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# NEPA Threshold Determinations; A Framework of Analysis

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# COMMENTS

## NEPA THRESHOLD DETERMINATIONS: A FRAMEWORK OF ANALYSIS

ROBERT D. PELTZ\* AND JEFFREY WEINMAN\*\*

*The authors suggest that traditional concepts of judicial review are ineffective in promoting the intent of the National Environmental Policy Act to inject environmental considerations into all federal agency decisionmaking. They propose the adoption of a framework of analysis to serve as a guideline for agencies in making the threshold determination of whether to file an environmental impact statement.*

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## I. INTRODUCTION

### A. *What is NEPA?*

The National Environmental Policy Act<sup>1</sup> (NEPA) proclaims broad policy goals which seek to reverse the previous federal policy of benign ecological neglect by requiring that federal agencies give attention to environmental values. NEPA seeks to accomplish this by imposing upon the federal bureaucracy both substantive<sup>2</sup> and

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1. 42 U.S.C. §§ 4331-47 (1970).

2. Section 101, 42 U.S.C. § 4331 (1970) provides:

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

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

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

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

procedural<sup>3</sup> mandates to channel agency decisionmaking in accordance with its broad policy statement.

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

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

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

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

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

Cases recognizing the substantive mandate of § 101, include: *Environmental Defense Fund, Inc. (E.D.F.) v. Corps of Eng'rs*, 492 F.2d 1123 (5th Cir. 1974); *Sierra Club v. Froehlke*, 486 F.2d 946 (7th Cir. 1973); *Conservation Council v. Froehlke*, 473 F.2d 664 (4th Cir. 1973); *Calvert Cliff's Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). See also Note, *The Least Adverse Alternative Approach to Substantive Review under NEPA*, 88 HARV. L. REV. 735 (1975); Briggs, *NEPA as a Means to Preserve and Improve the Environment—The Substantive Review*, 15 B.C. IND. & COM. L. REV. 699 (1974).

3. The relevant portions of § 102, 42 U.S.C. § 4332 (1970) provide:

The Congress authorizes and directs that, to the fullest extent possible . . .

(2) all agencies of the Federal Government shall—

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

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

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact in-

Section 101 of NEPA provides that environmental concerns are not to be given superior weight to competing social values. Rather, they are to be balanced with economic and social considerations in order to resolve the conflict between protection of the environment and advancement of other important national goals in the context of federal government decisionmaking.<sup>4</sup> "All practicable means" are to be used to insure the fulfillment of these goals. This substantive mandate is thus inherently flexible, permitting wide latitude by the administrators of federal agencies.<sup>5</sup>

Since wide discretion can breed wide abuse, to insure that the essence of NEPA be properly distilled, the substantive flexibility of section 101 is tempered by the procedural provisions of section 102 which must be strictly adhered to and which leave considerably less room for discretion.<sup>6</sup> The "action-forcing" requirements of section 102 are thus designed to transform the otherwise noble, but ephemeral declarations of section 101 into meaningful and identifiable statutory duties.<sup>7</sup> Most importantly, the procedures so compelled

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involved. Copies of each statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes

Cases clarifying the procedural directives of NEPA include: *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233 (10th Cir. 1971), *vacated and remanded sub nom. Upper Pecos Ass'n v. Peterson*, 409 U.S. 1021 (1972); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd on other grounds*, 412 U.S. 669 (1973).

4. S. REP. No. 296, 91st Cong., 1st Sess. 8 (1969). See *Pizitz, Inc. v. Volpe*, 4 E.R.C. 1195 (M.D. Ala.), *aff'd per curiam*, 467 F.2d 208 (5th Cir. 1972); *E.D.F. v. Hardin*, 325 F. Supp. 1401, 1403-04 (D.D.C. 1971). *But see E.D.F. v. Corps of Engr's*, 470 F.2d 289, 299 n.15 (8th Cir. 1972).

5. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971). See, e.g., *Donovan, The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 12 B.C. IND. & COM. L. REV. 541 (1971); *Hanks & Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970); *Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 643-50 (1970); *Yannacone, National Environmental Policy Act of 1969*, 1 ENVIR. LAW 8 (1970); *Note, The National Environmental Policy Act: A Sheep in Wolf's Clothing?* 37 BROOKLYN L. REV. 139 (1970). See also notes 32-35 *infra* and accompanying text.

6. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112. See discussion regarding the scope of review for agency threshold determinations Section II D, *infra*.

7. See the comments of Senator Jackson, NEPA's principal sponsor, at *Hearings on S.*

are to be carried out "to the fullest extent possible."<sup>8</sup>

Specifically, section 102 directs all agencies of the federal government to utilize a "systematic, interdisciplinary approach" to planning which may have an impact on the environment and to "identify and develop methods" which would ensure a balanced consideration of environmental and economic factors. To achieve this, section 102 (c) provides that all federal agencies

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 . . .<sup>9</sup> (emphasis added).

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1075, S.237, S. 1752, before the *Senate Comm. on Interior & Insular Affairs*, 91st Cong., 1st Sess. 116 (1969).

8. This does not qualify § 102 such that it permits agency discretion but rather it reduces that discretion greatly. The Senate and House conferees who added the "fullest extent possible" language to NEPA stated:

The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in . . . [Section 102(2)] unless the existing law applicable to such agency's operations does not make compliance possible . . . it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means to avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall seek to construe its existing statutory authorizations in a manner designed to avoid compliance.

*Major Changes in S. 1075 as Passed by the Senate*, 115 CONG. REC. pt. 30 at 40417-18. See also 36 Fed. Reg. 7724 (1971). The only qualification to the "fullest extent possible" language of § 102 can be found in § 104 which states:

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

42 U.S.C. § 4334 (1970). Note the contrasting statutory language of "all practicable means" utilized in § 101 and "the fullest extent possible" used in § 102. This in itself suggests varying standards of compliance and consequently varying standards of judicial review.

9. 42 U.S.C. § 4332(2)(C) (1970). This statement is to include a discussion of the following factors:

- (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

This detailed statement is commonly referred to as an Environmental Impact Statement (EIS).

Administrative agency chiefs therefore must first make a threshold determination as to whether the action under consideration is "a major federal action significantly affecting the environment."<sup>10</sup> A negative finding relieves the agency of the duty to file an environmental impact statement.<sup>11</sup> Such negative threshold determinations have spawned a great deal of litigation, usually in the form of suits seeking injunctive relief.<sup>12</sup>

Other litigation under NEPA has been based on the allegation that although an EIS was filed, it was either insufficient, or even though adequate, the substantive administrative decision to go ahead with the project was improper in that it gave insufficient weight to relevant environmental factors.

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would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332 (2) (C) (1970).

For a detailed treatment of the technical aspects of preparing an EIS, see Kross, *Preparation of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81 (1972). See generally, *The Environmental Impact Statement: A Small Step Instead of a Giant Leap*, 5 URBAN LAW. 264 (1973); Orloff, *Environmental Impact Statement Process*, 29 BUS. LAW. 1319 (1974).

10. While there has been substantial litigation concerning the meaning of "major federal action," this comment will not deal with that issue. See note 11 *infra*.

11. Such a determination may be made by the agency because the action either (1) is not a *federal action*, (2) is not a *major action* or (3) does not *significantly* affect the environment. These three grounds are not always easy to separate conceptually and thus courts and commentators have reasoned that the statutory term "major federal action significantly affecting the environment" should be read as one. That is, a minor federal action which has potentially monumental environmental consequences should not be exempted from the EIS requirement simply because it can be characterized as not major. To read each factor as an independent prerequisite to the filing of an impact statement could clearly thwart the intent of Congress. One author has in fact proposed a sliding scale approach whereby the requisite finding of *major federal action* would be reduced to *any federal action* where the environmental impact would be severe. The size of the federal action needed to trigger the EIS would increase as the magnitude of the environmental impact decreased. Comment, *Environmental Law*, 26 S.C.L. REV. 119, 134-35 (1974).

For further discussion regarding the potentially anomalous results of separating "significant impact" from "major federal action," see *Minnesota Public Interest Research Group (M.P.I.R.G.) v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *Scientists' Institute for Public Information, Inc. (S.I.P.I.) v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972); *N.R.D.C. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974). *But see*, *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971).

12. See, e.g., *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973); *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972).

### B. *Purpose of the Article*

In the absence of any congressional or administrative direction in setting forth a list of environmental factors or meaningful guidelines to be considered in determining whether a proposed action will significantly effect the environment,<sup>13</sup> litigation concerning these threshold determinations has resulted in a great deal of confusion. This confusion is heightened by a judicial tendency to analyze EIS threshold determinations in terms of scope of review rather than to directly address the problem of statutory construction created by NEPA's vague and amorphous triggering standard. Moreover, many courts have further obscured the issue by failing to adequately distinguish between the correctness of an agency's threshold determination of significant impact, the sufficiency of the impact statement, and the agency's subsequent substantive decision to go ahead with the action despite its environmental aspects, each of which requires a different legal analysis and the application of a different scope of review.

The purpose of this article is to attempt to eliminate some of the confusion surrounding threshold determinations of significant impact under NEPA. First, it will examine the nature, scope and effectiveness of past judicial review under the Act. Next, it will develop the case for adoption of a comprehensive test as a solution to the confusion. Thirdly, it will survey the existing judicial analysis of what constitutes a "significant impact" on the environment. Finally, it will distill from this existing authority a framework of analysis to serve as a comprehensive test for agencies to use in making threshold determinations.

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13. Cases recognizing the lack of guidance include: *First Nat'l Bank v. Richardson*, 484 F.2d 1369, 1373 (7th Cir. 1973); *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). It has been widely recognized that:

The legislative history of NEPA is virtually useless in determining the meaning of the term "significantly". Although "the infirmity of the phrase," has been noted judicially, Congress apparently has left the initial interpretation to the Council on Environmental Quality (CEQ) and, in turn, to the agencies themselves. The original CEQ guidelines provided that in construing the phrase . . . agencies were to consider the overall, cumulative effect of the proposed action . . . [and] to prepare an EIS where the environmental impact was potential, controversial, or reasonably anticipated in light of cumulative actions . . . . [Subsequent] CEQ guidelines have provided little further clarification . . . .

Note, *Threshold Determinations Under Section 102(2)(C) of NEPA: The Case for "Reasonableness" as a Standard for Judicial Review*, 16 WM. & MARY L. REV. 107, 111-12 (1974). See also *The Environmental Impact Statement: A Small Step Instead of a Giant Leap*, 5 URBAN LAW. 264 (1973).



## II. THE SCOPE OF JUDICIAL REVIEW

### A. Generally

In ascertaining the appropriate scope of judicial review for administrative action generally, it is important to first determine whether the applicable statute provides for judicial review and, if so, whether Congress has directed a particular standard by which to gauge the action. Absent express congressional intent to the contrary, there is a basic presumption of reviewability.<sup>14</sup>

Although NEPA does not expressly provide for judicial review, courts have reviewed agency decisions under it by either finding review implicit within the statute itself<sup>15</sup> or by applying to NEPA the "arbitrary and capricious" standard of review applicable to administrative actions generally under the Administrative Procedure Act (APA).<sup>16</sup> In applying the APA standard, the crucial issue becomes the extent to which the administrative determination is factual or discretionary as opposed to legal.<sup>17</sup> Thus the basic problem is the difficult one of distinguishing between law and fact. This problem arises because under the APA, questions of law are for judges to determine, while questions of fact are committed to agency discretion and thus, for the most part, subject only to limited review.<sup>18</sup> This distinction between law and fact, however, often becomes quite murky. Legal scholars have vigorously debated it because there clearly exists a middle ground of mixed law and fact.<sup>19</sup>

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14. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). The requisites of standing and finality must of course also be met.

15. See, e.g., *E.D.F. v. Hardin*, 325 F. Supp. 1401, 1407 (D.D.C. 1971). But see *E.D.F. v. Corps of Engr's*, 470 F.2d 289, 299 n. 15 (8th Cir), cert. denied, 409 U.S. 1072 (1972).

16. APA § 10(e), 5 U.S.C. § 702 (1970). Most courts follow this approach. See, e.g., *E.D.F. v. Armstrong*, 487 F.2d 814, 817 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).

17. For purposes of simplification, factual and discretionary determinations will be used more or less interchangeably. They are in fact different notions, and the scope of review applied to each differs. Generally, the substantial evidence rule obtains for factual issues while the arbitrary and capricious test applies for discretionary determinations. Nevertheless, courts often speak of the arbitrary and capricious test in the context of an analysis of factual versus legal distinctions. See, e.g., *Hanly v. Kleindienst*, 471 F.2d 823, 838 (2d Cir. 1972). In activity in the context of NEPA, distinctions between fact and discretion are not susceptible to clear lines of demarcation because often the interpretation and application of relevant facts involves a degree of discretion. Thus, the arbitrary and capricious standard is applicable to such "factual" determinations.

18. APA § 10(e), 5 U.S.C. § 706(2)(A) & (D) (1970); see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). See generally, K. DAVIS, *ADMINISTRATIVE LAW TEXT* chs. 28-30, 3d ed. (1972).

