placed on the words "to the fullest extent possible." In reference to this phrase, the conference report on NEPA stresses that federal agencies are required to comply with NEPA "unless existing law . . . expressly prohibits or makes full compliance . . . impossible." ³⁴ In addition, the conference report expresses the intent that this phrase "should not be used as a means of avoiding compliance" and that "no agency shall utilize an excessively narrow construction of its existing statutory authority to avoid compliance." ³⁵ Thus, the legislative history indicates that the phrase "to the fullest extent possible" directs both the courts and agencies promulgating NEPA regulations to interpret NEPA broadly.

Guidelines promulgated by the Council on Environmental Quality (CEQ), which has the authority to promulgate general NEPA regulations, ³⁶ echo this mandate for a broad interpretation of NEPA. Indeed, the directing phrase "to the fullest extent possible" appears in the introductory sections of the guidelines. ³⁷ Courts have also keyed in on this phrase. One court declared that the phrase evidences that NEPA is a "value judgment by Congress" that "Americans must, beginning now, act 'as trustee of the environment for succeeding generations.'" ³⁸ The seminal case of *Calvert Cliffs' Coordinating Committee v. AEC* ³⁹ found that NEPA's procedural provisions, including the mandate to comply "to the fullest extent possible," were "not highly flexible . . . [but established] a strict standard of compliance." ⁴⁰ The court in *Calvert Cliffs'* stressed that the language of the Act did not "provide an escape hatch for footdragging agencies," that the procedural

33. 42 U.S.C. § 4332 (1976).

34. CONF. REP. NO. 91-765, 91st Cong., 1st Sess., reprinted in [1969] U.S. CODE CONG. & AD. NEWS 2767, 2770.

35. *Id.*

36. Exec. Order No. 11,514, 3 C.F.R. 105 (1972).

37. 40 C.F.R. § 1500.1(a) (1977).

38. *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972).

39. 449 F.2d 1109 (D.C. Cir. 1971).

40. *Id.* at 1112. These procedural provisions also include EIS preparation.

requirements were not discretionary, and that NEPA was not intended to be a "paper tiger."⁴¹

Following this theme, courts have construed NEPA exemptions narrowly. In *Homeowners Emergency Life Protection Committee v. Lynn*,⁴² the court held that a NEPA exemption enacted in the Federal Disaster Relief Act of 1974,⁴³ which relieved HUD from preparing an EIS regarding its actions in disaster relief, would not be applied retroactively.⁴⁴ Similarly, the court in *American Smelting and Refining Co. v. Federal Power Commission*,⁴⁵ held that an agency could avoid NEPA compliance only after making express findings that demonstrated the "statutory conflict which prohibits compliance."⁴⁶

Thus, in considering the legislative history, the administrative regulations, and the case law, it appears that the phrase "to the fullest extent possible" mandates that NEPA be construed as broadly as possible in all contexts.⁴⁷

B. "*Major Federal Action Significantly Affecting the Quality of the Human Environment*"

CEQ guidelines indicate the type of actions covered by NEPA and the characteristics of a major federal action. These regulations state that the Act applies to projects or programs that are (1) directly undertaken by a federal agency; (2) supported by federal funding (except revenue sharing); or (3) involve a federal lease, permit, license or other entitlement for use.⁴⁸ The guidelines also establish three indices which help identify a "major federal ac-

41. *Id.* at 1114.

42. 541 F.2d 814 (9th Cir. 1976).

43. 42 U.S.C. § 5175 (1976).

44. 541 F.2d at 818.

45. 494 F.2d 925 (D.C. Cir. 1974).

46. *Id.* at 948.

47. *But see* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). In *Vermont Yankee*, the Supreme Court upheld an Atomic Energy Commission license to operate a power plant. The respondent, an environmental group, challenged the license on the ground that procedures adopted by the AEC did not conform to the policies of NEPA. *Id.* at 548. The Court rejected such a broad application of NEPA, stating, "We have before observed that 'NEPA does not repeal by implication any other statute.' . . . [I]t is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA." *Id.* In addition, the Court curtailed the scope of judicial review and adopted a stance of extreme deference to administrative agencies. *Id.* at 555. Yet, *Vermont Yankee* does not hinder the pervasive range and effect of NEPA policies. *See* Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979). *See also* notes 186-200 *infra* and accompanying text.

48. 40 C.F.R. § 1500.5(a)(2) (1977).

tion." Two indices are general administrative guides. Under the first index, activities must be considered in light of their overall cumulative impact. This requires an agency to view its own activities broadly when deciding whether an EIS is required.⁴⁹ The second index requires that "in all cases" in which the proposed action is "likely to be highly controversial" an EIS must be prepared.⁵⁰

According to the third index, actions are "federal" if the federal government exercises "sufficient federal control and responsibility."⁵¹ This index requires a federal nexus to the activity in question. Many cases have restated this requirement. In one such case, *Friends of the Earth, Inc. v. Coleman*,⁵² the court determined that, regarding joint federal-state activities, there was "some point [at which] the nexus will become so close, and the projects so intertwined, that they will require joint NEPA evaluation."⁵³ Other cases have described this requirement as mandating that an EIS be prepared for those activities that have a "federal character."⁵⁴

49. *Id.* § 1500.6(a).

50. *Id.* The meaning of this requirement is not clear. In *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) (*Hanly II*), *cert. denied*, 412 U.S. 908 (1973), the court stated that the term controversial refers to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than the existence of opposition to a use, the effect of which is relatively undisputed. 471 F.2d at 830. It reasoned that to make the threshold determination rest on the likelihood of a court challenge would have the effect of placing the determination of federal action status in the hands of the opponents to the activity in question. *Id.* at 830 n.9A; *accord*, *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973), where the court stated: "We reject, however, the suggestion that 'controversial' must necessarily be equated with opposition."

Yet, the *Hanly II* dissent and commentators argued for a different, perhaps less strained reading of this requirement—that "controversial" refers to actions which are almost certain to evoke a challenge in the courts. 471 F.2d at 839 (Friendly, C.J., dissenting); *see, e.g.*, Note, *Environmental Law—Rucker v. Willis: Are Impact Statements for Private Projects that Require Federal Permits an Endangered Species?*, 52 N.C. L. REV. 654, 667 (1974). The dissent contended that CEQ may have believed that to avoid "the delay incident to such a suit . . . the agency would do better to prepare an impact statement in the first instance." *Id.* (Friendly, C.J., dissenting). Inclusion of the words "likely" and "highly" in the regulation indicate a limitation which would alleviate the fear of spurious major federal action determinations. *Id.* at 839 (Friendly, C.J., dissenting). In addition, to construe the controversy requirement as the *Hanly II* majority did unnecessarily limits the CEQ guidelines, and undercuts the policy of encouraging the use of impact statements. *See Note, supra* at 667.

51. 40 C.F.R. § 1500.6(c) (1977).

52. 518 F.2d 323 (9th Cir. 1975).

53. *Id.* at 329.

54. *No East-West Highway Comm., Inc. v. Whittaker*, 403 F. Supp. 260, 275 (D.N.H. 1975) (a highway, although far from completed, required an EIS when built with the assistance of the Federal Works and Highways Administration).

