

10-1-1973

Environmental Land-Use Control: Common Law and Statutory Approaches

Wayne E. Ripley Jr.

Eric Cohen

John R. Dwyer Jr.

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Wayne E. Ripley Jr., Eric Cohen, and John R. Dwyer Jr., *Environmental Land-Use Control: Common Law and Statutory Approaches*, 28 U. Miami L. Rev. 135 (1973)

Available at: <https://repository.law.miami.edu/umlr/vol28/iss1/7>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENT

ENVIRONMENTAL LAND-USE CONTROL: COMMON LAW AND STATUTORY APPROACHES

WAYNE E. RIPLEY, JR.,* ERIC COHEN** & JOHN R. DWYER, JR.***

I. INTRODUCTION	136
II. TRADITIONAL LAND-USE CONTROL DEVICES	138
A. <i>Common Law Approaches—Judicial Reconciliation of Discordant Land Use</i> ..	138
1. VOLUNTARY RESTRICTIONS	138
2. NUISANCE	138
a. Public Nuisance	139
b. Private Nuisance	141
3. TRESPASS	144
4. NON-INTENTIONAL INVASIONS OF THE USE AND ENJOYMENT OF LAND	146
a. Strict Liability	146
b. Negligence	147
5. RIPARIAN RIGHTS	149
6. THE PUBLIC TRUST DOCTRINE	151
7. CONCLUSION	152
B. <i>Traditional Statutory Land-Use Control Devices</i>	153
1. FACTORS AFFECTING THE VALIDITY OF LAND-USE CONTROL STATUTES	153
2. ZONING	155
3. OPEN SPACE ZONING	159
4. SUBDIVISION CONTROLS AND EXACTIONS	161
5. PERMITS	163
6. CONCLUSION	164
III. FEDERAL ENVIRONMENTAL LAWS	164
A. <i>The National Environmental Policy Act of 1969 (NEPA)</i>	165
1. PURPOSE OF THE ACT	165
2. WHEN MUST AN IMPACT STATEMENT BE FILED?	167
a. What Constitutes Federal Action?	167
b. Major Federal Action Significantly Affecting the Quality of the Human Environment	168
3. STANDING TO SUE UNDER NEPA	171
4. COURT DECISIONS INVOLVING HOUSING	178
5. CONTENTS OF THE IMPACT STATEMENT	181
a. Rules	181
b. Case Law	181
c. Who Must Prepare the Statement	182
6. PROBLEMS OF NEPA	183
B. <i>Other Federal Laws</i>	185
1. POLLUTION CONTROL LAWS	185
2. LAND PLANNING LAW	187
IV. STATE ENVIRONMENTAL LAWS AFFECTING LAND USE	188
A. <i>California Follows NEPA (CEQA)</i>	188
1. INITIAL PROBLEMS	188
2. THE AMENDED CEQA	193

* Articles and Comments Editor, University of Miami Law Review, Student Instructor in Freshman Research and Writing.

** Student Writing Editor, University of Miami Law Review, Student Instructor in Freshman Research and Writing.

*** Articles and Comments Editor, University of Miami Law Review.

B. <i>Florida's Regulatory Problem</i>	195
1. THE FLORIDA ENVIRONMENTAL LAND AND WATER MANAGEMENT ACT OF 1972..	196
2. ANALYSIS OF THE FLORIDA ACT	199
C. <i>Significant Developments in Other States</i>	201
V. NATIONAL LAND USE MANAGEMENT—A NEW APPROACH	204
VI. CONCLUSION	207

I. INTRODUCTION

Environmental quality control is an accepted concept today. In the sixties, the public demanded pollution abatement, and Congress responded by passing laws in the early seventies. The result was the creation of the Council on Environmental Quality,¹ the Environmental Protection Agency² and the passage of federal laws designed to abate air³ and water pollution.⁴ In spite of pressure from special interest groups, and warnings that industry cannot afford to comply with the clean air and water standards, the environmental quality movement has generated enough support to ensure enforcement of the standards without material compromise.

On its face, the legislative scheme seems to provide the necessary basis for preserving the environment. However, there is a growing awareness that one important link is missing in the chain: a land regulation scheme.

Control of both air and water pollution depends on land control to a great degree. Evidence of this is presented by present clean air regulations which control the placement of shopping centers and other public attractions if the consequential increase in traffic would cause a violation of the air quality standards.⁵ The effects of land use on water quality are equally obvious. Erosion, fertilizer and animal excretion runoff, sewage disposal, and destruction of the aquifer are examples of how improper land use is tied into water pollution.