19. Compare, K. DAVIS, *supra* note 18, at § 30.02 (analytical versus practical approach

For scope of review purposes, this distinction between law and fact is crucial because the characterization of the issue determines the nature of the scrutiny courts should exercise in examining agency decisions. Along the spectrum of judicial investigation, the more factual the agency decision, the narrower the scope of review will be. Conversely, the more closely the agency determination resembles a legal issue, the more liberal the scope of review will be. Specifically, factual determinations are reviewed only when arbitrary or capricious<sup>20</sup> while legal determinations made by agencies are given de novo review.<sup>21</sup> The standard applied for mixed questions varies.<sup>22</sup>

Under the traditional APA analysis, courts must therefore determine where along the factual-legal spectrum the various issues arising under NEPA lie. In general, delegating to the agency the initial identification of actions with a significant environmental impact acknowledges that the determination is discretionary, that it is the agency's function to analyze and apply the facts, and that judicial review will thus be narrow. Conversely, to argue that complete review is required implies that interpreting significant impact is a matter of statutory construction and therefore purely legal in nature. It is also important to consider whether the case arises under section 101 or 102,<sup>23</sup> and whether the issue concerns the sufficiency

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to the law-fact distinction) *with* L. JAFFEE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 592-94 (1965). Notwithstanding the differing analyses of these two authors, they both conclude that the proper standard of review for mixed questions of law and fact is "reasonableness."

20. APA § 10(e), 5 U.S.C. § 706(2)(A) (1970). *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Hanly v. Kleindienst*, 471 F.2d 823, 828 (2d Cir. 1972); *Town of Groton v. Laird*, 353 F. Supp. 344, 349 (D. Conn. 1972).

21. *See, e.g.*, *Hanly v. Kleindienst*, 471 F.2d 823, 828 (2d Cir. 1972); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Kisner v. Butz*, 350 F. Supp. 310 (N.D.W. Va. 1972); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971).

22. The rational basis test, also characterized as a reasonableness standard has attracted the widest following. *See* *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). *But see* *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958) (applying an arbitrary and capricious test to mixed questions); *Hanly v. Kleindienst*, 471 F.2d 823, 829 (2d Cir. 1972).

Professor Davis states that in reality "[i]n reviewing administrative action . . . a court always has power to decide questions of law and . . . to a great extent a court has power to convert questions of discretion and questions of fact into questions of law by making law about them." K. DAVIS, *supra* note 18, at 554.

23. *Compare* *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (substantive decisions made pursuant to § 101 totally within discretion of agency and reviewing courts probably cannot reverse unless the action was arbitrary or clearly gave insufficient weight to environmental values); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970), *aff'd*, 454 F.2d 613 (3d Cir. 1971) *with* S.I.P.I. v.

of the EIS, the substantive decision of the agency, or a threshold determination.<sup>24</sup>

### B. *Sufficiency of the EIS*

Attacks on the sufficiency of an EIS come under the procedural mandates of section 102. The sufficiency of the statement is measured by the extent to which it analyzes and considers the action's adverse environmental impacts, possible alternative courses of action, the relationship between short-term and long-range effects, and whether there are irreversible commitments of resources.<sup>25</sup> As previously suggested, the scope of review for sufficiency challenges tends to be more searching because agency discretion is often perceived to be sharply limited by section 102.<sup>26</sup> For example, the D.C. Circuit has determined that a "hard look"<sup>27</sup> must be given when testing the adequacy of an EIS. The court's scrutiny, however, is considerate of the realities of agency preparation.

In *Natural Resources Defense Council, Inc. v. Morton*,<sup>28</sup> the court reasoned that consistent with section 102(2)(c) of NEPA an agency need not make an analysis of the environmental effects of remote and speculative alternatives.<sup>29</sup> However, the assessment should include a list of opposing views as well as agency views.<sup>30</sup> Not surprisingly, standards more restrictive than the "hard look" test

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AEC, 481 F.2d 1079 (D.C. Cir. 1973) (decision not to file EIS made pursuant to procedural § 102 not discretionary and reviewable) and note 8 *supra*.

24. Professor Davis identifies five factors which he feels are important to a judge in determining to review what are in reality discretionary administrative decisions. While these factors are not articulated in formal written opinions they are probably considerations which are given great weight by judges. These factors are: "[the] comparative qualifications of courts and of agencies, the quality of the particular agency, judicial impressions of the thoroughness and expertness of the administrative handling of the particular case, the extent to which the agency is exercising power that has been especially delegated to it and withheld or withdrawn from the courts, and whether or not lawmaking by the courts is needed or appropriate in the particular case." K. DAVIS, *supra* note 18, at 552.

25. See note 9 *supra* and accompanying text.

26. See notes 6-8 *supra* and accompanying text.

27. *N.R.D.C. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). This is also characterized as the "rule of reason."

28. *Id.*

29. *Id.* at 834-38. The court thus clearly recognizes that agency resources are not infinite and that there are limitations on the demands of NEPA.

30. *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 (D.C. Cir.), *aff'd mem. sub nom. Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971).

have been applied in cases attacking EIS sufficiency. Thus, the "arbitrary and capricious" standard is sometimes invoked.<sup>31</sup>

### C. *Substantive Decision*

Attacks on an agency's decision to go ahead with or approve an action or project as opposed to the sufficiency of the EIS are judged within the framework of section 101 of NEPA, the substantive section. Under this section judicial inquiry will generally be limited to a determination of whether or not there has been a proper balancing of environmental factors with other relevant considerations.

Much greater deference will be granted such agency determinations because of their discretionary nature, and out of respect for agency expertise. Thus, the scope of review will be narrower than in the case of EIS sufficiency questions.

Judicial respect for substantive agency decisions is evident from the scope of review standards adopted by the courts in analyzing such decisions. These tests range from allowing a very narrow review of substantive agency decisions,<sup>32</sup> to following a reasonableness approach,<sup>33</sup> with intermediate standards including arbitrariness<sup>34</sup> and good faith.<sup>35</sup>

### D. *Threshold Determinations of Significant Impact*

Judicial inconsistency in construing NEPA is perhaps nowhere more readily apparent than with regard to judicial determination of the proper scope of review to be applied to agency threshold determinations of whether a proposed action will significantly affect the quality of the human environment.

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31. *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975), *rev'd on other grounds*, 96 S. Ct. 2718 (1976); *E.D.F. v. Armstrong*, 487 F.2d 814 (9th Cir. 1973); *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973).

32. *National Helium Corp. v. Morton (I)*, 455 F.2d 650 (10th Cir. 1971).

33. *National Helium Corp. v. Morton (II)*, 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); *cf.*, *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975).

34. *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (not reviewable unless arbitrary).

35. *S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *E.D.F. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972) (good faith objectivity in balancing competing interests); *City of New York v. United States*, 344 F. Supp. 929, 940 (E.D.N.Y. 1972). See Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509 (1974). Judge Leventhal argues for more than subjective good faith. He would require that there be substantial evidence to support the decision and that it be within a "zone of reasonableness." *Id.* at 529.

Ironically, however, this is where certainty is most needed because an improper negative threshold determination by an agency in the first instance thwarts NEPA's broad purposes by failing to disclose the environmental hazards of a proposed action. In addition, it denies the public and the courts the benefits of a reviewable environmental record which would reveal whether, and to what extent, the agency considered environmental values in making its decision. NEPA's most effective safeguard could thus be easily evaded.

As with other scope of review questions, the distinction between law and fact is of primary importance in review of threshold determinations. The more the decision is factual or discretionary, the more restricted will be the scope of review. Conversely, the more the issue resembles one of law, the wider the scope of review will be. Given the amorphous nature of the statutory phrase "major federal action significantly affecting the quality of the human environment"<sup>36</sup> and its attendant susceptibility to a broad spectrum of interpretations, it is not surprising that as many as five different standards for scope of review of threshold determinations can be identified.<sup>37</sup> The five standards follow.

#### 1. ARBITRARY AND CAPRICIOUS

In *Hanly v. Kleindienst*,<sup>38</sup> the Second Circuit decided that the proper scope of review to be applied to the General Services Administration's (GSA) decision not to file an EIS for the construction of a Metropolitan Correction Center was the APA's arbitrary and capricious standard. In analyzing the issue the court acknowledged the mixed character of the question by concluding that

[t]he action involves both a question of law—the meaning of the word "significantly" in the statutory phrase "significantly affecting the quality of the human environment"—and a question of

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36. Judicial attempts to define the statutory phrase "significant impact" have thus far not been enlightening. For a discussion of the judicially developed tests see section V, B, *infra*. The Council on Environmental Quality (CEQ) Guidelines would require an environmental impact statement where the impact is potential, controversial or reasonably anticipated in light of cumulative actions. 36 Fed. Reg. 7724-25 (1971). See notes 78-81 *infra* and accompanying text.

37. An analysis of suits alleging agency impropriety in filing an EIS reveals a great deal about the role judges feel the courts should play in connection with NEPA.

38. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

fact—whether the MCC will have a “significantly” adverse environmental impact.<sup>39</sup>

Notwithstanding its recognition of the traditional judicial function of *de novo* review for questions of law<sup>40</sup> as well as the availability of the “rational basis” standard for mixed questions of law and fact,<sup>41</sup> the court opted for the arbitrary and capricious test citing the Supreme Court’s decision in *Citizens to Preserve Overton Park v. Volpe*<sup>42</sup> as authority.

Insofar as the court applied the arbitrary and capricious test to a self-acknowledged question of mixed fact and law its choice represents a departure from traditional administrative law doctrine. Nevertheless, the *Hanly* court rationalized this approach by stating that

in some cases a complete *de novo* analysis of the legal questions, though theoretically possible, may be undesirable for the reason that the agency’s determination reflects the exercise of expertise not possessed by the court.<sup>43</sup>

This result is questionable, however, because the court’s reliance on *Overton Park* appears misplaced. Subsequent decisions have more accurately interpreted *Overton Park* to require a broader scope of review for agency threshold decisions than the arbitrary and capricious standard apparently embraced by the Supreme Court.<sup>44</sup> Moreover, the *Hanly* court’s deference to administrative expertise,

39. *Id.* at 828.

40. *Id.*, citing APA § 10(e), 5 U.S.C. § 706 (1970) and K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958).

41. 471 F.2d at 829, citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

42. 401 U.S. 402 (1971). This case involved a suit brought to enjoin the Secretary of Transportation from building a highway through the center of a city park. While *Overton Park* expressly adheres to the arbitrary and capricious test, it impliedly calls for a much broader review by directing courts to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* at 416. Moreover, although there is a presumption that the agency acted with regularity, “that presumption is not to shield his [the Secretary of Transportation’s] action from a *thorough, probing, in-depth review.*” *Id.* at 415 (emphasis added).

43. 471 F.2d at 829, citing *Moog Industries, Inc. v. FTC*, 355 U.S. 441 (1958); see also *Radio Corp. of America v. United States*, 341 U.S. 412 (1951).

44. Leventhal, *supra* note 35, at 513; 60 GEO. L. J. 1101, 1112, (1972); Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 315-16 (1971); Note, 48 N.Y.U.L. REV. 522, 535 (1973); *Maryland - Nat’l Capital Park & Planning Comm’n v. United States Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973).

under the circumstances, would seem to be similarly questionable<sup>45</sup> in light of the limited deference granted it by Judge Leventhal of the D.C. Circuit.

In the exercise of the court's supervisory function, full allowance must be given for the reality that agency matters typically involve a kind of expertise—"sometimes technical in a scientific sense, sometimes more a matter of specialization in kinds of regulatory programs." Nevertheless, the court must study the record attentively, even the evidence on technical and specialist matters, "to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion with reasons that do not deviate from or ignore the ascertainable legislative intent."<sup>46</sup>

Nevertheless, both *Hanly* and *Overton Park* have been cited frequently by courts who likewise apply the arbitrary and capricious standard.<sup>47</sup>

## 2. SUBSTANTIAL EVIDENCE

The substantial evidence formula for governing the scope of judicial review is, in the field of administrative law, widely applied. In the context of NEPA, however, this test has not been enthusiastically received. It is a restrictive test, permitting limited judicial scrutiny.

This test was first applied in the environmental area in *Scenic Hudson Preservation Conference v. FPC*.<sup>48</sup> The rationale cited for the rule is that the court's function is "only 'to determine whether there has been substantial compliance with applicable procedures and statutes, and not to review the administrative determination as

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45. Judge Leventhal has commented: "The role of the courts in environmental matters is significantly shaped . . . by whether the agency or official under review is one whose primary function is or is not environmentally oriented." Leventhal, *supra* note 35, at 515. This approach would seem to demand more searching review in the majority of cases as the role of most agencies is only secondarily environmentally oriented. See note 66 *infra* and accompanying text.

46. Leventhal, *supra* note 35, at 511, citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 406 U.S. 950 (1972) (footnotes omitted).

47. *Echo Park v. Romney*, 3 E.R.C. 1255 (C.D. Cal. 1971); *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

48. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). It is of limited importance however, both because it has failed to attract any judicial converts and because it predates the enactment of NEPA.

to the wisdom or good judgment of the agency in exercising its discretion.’”<sup>49</sup> Given the clear mandate of NEPA, that its provisions be carried out to “the fullest extent possible,” the test is ill-suited only for the resolution of negative threshold determinations.<sup>50</sup> Arguably, in the context of NEPA, the substantial evidence test is not applicable at all. In *Overton Park* the Supreme Court expressed the view that the substantial evidence rule is only applicable to administrative determinations which are made on the basis of an agency hearing.<sup>51</sup> Under NEPA there is no hearing and no record required, as such, from which one can determine whether an agency’s threshold determinations are supported by substantial evidence.

### 3. RATIONAL BASIS

Under this test the court will affirm agency action if it has a rational basis.<sup>52</sup> This test is applied by examining the record to see if there is a rational basis for the agency determination. It is thus closely related to the substantial evidence rule and therefore shares many of the same problems when applied to NEPA threshold determinations. It is particularly deficient as a tool for understanding NEPA in that its use inevitably leads to a discussion of the law-fact distinction and subsumes the real issue,<sup>53</sup> which is the amount of

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49. *Charlton v. United States*, 412 F.2d 390 (3d Cir. 1969). In *Charlton*, the court specifically rejected the substantial evidence test and its rationale.