There have also been extensions of this requirement.⁵⁵ For example, while many courts have found that "major" refers to the environmental impact requirement and "federal" refers to the federal involvement criterion,⁵⁶ other courts have combined the two concepts.⁵⁷ Under the latter view, the nature and extent of federal involvement has been examined in the federal character inquiry,⁵⁸ implying that the term "major" modifies "federal" as well as "action." Some commentators have even suggested a sliding scale between environmental impacts and federal involvement. This approach would result in major federal action classification for projects with minor impact but substantial federal involvement as well as projects with significant impact but minimal federal involvement.⁵⁹

Another approach to the federal control requirement has significant importance to the question of the applicability of NEPA to state-issued NPDES permits. This broad test finds federal character when there is the *opportunity* for federal control, regardless of whether that control is exercised. The CEQ control requirement as developed by case law may be summarized as follows: "The distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material aspects. The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. Cases finding 'federal' action emphasize authority to exercise discretion over the outcome."⁶⁰

Courts have developed rationales which have extended this "authority to exercise discretion" concept of federal control. In *Davis v. Morton*,⁶¹ the court found that NEPA applied to situa-

55. Perhaps the furthest extension proposed was that NEPA should apply to general revenue sharing. Note, *The Application of Federal Environmental Standards to the General Revenue Sharing Program: NEPA and Unrestricted Federal Grants*, 60 VA. L. REV. 119, 121-23 (1974). *Contra*, Note, *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).

56. In *Defenders of Wildlife v. Andrus*, 7 ENVIR. L. REP. (ELI) 20225 (D.D.C. 1977), for example, the court stated that "where federal action is not in the form of funding or direct participation, courts frequently look to the significance of the environmental impact to determine whether the federal action constitutes a major federal action." *Id.* at 20230 n.17.

57. *See, e.g.*, *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971) (an EIS was required for the cancellation of a contract to purchase irreplaceable helium).

58. *Id.* at 656.

59. *E.g.*, Comment, *supra* note 7, at 134.

60. W. RODGERS, *supra* note 4, § 7.6 at 736.

61. 469 F.2d 593 (10th Cir. 1972).

tions where the only federal involvement was federal approval of a program. In *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*,⁶² which involved a challenge to the issuance of a license to operate a nuclear power plant, the court found that there was federal action "whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment."⁶³ Another court, in *McLean Gardens Residents Association v. National Capital Planning Commission*,⁶⁴ found that the role of the National Capital Planning Commission, a federal agency, in merely advising and consulting with the D.C. Zoning Commission, a local body, regarding development applications was enough to require the preparation of impact statements.⁶⁵ Thus, the requirement for federal control has been refined to a point where federal approval, permission or advice gives rise to major federal action status.

Developing this idea further, one federal district court has found that the existence of theoretical but unexercised federal control is sufficient to require EIS preparation. In *Defenders of Wildlife v. Andrus*,⁶⁶ a citizens' environmental group sought to enjoin the State of Alaska from conducting a wolf kill program on federal lands because an EIS had not been prepared. The court stated that:

The fact that defendants [the federal government] are not funding or directly participating in the wolf kill does not preclude their action from being a major federal action. A decision by a federal agency which permits another party, governmental or private, to take action affecting the environment can constitute a major federal action. . . . [D]efendants' failure to prevent the wolf kill . . . is in substance action which permits . . . hunters to take action affecting the environment.⁶⁷

Thus, agency failure to take action to prevent activities which affect the quality of the environment may itself be considered a federal action.

62. 481 F.2d 1079 (D.C. Cir. 1973).

63. *Id.* at 1088. The court held that an EIS was required before the license could be issued. *Id.*

64. 2 ENVIR. L. REP. (ELI) 20659 (D.D.C. 1972).

65. *Id.* at 20662. Subsequent to this decision, however, the statutory authority of the National Capital Planning Commission was changed. In light of this, the D.C. District Court reversed itself in *McLean Gardens Residents Ass'n v. Nat'l Capital Planning Comm'n*, 390 F.2d 165 (D.D.C. 1974), holding that NCPC review of zoning applications did not require EIS preparation.

66. 7 ENVIR. L. REP. (ELI) 20225 (D.D.C. 1977).

67. *Id.* at 20229 (citations omitted). *Cf.* *Students Challenging Regulatory Agency Procedures v. United States*, 346 F. Supp. 189, 199-200 (D.D.C. 1972) (*SCRAP I*).

This concept of federal action has direct bearing on the question of the applicability of NEPA to a state's issuance of NPDES permits. Following *Defenders* it may be argued that EPA's failure to object to specific state-proposed permits is a similarly sufficient federal nexus to require EIS preparation for such proposals.

Courts are not unanimous, however, on the question whether the failure to exercise available federal power is indicative of a major federal action. In *Alaska v. Andrus*,⁶⁸ the United States District Court for the District of Alaska, in a case involving the same litigation as *Defenders*,⁶⁹ held that the federal government's decision not to object to the wolf kill did not constitute a major federal action.⁷⁰ The court stated that for a decision "which allows others to take action affecting the environment" to constitute a federal action there must be some affirmative conduct by the federal government before the other party can act.⁷¹ The court found no such affirmative conduct in *Alaska*.⁷²

At this point, one can only speculate whether courts will follow *Defenders* or *Alaska*. While it is clear that under *Defenders* a state's issuance of an NPDES permit constitutes a major federal action, the same result may also follow from *Alaska*. The *Alaska* court found "it a strained chain of logic which turns totally non-federal action into federal action just because the [federal government] has the power to regulate the activity."⁷³ In *Alaska*, the power to regulate involved only the authority to permit or stop the wolf kill.⁷⁴ In contrast, EPA's involvement in the NPDES permit process entails not only the power to veto the proposed permit but also the opportunity to comment on that permit and to provide technical assistance.⁷⁵ Thus, EPA's decision not to object to a permit may be only the culmination of a continuous involvement in the permit process. This greater participation by EPA may provide a court—even one that follows *Alaska*—with the

68. 429 F. Supp. 958 (D. Alas. 1977).

69. Since the State of Alaska was not a party to the District of Columbia proceeding (*Defenders*), the Secretary of the Interior, pursuant to that court's decision, issued an order to the State to halt the wolf kill. The State then challenged that order in the United States District Court for the District of Alaska. *Id.* at 960-61.

70. *Id.* at 962. See also *Molokai Homesteaders Coop. Ass'n v. Morton*, 506 F.2d 572, 580 (9th Cir. 1974) (holding that the determination of the federal government not to object to violations in a federal loan, although it had the right to do so, was not sufficient federal nexus to find a federal action).

71. 429 F. Supp. at 962.

72. *Id.* at 963.

73. *Id.*

74. *Id.* at 961-62.

75. For a description of EPA's role in the permit process, see note 19 *supra*.

federal nexus that would justify a finding that a state's issuance of an NPDES permit constituted a major federal action.

II. NEPA AND ENVIRONMENTAL REGULATORY ACTIVITIES

An analysis of NEPA may be moot with respect to discharge permits, as with all environmental regulatory activities undertaken by the federal government. NEPA requires a federal agency to take environmental concerns into account when performing its activities.⁷⁶ It can be argued, however, that environmental regulatory activities, by their nature, meet this requirement. Thus, the safeguards in NEPA may not be needed and could be construed as unnecessary encumbrances on such activities, hampering the attainment of effective environmental protection that is the very goal of NEPA.⁷⁷

Originally, NEPA regulations promulgated by CEQ exempted environmental regulatory activities from the procedural requirements imposed by the Act.⁷⁸ This policy was gleaned from the Act's legislative history⁷⁹ and was supported by the desire to avoid needless delay of activities that were already environmentally oriented.⁸⁰ In the 1972 Federal Water Pollution Control Act Amendments, however, Congress modified its exemption policy by enacting section 511(c)(1) which exempted all EPA water pollution control activities except construction grants for publicly owned treatment plants and issuances of new source NPDES permits by EPA.⁸¹ Subsequently, EPA promulgated regulations for

76. See notes 1-6 *supra* and accompanying text.

77. See text accompanying notes 81 and 176-85 *infra*.

78. 36 Fed. Reg. 7724-29 (1971).