Apart from its effect on air and water pollution, the improper use of land can cause environmental degradation in the form of the destruction of aesthetic quality.⁶ Although the United States Supreme Court has recognized that there is a fundamental right to aesthetic quality, the Court requires a showing of injury *in fact* in order to have standing to sue.⁷ However, there is no federal law which recognizes this right in the

1. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970) [hereinafter cited as NEPA].

2. Reorganization Plan No. 3 of 1970, 84 Stat. 2086.

3. Clean Air Act, 42 U.S.C.A. § 1857 *et seq.* (Supp. 1973).

4. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. § 1251 *et seq.* (Supp. 1973).

5. *E.g.*, 40 C.F.R. § 52.493 (1973).

6. *See, e.g.*, Magid, *Environmental Law Symposium: Land Use, Aesthetics and the State Legislature*, 19 WAYNE L. REV. 73 (1972).

7. *See* *Sierra Club v. Morton*, 92 U.S. 1361 (1972).

public.⁸ Thus, absent specific statutory provisions⁹ a citizen may be legally powerless to stop a federal agency or private developer from the pursuit of economic gain destroying the land's beauty. The problem is particularly crucial because, unlike the effects of water pollution, the destruction of the aesthetic uniqueness and beauty of the land cannot be reversed.¹⁰

There is a great need for a revitalized land ethic in this country. We need to develop a system of values which places proper emphasis on man's need to live with his environment. As Stuart Udall wrote in his book, *The Quiet Crisis*:¹¹

We cannot afford an America where expedience tramples upon aesthetics and development decisions are made with an eye only on the present.

Henry Thoreau would scoff at the notion that the Gross National Product should be the chief index to the state of the nation, or that automobile sales or figures on consumer consumption reveal anything significant about the authentic art of living. He would surely assert that a clean landscape is as important as a freeway, he would deplore every planless conquest of the countryside, and he would remind his countrymen that a glimpse of grouse can be more inspiring than a Hollywood spectacular or color television. To those who complain of the complexity of modern life, he might reply, "If you want inner peace find it in solitude, not speed, and if you would find yourself, look to the land from which you came and to which you go."¹²

8. It has been argued that section 4331 of NEPA gives all citizens the right to a clean and healthful environment. This argument has been rejected in all cases so far. *See* Environmental Defense Fund, Inc. v. Corps of Eng'rs, 348 F. Supp. 916 (N.D. Miss. 1972); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972); *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233 (10th Cir. 1971), *cert. vacated*, 409 U.S. 1021 (1973).

9. A 1970 Michigan act permits the designation of county roads as "Natural Beauty Roads." Once so designated, the vegetation around such roads cannot be altered. MICH. COMP. LAWS ANN. §§ 247.381-.385 (Supp. 1971).

Another example is presented by two identical federal statutes which say that, the Secretary of Transportation shall not approve any program or project which requires the use of any publicly owned land from a public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use.
23 U.S.C. § 138; 49 U.S.C. § 1653(f) (1970).

10. "Environmentalists recognize that improper use of land 'is now one of the most serious and difficult challenges to environmental quality because it is the most out-of-hand, and irreversible.'" Magid, *Environmental Law Symposium: Land Use, Aesthetics and the State Legislature*, 19 WAYNE L. REV. 73, 75 (1972), *citing* COUNCIL ON ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT 165 (1970).

11. UDALL, *THE QUIET CRISIS* (1963).

12. *Id.* at 202.

This paper deals with the connexity between land use and the environment. Section II deals with the common law and traditional approach to the problems of land use. Section III deals with the impact of federal laws on the use of the land, section IV shows how some states have recently dealt with the problem by adopting new approaches based on the federal laws, and section V discusses new proposals for federal land use management.

The reader should discover that none of the approaches outlined above have really worked. The authors feel that the answer to the land use problem lies somewhere in the maze of all the laws, rules and regulations to be discussed. We hope that by presenting an analysis of the various regulatory schemes, we can contribute to the solution of the most basic problem facing America today.

II. TRADITIONAL LAND-USE CONTROL DEVICES

Ours is a civilization based upon private ownership. It is, therefore, a socially desirable policy that each person be allowed to use his own land as he sees fit. This tenet of the American credo has become obsolete because it discouraged responsible and far-sighted land use, although it is occasionally reverently recited by a court preparing to further restrict property rights.¹³ Restrictions of property rights are not a recent development, but merely the inevitable result of increasing population density. This section will briefly examine the more traditional forms of land-use control devices, both ancient and modern, common law and statutory.