50. Its chief shortcoming from the standpoint of the environmentalist is that it “virtually precludes the possibility of a judgment for a plaintiff on the merits, due to the potentially vast documentary resources of an administrative agency.” *NEPA Reasonableness*, *supra* note 13, at 120.

51. 401 U.S. at 414.

52. The rational basis test had its genesis in *NLRB v. Hearst Publishing Inc.*, 322 U.S. 111 (1944) and *Gray v. Powell*, 314 U.S. 402 (1941).

53. *NEPA Reasonableness*, *supra* note 13 at 122:

The inherent subtlety of the law-fact distinction renders the reasonable basis test, as traditionally applied to mixed questions, difficult to use in reviewing threshold determinations. After judicial determination that an issue embodies questions of law and fact, a court’s resolution of the relevant law need not be determinative, because a court can permit an agency’s factual finding to stand. Further, although the test affords some freedom for appellate review, the reasonable basis standard attaches as a condition subsequent to judicial identification of a mixed question, foreclosing an opportunity for greater judicial latitude on a question of law alone. However, wielded by appellate courts, application of that standard necessarily entails embroilment in the law-fact controversy, and thereby fails to resolve the confusion surrounding the assessment of a threshold decision under section 102(2)(C) (footnotes omitted).



discretion administrators should have under the mandate of NEPA.<sup>54</sup> Nevertheless, the rational basis test permits a somewhat broader judicial review of administrative decisions and therefore has been adopted by a number of courts and commentators.<sup>55</sup>

#### 4. REASONABLENESS

Of the tests which acknowledge that there is *some* agency discretion involved, the reasonableness test has the most followers.<sup>56</sup> The rationale advanced for adopting the reasonableness test as opposed to the arbitrary and capricious standard was clearly stated in *Save Our Ten Acres v. Kreger*:<sup>57</sup> "The spirit of [NEPA] would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review."<sup>58</sup>

There is scholarly support for application of a broader scope of review than the APA's arbitrary and capricious standard even where the administrative action is admittedly in part discretionary. Professor Jaffe, for example, proposes that courts limit agency discretion where statutory intent would so require.<sup>59</sup> Congress' directive that NEPA be followed "to the fullest extent possible" would evidence sufficient intent to so narrowly define the range of agency discretion.<sup>60</sup>

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It is not altogether clear how this test differs, if at all, from the substantial evidence test. See notes 56-60 *infra* and accompanying text.

54. Scope of review is the wrong vehicle by which to insure the consideration of environmental values. See discussion *infra*, section IV.

55. See, e.g., *S.I.P.I. v. AEC*, 481 F.2d 1079, 1094 (D.C. Cir. 1973); 53 B.U.L. REV. 879, 896 (1973).

56. See *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973); *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973); *Scherr v. Volpe*, 336 F. Supp. 886 (W.D. Wis. 1971), *aff'd*, 466 F.2d 1027 (7th Cir. 1972). *NEPA Reasonableness*, *supra* note 13. Cf. *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973); see also *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).

Many of the courts adopting the reasonableness test limit the discretion exercised by the agency chief to determining only whether NEPA applies at all. Even then, the agency must make a good faith judgment. See, e.g., *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

57. 472 F.2d 463 (5th Cir. 1973).

58. *Id.* at 466.

59. L. JAFFE, *supra* note 19, at 572. "Discretion . . . is not self-defining; it does not arise parenthetically from 'broad' phrases. Its contour is determined by the courts, which must define its scope and its limits." *Id.* (emphasis added).

60. See note 8 *supra*.

### 5. DE NOVO REVIEW

Some courts hold that there is no discretion whatever to be exercised by administrators and therefore a de novo review of a threshold determination is appropriate.<sup>61</sup> The rationale stated for this position is that the meaning of "significant environmental impact" is a question of statutory construction and as such is a judicial function.

### III. EXPLANATION OF COURT DIVERSITY UNDER "SCOPE OF REVIEW ANALYSIS"

The standards for review of agency threshold determinations under NEPA thus range from very limited review (based on a finding of maximum agency discretion) to complete review (founded on the belief that there is no discretion to be exercised by administrators whatsoever).<sup>62</sup>

Underlying judicial application of an expanded scope of review is the notion that environmental concerns cannot be trusted to administrative agencies which, NEPA notwithstanding, have as their primary goal the advancement of other interests.<sup>63</sup> Indeed, "[i]t is the premise of NEPA that environmental matters are likely to be

61. See *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971); *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971), *cert. denied sub nom. Kaibab Industries v. Parker*, 405 U.S. 989 (1972); *Rhode Island Comm. Energy v. GSA*, 397 F. Supp. 41 (D.R.I. 1975); *Kisner v. Butz*, 350 F. Supp. 310 (N.D.W. Va. 1972); *Scherr v. Volpe*, 336 F. Supp. 886 (W.D. Wisc. 1971), *aff'd*, 466 F.2d 1027 (7th Cir. 1972). It is the reviewing court's function to determine de novo all questions of law. APA § 10(e), 5 U.S.C. § 706 (1970). See also *K. Davis*, *supra* note 18 at § 28.05.

62. Note that some courts have adopted the position that when an agency determines that no EIS is required, it must file a statement indicating why an EIS is unnecessary. This has been characterized as a negative impact statement. See, e.g., *Arizona Public Serv. Co. v. FPC*, 483 F.2d 1275, 1282 (D.C. Cir. 1973); *S.I.P.I. v. AEC*, 481 F.2d 1079, 1095 (D.C. Cir. 1973). See also EPA Interim Regulations, 38 Fed. Reg. No. 11 at 1699 (1973), amending 40 CFR § 6.25(a) (1972).

63. See *Developments in Environmental Law*, 3 ENV. L. REP. 50001, 50003 (1973), where it is asserted:

[F]or the most part the agencies which must do the "full good faith" balancing of economic and social costs against environmental costs are generally structured to be advocates for economic expansion. As long as agencies are left to do the balancing, and so long as they have a dual mandate of environmental protection and economic development in their particular field—for example, power growth for the FPC, nuclear development for the AEC, or flood containment for the Army Corps of Engineers—is not the environment bound to come out on the short end? (emphasis in original).

of secondary concern to agencies whose primary missions are non-environmental."<sup>64</sup>

NEPA demands that environmental values be given equal status with economic and social values.<sup>65</sup> Indeed, the rights protected under NEPA have been elevated to near constitutional proportions.<sup>66</sup>

The importance of the rights protected by NEPA is only one factor, however, in analyzing why courts have found it necessary to carefully scrutinize agency threshold determinations. Other considerations are also at work, although they are not necessarily as obvious.

Agencies do not always have the necessary expertise available to make informed environmental decisions.<sup>67</sup> While it is true that NEPA commands agencies to utilize a "systematic interdisciplinary approach" to decisionmaking and to solicit the assistance of other federal agencies, deference should not be given to such expertise unless it is in fact the basis of that decision. The fact that NEPA directs agencies to seek or develop the expertise that they lack does not mean that they will do so.<sup>68</sup>

64. Leventhal, *supra* note 35, at 515. Given this premise it is clear that the review required to safeguard NEPA's objectives must be conducted by an institution that is "independent" in the sense that it is not caught up in the agency's mission as its reason for being and basis for succeeding. *Id.* See notes 45 & 63, *supra*. See also *Substantive Review*, *supra* note 2, at 757. See generally A. DOWNS, *INSIDE BUREAUCRACY* 237, 242 (1967).

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

66. *E.D.F. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971):

[C]ourts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with . . . economic interests . . .

(emphasis added). See also *Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029, 1039 n.7 (D.C. Cir. 1973); *Citizen Suits*, *supra* note 5; Klipsch, *Aspects of A Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 *IND. L.J.* 203 (1974).

67. See generally *Citizen Suits*, *supra* note 5; Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 *COLUM. L. REV.* 612, 629 (1970). Moreover, judges are relatively more expert at interpreting statutory language than are administrative agencies. L. JAFFEE, *supra* note 19, at 613.

The role of the courts should in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. . . . "[W]here the only or principal dispute relates to the meaning of the statutory term," . . . [the dispute] presents issues on which courts, and not [administrators] are relatively more expert.

*Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 14 (1968).

68. See, e.g., *E.D.F. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

Time constraints may foreclose the necessary search for the required expert opinion mandated. Indeed, Judge Leventhal argues that even when the agency consults an expert, there should be no more than a reasoned deference to agency expertise.<sup>69</sup> Moreover, agencies often become carried away with their own abilities and defiantly refuse to comply with laws which they feel might hinder their operation.<sup>70</sup> They may seek to insulate themselves from the law and judicial scrutiny, hiding behind the shield of expertise and a self-proclaimed autonomy.

It has been argued that judicial review will improve the quality of agency decisionmaking and insure that the broad goals of NEPA will thus be realized.<sup>71</sup> In addition, the currently popular theory that regulatory agencies have been "captured" by the industries which they regulate<sup>72</sup> may be shared by the courts. Perhaps, subtly acknowledging the capture notion, Chief Judge Bazelon of the D.C. Circuit has stated:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the deci-

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69. See text accompanying note 46 *supra*.

70. See Rhode Island Comm. on Energy v. GSA, 397 F. Supp. 41, 58 (D.R.I. 1975) (court found utter disregard of environmental considerations in spite of knowledge of the environmental significance of a nuclear power plant); Comment, *Four Years of Environmental Impact Statements: A Review of Agency Administration of NEPA*, 8 AKRON L. REV. 545 (1975). "[F]or the last 10 years the (AEC) has purposefully concealed information about the dangers of nuclear power plants for which it has issued both construction and operation permits." *Id.* at 559, citing, N.Y. Times, Nov. 10, 1975, § 1, at 1, Col. 1.

71. *Sierra Club v. Froehlke*, 486 F.2d 946, 952 (7th Cir. 1973); *E.D.F. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971); K. DAVIS, *supra* note 18, at 524. *But see*, Voigt, *The National Environmental Policy Act and the Independent Regulatory Agency: Some Unresolved Conflicts*, 5 NATURAL RES. LAWYER 13, 22 (1972) (arguing that close judicial supervision will cripple the administrative process); 47 NOTRE DAME LAW. 1042, 1055 (1972) (fearing that environmental priorities will be left in the hands of a judicial elite).

72. See 58 VA. L. REV. 177, 186 (1972): "To those who believe that federal agencies tend to protect the industries they are supposed to regulate, it may seem anomalous and self-defeating to charge these agencies with the primary duty to protect the environment."

sion, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.<sup>73</sup>

With regard to scope of review generally, it is naive to assume that courts determine the proper scope based upon whether they find the issue involved to be legal or factual. It is submitted that more often than not, courts attach the law or fact label *after* they have determined what scope of review to employ.<sup>74</sup>

While this judicial technique may lead to equitable results it also leads to confusion. Expansion of the scope of review doctrine is thus a poor foundation on which to base a framework for analysis of NEPA's threshold determination or by which to insure that NEPA's goals will be realized.<sup>75</sup>

#### IV. SOLUTION: JUDICIAL ADOPTION OF A COMPREHENSIVE TEST

The scope of review approach does not reach the root of the problem—defining “significant impact.” It is in fact largely irrelevant which standard of review is utilized by the courts. Will the well meaning administrator be better able to determine that an EIS is required knowing that the standard for reviewing his decision is

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73. *E.D.F. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971) (footnotes omitted). This increased use of judicial power is further evidenced by the expanding notions of standing and reviewability. See *United States v. SCRAP*, 412 U.S. 669 (1973) (standing); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (reviewability).

74. In truth, the distinction between “questions of law” and “questions of fact” really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right. It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of “fact”; and when otherwise disposed, they say that it is a question of “law.”

J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES*, 55 (1927).

75. Some commentators have suggested that the solution can be found in the establishment of an environmental court, Whitney, *The Case for Creating a Special Environmental Court System*, 14 *WM. & MARY L. REV.* 473, 489 (1973), or by abdicating to Congress the task of providing the proper scope of review for environmental cases. Comment, *The National Environmental Policy Act of 1969: A Step in the Right Direction*, 26 *ARK. L. REV.* 209, 224 (1972).

whether it was arbitrary and capricious or whether it was reasonable? Similarly, will courts assist in clarifying the statutory language of NEPA by adjudging an administrator's actions unreasonable?

Application of an expanded scope of review is perhaps a deterrent<sup>76</sup> and sometimes a remedy<sup>77</sup> but it is not a guide which will facilitate administrative decisionmaking in the first instance. More importantly it will not promote the consideration of environmental values at the administrative agency level where Congress clearly intended NEPA's goals to be implemented.

The trend toward expanded scope of review in NEPA cases, as evidenced by a partial judicial abandonment of the arbitrary and capricious standard, implicitly acknowledges that administrators are perceived to have little, if any discretion under the statute. Even if they do have discretion, the courts will limit or closely monitor its use. If this be the case, the administrator's function in threshold determinations is essentially ministerial. Performance of ministerial duties requires a reasonably clear standard which so far neither Congress, the Council on Environmental Quality (CEQ)<sup>78</sup> nor the courts have provided.

Judicial adoption of a comprehensive test<sup>79</sup> which would aid agency decisionmaking would in no way inhibit a court's ability to utilize existing scope of review analysis to invalidate improper agency action.<sup>80</sup> It might have the added benefit of eliminating from

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76. *But see* note 72 *supra* and accompanying text.

77. Review will still occur in those situations where agency action is challenged. When it remains unchallenged NEPA will have failed.

78. The CEQ guidelines are vague and without the force of law. *Compare* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) *with* Citizens for Clean Air Inc. v. Corps of Eng'rs, 349 F. Supp. 696 (S.D.N.Y. 1972).