79. The announced policy in the legislative materials, called the Muskie-Jackson Compromise, assured that NEPA, which originated in Senator Jackson's Interior and Insular Affairs Committee, would not hinder environmental programs under the purview of Senator Muskie's Subcommittee on Air and Water Pollution. See 1 ENVIR. L. REV. (ELI) 10127 (1971).

80. See text accompanying notes 81, 176-85 *infra*.

81. FWPCA § 511(c)(1), 33 U.S.C. § 1371(c)(1) (1976). For the text of this section, see note 23 *supra*. Section 511(c)(1) was prompted by *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971), which held that absent a legislative exemption, discharge permits issued by the Army Corps of Engineers pursuant to the Refuse Act of 1899, 33 U.S.C. § 407 (1976), were required to comply with NEPA's procedural provisions. This had a detrimental effect on the revitalized permit program "discovered" by President Nixon, Exec. Order No. 11, 574, 3 C.F.R. 551 (1972). For example, only twenty out of 20,000 proposed permits were issued in the period between 1970 and 1972. See 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 156 (1973) [hereinafter cited as LEGISLATIVE HISTORY]. To avoid further delay in implementing environmental regulatory activities and to negate the effect of *Kalur*, Congress expressly exempted environmental regulatory activities from NEPA's requirements. See 118 CONG. REC. 33707, 33713 (1972)

the preparation of impact statements in the NPDES permit process.⁸² Notably, these regulations did not apply to state-issued NPDES permits.⁸³

Predictably, EPA received many comments on this limitation to the exception. CEQ, for example, argued that the regulations would increasingly "extinguish EPA's NEPA responsibilities" as states gained control of NPDES programs.⁸⁴ It predicted that such a scheme "would produce an arbitrary and inequitable pattern of NEPA application" in which NEPA would have disparate effects on similar programs in different states only because of the variance in the states' assumption of NPDES responsibility.⁸⁵ Additionally, the Council contended, such discrimination was unsupported by the policies which created the exception, *i.e.*, the viability of environmental review for new source permits as a planning tool to assure effective environmental safeguards.⁸⁶

Countering these criticisms, EPA supported the limitation of the section 511(c)(1) exception on two grounds. First, it believed that state-issued permits were state, not federal actions and that therefore NEPA could not apply.⁸⁷ Second, EPA argued that its authority to veto a state-issued permit could not be construed as a

(remarks of Senators Buckley and Hart), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* at 195, 210. See notes 176-85 *infra* and accompanying text.

82. 40 C.F.R. § 6 (1977).

83. The regulations stated: "These procedures shall apply only to the issuance of a new source NPDES permit by EPA and not to the issuance of a new source NPDES permit from any State which has an approved NPDES program in accordance with Section 402(b)" *Id.* § 6.904(a).

84. Plaintiffs' Memorandum, *supra* note 19, at 35.

85. *Id.*

86. The CEQ position was summarized in a letter written by Russell Peterson, the Chairman of the Council, to Russell Train, EPA Administrator, in response to the proposed NPDES EIS regulations:

Sound public policy supports using NEPA in all aspects of EPA's new source permit program. The NPDES new source permit is intended to be a preconstruction permit. . . . While it is a water quality permit, the environmental effects of its approval or denial can be far-reaching. . . . It was in recognition of the need to broaden the focus of decisionmaking in these cases beyond water quality that Congress specifically required EPA to apply NEPA to the new source permit program. Those reasons are equally valid whether it is EPA or the state which is issuing the permit.

In such circumstances the environmental impact statement performs its most useful function. Because the new source approval is a preconstruction permit, there is time for environmental review and there are real alternatives to be looked at. . . . [T]he NEPA process can help by focusing issues and laying out options. It gives states and localities a strong informational basis for their determinations on the design, location, and operation of new facilities.

Id. For a discussion of the legislative policies behind § 511(c)(1), see notes 176-85 *infra* and accompanying text.

87. 42 Fed. Reg. 2450 (1977).

permit issuance within the "issuance" language of section 511(c)(1) since, under the 1972 amendments, the Administrator could not actually issue permits within a state which had assumed NPDES responsibility. Therefore, EPA concluded, even if its role in a state permit process could be viewed as a major federal action, "the Federal action is not the issuance of a permit to a new source and therefore section 511(c)(1) exempts EPA from the requirement to prepare an environmental impact statement in such a situation."⁸⁸

EPA's analysis is flawed in two respects. First, its argument that state issuance could never be an Administrator's issuance since the Administrator could not actually issue permits unless he withdrew approval of the state's program is mooted by the 1977 amendments. Amended section 402(d) now allows the Administrator to issue new source permits when the proposed state permit is inadequate.⁸⁹ Second, although EPA established an accurate test in requiring that state-issued permits fit within the exception to the section 511(c)(1) exemption,⁹⁰ this analysis begs the fundamental question of determining the federal-state character of such permits. For if the issuance of such permits is deemed to be federal action, then it must logically follow that such permits are issued by the Administrator, since he is the only federal official with any connection to the NPDES program. Thus, although use of the broad policy underpinnings of NEPA may be tempered by the exemptions in section 511(c)(1), the question of NEPA applicability to state-issued NPDES permits must ultimately depend on the federal-state character of such permits.

III. THE FEDERAL WATER POLLUTION CONTROL ACT

Inquiry into the federal-state character of state-issued NPDES permits requires an examination of the legislative background of the permit program.

A. NPDES Permits—Section 402

1. Generally

The legislative origin of the NPDES permit program, section 402 of the Federal Water Pollution Control Act,⁹¹ resulted from

88. *Id.*

89. 33 U.S.C.A. § 1342(d)(4) (1978) (amending 33 U.S.C. § 1342(d) (1976).

90. FWPCA § 511(c)(1), 33 U.S.C. § 1371(c)(1) (1976). For the text of this section, see note 23 *supra*.

91. 33 U.S.C. § 1342 (1976).

the clash and ultimate compromise between two conflicting policy goals: the desire for national uniformity in the administration of the permit program and the desire to place the responsibility for environmental protection at the local level. The predominance of either of these policies over the other as an ultimate manifestation of legislative intent has direct bearing on the determination of the federal-state character of state-issued NPDES permits. If the predominant intention of Congress in developing the NPDES program was to assure uniformity, it could be argued that even after federal approval of a state's NPDES program, federal review procedures for specific permits are evidence of a program still within the confines of federal control. State assumption of NPDES programs would be considered a mere delegation of federal authority. This would lead to the conclusion that NPDES permits represent federal action notwithstanding the governmental source from which they were issued. Conversely, if the predominant intention of Congress was to assure local control of environmental decisionmaking, then one could argue that once the state assumes NPDES responsibility, the programs are purely state actions, making NEPA inapplicable.⁹²

To ascertain which of these policies is predominant is a difficult task since the Act and the legislative materials are ambiguous. A strong case has been made that the language of the Act supports a policy of state autonomy.⁹³ The Act specifically directs the Administrator to "suspend the issuance of permits" under a program administered by EPA, in a state once EPA approves that state's program.⁹⁴ Subsequent review by EPA of such permits is discretionary.⁹⁵ Even more importantly, the Act declares a policy to "recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution

92. This is not to contend that Congress in its deliberations necessarily decided to implement one policy to the exclusion of the other. The final versions of both the 1972 and 1977 Amendments to the Federal Water Pollution Control Act were the result of the accommodation of both of these policies. This very accommodation is the reason for the difficulty in ascertaining the federal-state character of state-issued NPDES permits. *See* notes 93-133 *infra* and accompanying text. For the purpose of determining the applicability of NEPA, however, one must conclude that these permits are either federal actions or state actions. Thus, it is necessary to find the predominant intent or policy.

93. *See* *Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282, 1290-92 (5th Cir. 1977). *See* notes 134-48 *infra* and accompanying text.

94. FWPCA § 402(c)(1), 33 U.S.C. § 1342(c)(1) (1976), provides: "Not later than ninety days after the date on which a State has submitted a program [later approved by EPA] . . . , the Administrator shall suspend the issuance of permits [from EPA NPDES programs] as to those navigable waters subject to such program."

95. *Id.* §§ 402(d)(3), (e), 33 U.S.C. §§ 1342(d)(3), (e).

. . . .⁹⁶ Collectively, these factors, may indicate that once EPA approval is given, EPA's role becomes a minor one, with the state taking the substantial responsibility and workload. This supports the concept that state permits represent state and not federal action.

The language of the Act, however, also supports the argument that section 402 manifests a policy of uniformity. The Act requires all permits to be subject to the same terms, conditions, and requirements, whether they are issued from a federal or state agency.⁹⁷ In addition, the Act provides many procedural safeguards which demonstrate the pervasiveness of EPA control: EPA approval of state NPDES programs is conditioned on a state's ability to demonstrate compliance with all EPA and FWPCA requirements;⁹⁸ state programs, once approved, are directed to comply with all NPDES requirements established in the Act and with EPA guidelines for water quality analyses and reports;⁹⁹ the Administrator may withdraw his approval of a state program at any time;¹⁰⁰ the state is required to transmit each permit application to EPA for its review;¹⁰¹ and the Administrator has the ability to block the issuance of any permit to which he objects.¹⁰² Thus, it may be effectively argued that through EPA review and approval procedures of both state programs and permits, EPA retains control of state-issued permits: a manifestation of the policy of uniformity and an indication of the federal character of state-issued NPDES permits.

The conflict and resultant ambiguity produced by these policies is illustrated by the etiology of section 402(d)(2) of the 1972 amendments.¹⁰³ This section deals with the Administrator's review and veto power over a state's proposed permits. The Senate bill allowed the Administrator final veto power; his approval was a condition precedent to issuance.¹⁰⁴ Such federal control would

96. *Id.* § 101(b), 33 U.S.C. § 1251(b).

97. *Id.* § 402(a)(3), 33 U.S.C. § 1342(a)(3).

98. *Id.* § 402(b), 33 U.S.C. § 1342(b).

99. *Id.* § 402(b)(2), 33 U.S.C. § 1342(b)(2).

100. *Id.* § 402(c)(3), 33 U.S.C. § 1342(c)(3). Withdrawal is subject to conditions established in this section.

101. *Id.* § 402(d)(1), 33 U.S.C. § 1342(d)(1).

102. *Id.* § 402(d)(2), 33 U.S.C. § 1342(d)(2).

103. *Id.*

104. The Senate proposal provided, "No permit shall issue until the Administrator is satisfied that the conditions imposed by the State meet the requirements of this Act." S.2770, 92d Cong., 1st Sess. § 402(d)(2) (1971), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, at 1690.

support contentions of the primarily federal character of state-issued permits. The House version, however, greatly undercut the pervasiveness of an Administrator's power, making the Administrator's nonobjection a condition subsequent to approval, thus placing the burden upon EPA to act to block issuance of objectionable permits.¹⁰⁵ This view buttresses the state character of state-issued permits.

The final version of section 402(d)(2) retained the condition subsequent posture of the House bill but extended the time period in which EPA could respond.¹⁰⁶ Although this version—because of its reduced federal rule—apparently signals a preference for the concept of state character of state-issued permits in state NPDES programs which have been approved by EPA, the fact that the Administrator's veto power was retained may indicate a preference for the view that the issuance of these permits constitutes federal action.

2. *The 1972 Amendments*

Contrary to decided cases,¹⁰⁷ there is no clear indication of a preference for state autonomy or uniformity, and consequently, no indication whether state discharge permits were intended to be federal or state in character. The conference report on the 1972 amendments discusses the general intent of both the Senate and House proposals with respect to section 402.¹⁰⁸ It indicates that the Senate bill favored uniformity, emphasizing the Administrator's "delegation" of permit authority to the states and the pervasiveness of federal overview and control.¹⁰⁹ The House measure, on the other hand, is described as supporting state autonomy, containing certain provisions in which a state is "to administer its own permit program in lieu of the Administrator's program"¹¹⁰ The conference report fails, however, to describe ade-

105. The House bill stated, "No permit shall issue if the Administrator within sixty days [after receiving the proposed permit] . . . objects in writing to the issuance of such permit." H.R. 11876, 92d Cong., 2d Sess. § 402(d)(2) (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 81, at 893, 1058.

106. *Id.* § 402(d)(2), 33 U.S.C. § 1342(d)(2) (the time period was extended to ninety days).

107. *See* note 81 *supra*; and *Chesapeake Bay Foundation, Inc. v. United States*, 453 F. Supp. 122 (E.D. Va. 1978). For a discussion of these cases, see notes 134-64 *infra* and accompanying text.

108. CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 138, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3776, 3816.

109. *Id.*

110. In addition, the House bill, according to the conference report, "required" that the

quately the nature of the bill reported out of conference, stating only that: "The Conference substitute is basically the same as the Senate bill as revised by the House amendment" ¹¹¹

Statements made by opponents of the House and Senate bills support the conclusions drawn by the conference report. For example, Senator Buckley opposed the Senate bill because he felt that: (1) it was an erosion of the commitment to give the states the "primary responsibilities and rights . . . to prevent and eliminate water pollution;" (2) it made the Administrator's role "excessively broad"; and (3) EPA had continued responsibility after "delegation" of NPDES authority. ¹¹² Representatives Abzug and Rangel opposed the House bill because they felt that EPA would have no control after approving state NPDES programs. The two Representatives contended:

Under the bill, once EPA approves a state permit program . . . , all federal ties to the program are severed. The state is not EPA's delegate. Even the policies and requirements of the National Environmental Policy Act . . . will not apply to the state permit program and environmental impact statements will therefore not be required. ¹¹³

Yet, these general conclusions regarding the Senate and House bills are not entirely accurate. Although the House report specifically declared that "permits granted by states under section 402 are not federal permits—but state permits," and expressed the belief that the Administrator would "suspend" his activities on approval of a state's program, it also announced that "federal overview of State permit programs is *essential* after permit issuing authority has been *delegated*" ¹¹⁴ Similarly, the Senate report does not give as clear an indication of support for uniformity as intimated by the conference report. While it is true that the Senate report did emphasize the enforcement role of the Administrator, ¹¹⁵ it also discussed the need to "restore the balance of federal-state effort" ¹¹⁶ and expected "that the States will play a

Administrator approve a submitted program unless there was inadequate authority to issue permits. *Id.* at 139-40, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 3816.

111. *Id.* at 140, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 3817.

112. S. REP. NO. 92-414, 92d Cong., 1st Sess. 102 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3767.

113. H.R. REP. NO. 92-911, 92d Cong., 2d Sess. 393 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 81, at 862.

114. *Id.* at 127, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 81, at 814 (emphasis added).