79. "When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules." K. Davis, *supra* note 18, at 55, *citing* Fook Hong Mak v. Immigration and Naturalization Serv., 435 F.2d 728, 730 (2d Cir. 1970).

It is submitted that where administrators either refuse or are unable to adopt meaningful standards which would fulfill the relevant statutory intent, then the courts should adopt standards to guide the administrators, rather than foster confusion by ad hoc decisionmaking. What should be adopted is not a standard of review for the courts but a standard of compliance which administrators and courts alike can utilize effectively.

80. To reduce the scope of review problem in threshold determination analysis, it is suggested that failure to utilize the test proposed herein would be arbitrary and capricious. This would eliminate the need to apply a more liberal scope of review to investigate an administrator's action since his action would not comport with even the strictest standard.

the court's docket those close cases which heretofore required judicial intervention and remedial action. The net result would be a more widespread and thorough consideration of environmental values accompanied by a saving of judicial labor. An ancillary and welcome benefit would be the development of a body of more intelligible law under NEPA.

## V. JUDICIAL ANALYSIS OF SIGNIFICANT IMPACTS

### A. *Judicial Determinations*

In order to develop a comprehensive test based on statutory interpretation of the policy and goals behind NEPA, a list of environmental factors or meaningful guidelines to be considered in determining whether a proposed action will significantly affect the environment<sup>81</sup> must be set forth. Because of the almost complete lack of Congressional and administrative leadership in this task, it is necessary to look to the decisions of the federal courts for guidance, as they have almost exclusively carried this burden.<sup>82</sup> In the 7 years since the enactment of NEPA, a wide variety of factual situations have been found to produce a significant impact upon the environment. Some have been obvious, such as highway construction<sup>83</sup> and the taking of parklands through eminent domain,<sup>84</sup> while others, such as the ICC's approval of railroad surcharges on all freight including recyclables,<sup>85</sup> and technology research and development programs directed toward creating new nuclear power plants in the future,<sup>86</sup> have not.

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81. See note 1 *supra* and accompanying text.

82. See Note, *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,"* 26 S.C.L. Rev. 119 (1974).

83. See, e.g., *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (converting a conventional two-lane highway into a four-lane freeway); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972) (construction of interstate highway segment through mountain camping area); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972) (construction of six to eight lane highway).

84. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972); *TVA v. Three Tracts of Land, Etc.*, 377 F. Supp. 631 (N.D. Ala. 1974); *Businessmen Affected Severely by the Yearly Action Plans, Inc. (BASYAP) v. D.C. City Council*, 339 F. Supp. 793 (D.D.C. 1972).

85. *SCRAP v. United States*, 346 F. Supp. 189 (D.D.C.), *stay of injunction denied sub nom. Aberdeen & Rockfish R.R. v. SCRAP*, 409 U.S. 1207 (1972), *rev'd on other grounds, United States v. SCRAP*, 412 U.S. 669 (1973).

86. *S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

In order to make these determinations, the courts have considered an equally wide range of factors. Judicial analysis has not stopped at mere considerations of increases in water and air pollution,<sup>87</sup> but has extended to the evaluation of factors which affect the urban environment as well, such as noise, crime, traffic congestion and even the availability of drugs.<sup>88</sup>

Nevertheless, the term "significantly," which triggers the impact statement requirement, can be interpreted to mean anything from "not trivial" through 'appreciable' to 'important' and even 'momentous.'"<sup>89</sup> Although courts have generally gravitated toward "the lower end of [this] spectrum,"<sup>90</sup> attempts at precise definition have produced nothing more helpful than an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment."<sup>91</sup> Such mere reshuffling of words, however, is of little help in making a threshold determination.<sup>92</sup> Therefore, in order to develop a meaningful framework of analysis to define those actions which significantly affect the environment, it is necessary to analyze the factual situations in which the courts have found a significant impact and the factors they have considered in making these determinations.

#### 1. THE NATURAL ENVIRONMENT

As might well be expected, the great majority of cases construing NEPA's impact statement requirement have concerned agency actions directly<sup>93</sup> affecting the natural environment. Thus, a host of decisions exist considering the environmental impact of actions

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87. *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972); *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974), *modified*, 523 F.2d 88 (2d Cir. 1975); *accord*, *Jones v. HUD*, 390 F. Supp. 579 (E.D. La. 1974).

88. *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972); *McDowell v. Schlesinger*, 404 F. Supp. 221, 246 (D. Mo. 1975).

89. *Hanly v. Kleindienst*, 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, C.J., dissenting).

90. *Id.*

91. *N.R.D.C. v. Grant*, 341 F. Supp. 356, 367 (E.D.N.C. 1972).

92. See Karp, *NEPA: Major Federal Action Significantly Affecting the Quality of the Human Environment*, 11 *Am. Bus. L.J.* 209, 224 (1974).

93. Subsection VI, B, 3 *infra* will deal with the question of agency actions indirectly affecting the environment. These are actions of the agency which do not in themselves affect the environment, but which allow others to affect the environment, such as where an agency grants a private company a license to log a forest or mine government lands. The aspects of these decisions which deal with effects upon the natural environment shall be discussed in this subsection.



such as highway projects,<sup>94</sup> eminent domain proceedings,<sup>95</sup> logging operations,<sup>96</sup> channelization projects,<sup>97</sup> harbor dredgings,<sup>98</sup> dam construction,<sup>99</sup> grazing,<sup>100</sup> herbicide spraying,<sup>101</sup> wildlife refuge funding,<sup>102</sup> insect control,<sup>103</sup> and even Navy amphibious landing drills.<sup>104</sup> While many of these cases merely come to the obvious conclusion that a significant impact either does or does not exist because of the immediate facts of its particular circumstances, several provide an

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94. *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (project involving conversion of two-lane conventional highway into four-lane freeway); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972) (construction of an interstate highway in mountain camping area); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972) (construction of six to eight-lane highway); *Barta v. Brinegar*, 358 F. Supp. 1025 (W.D. Wis. 1973) (proposed highway segment through marshland areas); *Kisner v. Butz*, 350 F. Supp. 310 (N.D.W. Va. 1972) (completion of one-lane forest road); *Conservation Society v. Volpe*, 343 F. Supp. 761 (D. Vt. 1972), *aff'd sub nom. Conservation Soc'y v. Secretary of Transp.*, 508 F.2d 927 (2d Cir. 1974) (highway widening project).

95. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972) (taking of 11 acres of park land in a thickly settled city constituted a significant impact); *TVA v. Three Tracts of Land, Etc.*, 377 F. Supp. 631 (N.D. Ala. 1974) (acquisition of land, itself, by TVA through eminent domain did not constitute a significant impact regardless of proposed use).

96. *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974) (logging constituted a significant impact); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973) (harvesting of timber constituted a significant impact); *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974) (no significant impact was created by a federal program "setting aside" certain lumber for small businesses before being made available to larger ones because it would not change either the manner or volume of timber harvested, but merely the question of who did the harvesting).

97. *N.R.D.C. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972) (project involving 66 miles of channelization significantly affected the environment).

98. *Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972) (dredging of a harbor and the proposed offshore dumping of more than 1,000,000 tons of materials containing pollutants in excess of guidelines promulgated by the Environmental Protection Agency significantly affected the environment).

99. *Concerned Residents v. Grant*, 388 F. Supp. 394 (M.D. Pa. 1975) (likelihood that environmental effects from project will be significant and findings of the Soil Conservation Service that lead to negative impact statement do not justify contrary conclusion).

100. *N.R.D.C. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd* 527 F.2d 1386 (D.C. Cir. 1976) (significant impact found).

101. *Wisconsin v. Butz*, 389 F. Supp. 1065 (E.D. Wis. 1975) (proposed spraying of herbicides in national forests to "release" pine seedlings from competition with other vegetation significantly affected the environment).

102. *Kleppe v. Sierra Club*, 96 S.Ct. 2718 (1976) (annual budget proposal of approximately \$200,000,000 for financing National Wildlife Refuge System consisting of 350 refuges, containing 30,000,000 acres significantly affected the environment).

103. *E.D.F. v. Hardin*, 325 F. Supp. 1401 (D.D.C. 1971) (program to control imported fire ants in Southeast United States constituted a significant impact upon the environment).

104. *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972) (no significant impact found).

analysis of environmental factors which are equally relevant in other situations where the impact upon the natural environment is under consideration.

Thus, in *Scherr v. Volpe*,<sup>105</sup> which involved the conversion of a conventional two-lane highway into a four-lane freeway, the court concluded that because the project would result in damage to the natural habitats of various wild animals, strip forested land, increase levels of noise, air and water pollution, and impinge upon the natural beauty and recreational value of the area,<sup>106</sup> it would significantly affect the natural environment.

While these same factors have been considered in a great number of cases analyzing effects upon the natural environment,<sup>107</sup> courts have also looked to a variety of other factors as well, such as pre-existing uses of the area,<sup>108</sup> the permanency of the adverse environmental effects,<sup>109</sup> accompanying restoration plans<sup>110</sup> and effects upon the geological, historical and archeological characteristics of the area.<sup>111</sup>

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105. 466 F.2d 1027 (7th Cir. 1972).

106. *Id.* at 1033.

107. *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974) (logging would create an excess nutrient run-off which would cause algae growth in lakes and streams affecting water purity); *Concerned Residents v. Grant*, 388 F. Supp. 394 (M.D. Pa. 1975) (proposed dam would change temperature of water possibly affecting the habitat of fish); *Smith v. City of Cookeville*, 381 F. Supp. 100 (M.D. Tenn. 1974) (loss of wildlife); *Barta v. Brinegar*, 358 F. Supp. 1025 (W.D. Wis. 1973) (proposed highway would affect nesting areas, food and shelter for waterfowl and other wildlife); *Kisner v. Butz*, 350 F. Supp. 310 (N.D.W. Va. 1972) (completion of one-lane gravel mountain road would not significantly affect water, air, or noise pollution); *N.R.D.C. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972) (channelization project would result in reduction of fish population and loss of wetland habitat).

108. *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973) (construction of fishing pier would not significantly affect the environment where several already were in existence); *Kisner v. Butz*, 350 F. Supp. 310 (N.D.W. Va. 1972) (completion of one-lane gravel mountain road which was part of an overall roadway system in area used for 30 years would not significantly affect the environment); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972) (introduction of stretch jets into Washington's national airport would not significantly affect the environment because of minimal impact over normal jets already using the airport). For further discussion of this factor see subsection VI, B, 4 *infra*.

109. *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974) (effects of erosion caused by logging would remain visible for as long as 100 years).

110. *Id.* (court considered the fact that money received by agency for issuing logging receipt would not be adequate to finance a reforestation program).

111. *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167 (S.D. Iowa 1972), *modified*, 484 F.2d 11 (8th Cir. 1973) (court required an environmental assessment in light of these factors); *Boston Waterfront Residents Ass'n, Inc. v. Romney*, 343 F. Supp. 89 (D. Mass. 1972) (court considered historical value in restraining Boston Redevelopment Authority from demolition plans).

In short, courts have generally effectuated the congressional intent behind NEPA by recognizing that the decisionmaker's task is not to merely total up dollars-and-cents costs and injuries to the environment in a profit-ledger type of analysis, but rather to give attention to the previously unconsidered ecological effects of an action to both present and future generations and to decide whether the depletion of irreplaceable natural resources should proceed in the manner suggested.<sup>112</sup>

## 2. THE URBAN ENVIRONMENT

The scope of NEPA, however, is not merely limited to the protection of the natural environment. Rather, it "must be construed to include protection of the quality of life for city residents . . . ."<sup>113</sup> and consequently, the Act is equally concerned with effects upon the so-called urban environment.<sup>114</sup>

This concern for the urban environment as such was first fully developed in *Hanly v. Mitchell (Hanly I)*,<sup>115</sup> where the Second Circuit upheld the GSA's threshold decision that the addition of a 12-story office building to an existing government complex in Manhattan would not significantly affect the environment, but rejected a similar conclusion by the agency with regard to an accompanying detention facility containing planned community prisoner release and drug rehabilitation programs.

Although consideration by the agency of the availability of utilities, the adequacy of mass transportation, the removal of trash, the absence of a relocation problem and the intention to comply with existing zoning ordinances was deemed sufficient to make a threshold determination concerning the proposed office building, the court held that it was not sufficient to make such a determination concerning the detention facilities. Noting that although NEPA contains no exhaustive list of so-called environmental considerations, the court concluded that it nevertheless extends beyond sewage and garbage concerns and even beyond increases in water and air pollu-

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112. *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975), *rev'd on other grounds*, 96 S.Ct. 2718 (1976).

113. *Hanly v. Kleindienst*, 471 F.2d 823, 827 (2d Cir. 1972); *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972).

114. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972); *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972).

115. 460 F.2d 640 (2d Cir. 1972).

tion to include considerations of factors which affect the urban environment, such as noise, traffic, overburdened mass transportation systems, crime, congestion and even the availability of drugs. Thus, it was held that the GSA should have considered the possibility of riots and disturbances in the jail to which neighbors might be exposed, the dangers of crime accompanying the drug rehabilitation program and possible traffic and parking problems that would be increased by the functioning of the facility.<sup>116</sup>

A second assessment statement by the GSA was also held to be insufficient to support its determination with regard to the proposed detention facility in *Hanly v. Kleindienst (Hanly II)*.<sup>117</sup> Although the agency considered the location, proposed use, design features, energy demands and transportation and pollution effects of the facility, the court concluded that the GSA's repeated failure to evaluate the possibilities that it would increase the risk of crime in the immediate area and endanger the safety of neighbors<sup>118</sup> was fatal to the agency's threshold determination.