115. S. REP. NO. 92-434, 92d Cong., 1st Sess. 10 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3677.

116. *Id.* at 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 3737.

major role in the administration of the program."¹¹⁷

The debates of both Houses are also not helpful in ascertaining the intended nature of state-issued NPDES permits. Probably the strongest statement for state control came from Representative Wright during the House debates on the conference bill. Wright stated that once EPA approved a state's program, the states would issue permits under state law. He continued:

These would be state, not federal actions and thus, whether for existing or new sources . . . , such permits would not require environmental impact statements. The managers expect the Administrator to use his . . . veto authority judiciously; it is their intent that the act be administered in such a manner that the ability of the states to control their own permit programs will be developed and strengthened.¹¹⁸

Yet, this statement is inconsistent with a statement made by Representative Gubser in support of the original House bill, which was supposedly stronger with respect to state autonomy than the conference substitute. Gubser maintained that the House bill did not "abdicate responsibility" of the federal government to the states "with no strings attached,"¹¹⁹ thus indicating an intention contrary to the strict state autonomy stance taken by Representative Wright. Representative Gubser pointed out the federal overview aspects of the bill and termed the state's assumption of authority a "delegation."¹²⁰

There were others who maintained that discharge of pollutants into navigable waters of the United States was a privilege which could be granted only by authority of the federal government.¹²¹ Still others emphasized the importance of federal control, arguing that only by assuring uniformity with EPA overview could one prevent competition between the states for industry, and thus promote an effective permit system nationwide.¹²²

Thus, in summary, equally meritorious arguments can be made for finding legislative intent for either state or federal character for state issuances of NPDES permits. As illustrated by the

117. *Id.* at 71, reprinted in [1972] U.S. CODE CONG. & AD. NEWS at 3737.

118. 118 CONG. REC. 33761 (1972), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 81, at 262.

119. *Id.* at 10768-69, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 81, at 663.

120. *Id.*

121. *E.g.*, CONG. REC. 38821 (1971), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, at 1035 (remarks of Sen. Cooper).

122. *E.g.*, 118 CONG. REC. 10639 (1972), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 81, at 517 (remarks of Rep. Harrington).

etiology of section 402(d)(2),¹²³ the enacted version tends to adopt more of the House language which supports the policy of state autonomy and the characterization of state permits as state actions. The argument that state-issued permits are state and not federal action, making NEPA inapplicable, is directly supported by specific statements to that effect in the House report,¹²⁴ and by Representatives Wright,¹²⁵ Abzug, and Rangel,¹²⁶ as well as by a policy proclamation to promote state pollution control management responsibilities.¹²⁷ Taken together, these considerations comprise a potent argument that Congress intended that state character be accorded state-issued permits.

There are equally cogent arguments supporting the thesis that Congress intended that state permits be federal actions. The existence of pervasive EPA overview (although diminished from the original Senate bill)¹²⁸ coupled with statements made in the House,¹²⁹ Senate,¹³⁰ and conference reports¹³¹ stressing the importance of that overview lend credence to this view. The arguments emphasizing the necessity for uniformity¹³² and the per se federal nature of the issuance of discharge permits as a privilege granted from the federal government¹³³ are also supportive. Thus, an analysis of the legislative history of section 402 of the 1972 amendments is, at best, inconclusive.

3. *Case Law*

Prior to 1977, there had been a number of cases which have dealt with the federal-state character of NPDES permit issuances, although indirectly. Specifically, these cases have concerned whether EPA's failure to object to state-issued permits is an "Administrator's action" reviewable by the U.S. Circuit Court of Appeals pursuant to section 509(b)(1)(F).¹³⁴ Unanimously, these

123. See notes 103-106 *supra* and accompanying text.

124. See note 114 *supra* and accompanying text.

125. See note 118 *supra* and accompanying text.

126. See note 113 *supra* and accompanying text.

127. See note 96 *supra* and accompanying text.

128. See notes 103-106 *supra* and accompanying text.

129. See note 114 *supra* and accompanying text.

130. See note 115 *supra* and accompanying text.

131. See note 109 *supra* and accompanying text.

132. See note 122 *supra* and accompanying text.

133. See note 121 *supra* and accompanying text.

134. FWPCA § 509(b)(1), 33 U.S.C. § 1369(b)(1) (1976), provides, "Review of the Administrator's action . . . [i]n issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States"

courts have held that state-issued NPDES permits were state and not federal actions. Thus, these courts have found that neither the issuance of such permits by the state nor EPA's nonobjection could be an "Administrator's issuance."¹³⁵ The basis for these decisions is twofold. First, the courts have found a legislative emphasis placing the primary responsibility for the permit program, as with all environmental regulatory activities, at the local level. In *Shell Oil Co. v. Train*,¹³⁶ the court declared that the language of the 1972 amendments suggested that "Congress did not intend the environmental effort to be subject to a massive federal bureaucracy; rather, the states were vested with the primary responsibility for water quality, triggering the federal enforcement mechanism only where the states defaulted."¹³⁷ Second, logically following from the above, it was believed that state authority to issue permits was not a delegation of power by the federal government. The court in *Mianus River Preservation Committee v. Administrator, EPA*¹³⁸ held that there was no such delegation of federal power and thus no federal character or Administrator's action. The court reasoned that the power to approve state programs was not discretionary but was mandated by the Act if all applicable requirements had been met and, once that occurred, the Administrator was required to suspend his activity in those states.¹³⁹ It characterized the use of "delegation" terminology in the legislative history as "passing references" and found them to be outweighed by specific references to the contrary.¹⁴⁰ In addition, the court viewed the procedural safeguards of EPA review as intended merely to maintain minimum standards, and not as evidence of continuing EPA control as "Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government."¹⁴¹ Instead, the court

135. See *Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282 (5th Cir. 1977); *Mianus River Preservation Comm. v. Administrator, EPA*, 541 F.2d 899 (2d Cir. 1976); and *Shell Oil Co. v. Train*, 415 F. Supp. 70 (N.D. Cal. 1976).

136. 415 F. Supp. 70 (N.D. Cal. 1976).

137. *Id.* at 77.

138. 541 F.2d 899 (2d Cir. 1976).

139. *Id.* at 903-905.

140. *Id.* at 905.

141. *Id.* at 906. The point raised by the *Mianus* court, that federal overview procedures were instituted to assure compliance with minimum standards, is essentially that court's rationalization of the accommodation of conflicting policies. See note 92 *supra*. Yet, this adds nothing to the analysis. The real question that remains unanswered is the degree of federal involvement Congress thought necessary. To say federal involvement is intended only to maintain minimum standards says nothing of the pervasiveness of such involvement to attain compliance with those standards.

concluded that Congress had invited the states to enact even more stringent environmental controls.¹⁴²

Underlying both of these points was an emphasis of that part of the legislative history which supported state autonomy.¹⁴³ For example, the *Mianus* court described the discretionary nature of the Administrator's review power,¹⁴⁴ and concluded from this that "Congress intended that the Administrator should more often than not take the 'action'"¹⁴⁵ Further, *Mianus* cited the remarks of Congressman Wright¹⁴⁶ and the development of section 402(d)(2)¹⁴⁷ as support for its ultimate holding.¹⁴⁸

In light of these cases, it would seem that a proper reading of the 1972 amendments would be one that supported the policy of state autonomy notwithstanding the otherwise inconclusive and ambiguous nature of the legislative history.

At present, *Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Board* is the only reported case that has directly decided whether NEPA should apply to a state's issuance of an NPDES permit.¹⁴⁹ This case arose when two environmental groups brought suit on four grounds,¹⁵⁰ all relating to the alleged significant environmental impact of the refinery's discharge.¹⁵¹

142. *Id.* For support of this point, the court cited FWPCA § 510, 33 U.S.C. § 1370 (1976), which allows states to set more stringent pollution controls.

143. See text accompanying notes 96-106, 113-14, 118 *supra*.

144. See note 95 *supra* and accompanying text.

145. 541 F.2d at 907.

146. See text accompanying note 113 *supra*.

147. See text accompanying notes 103-106 *supra*.

148. 541 F.2d at 907.

149. 453 F. Supp. 122 (E.D. Va. 1978).

150. The four grounds argued by the plaintiffs were: 1) that issuance of such a permit required an EIS and thus, since one had not been prepared, NEPA had been violated; 2) that total maximum daily pollutant loads had not been calculated for the receiving water body and therefore the permit could not ensure that such loads would not be exceeded, a violation of FWPCA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A) (1976); 3) that since the permit record contained no evidence that the permit would ensure compliance with applicable water quality standards, FWPCA § 301, 33 U.S.C. § 1311 (1976), had been violated; and 4) that since permit procedures as specified by federal and state law had not been followed, EPA was under a duty to object to the permit. FWPCA § 402(d)(2), 33 U.S.C. § 1342(d)(2) (1976). Plaintiffs' Memorandum *supra* note 19, at 1-2.

151. When the merits of the case were reached in a subsequent decision, the court acknowledged that there was no doubt that the issuance of the discharge permit would cause a significant environmental impact. 453 F. Supp. at 124. Testimony at the permit hearing revealed that the refinery would discharge 445,000 gallons of effluent per day containing, among other pollutants, suspended and dissolved solids, oil and grease, ammonia, sulfides, phenols and chromium—all either oxygen-depleting or toxic. Plaintiffs' Memorandum, *supra* note 19, at 14. The estuary into which effluent would be discharged was, at the time of the hearing, at maximum assimilative capacity. *Id.* at 15.

In addition, concerns were raised regarding the location of the refinery and the havoc

While the court dismissed three non-NEPA claims for lack of jurisdiction, it held that it did have jurisdiction over the remaining issue—whether an EIS was required for a state's issuance of a discharge permit.¹⁵² The merits of this issue were decided in a second round of litigation.

In that decision, the court concluded that an EIS is not required when a federal agency fails to take action, even though some environmental impact will result from that failure to act.¹⁵³ The court rejected the plaintiffs' argument that: (1) EPA's failure to object was, in effect, an issuance by the Administrator bringing it within the exception to the NEPA exemption in section 511(c)(1) of the Federal Water Pollution Control Act,¹⁵⁴ and that (2) there was sufficient federal involvement in the state's issuance of an NPDES permit to make such an issuance a major federal action.¹⁵⁵ The *Chesapeake* court summarily dismissed the first argument by relying on those cases which had held that the Administrator's decision not to veto a state-issued NPDES permit did not constitute "Administrator's action" reviewable by a federal court of appeals pursuant to section 509(b)(1)(F) of the FWPCA.¹⁵⁶ Although these cases were decided in a different context, the court believed that if failure to object to a state-issued permit did not constitute "Administrator's action," it also could not constitute issuance of a permit by the Administrator.

In deciding the second issue—whether there was sufficient federal involvement in the permit process to make the issuance of a

produced by potential oil spills. The U.S. Fish and Wildlife Service commented that it believed:

that the construction and operation of a refinery complex in Hampton Roads . . . [would] result in a significant contribution to the long term diminution of the area's fish and wildlife resources and could, in the event of a single major oil spill under certain available conditions, result in the elimination of a significant shellfish industry.

Id. In sum, the Director of the Virginia Bureau of Shellfish Sanitation called the placement of the refinery "the worse possible location for an oil refinery." *Id.*

152. *Chesapeake Bay Foundation, Inc. v. United States*, 445 F. Supp. 1349, 1353-55 (E.D. Va. 1978).

153. 453 F. Supp. at 125. For a discussion of the opposing view, see text accompanying notes 51-75 *supra*.

154. 453 F. Supp. at 125.

155. *Id.* at 126-27.

156. For text of FWPCA § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F), see note 134 *supra*.

Chesapeake cited *Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282, 1291 (5th Cir. 1977) and *Mianus River Preservation Comm. v. Administrator, EPA*, 541 F.2d 899, 909 (2d Cir. 1976), which held as noted above, and *Washington v. United States EPA*, 573 F.2d 583, 587 (9th Cir. 1978), which held that for the purposes of § 509(b)(1)(F) "objecting to" did not equal "denying" and therefore, that the Administrator's objection to a state-issued permit did not constitute "Administrator's action."

permit a major federal action—the court examined two theories propounded by the plaintiffs. Under one theory, the plaintiffs argued that the State Board was exercising federal authority since state discharge permits are issued pursuant to the Refuse Act.¹⁵⁷ The court quickly refuted this argument by pointing out that the Refuse Act had been superseded by the enactment of the NPDES program.¹⁵⁸

The bulk of the court's opinion addressed the plaintiffs' other theory—that EPA's supervision over the NPDES program was so pervasive that state issuances of discharge permits were in reality federal actions.¹⁵⁹ In support of this theory, the plaintiffs pointed to the intensive federal regulation of the NPDES program and argued that federal authority to issue permits had been merely delegated to the states.¹⁶⁰ The court responded by stating that the "fact that an area is subject to heavy federal regulation does not transform state actions in that area to federal actions"¹⁶¹

Relying on the rationale of its earlier opinion, the court found that federal requirements for state NPDES permits were irrelevant for NEPA purposes since such permits are "basically state matters, which are merely subject to minimum federal requirements."¹⁶² The earlier opinion was based on the same cases which the court later relied on for its conclusion that failure to object was not an issuance.¹⁶³

The court resolved the delegation issue by examining the legislative intent of the FWPCA, quoting from the conference report on the 1977 amendments. The report emphasized that section 402 "provides for state programs which function in lieu of the federal program and does not involve a delegation of authority."¹⁶⁴

Chesapeake is notable for two reasons. First, the court, in bol-

157. 453 F. Supp. at 127 (citing 33 U.S.C. § 407 (1976)).

158. 453 F. Supp. at 127.

159. *Id.* at 125.

160. *Id.* at 125-26.

161. *Id.* at 126.

162. *Id.*

163. *Chesapeake Bay Foundation, Inc. v. United States*, 445 F. Supp. at 1353. Specifically, this opinion used two cases in its analysis: *Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282 (5th Cir. 1977), and *Mianus River Preservation Comm. v. Administrator, EPA*, 541 F.2d 899 (2d Cir. 1976). For a discussion of these cases, see text accompanying notes 134-48 *infra*.

164. 453 F. Supp. at 126 (quoting H. CONF. REP. NO. 95-830, 95th Cong., 1st Sess. 104, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4424, 4479). The court also discussed dicta in *Mahelona v. Hawaiian Electric Power Co.*, 418 F. Supp. 1328 (D. Hawaii 1976). That court expressed the opinion that "in view of the significant role played by EPA in the state administration of its own NPDES program . . . it appears likely that an EIS would

stering its reasoning to support its position that state-issued NPDES were "state matters," relied on the earlier section 509 cases and thus approved of their analysis of section 402 and the 1972 legislative history. As noted above, the legislative history is subject to alternate interpretations. In addition, the section 509 cases did not consider the 1977 amendments.

A second notable aspect of *Chesapeake* was the court's analysis of the legislative history of the 1977 Water Act amendments, as demonstrated by its quotation from the conference report. Although the court's reading of the 1977 amendments and their legislative history is apposite with the conclusions of earlier cases from the 1972 amendments, a closer scrutiny reveals that, as with the 1972 legislative history, contrary conclusions may be drawn.

4. *The 1977 Amendments*

The 1977 amendments¹⁶⁵ encompassed a number of "midcourse corrections"¹⁶⁶ which Congress determined were necessary to meet national pollution abatement goals set for the early to middle 1980's.¹⁶⁷ Among the changes was a new articulation of permit policy and a revamping of permit programs in several areas. Specifically, the new amendments proclaimed: "It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs"¹⁶⁸ Although such a statement may appear to support a policy of state autonomy, the use of the word "implement" does not preclude the argument that federal control would still be maintained. This statement may merely suggest that more states should take over the immediate administrative responsibilities, *i.e.*, carry on with the delegation process. In addition, the use of the word "implement" contrasts with the choice of the word "manage" for construction grants. "Manage" denotes a conveyance of more substantive responsibility to the states, making the insertion of the word "implement" particularly significant.