A number of other factors have also been stressed by various decisions considering the effect of proposed agency actions upon the urban environment. These factors have included population density and distribution,<sup>119</sup> deteriorating neighborhood influences,<sup>120</sup> the destruction of historical landmarks,<sup>121</sup> alterations in the character of neighborhoods,<sup>122</sup> loss of existing view from adjoining properties,<sup>123</sup> and aesthetics.<sup>124</sup> Courts have generally resisted inclusion of socio-

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116. *Id.*

117. 471 F.2d 823 (2d Cir. 1972).

118. The court was especially concerned with the possibility that the facility would endanger the safety of neighbors by exposing them to drug addicts taking part in the outpatient treatment facility and pushers and others who would necessarily frequent the vicinity of drug maintenance centers.

119. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971).

120. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973). See note 127 *infra* and accompanying text.

121. *Boston Waterfront Residents Ass'n, Inc. v. Romney*, 343 F. Supp. 89 (D. Mass. 1972).

122. *B.A.S.Y.A.P. v. D.C. City Council*, 339 F. Supp. 793 (D.D.C. 1972); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971).

123. *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971).

124. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *Continental Ill. Nat'l Bank & Trust Co. v. Kleindienst*, 382 F. Supp. 107 (N.D. Ill. 1973); *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972).

economic factors,<sup>125</sup> however, such as the influx of low income workers<sup>126</sup> or the alleged anti-social propensities of low income persons and the resulting fears which their increasing presence might engender, as proper factors to be considered under NEPA.<sup>127</sup>

Where agencies have properly considered these factors, the courts have generally upheld their threshold determinations, such as in the case of housing projects<sup>128</sup> and even detention facilities<sup>129</sup> similar to that in *Hanly*. But where agencies have failed to give due weight to these factors, the courts have been quick to reject agency

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125. *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974), modified, 523 F.2d 88 (2d Cir. 1975).

126. *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 372 F. Supp. 147 (N.D. Ill. 1973). But see *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972) (consideration of socio-economic factors).

127. *Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973).

In *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 372 F. Supp. 147 (N.D. Ill. 1973), the court noted that "although human beings may be polluters . . . they are not themselves pollution." *Id.* at 149. The court did leave the door open for consideration of socio-economic factors, however, by further stating that although the social and economic characteristics of potential occupants of public housing, as such, are not relevant in determining whether the program will significantly affect the environment, the consideration of whether acts resulting from the social and economic characteristics of the potential occupants will create a significant impact upon the environment, are proper.

*Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974), however, apparently recognized the potential danger of abuse by using NEPA as a new weapon for the practice of discrimination and flatly held that such factors are not objective criteria of impact upon the human environment and therefore are not proper factors to be considered under NEPA.

128. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974); *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 372 F. Supp. 147 (N.D. Ill. 1973); *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972).

129. *First Nat'l Bank v. Richardson*, 484 F.2d 1369 (7th Cir. 1973); *Continental Ill. Nat'l Bank & Trust Co. v. Kleindienst*, 382 F. Supp. 107 (N.D. Ill. 1973). In *First Nat'l* the court upheld the GSA's threshold determination because the agency had considered the building's conformity to building codes, the adequacy of existing utilities and waste facilities, aesthetics and impacts upon traffic. Although adopting the two-pronged *Hanly* test, the court distinguished the GSA's failure to consider increases in crime from the Second Circuit's mandate in *Hanly* on the grounds that the Chicago facility would not be near a residential area like the New York project in *Hanly*. Rather, it would be located in the blighted Chicago "Loop" area which was composed of deteriorating buildings, flophouses, adult bookstores, arcades, liquor stores, taverns and non-resident commercial and office buildings. Furthermore, the Chicago facility failed to contain a drug maintenance unit which would attract the addicts, pushers and others which so disturbed the court in *Hanly*.

A similar line of reasoning was followed in *Continental* where the court placed great weight on the fact that the detention facility would be located in a totally non-residential area.

determinations concerning the construction of high-rise buildings,<sup>130</sup> urban renewal projects,<sup>131</sup> shopping center developments,<sup>132</sup> and even a railroad abandonment proceeding.<sup>133</sup>

Unfortunately, however,

the environmental problems of the city are not as readily identifiable as clean air and clean water . . . . Life in the inner city embraces a range of environmental problems, some starkly evident, some disguised, some acknowledged as environmental, some wearing other labels . . . . [M]any of our most severe environmental problems interact with social and economic conditions [in the inner city] which the Nation is also seeking to improve . . . . [And thus] [t]he traditional environmental objectives of clean air and water and preservation of national parks . . . are not the central concerns of . . . [the] inner city.<sup>134</sup>

Nevertheless, these cases present the realization that the "[e]nvironment" means something more than rocks, trees, and streams or the amount of air pollution . . . [Instead] [i]t encompasses all the factors that affect the quality of life . . . ." <sup>135</sup> thereby extending the reach of NEPA beyond merely the natural environment to include the urban environment as well.

### 3. INDIRECT EFFECTS OF AGENCY ACTIONS

Courts have given further effect to the broad policy considerations behind NEPA by refusing to restrict the Act's application merely to those effects upon the environment directly and actually caused by the agency itself, but instead have construed NEPA's impact statement requirement to include also those actions and decisions taken by agencies which have allowed both the states and private parties to take actions significantly affecting the environment.<sup>136</sup> Thus, courts have required impact statements by agencies prior to their approval of grants and loans of federal funds for con-

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130. *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971).

131. *B.A.S.Y.A.P. v. D.C. City Council*, 339 F. Supp. 793 (D.D.C. 1972).

132. *Jones v. HUD*, 390 F. Supp. 579 (E.D. La. 1974).

133. *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972). The court noted the potential for the increase in the use of alternate modes of transportation with their correspondingly greater pollution effects.

134. *First Nat'l Bank v. Richardson*, 484 F.2d at 1377-78 (7th Cir. 1973), *quoting* 2 Council on Environmental Quality Ann. Rep. 189-91 (Aug. 1971).

135. *Jones v. HUD*, 390 F. Supp. 579, 591 (E.D. La. 1974).

136. *S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

struction programs,<sup>137</sup> logging leases,<sup>138</sup> grazing permits,<sup>139</sup> increases in industry surcharges on freight,<sup>140</sup> and even funding proposals for technology research and development programs.<sup>141</sup>

To reach this result, courts have examined the phrase "actions significantly affecting the quality of the human environment," and have either construed the word "affecting" as referring to both direct and indirect effects of an agency's action<sup>142</sup> or interpreted the word "actions" to include not only actions taken by the agency itself, but also actions (or decisions) of the agency which have allowed others to act in a way which would significantly affect the environment.<sup>143</sup>

The logical extensions of this approach to defining the reach of NEPA are best illustrated by the holdings in *SCRAP v. United States*<sup>144</sup> and *Scientists' Institute for Public Information, Inc. (S.I.P.I.) v. AEC*.<sup>145</sup> In *SCRAP*, the United States District Court for the District of Columbia held that the Interstate Commerce Commission was required to submit an impact statement before it approved the railroad industry's implementation of a 2.5 percent surcharge on all railroad freight, because such a surcharge might discourage the movement of recyclables. The court reasoned that since the existing rate structure already discouraged the movement of recyclables, every across-the-board increase would further decrease incentives to recycling. This would in turn result in the increased degradation of the natural environment by discarded, unrecycled goods and the increased exploitation of scarce natural resources.<sup>146</sup>

137. *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974) (commitment to guarantee bond obligations used to finance housing and urban development); *Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973) (approval of loan application to finance a portion of construction costs to expand paper machinery company); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971) (grant for construction of medical and reception areas for prisoners).

138. *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974) (logging lease).

139. *N.R.D.C. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974).

140. *SCRAP v. United States*, 346 F. Supp. 189 (D.D.C.), *stay of injunction denied sub nom. Aberdeen & Rockfish R. R. Co. v. SCRAP*, 409 U.S. 1207 (1972), *rev'd on other grounds*, *United States v. SCRAP*, 412 U.S. 669 (1973) (ICC approval of railroad surcharge increases on all freight including recyclables).

141. *S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973) (research and development programs for nuclear reactors).

142. *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974).

143. *N.R.D.C. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974).

144. 346 F. Supp. 189 (D.D.C. 1972).

145. 481 F.2d 1079 (D.C. Cir. 1973).

146. 346 F. Supp. 189 (D.D.C. 1972). Chief Justice Burger in chambers, subsequently

The D.C. Circuit extended the concept of "indirect effects" even further in *S.I.P.I.* by holding that the Atomic Energy Commission's proposals for the funding of technology research and development programs directed toward creating liquid metal fast breeder reactors<sup>147</sup> constituted a significant environmental impact. The court reasoned that such agency funded programs would create a technology which would permit utility companies to take action affecting the environment in the future by building such plants in much the same way that an agency's decision to grant a construction permit to a builder would affect the environment. The court further concluded that to postpone consideration of a technology's possible adverse environmental effects until it reached the stage of commercial feasibility would frustrate any meaningful consideration of environmental costs, because technological advancements are capital investments such that the investment of time and resources in their development acts to compel their application once they are brought to a stage of commercial feasibility.<sup>148</sup>

Despite the broad scope of these decisions, however, the courts have put some limitations on how "indirect" an action may be before it can no longer be said to significantly affect the environment. Thus, courts have upheld agency determinations concluding that no significant impact was created by a Federal Trade Commission decision to promulgate guidelines respecting vertical mergers in the cement industry<sup>149</sup> and by the Comptroller of Currency's preliminary approval of an application to organize a second national bank which would finance urban developments that in turn would

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refused the railroads' petition for a stay of the injunction granted by the district court pending review by the entire Court, under the theory that an appellate court should not grant a stay of an injunction by a lower court unless that court's action in granting the injunction was "clearly erroneous." *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 409 U.S. 1207 (1972).

147. Liquid metal fast breeder reactors are a highly fertile energy source which by the year 2000 are expected to generate nearly one-fourth of our nation's electric power. This anticipated large scale use, which is a result of its apparent technological and commercial feasibility, will create complex problems regarding the handling and storing of large amounts of radioactive wastes, site selections and accident prevention. Note, 87 *HARV. L. REV.* 1050 (1974).

148. Although it has been suggested that a construction of *S.I.P.I.* to encompass all research programs which would significantly affect the environment upon implementation is too broad because of the lack of a sufficient nexus between the immediate research program and any possible future environmental harms in most such programs, Note, 87 *HARV. L. REV.* 1050, 1053 (1974), this is really a problem concerning the "timing" of the threshold determination, which is discussed in detail in subsection VI, B, 5 *infra*.

149. *Gifford-Hill & Co. v. FTC*, 389 F. Supp. 167 (D.D.C. 1974).



contribute to the urbanization of the area and a worsening ecological crisis.<sup>150</sup>

Thus, the courts have realized that although the reach of NEPA is clearly not unlimited,<sup>151</sup> its triggering phrase of "actions significantly affecting the . . . environment" is intentionally broad in order to reflect the Act's attempt to promote an across-the-board adjustment in federal agency decisionmaking so as to make the environment a concern of every federal agency,<sup>152</sup> and that to implement this purpose the Act's application may not be limited merely to those effects upon the environment directly and actually caused by the agency itself.<sup>153</sup>

#### 4. EXISTING USES AND ZONING RESTRICTIONS

The reach of NEPA has been inadvertently restricted in several instances where courts have given undue weight to the considerations of whether a proposed action was in keeping with local zoning ordinances or consistent with pre-existing uses of the area.<sup>154</sup>

In *Rucker v. Willis*,<sup>155</sup> for example, the Fourth Circuit gave scant consideration to the actual environmental effects of a proposed fishing pier and boat basin to be built on part of North Carolina's outerbanks and instead placed its reliance upon the fact that the area was already host to several commercial fishing piers similar to the one in dispute in holding that the action would not significantly affect the environment.

Similarly, in *Maryland-National Capital Park and Planning Commission v. United States Postal Service*,<sup>156</sup> it was reasoned that

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150. *First Nat'l Bank v. Watson*, 363 F. Supp. 466 (D.D.C. 1973). The court further reasoned that the existence of strong local and state laws protecting the environment and the new consciousness in environmental matters would intervene to prevent the bank from financing a project which might cause ecological harm to the environment.

151. *E.g.*, *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972).

152. *S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *N.R.D.C. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974).

153. *See S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

154. *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973). *See also Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) and *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), which develop a two-pronged test to determine whether a project will significantly affect the environment, by considering, in part, the existing uses of the area. The *Hanly* test however, prevents the giving of undue weight to this factor by requiring the decisionmaker also to analyze the cumulative effects of the proposed project.

155. 484 F.2d 158 (4th Cir. 1973).

156. 487 F.2d 1029 (D.C. Cir. 1973).

when local zoning ordinances are followed by a federal agency, there is an assurance that the environmental effects resulting from such land uses will be no greater than that demanded by the residents of the locale acting through their elected representatives. Thus, concluded the court, a presumption should arise that the effects of the proposed action are insignificant for purposes of EIS analysis, whenever the agency action complies with such local land use restrictions.

These cases fail to recognize, however, that although existing area uses and restrictions are clearly relevant factors to be considered in assessing whether a proposed agency action will significantly affect the environment,<sup>157</sup> undue reliance upon them shifts the focus of analysis away from evaluating the actual environmental impact of an action. Moreover, such uses and restrictions are not necessarily made with the benefit of an impact statement or the federal agency's available expertise nor under the mandate required by NEPA to consider environmental factors. Thus, such local decisions are not necessarily the product of informed or environmentally motivated decisionmaking.