Among the changes in Title IV of the Act (regarding permits

be required of at least one responsible agency even when the state issues an NPDES permit in the first instance." *Id.* at 1332 n.6.

165. Clean Water Act of 1977, Pub. L. No. 96-217, 91 Stat. 1566 (codified in scattered sections of 33 U.S.C.A. (1978)).

166. S. REP. NO. 95-370, 95th Cong., 1st Sess. 1-12, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4326, 4327-38.

167. FWPCA § 101(b), 33 U.S.C.A. § 1251(b) (1978) (amending 33 U.S.C. § 1251(b) (1976)).

168. *Id.*

and licenses) were amendments establishing a permit program to regulate discharge of dredged or fill materials into navigable waters.¹⁶⁹ This new program was modeled after the NPDES program and was designed to eventually be administered by the states, with the federal program to be suspended.¹⁷⁰ The conference report (the same report quoted from in *Chesapeake*) emphasized the similarity of the structure of the two permit programs and noted:

such a program is one which [is established] under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority. This point has been widely misunderstood with regard to the permit program under section 402 of the Act. That section, after which the Conference substitute . . . is modeled, also provides for State programs which function in lieu of the Federal program and does not involve a delegation of Federal authority.¹⁷¹

Such an interpretation supports the policy of state autonomy and leaves the interpretations reached by cases subsequent to 1972 intact.

The changes in section 402 itself, however, rebut such a conclusion. Among the most important of the changes was the addition of section 402(d)(4) which allows the Administrator to issue his own permits after objecting to a state's proposed permit, something which he could not previously do.¹⁷² This change is important to the analysis of the applicability of NEPA to NPDES permits in two ways. First, it undercuts EPA's rationale for limiting the 511(c)(1) exemption that state-issued permits could never be Administrator issuances because the Administrator could not issue any permits once approval had been given to the state's program.¹⁷³ Second, it severely weakens the argument that federal responsibility and authority is substantially diminished and that independent authority in the state is created upon approval of a

169. *Id.* § 404, 33 U.S.C.A. § 1344 (amending 33 U.S.C. § 1344 (1970)).

170. H.R. REP. No. 95-830, 95th Cong., 1st Sess. 104, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4424, 4479.

171. *Id.*

172. New section 402(d)(4) provides:

In any case where, after the date of enactment of this paragraph, the Administrator . . . objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. *If the State does not resubmit such permit revised to meet such objection* within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, *the Administrator may issue the permit . . . for such source* in accordance with the guidelines and requirements of this Act.

33 U.S.C.A. § 1342(d)(4) (1978) (amending 33 U.S.C. § 1342(d) (1976)) (emphasis added).

173. *See* note 88 *supra* and accompanying text.

state program. Moreover, it bolsters the argument for uniformity by increasing the federal government's ability to effectively review state actions.

The legislative history also supports the latter view. In the report of the Senate conferees, uniformity and equal treatment were emphasized. Specifically, the report stated that "[e]qual treatment shall apply not only where EPA is administering the permit system but also where an approved State is administering such system."¹⁷⁴ In addition, the report indicated dissatisfaction with EPA's administration of the 1972 amendments. It commented that the permit program developed from that enactment was characterized by inadequate federal overview. Such inadequacy, the report explained, could lead to the "creation of 'pollution havens' . . . [which] was exactly what the 1972 amendments were designed to avoid."¹⁷⁵

Thus, an examination of section 402 and its legislative history yields inconclusive results. Although cases subsequent to the 1972 amendments have found the arguments for state autonomy to be stronger, the 1977 amendments, specifically the changes in section 402 and the policies underlying them, undermine such interpretations and lend convincing support for interpretations which find a predominant legislative desire for uniformity.

B. *NEPA, NPDES, and Section 511(c)(1)*

An examination of the legislative history of section 511(c)(1) (the section which establishes an exemption from NEPA for most EPA activities outlined in the FWPCA¹⁷⁶) is instructive in attempting to ascertain the scope of the NPDES permit exception. If an intention either to include or exclude state permits from NEPA's purview may be gleaned, the question of the applicability of NEPA may be settled notwithstanding the ambiguity in section 402 concerning the federal-state character of these permits.

Unfortunately, the legislative history of section 511(c)(1) is not dispositive. Two important yet contradictory statements, one by

174. S. REP. NO. 95-370, 95th Cong., 1st Sess. 73, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4326, 4398.

175. The report continued:

Lack of a strong EPA oversight of State programs is neither fair to industry nor to states that are vigorously pursuing the act's requirements. The Committee is concerned that the Agency is not conducting a vigorous overview of State programs to assure uniformity and consistency of permit requirements and of the enforcement of violation of permit conditions.

Id.

176. For the text of section 511(c)(1), see note 23 *supra*.

Senator Jackson, the other by Senator Muskie, frustrate the search for a clear solution. Senator Jackson, one of the original sponsors of NEPA,¹⁷⁷ opposed section 511(c)(1) because of the potential expansiveness of the exemption and the inadequacy of the exception. He stated:

[T]he exemption is made virtually unlimited through another means. No environmental impact statement apparently would be required for EPA approval of State permit plans. Yet, once approved, *these plans would allow the State to issue permits—presumably even for new source discharges—without further Federal review, including NEPA review.* Therefore, even one of two exceptions to the exemption—new source permits—can be folded into the exemption through approval of state plans.¹⁷⁸

This emphatic statement from such a NEPA expert lends considerable weight to the argument that NEPA does not apply to state permits.

Senator Muskie's comments, outlining the policies behind the exception and the exemption, support the opposite position.¹⁷⁹ He maintained that the purpose of the amendments was "to set rapidly in motion an effective water pollution control program."¹⁸⁰ This could be achieved in two ways. First, by establishing and adhering to rigid timetables for Administrator activities, reasonably immediate implementation would result. To facilitate the decisions to be made by the Administrator and others, the Act identified many factors which had to be considered and balanced.¹⁸¹ In this framework, Senator Muskie concluded, the safeguards established by NEPA would hinder the attainment of effective pollution abatement programs because they would delay adherence to the timetables.¹⁸² Additionally, such delay was unnecessary since many of the factors which the EIS preparation process would identify for consideration were already required to be considered by the amendments. Thus, the NEPA exemption

177. Senator Jackson was Chairman of the Senate Committee on Interior and Insular Affairs which reported NEPA to the Senate. *See* note 79 *supra*.

178. 118 Cong. Rec. 33710 (1972), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 81, at 204 (emphasis added).

179. *Id.* at 33701, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 81, at 182-83.

180. *Id.*

181. *Id.*

182. *Id.* Senator Muskie was concerned that polluters would attempt to use NEPA to frustrate the Administrator's attempts to implement the FWPCA: "[I]f the . . . analysis that some courts have found in NEPA were to be superimposed on the decisions of the Administrator . . . the owners or operators of sources of pollution . . . would use NEPA to delay the implementation of the Act . . ." *Id.*

was established for most of the Administrator's programs.¹⁸³

The second way to achieve adequate water quality programs would be to require comprehensive environmental planning for those activities which would lend themselves to such treatment without significantly delaying implementation of environmental controls. Senator Muskie stated that construction grants for publicly owned waste treatment plants and new source permits were two such activities.¹⁸⁴ With regard to new source permits he explained:

The Conferees believe that the owner or operator of what is to be a new source has a degree of flexibility in planning, design, construction and location that is not available to the owner or operator of an existing source. The Conferees concluded, therefore, that it would be both appropriate and useful for the Administrator to consider the various "alternatives" described in section 102(2)(c) . . . of NEPA in connection with the proposed issuance of a permit to a new source, whereas the Conferees concluded that consideration of "such alternatives" in connection with the proposed issuance of a permit for existing sources . . . would not be appropriate and consequently did not extend the various requirements of NEPA to such permits.¹⁸⁵

The essence of Senator Muskie's comment is that it is the nature of the activity—that is, whether it could use the NEPA requirements as an effective planning tool—which renders it susceptible to NEPA, regardless of what level of government administers the activity. This supports the concept of the federal character of state-issued NPDES permits. Since the exception to the exemption does not distinguish between state and federal permits, all new source permits would be included within the exclusion and thus be susceptible to NEPA review.