NEPA was not intended to be a meta-zoning law nor was it designed to enshrine existing zoning ordinances on the theory that their violation presents a threat to the environment.<sup>158</sup> Furthermore, the Act was not intended to be used by communities as an instrument to shore up large lots and serve as another exclusionary zoning device that prices out low and even middle income families.<sup>159</sup>

##### 5. TIMING<sup>160</sup> OF THE THRESHOLD DETERMINATION

Neither NEPA nor the CEQ guidelines provide any meaningful assistance in determining the point in a project's lifetime at which

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157. See *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

158. *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972). It should be noted, however, that the court did give weight to the fact that the Navy's proposed use for the land in question (*i.e.*, a housing project) was nearly identical to the city's intended use.

159. *Id.*

160. The use of the word "timing" here refers to the timing of the threshold decision of whether or not a significant impact exists and is thus to be distinguished from its use in numerous other cases concerned with the timing of the seeking of review by intervenors at some point after the project has commenced physically. See, *e.g.*, *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973). For a discussion of the question of review of projects initiated prior to the enactment of NEPA see *Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974).

the proposed agency action is sufficiently concrete to be said to "significantly affect the environment" (and yet not be beyond that stage where the impact statement will have utility to the agency in its decisionmaking process).<sup>161</sup> However, an attempt to resolve this question has been undertaken by a number of courts. Because the impact statement is designed to aid agency decisionmaking rather than to provide an *ex post facto* justification for it, these courts have had the difficult task of attempting to reconcile the need to prepare the impact statement prior to the agency's proposal, with the unfortunate fact of life that the effects of the proposal may not actually be known or anticipated at such an early stage.<sup>162</sup> Moreover, when the implementation of the action is too remote, it will not yet have a significant impact.

In order to balance these competing concerns, the D.C. Circuit has developed four factors to be considered in determining timeliness:<sup>163</sup> (1) the likelihood that the program will come into fruition and how soon that will occur; (2) the extent that meaningful information is presently available on the effects of the implementation of the program and of its alternatives and their effects; (3) the extent that irretrievable commitments are being made at the time and that options might become precluded as refinements of the proposal progress; and (4) the severity of the environmental impact if the proposal progresses.

Applying these factors in *S.I.P.I.*, the court concluded that the AEC's research and development program directed toward the development of nuclear reactors required an impact statement even though the program had not yet reached commercial feasibility.<sup>164</sup> In reaching this decision, the court relied upon the magnitude of the federal investment in the program, its controversial effects, the speed with which the program had moved beyond pure scientific

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161. NEPA fails to speak directly to the issue of when an impact statement must be filed, providing only that it "shall accompany the proposal through the existing agency review process." Moreover, the CEQ Guidelines merely provide that a detailed statement will be required "[a]s early as possible and in all cases prior to the agency decision. . . ." CEQ Guidelines § 2, 36 Fed. Reg. 7724 (1971). Thus all NEPA and the CEQ tell us is that the impact statement must be prepared and circulated early enough to effect the decisionmaking process. See Fishman, *A Preliminary Assessment of the National Environmental Policy Act of 1969*, 1973 URBAN LAW ANNUAL 209.

162. *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), *rev'd*, 96 S. Ct. 2718 (1976); *S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

163. *S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

164. *Id.* at 1095-96.

research toward creation of a viable model, and the manner in which investment in this technology was likely to restrict the future alternatives. Thus, it reasoned, that to wait until commercial feasibility had been reached would be to preclude the usefulness of the EIS and any meaningful consideration of environmental factors.

The Supreme Court, in reviewing *Sierra Club v. Morton*,<sup>165</sup> recently rejected the D.C. Circuit's approach to the timing issue. Despite a persuasive opinion by Mr. Justice Marshall, concurring in part and dissenting in part, Mr. Justice Powell, writing for the majority, stated:

The statute clearly states when an impact statement is required, and mentions nothing about a balancing of factors . . . . [U]nder the first sentence of §102(2)(C) the moment at which an agency must have a final statement ready "is the time at which it makes a recommendation or report on a *proposal* for federal action." [citations omitted] The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise. A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared*.<sup>166</sup>

Although concurring in the Court's conclusion that the court of appeals was wrong in granting the Sierra Club an injunction, Mr. Justice Marshall dissented from the above quoted section of the majority opinion.

In short, the Court offers nothing but speculation, misconception and exaggeration to reject a reasonably designed test for enforcing the duty NEPA imposes upon the federal agencies. Whatever difficulties the Court may have with the initial application of the test in this case—and I agree that an injunction was not warranted on the facts before the court of appeals—the Court has articulated no basis for interring the test before it has been given a chance to breathe.<sup>167</sup>

Several other courts have considered the question of timeliness in the context of highway and airport construction programs, but

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165. *Kleppe v. Sierra Club*, 96 S. Ct. 2718 (1976).

166. *Id.* at 2728-29 (emphasis in original).

167. *Id.* at 2736.

without the detailed analysis of the D.C. Circuit. In *Upper Pecos Association v. Stans*,<sup>168</sup> the Tenth Circuit held that an impact statement was not required prior to the offer of a grant of funds to a state for highway construction through a national forest, where the agency had yet to approve the location or the construction plans<sup>169</sup> of the proposed highway. The court's only guidance in so holding was that an impact statement must be filed "at some point before commencement of the project."<sup>170</sup>

The Ninth Circuit's subsequent decision in *Lathan v. Volpe*,<sup>171</sup> helped to close in on this chronological "point" by holding that the Department of Transportation's approval of a proposed highway location required an impact statement even though final approval had yet to be given for either the highway's design or its construction plans, because of the realization that once the highway planning process has reached its latter stages most of the flexibility in selecting alternative plans would be lost. Conversely, the Ninth Circuit has also held that the Federal Aviation Agency's approval of an airport layout does *not* require an impact statement<sup>172</sup> because

whereas highway location approval constitutes "a decision, in the ordinary course, final, that a federal aid highway is approved for a particular location," under the airport aid scheme the "single decision to fund or not to fund a project" comes at the tentative allocation rather than the layout approval stage.<sup>173</sup>

Thus it was found that there had been no irreversible and irretrievable commitment of resources at the time of approval.<sup>174</sup>

A number of courts have also held that agency "proposals" which significantly affect the environment, such as a Department of Interior budget proposal of approximately \$200,000,000 for the financing of the 350 refuges making up the National Wildlife Refuge System,<sup>175</sup> or the Atomic Energy Commission's budget proposals for

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168. 452 F.2d 1233 (10th Cir. 1971), *vacated*, 409 U.S. 1021 (1972) (judgment was vacated and remanded to determine whether the case had become moot).

169. The location of the proposed highway and its construction plans and specifications must be approved by the United States Forest Service before a grant of a right-of-way easement is given and such an easement is necessary to permit the use of National Forest lands for highway purposes. *Id.*

170. *Id.* at 1236.

171. 455 F.2d 1111 (9th Cir. 1972).

172. *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975).

173. *Id.* at 328, *citing* *City of Boston v. Volpe*, 464 F.2d 254, 259 (1st Cir. 1972).

174. *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975).

175. *Sierra Club v. Morton*, 395 F. Supp. 1187 (D.D.C. 1975).

its technology research and development programs,<sup>176</sup> require the filing of an impact statement even though they are not "final agency decisions."

Some courts have even gone so far as to suggest that since the environmental consideration process should be ongoing, NEPA *may* require constant re-evaluations of projects at various times. These cases, however, have invariably dealt with projects initiated prior to the enactment of NEPA for which environmental interests have sought an initial impact statement, rather than with projects in which the courts have required a number of statements at different stages in the project.<sup>177</sup>

The Supreme Court's cavalier rejection of the D.C. Circuit's test for determining the ripeness of an agency proposal for the filing of an EIS is unfortunate. Its literal reading of section 102(2)(C) is overly simplistic and it is suggested that the timing of an EIS statement, in those cases where timing is a critical issue, should be determined by consideration of the four factors set out by the D.C. Circuit. This would serve to give effect to the NEPA mandate that environmental values be considered at every important stage of the decisionmaking process.

#### 6. PROJECT SEGMENTATION AND CUMULATIVE COMPONENT IMPACTS

A considerable amount of judicial labor has also been spent in attempting to determine whether an EIS is required for an action which, although relatively harmless by itself, constitutes a significant environmental impact when considered together with other actions.

The earliest effort to analyze this problem was concerned with determining whether an agency had segmented<sup>178</sup> one project in order to avoid the EIS requirement. Although the courts have been quick to hold that NEPA could not be circumvented by dividing up a project into relatively insignificant components,<sup>179</sup> this rule

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176. *S.I.P.I. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

177. *See, e.g., E.D.F. v. TVA*, 468 F.2d 1164 (6th Cir. 1972); *Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974).

178. For a discussion of the division of projects commenced before the adoption of NEPA, but in progress afterward, in the separate stages for purposes of determining whether the Act's impact statement requirement must be complied with see *E.D.F. v. TVA*, 468 F.2d 1164 (6th Cir. 1972).

179. *See Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir.), *cert. denied*, 406 U.S. 933 (1971); *Indian Lookout*

against segmentation was not construed to be absolute.<sup>180</sup> Instead, the courts usually looked to either the functional relationship between such individually minor actions<sup>181</sup> or to the coercive effect one action might have on creating others<sup>182</sup> and have only required an EIS where a sufficient relationship existed between such actions that they could be considered to be components of one larger action.

With the realization that the environment could be affected as significantly by the cumulative impact of many functionally unrelated minor actions as by one larger action requiring an EIS, a number of courts became increasingly more concerned with the cumulative impact of individual actions than with their functional relationship.<sup>183</sup> This shift in analysis allowed these courts to make a much more accurate determination of the true environmental effects of an action by freeing them from having to consider largely irrelevant questions concerning the relationship between various actions and allowing them instead to concentrate purely on questions of environmental impact.

In *Sierra Club v. Morton*,<sup>184</sup> the D.C. Circuit offered some guidance in defining a "broad agency program" which requires its own cumulative impact statement by rejecting the argument that such an impact statement is necessary only when the agency designates its actions as a program. Instead, the court concluded that

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*Alliance v. Volpe*, 345 F. Supp. 1167 (S.D. Iowa), *modified*, 484 F.2d 11 (8th Cir. 1972); *Conservation Soc'y v. Volpe*, 343 F. Supp. 761 (D. Vt. 1972), *aff'd*, 508 F.2d 927 (2d Cir. 1974). *See also* *Alpine Lakes Protection Soc'y v. Schlapfer*, 518 F.2d 1089 (9th Cir. 1975).

180. *Sierra Club v. Calloway*, 499 F.2d 982 (5th Cir. 1974).

181. *Conservation Soc'y v. Volpe*, 343 F. Supp. 761 (D. Vt. 1972) (highway segment held to be "entirely" independent of the remainder of highway project so that it did not require an impact statement); *Sierra Club v. Calloway*, 499 F.2d 982 (5th Cir. 1974). *See also* *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975).

182. In *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971) the court held that segmentation of a highway project which would traverse parkland into three parts, with only the middle one running through the parkland, was not permissible to avoid the filing of an impact statement on the non-parkland segments because their construction would compel the building of the middle segment through the parkland. *See also* *Conservation Soc'y v. Volpe*, 343 F. Supp. 761 (D. Vt. 1972) and *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167 (S.D. Iowa 1972).

183. *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), *rev'd*, 96 S.Ct. 2718 (1976); *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *N.R.D.C. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972). *See also* *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) and *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), which incorporate this factor into their two-pronged test for determining significant impact. For a further discussion of this test see section V, B *infra*.

184. 514 F.2d 856 (D.C. Cir. 1975).

where the federal government attempts to control the development of a definite region through the exercise of its power to control leases, mining plans, rights of way, and water option contracts, it is engaged in a program requiring a cumulative impact statement.

However, as noted previously, the Supreme Court recently overturned the D.C. Circuit's decision in *Sierra Club v. Morton*.<sup>185</sup> The Court found that the federal government had not, in fact, attempted to control the development of coal production in the Great Plains states through a regional program. Furthermore, the Court rejected the Sierra Club's argument that a regional EIS was required on all coal-related projects in the region because they were intimately related, holding that the Department of the Interior had not been arbitrary or capricious in its decision not to handle Great Plains coal production through a regional program.

The Supreme Court did accept the Sierra Club's position that when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.<sup>186</sup>

However, the Court concluded that there was no proposal for region-wide action by the Department of the Interior requiring a regional impact statement.<sup>187</sup>

Thus, the mode of analysis which courts will take in the future is far from clear. Although there can be little doubt that project segmentation intended to avoid the filing of an impact statement will not be allowed, it is not at all certain whether courts have progressed beyond the functional interdependence mode of analysis to a consideration of the overall cumulative impact of an action with related and further contemplated actions. Moreover, it is also questionable whether other courts will be able to follow the D.C. Circuit's lead by requiring impact statements analyzing the cumulative impact of "broad agency programs," and, if so, how they will choose to define such "programs."

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185. *Kleppe v. Sierra Club*, 96 S.Ct. 2718 (1976).

186. *Id.* at 2730.

187. *Id.* at 2732-33.



## 7. CONTROVERSIALITY

Many courts have discussed,<sup>188</sup> but few have relied upon<sup>189</sup> the controversiality of a project as a factor in determining whether an impact statement should be filed. This concern is undoubtedly the result of the CEQ Guidelines which provide that “[p]roposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases [by an impact statement].”<sup>190</sup> Nevertheless, courts have usually been content to pay lip service to this principle and to observe that CEQ Guidelines, while persuasive, are not mandatory.<sup>191</sup> Further confusion is created by the fact that the CEQ Guidelines fail to answer the question of how one measures whether action is “highly controversial.” For instance, “will the contest of a single individual, or a single conservation organization, suffice, or will it take five complainants?”<sup>192</sup>

Judicial decisions have, however, generally made it clear that the term “controversial” refers to situations where a substantial dispute exists as to the environmental effects of the proposed action and not merely to opposition to the intended use of the project.<sup>193</sup> Although this position has been criticized,<sup>194</sup> its logic has become even more compelling in light of recent attempts to use NEPA as an instrument of discrimination against the poor by seeking to include socio-economic impact resulting from the influx of low income

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188. See, e.g., *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

189. But see *Silva v. Romney*, 342 F. Supp. 783 (D. Mass. 1972) (impact statement required under HUD regulations where a controversy existed concerning drainage facilities of proposed housing project).

190. CEQ Guidelines § 5(b), 36 Fed. Reg. 7724 (1971).

191. See, e.g., *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974); *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *Continental Ill. Nat'l Bank & Trust Co. v. Kleindienst*, 382 F. Supp. 107 (N.D. Ill. 1973).

192. Karp, *NEPA: Major Federal Action Significantly Affecting the Quality of the Human Environment*, 11 Am. Bus. L.J. 209, 235 (1974).

193. *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972).

194. *Hanly v. Kleindienst*, 471 F.2d 823, 836-40 (2d Cir. 1972) (Friendly, C.J., dissenting). Chief Judge Friendly argued that the term controversial as used in the CEQ Guidelines referred to any “intense opposition, even if the actual environmental impact is readily apparent,” because in such situations those opposing the action would certainly file suit for non-compliance with NEPA anyway. The filing of the EIS in such situations would preclude these lawsuits. Friendly further argued that such impact statements would provide new information which might turn up unexpected environmental findings and that the agency's action in filing the impact statement itself will give the project's opponents the feeling that their objections are being considered.

people into an area accompanying a proposed agency action as proper consideration in making the threshold determination.<sup>195</sup>

Thus, it appears that while controversiality surrounding the extent of an environmental impact created by a proposed agency action may be considered in making a threshold determination, neighborhood opposition standing alone will *not* compel a finding of significant impact.<sup>196</sup> Nevertheless,

[t]he only conclusion that one can draw from the existing case law on this point is that it is highly uncertain. . . . from the question of what type of neighborhood opposition will suffice to demand preparation of an EIS, to whether neighborhood opposition is even relevant, to whether the Guidelines need be applied.<sup>197</sup>

### B. *Judicially Developed Tests*

Although various "tests" have been espoused by a number of courts in order to determine whether an agency action will significantly affect the environment, they have invariably been in the form of post facto legal conclusions, rather than meaningful frameworks of analysis. Thus, courts have held that an EIS must be filed where the agency action will either "arguably,"<sup>198</sup> "reasonably,"<sup>199</sup> or "potentially"<sup>200</sup> have a significant impact or where the agency's decision not to file would be "arbitrary and capricious"<sup>201</sup> or not in "good faith compliance with NEPA's procedural requirements."<sup>202</sup> While such so-called tests offer considerable flexibility, they provide little

195. See *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974); *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 372 F. Supp. 147 (N.D. Ill. 1973).

196. *Simmans v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974).

197. Karp, *supra* note 192, at 236.

198. *Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973); *SCRAP v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd*, 412 U.S. 669 (1973).

199. *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973). See also *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974) which held that requirements of what an agency must consider is governed by the "rule of reason."

200. *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974).

201. *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973); *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n*, 477 F.2d 402 (D.C. Cir. 1973). Although these cases are really dealing with the question of the scope of judicial review, it is not always possible to separate the scope of review from these "tests" because they have the same post facto nature. For a further discussion of the scope of judicial review see section II *supra*.

202. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

in the way of judicial certainty or guidance<sup>203</sup> in analyzing what constitutes a significant impact, because they put the emphasis upon subsequent judicial review rather than upon informed agency decisionmaking in the first place.

One exception to this *ex post facto* type of analysis, however, was the development of a two-pronged analytical framework in *Hanly II*, under which an agency is *required* to review the proposed action in light of both

- (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and
- (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.<sup>204</sup>

This test implemented the second circuit's belief that while conduct conforming to existing uses will usually have less significant adverse consequences than action which represents a radical change, even a slight increase in the adverse conditions forming an existing environmental balance may sometimes bring about significant harm, so that the absolute as well as the comparative effects of an action must be considered.

Although the bifurcated *Hanly II* approach clearly provides a valuable first step in developing a framework to analyze the degree of environmental impact produced by agency action, it lacks both the comprehensiveness necessary to make it universally applicable and the detail required to insure that agencies will consider the proper factors prior to judicial review.

## VI. DEVELOPING A FRAMEWORK OF ANALYSIS

### A. *The Need for a Liberal Construction of the EIS Requirement*

NEPA makes environmental protection a part of the mandate

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203. This need for guidance is crucial in developing a meaningful framework of analysis, because federal agencies' inability to discern the level of impact upon the environment has largely resulted from the difficulty they have experienced in deciding what factors to consider in making the threshold determination that an impact statement is required. See Note, *Factors to be Considered in Making a Threshold Determination that an EIS is Necessary Under the NEPA of 1969*, 2 *FORDHAM URBAN L.J.* 419 (1974).

204. 471 F.2d at 830-31. Judge Friendly, dissenting, opted for a broader definition—whenever the action would “arguably have an adverse impact.” *Id.* at 838.

of every federal agency<sup>205</sup> and thus the phrase "actions significantly affecting the quality of the human environment,"<sup>206</sup> which triggers the action forcing provisions<sup>207</sup> of the EIS requirement, must be construed to be intentionally broad in order to effectuate the Act's policy of "promot[ing] an across-the-board adjustment in federal agency decisionmaking so as to make the quality of the environment a concern of every federal agency."<sup>208</sup>

The EIS requirement was intended as the means to implement Congress' objectives of requiring a comprehensive approach to environmental management and of facing problems of pollution

"while they are still of manageable proportions and while alternative solutions are still available" rather than to persist in environmental decision-making wherein "policy is established by default and inaction" and environmental decisions "continue to be made in small but steady increments" that perpetuate the mistakes of the past without being dealt with until "they reach crisis proportions."<sup>209</sup>

Thus, the impact statement is essential to the decisionmaking process because it provides a basis for the evaluation of the benefit of the proposed project in light of its environmental risks and a comparison with the risks presented by alternative courses of action.<sup>210</sup>

The impact statement requirement also serves as an environmental full disclosure law<sup>211</sup> by providing an accessible means for opening up the agency decisionmaking process and subjecting it to critical evaluation by those outside the agency, including both the public<sup>212</sup> which will be directly affected by its decisions, and the

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205. See, e.g., *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

206. § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

207. The so-called "action forcing" provision of NEPA is 42 U.S.C. § 4332(2)(C) (1970) which requires the filing of an impact statement by an agency whenever one of its proposed actions will significantly affect the quality of the human environment. See *Hearings on S.1075, S.237 and S.1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969).

208. *S.I.P.I. v. AEC*, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

209. *N.R.D.C. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972), citing S. REP. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

210. *N.R.D.C. v. TVA*, 502 F.2d 852 (6th Cir. 1974); *N.R.D.C. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

211. *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849 (8th Cir. 1973); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972).

212. See, e.g., *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *E.D.F. v. Froehlke*, 473 F.2d 346 (8th Cir. 1972).

courts<sup>213</sup> which must review its decisions.

Moreover, environmentally concerned individuals and groups may not be able to provide an effective analysis of environmental factors because of limited resources, both in terms of money and technical expertise. The impact statement requirement, in effect, places the burden upon the government to make such an analysis, as well as to carry the burden of proof that no significant impact exists when its failure to file an impact statement is challenged.<sup>214</sup>

Thus, NEPA represents the first comprehensive congressional response to the environmental concerns that surfaced so dramatically during the 1960's and embodies the realization that we no longer have the margin of error with regard to the environment that we once enjoyed.<sup>215</sup> The ultimate issues presented by the short-sighted, conflicting and often selfish demands upon the finite resources of the earth are clear. In order to realize Congress' intent to assure that all federal agencies plan and work toward meeting the challenge of these demands upon the environment,<sup>216</sup> it is necessary

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213. See, e.g., *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974); *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972). A number of courts have gone one step further by holding that NEPA was intended to effect substantive changes in decisionmaking so that purely mechanical compliance with procedural requirements alone, without giving effect to environmental goals in reaching decisions, is insufficient to comply with NEPA's mandates. *M.P.I.R.G. v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *E.D.F. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972). It naturally follows that to give effect to this congressional intent, courts must have the power to review the agency's substantive decision in order to determine that the decision was reached after a good faith consideration of environmental factors and that the balance of environmental costs and benefits struck is not so arbitrary or capricious that insufficient weight has been given to environmental values. See also *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975); *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974); *E.D.F. v. Froehlke*, 473 F.2d 346 (8th Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). But see *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *E.D.F. v. Armstrong*, 487 F.2d 814 (9th Cir. 1973).

214. *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir. 1972). See also *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974); *Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973). But see *Sierra Club v. Calloway*, 499 F.2d 982 (5th Cir. 1974).

Furthermore, courts have generally followed the rule that the mere statement by an agency that no significant impact exists is insufficient to satisfy the procedural requirements of NEPA. Rather, an assessment statement must be given, providing convincing reasons why the project does not require a detailed impact statement. See, e.g., *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972); *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975); *Arizona Public Serv. Co. v. FPC*, 483 F.2d 1275 (D.C. Cir. 1973); *SCRAP v. United States*, 346 F. Supp. 189 (D.D.C.), *den. of application for stay of inj. sub. nom. Aberdeen & Rockfish R.R. Co. v. SCRAP*, 409 U.S. 1207 (1972).

215. *E.D.F. v. TVA*, 468 F.2d 1164 (6th Cir. 1972).

216. *Id.*

that NEPA's "action forcing" impact statement requirement be given the broadest possible application. Moreover, intelligent decisions concerning the use of our environmental resources can only be made if all the consequences and alternatives to actions affecting the quality of the environment are known.<sup>217</sup>

### B. *The Proposed Framework of Analysis*

It is essential that a framework of analysis have both the necessary flexibility to make it useful in the variety of environmental contexts in which the question of significant impact may arise and the detailed structural guidance required to allow agencies to make the proper threshold determination in the first instance as well as to give the courts a meaningful basis for review of that decision. Moreover, it is also apparent that no mathematically precise formula for determining significant impact can exist, and that decisionmakers must instead rely upon a comprehensive framework of analysis which will provide essential factors to be considered as well as a mode for their analysis.

Such a framework of analysis is presented in the following pages. This proposed framework has been developed from the philosophy behind NEPA, and many of the cases and comments construing it.

The proposed framework analyzes the impact of an agency action from eight different perspectives, each of which has been developed in order to evaluate a possible form that an environmental effect might take. This analysis is accomplished by utilizing a number of factors and/or tests within each of the eight areas, which are to be considered in the context of giving NEPA's "action forcing" provisions the broad interpretation necessary to implement the Act's previously discussed goals. Moreover, each of these eight forms of environmental impact is by itself sufficient to significantly affect the environment. Thus, a finding of significant impact under any one category would require the filing of an EIS.

#### 1. NATURAL ENVIRONMENT

The factors which are relevant in determining the need for an EIS in the case of a project which will directly affect the natural

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217. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

environment are the most easily identified. These factors are those most commonly perceived to be that stuff of which the environment is made: streams, lakes, air, trees, plants, wildlife, and ecological systems generally. These factors likewise encompass geological, historical, and archeological considerations.

The effects of pollution, destruction, and alteration of the natural habitat are the major foci of consideration under this section of the proposed test. Since such effects on the environment tend to be the best understood elements against which protection is needed, and because the existing case law has already adequately catalogued the relevant factors involved herein, an expanded discussion is not necessary.

*Thus, the first component of the proposed framework of analysis is the consideration of those effects on the natural environment which have traditionally been held to degrade its quality, such as pollution and the killing of or injury to wildlife and natural cycles.*

## 2. THE URBAN ENVIRONMENT

While it is clear that NEPA is concerned with effects upon the urban environment,<sup>218</sup> the Act contains no exhaustive list of environmental factors to be considered in analyzing these effects.<sup>219</sup> Nevertheless, a number of factors must, by their nature, assume paramount importance in such analysis. These factors form the nucleus of an environmental checklist for evaluating the impact of an action upon the urban environment.

The most obvious of these factors are increases in air and water pollution and the availability of waste and sewage removal facilities. Nearly as obvious are the adequacy of mass transportation systems, effects upon traffic and parking, and increases in congestion. However, the quality of the urban environment is affected by more than just pollution and transportation problems. Therefore, the list must also include the availability of utilities, increases in noise and obnoxious odors, effects upon population density and distribution, alterations in the character of neighborhoods, aesthetics, the destruction of historical landmarks, deteriorating neighborhood influences, relocation problems, energy demands, and even increases in crime and the availability of drugs. Care should be taken,

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218. See section V, A, 2 *supra*.

219. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

however, to avoid undue consideration of socio-economic factors, such as the influx of low income workers or the alleged anti-social propensities of the poor, because NEPA was not intended to be used as a tool for discrimination and such factors have limited, if any, environmental relevance.

As has previously been noted, however, "the environmental problems of the city are not [always] as readily identifiable as clean air and clean water . . ." <sup>220</sup> and thus any checklist must be adaptable to both the particular circumstances and the times. This has been clearly demonstrated by the recent increased concern with energy demands. Therefore, this checklist cannot be considered complete, but rather only the nucleus for determining the impact that a proposed action will have upon the urban environment. The need for additional factors must be determined by the particular environmental exigencies of the proposed action and the ability of such factors to influence the action's impact upon the quality of life for city residents.