IV. AN ALTERNATIVE APPROACH

At first glance, the law regarding whether a state-issued NPDES permit requires an environmental impact statement seems clear. The only court that has decided this specific issue and other courts which have decided similar substantive issues in different contexts have unanimously held that such permits are state actions, devoid of sufficient federal nexus to require NEPA compliance. These decisions are based on analyses of the federal-state character of state NPDES permits gleaned from the his-

183. *Id.*

184. *Id.*

185. *Id.* at 183.

tory of section 402 of the Federal Water Pollution Control Act. These courts have concluded that the legislators "clearly" intended to promote the NPDES function of the states and to reduce that of the federal government.¹⁸⁶

The arguments presented are not unfounded. The Act announces a policy of placing the primary responsibility with the states and requires the federal government to "suspend" its permitting activities in a state once the state's program is approved. The diminution of the role of federal government is evidenced by the constraints put on federal overview.¹⁸⁷ In addition, there are a number of specific statements in the legislative history denying any theory of delegation and proclaiming the independent state character of NPDES programs upon EPA approval of the state program.¹⁸⁸

Yet, such analyses of section 402 are not conclusive and do not overwhelmingly counter contrary arguments which maintain that such permits are federal actions requiring EIS preparation. Supporting this contention is the pervasive pattern of EPA review and the authority to veto state permit activities after approval of state programs.¹⁸⁹ The fact that federal overview was strengthened and emphasized in the 1977 amendments not only bolsters the argument for the federal character of state-issued NPDES permits, but also undercuts prior cases holding to the contrary.¹⁹⁰ The legislative history is also replete with numerous references to the "delegation" of federal authority and passages emphasizing the importance of vigorous federal overview and national uniformity as necessary to achieve an effective permit program.¹⁹¹ Finally, the theory, raised early in the history of the 1972 amendments, that permits are granted as privileges from the federal government promotes the characterization of state NPDES permits as federal actions.¹⁹²

By itself, an analysis of section 402 demonstrates that there is no clear answer regarding the federal-state character of state NPDES permits. There are additional factors, however, which may tip the balance toward finding federal action. Specifically,

186. See notes 134-64 *supra* and accompanying text.

187. For an example of such a constraint, see FWPCA § 402(d)(2), 33 U.S.C. § 1342(d)(2) (1976), and notes 103-106 *supra* and accompanying text.

188. See text accompanying notes 110 and 118 *supra*.

189. See text accompanying notes 97-102 *supra*.

190. See note 172 *supra* and accompanying text.

191. See notes 109, 112, 114, 119, 122 *supra* and accompanying text.

192. See note 121 *supra* and accompanying text.

one must recall that the inquiry regarding the necessity of preparing an EIS is, after all, a question of the applicability of NEPA. Thus, the broad underlying policies of NEPA¹⁹³ should be determinative in analyzing whether an EIS is required for state-issued permits. The combined factors of section 511(c)(1),¹⁹⁴ which establish an exemption from NEPA for most EPA activities outlined in the FWPCA, and the similarity in objectives between NEPA and the FWPCA, that is, concern for effective environmental management, demonstrate a reluctance to apply NEPA's stringent requirements to environmental regulatory activities. Yet, these factors do not mitigate against deference to the broad policies which NEPA establishes: NEPA's clarion call for adequate environmental protection must not be ignored.

Three arguments follow from this premise. First, stemming from the broad ranging policies contained in NEPA, it has been established that NEPA must be construed as broadly as possible.¹⁹⁵ As a corollary of this rule, NEPA exemptions must be interpreted narrowly to preserve the Act's broad scope.¹⁹⁶ This has direct bearing on the interpretation of section 511(c)(1), because to construe the exemption narrowly the exceptions to the exemption must be construed broadly in order to make NEPA applicable again. The rationale of the exception established by Senator Muskie¹⁹⁷ and echoed by CEQ¹⁹⁸ was that new source permits were excepted because of their amenability to the process of EIS analysis. Since no distinction was made between state and federal permits, the exception must be read to include *all* permits.

Second, in keeping with NEPA's policy of environmental vigilance, section 511(c)(1) should not be read to obstruct the attainment of effective environmental safeguards. For if that section is interpreted to distinguish between state and federal permits, a distinction not supported by the legislative history,¹⁹⁹ the issuance of state permits will escape the EIS review process and thus be subject to less rigorous safeguards than federal permits. This situation is not only contrary to the policies of NEPA but also undermines the policies and reasoning behind the establishment

193. See notes 1-6 *supra* and accompanying text.

194. For a discussion of the NEPA exemption provided by this section, see notes 76-90 and 176-85 *supra* and accompanying text.

195. See text accompanying notes 33-47 *supra*.

196. See notes 42-47 *supra* and accompanying text.

197. See text accompanying notes 179-85 *supra*.

198. See text accompanying notes 84-86 *supra*.

199. See text accompanying notes 179-85 *supra*.

of a national program to eliminate unnecessary and excessive water pollution discharges.²⁰⁰

Third, and perhaps most important, the policies established in NEPA should be a guide to interpreting any environmental legislation. This is not to say that NEPA works to "repeal by implication" environmental statutes,²⁰¹ but rather that any ambiguities in such enactments should be decided in favor of upholding the values expressed in NEPA. Thus, in the NPDES context, ambiguities in section 402 concerning the federal-state character of state-issued permits should be resolved in favor of their susceptibility to NEPA.

V. CONCLUSION

Although case law has decided otherwise, when seen within the framework of NEPA and a congressional desire to maintain adequate environmental safeguards, the arguments for uniformity and federal control in the state NPDES permit process should be given additional weight. These arguments should then give rise to a mandate that state-issued NPDES permits require an environmental impact statement.

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200. For a discussion of NEPA policies, see notes 1-6 *supra*. For a discussion of the basic policies behind the NPDES program, see 1 LEGISLATIVE HISTORY, *supra* note 81, at 156. In a letter to President Nixon from Senator Muskie and EPA Administrator Ruckelshaus, the reasoning behind NPDES was stated:

Despite the national character of pollution, it has not been dealt with uniformly. Varying local revenue capabilities, economic pressures, and citizen interest have often stagnated community and State initiative. To assure equity and national progress the Federal Government undertook to coordinate and support the many various efforts to control water pollution.

As the President stated in his 1970 Message on the Environment, ". . . strict standards and strict enforcement are nevertheless necessary—not only to assure compliance, but also in fairness to those who have voluntarily assumed the often costly burden while their competitors have not. Good neighbors should not be placed at a competitive disadvantage because of their good neighborliness."

To overcome these existing disparities, the Administration proposed that "standards be amended to impose precise effluent requirements on all industrial sources." The enrolled bill has done so.

Further, the Administration established the Refuse Act Permit Program as a major tool to clean the Nation's waters. The enrolled bill formalizes the Administration's initiative by mandating a permit program. The legislation establishes national baselines for classes and categories of industry, and an equitable assessment against all discharges within each class or category.

Id. See also FWPCA § 101(a)(1)-(3), 33 U.S.C. § 1251(a)(1)-(3) (1976).

201. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 at 548 (1978). See note 47 *supra*.