*Thus, the second component of the proposed framework of analysis is the consideration of an action's impact upon the urban environment by utilizing the factor checklist presented above in conjunction with whatever additional factors are demanded by the particular circumstances to measure such an impact.*

### 3. INDIRECT EFFECTS OF AGENCY ACTION

It can hardly be doubted that an agency action which *directly* allows a third party to affect the environment, itself affects the environment in much the same way. For purposes of making the threshold determination, it is necessary to consider the environmental impacts of such a third party action as a secondary effect of the agency action which allows it. <sup>221</sup>

Yet, as previously noted, the reach of NEPA is not unlimited. <sup>222</sup> Thus, while there may be no problem concluding that an agency's grant of funds, a license, or a permit affects the environment where the recipient takes action which affects the environment, <sup>223</sup> the analysis becomes much more difficult where the recipient merely acts

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220. See note 134 *supra* and accompanying text.

221. See section V, A, 3 *supra*.

222. See notes 149-151 *supra* and accompanying text.

223. See notes 137-141 *supra* and accompanying text.



so as to allow a third party to take action which has environmental consequences. Therefore, while it is easy to decide that an agency's approval of a construction loan will have the same environmental effects as the actual construction, it is not so easy to conclude that an agency's approval of a bank charter will have the same environmental effects as a construction project subsequently initiated under a loan from the bank.

The question becomes one of finding a logical limitation to the agency's "responsibility" under NEPA to consider such indirect effects. The most promising solution to this problem lies in the adoption of the tort theory of proximate cause to EIS analysis. Under this theory the agency would be "liable" for those actions it had taken which foreseeably<sup>224</sup> would allow others to affect the environment.

Although the theory of proximate cause has developed in response to the fault system of our tort law, it nonetheless creates a limitation based upon the foreseeable consequences of an action under particular circumstances.<sup>225</sup> This theory is also appropriate in EIS analysis. Thus, while the tort law application of foreseeability is based upon the defendant's duty of care owed to the plaintiff, the NEPA application would be viewed in terms of the agency's duty to file an EIS when its actions significantly affect the environment. Such a concept of proximate cause offers the necessary flexibility to be useful in EIS analysis and yet has been the subject of so much case law commentary that it is more than an amorphous term like "significantly."

*Thus, the third component of the proposed framework of analysis is the evaluation of those non-agency environmental impacts which proximately result from agency action in the first instance.*

#### 4. EXISTING USES AND ZONING RESTRICTIONS

Although pre-existing uses of an area are clearly relevant in determining whether a proposed action will significantly affect the environment, there is no assurance that such uses are either environmentally motivated or the product of informed decisionmaking.<sup>226</sup> Moreover, it must be recognized that even

[o]ne more factory polluting air and water in an area zoned for

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224. See W. PROSSER, LAW OF TORTS § 42 (4th ed. 1971).

225. *Id.*

226. See section V, A, 4 *supra*.

industrial use may represent the straw that breaks the back of the environmental camel . . . [and thus] the absolute, as well as comparative, effects of a major federal action must be considered.<sup>227</sup>

Nevertheless, when considered in the proper context, evaluation of pre-existing area uses provides a helpful tool for analysis and is therefore incorporated into the proposed framework. This context is provided by considering such pre-existing uses in terms of the two-pronged *Hanly II* test which evaluates

(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.<sup>228</sup>

By adopting the *Hanly II* formula in evaluating such existing uses, both the cumulative and incremental impact created by the proposed action are considered. Moreover, because such an evaluation constitutes only one of eight areas that are analyzed under the overall proposed framework, the fact that the pre-existing use might not be the product of informed decisionmaking or environmental motivation will not hinder the ultimate determination of a significant impact requiring an EIS.

The consideration of local zoning ordinances, however, is not included within the proposed framework of analysis. While it contains the same drawbacks as the evaluation of pre-existing area uses, it is not as susceptible to cure. Zoning ordinances are merely intangible restrictions put on the use of property by local governing officials and therefore are useless in measuring the environmental impact of an action, except to determine whether such impact is consistent with local expectations for the area. Such local expectations are motivated by a variety of factors, ranging from the environmental to the political and social. Moreover, they are not necessarily the result of informed decisionmaking.

*Therefore, the fourth component of the framework of analysis is the evaluation of the projection in light of pre-existing area uses, through the utilization of the two-prong Hanly II mode of analysis.*

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227. *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972).

228. *Id.* at 830-31.

## 5. TIMING

For certain agency actions it is more difficult to determine *when* an EIS is required than *whether* it is required. Despite the Supreme Court's rejection of the D.C. Circuit's test, *S.I.P.I.* has gone a long way toward identifying that point at which an EIS is required. The following factors, adopted from *S.I.P.I.*, should facilitate the determination of when an EIS is mandated.

### a. Feasibility

If the actual implementation of the project is unlikely or substantially uncertain, no EIS is required. On the other hand, the likelihood of, and nearness to *practical* implementation should trigger the filing of an EIS. Arguably, this would mandate an EIS where commercial development is not feasible but where government implementation is probable.<sup>229</sup>

The amount of government investment should have great bearing on the feasibility or likelihood of implementation. This is true because the more time and money invested by the government agency in developing the technology, the more likely that the project will be pursued until successful completion. Writing off a \$10,000 investment which has failed is more easily justified than dismissing one which has cost \$10,000,000. The converse is not necessarily true. The fact that government expenditure has thus far been minimal does not mean that development is not feasible and therefore no EIS is required. The impact may be great notwithstanding the relatively insignificant monetary investment. For example, the government decision to dump barrels of poisonous gas at sea may cost little to implement but the ramifications of those barrels leaking could be significant.

### b. Present Availability of Information

If an EIS is to be required, there must be more than speculation on which to base the report. Thus, where the costs required to compile and project the potential environmental effects of a project are exorbitant an EIS will not be required. This is also true where alternatives cannot be anticipated due to the inability of the project coordinators to determine the anticipated impacts. A claim of great

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229. See 87 HARV. L. REV. 1050, 1058 (1974).

expense due to the obscurity or nonavailability of the information, however, will not shield the agency from the EIS requirement. While the avoidance of sheer speculation and star gazing are desirable, NEPA's goal is to force agencies to disclose what the environmental effects of its actions will be. Moreover, where the impacts are not readily ascertainable, the greater the perceived potential impact the more willing courts should be to require expenditure by agencies to obtain information regarding this potential impact. Similarly, although agency heads may "dream out loud," once the dream becomes finite,<sup>230</sup> an EIS should be filed.

c. Any Irreversible and Irretrievable Commitment of Resources  
Should the Project be Implemented

This term is, for the most part, self explanatory. In addition, this factor "focuses on past expenditures and vested interests already emerging in connection with a new technological development even prior to any implementation decision."<sup>231</sup>

d. Severity of Potential Environmental Effects

This factor can be tied to (b) above. Thus, the greater the potential environmental impact, the sooner the EIS should be filed.

e. Need for Technology Compels Development

Where the demand for the emerging technology is so great that research will continue until successful, the postponement of preparing an EIS due to the speculative nature or great cost of so doing should be looked upon less favorably.<sup>232</sup> An example of such a situation is the current pursuit of alternative sources of energy. Also important is the growth over time in the significance of the technology under development.<sup>233</sup>

Any one of the components of this section should be sufficient to trigger the requirement for an impact statement.

*Thus, the fifth element of the proposed framework is a consideration of the proper timing for the impact statement utilizing the five*

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230. Finite can be equated with an agency expenditure or funding request to implement the "dream."

231. 87 HARV. L. REV. at 1059.

232. *Id.* at 1060.

233. *Id.* at 1061.

*factors discussed above to facilitate the determination as to when a proposed action will have a significant environmental impact.*

## 6. CUMULATIVE IMPACT

Because the cumulative impact of various individually minor actions can affect the environment as significantly as a single larger action, threshold analysis is more appropriately concerned with evaluating the cumulative environmental impact of a number of smaller actions than with trying to determine whether such smaller actions are in fact components of one larger action which was segmented in order to avoid EIS analysis.<sup>234</sup> The functional interdependence of such individual actions is largely irrelevant in terms of evaluating the actions' effect upon the environment, except perhaps to impose artificial policy oriented constraints upon the extent to which an agency must consider such individually insignificant actions in making its threshold determination.

While some constraints on cumulative impact evaluation are clearly necessary in order to prevent impact statement analysis from being rendered unfeasible, more meaningful limitations in terms of environmental analysis can be imposed by basing such constraints on the degree of geographic, environmental, or programmatic relationship between these actions, rather than upon the extent of their functional interdependence. Even these constraints, however, are not completely compatible with the previously enunciated policy behind the proposed framework.<sup>235</sup> Thus, the degree of relationship that is required to trigger this analysis must be *very slight*<sup>236</sup> at most.

A natural outgrowth of this analysis is the further requirement that a separate EIS be filed to evaluate the cumulative impact of "broad agency programs" even though statements have already been filed for the programs' individual components.<sup>237</sup> This further EIS analysis will insure the consideration of any cumulative im-

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234. See section V, A, 6 *supra*.

235. See section VI, A *supra*.

236. The definition of the term "very slight" is, itself, susceptible to treatment by an entire article and therefore beyond the scope of this work. Nevertheless, when considered in light of the strongly expressed policies behind the proposed framework's broad interpretation of the EIS requirement, the term is sufficiently meaningful to be useful in the analysis of cumulative environmental impacts by treating it in the context of its normal meaning, to wit: "[T]o a small degree or extent; somewhat." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 656 (6th ed. 1972).

237. See note 184 *supra* and accompanying text.

pacts which might be otherwise slighted in the agency's evaluations of its individual actions. The need for this further analysis should not be dependent upon an agency designation that a group of actions constitutes a program, but rather upon the existence of *systematic* federal actions which significantly affect the environment over a wide geographic range.<sup>238</sup>

*Therefore, the sixth component of the proposed framework is the analysis of the cumulative environmental impact produced by the proposed action's interplay with other existing and contemplated agency actions that are related either environmentally, geographically, or programmatically.*

#### 7. CONTROVERSIALITY

To include controversial, non-discrimination based projects among those actions requiring an EIS would expand the existing case law. However, this expansion is neither inconsistent with the thrust of NEPA nor the CEQ Guidelines. Moreover, while the facts discussed under the other headings are more finite in nature, "controversiality" allows for the consideration of perceived environmental effects. The extent to which this perception will be seriously considered as a factor by the courts or administrators should be determined, in part, by the extent to which the perception approaches reality. The more this category overlaps with the others, the more likely that the perceived environmental harm is in fact reality-based and the more deference it should be accorded.

In addition, it is submitted that perceptions can in themselves lead to real effects and to this extent they should also be given consideration. That is, perceptions tend to be self-fulfilling with regard to the human response to a perceived danger. Thus, if residents feel a neighborhood project will endanger their welfare, they will move, particularly where those fears are not quieted by rational explanation. Such perceptions, therefore, even without a factual basis, are worthy of federal agency consideration. Thus, even where mistakenly perceived effects create great controversy, an EIS should be filed to clarify misperceptions.

The rationale supporting this approach is compelling in light of NEPA's broad policy statements.

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238. Once again a more detailed definition of the term "program" would require considerable analysis which is beyond the scope of this article and is therefore left to subsequent articles.

The very uncertainty created by the conflicting assertions made by the parties as to the environmental effect [of the proposed project] underscores the necessity of the [EIR] to substitute some degree of factual certainty for tentative opinion and speculation.<sup>239</sup>

This is especially true since one major purpose of the EIS is "to inform other government agencies, and the public generally, of the environmental impact of a proposed project . . . and to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions."<sup>240</sup>

*Thus, the seventh component of the proposed framework is the consideration of controversial actions, which are to be defined in terms of a bona fide perception of those actions' effects on the environment.*

#### 8. PER SE CATEGORIES—ULTRAHAZARDOUS ACTIONS

Certain government actions, whether in the research or a more advanced stage, have such potentially far reaching environmental consequences that, regardless of the degree of federal involvement, the action must be carefully scrutinized.

Exemplary of such government actions are genetic or biological engineering and the development and implementation of nuclear technology. Other projects with equally potentially hazardous or monumental implications for humanity are easily identified. It is submitted that extensive EIS's should be required for such projects and that they should be continually updated. Surely, the benefits to be derived from such a procedure clearly outweigh the potential costs. Great expense should not be an excuse for failure to prepare an EIS in this category.

It is not the *likelihood* of a catastrophic effect which is important here but rather the *potential* for it.

*Thus, the final factor to be considered in the proposed framework leaves no room for administrative discretion. If the action in question is potentially ultrahazardous, an EIS must be filed.*

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239. *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 814, 108 Cal. Rptr. 377, 390 (1973) (reference is to California's requirement for an Environmental Impact Report pursuant to that state's Environmental Quality Act which is modeled after NEPA and construed similarly). See *E.D.F. v. Coastside County Water Dist.*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

240. *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66, 78 (1975).

## VII. CONCLUSION

Existing case law under NEPA relating to the preparation of an EIS when a major federal action significantly affects the quality of the human environment is confused at best. It is confused both because the statutory language is vague and because the courts have tended to approach the problem from the standpoint of scope of review.

Attempts to judicially clarify the language have not been helpful. Administrators and judges alike must have a clear understanding of when an EIS is required in order to fully implement NEPA.

Many cases have identified numerous factors which were found to be relevant in determining whether to file an EIS. These factors have been utilized and in some instances expanded in order to develop a proposed framework which will hopefully provide the guidance heretofore lacking.

"Significance" cannot be defined by a reviewing court when it finds an administrative decision to be arbitrary, reasonable, rational, etc. This leaves the test undefined because it does not state the facts that are determinative. Implementation of the proposed analytical framework should fill the existing void and insure that the quality of the human environment will be properly considered in all federal actions which might diminish that quality.