A. *Common Law Approaches—Judicial Reconciliation of Discordant Land Use*

1. VOLUNTARY RESTRICTIONS

The common law arsenal of land-use control devices includes several voluntary devices: covenants running with the land, equitable servitudes, easements, profits a prendre, defeasible fees and licenses. While the existence of such restrictions is of great interest to the developer, both as a cloud on title and as a planning device for subdivision, they are of slight environmental importance and merit no further discussion.

2. NUISANCE

“[‘Nuisance’] has meant all things to all men . . .”¹⁴ Public and private nuisance are two distinct concepts which unfortunately bear the

13. *E.g.* “There is no doubt of the general proposition that a man may do what he will with his own [property], *but . . .*” *Camfield v. United States*, 167 U.S. 518, 522-23 (1897) (emphasis added).

14. W. PROSSER, *TORTS* 592 (3d ed. 1964) [hereinafter cited as PROSSER].

same label and which have come to share certain characteristics.¹⁵ The term "nuisance" has reference to the interest invaded, not to the type of act causing the disturbance,¹⁶ although there have been numerous attempts to distinguish nuisance from strict liability or negligence¹⁷ on the basis of the defendant's actions. While nuisance is generally committed by misuse of the defendant's land, occasional cases involve actions unrelated to the defendant's use of land.¹⁸ The areas of public and private nuisance will be discussed separately, with common factors treated under public nuisance.

a. Public Nuisance

Unlike private nuisance, which is an invasion of the rights of use and enjoyment of a person's land, public nuisance involves an action which injures the "safety, health or morals . . . or works some substantial annoyance, inconvenience or injury to the public."¹⁹ Typically, these are statutory offenses involving "immoral" business or actions,²⁰ but pollution or other actions which are not statutory infractions may be public nuisances if harmful to the general welfare.²¹

The actions for public nuisance, which also create criminal liability, may normally be brought only by the proper governmental authorities.²² By statute, Florida allows citizens to sue in the name of the state²³ to enjoin enumerated statutory nuisances, without requesting permission

15. *Id.* at 592-94. See generally *McRae, Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948).

16. *Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724 (1944); PROSSER, *supra* note 14, at 594; RESTATEMENT (SECOND) OF TORTS, Scope and Introductory Note ch. 40 (1965).

17. *E.g.*, 23 FLA. JUR. NUISANCES § 4 (1959).

18. See, *e.g.*, Note, *Sound Amplifiers Reconsidered*, 2 U. FLA. L. REV. 257 (1949).

19. *City of Selma v. Jones*, 202 Ala. 82, 83, 79 So. 476, 477 (1918); *Federal Amusement Co. v. State*, 159 Fla. 495, 32 So. 2d 1 (1947). See FLA. STAT. § 823.01 (1971). The Supreme Court has recognized a federal common law public nuisance. *Illinois v. Milwaukee*, 92 S. Ct. 1385 (1972), *overruling without mentioning* *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1887).

20. *E.g.*, *Federal Amusement Co. v. State*, 159 Fla. 495, 32 So. 2d 1 (1947) (female impersonators); *Pompano Horse Club, Inc. v. State*, 93 Fla. 415, 111 So. 801 (1927). "It rests . . . within the province of the legislative body, to prescribe what shall constitute a nuisance, and . . . the Legislature . . . may make that a nuisance which was not one at common law." *Id.* at 441, 111 So. at 810. See generally PROSSER, *supra* note 14, at 603-05. However, a legal nuisance must be one in fact, although the legislative determination is given great weight. *City of Orlando v. Pragg*, 31 Fla. 111, 12 So. 368 (1893).

21. *E.g.*, *Lakeland v. State*, 143 Fla. 761, 197 So. 470 (1940) (sewage discharge); *Bartlett v. Moats*, 120 Fla. 563, 23 So. 2d 727 (1935) (noise); *Miami v. Coral Gables*, 233 So. 2d 7 (Fla. 3d Dist. 1970) (smoke).

22. *E.g.*, *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207 (1919). Although equity normally cannot enjoin a crime, the state may both prosecute and seek to suppress the nuisance in equity. *Pompano Horse Club, Inc. v. State*, 93 Fla. 415, 111 So. 801 (1927).

23. FLA. STAT. § 60.05 (1971). See also WIS. STAT. § 280.02 (1958). Other states allow private action where various "immoral" nuisances are involved. *E.g.*, MONT. REV. CODE § 94-1003 (1969).

from or after the refusal of state officials to seek injunction.²⁴ The same act may constitute both a private and a public nuisance. However, a private individual must show special damage, differing in kind, not merely degree, from the injury to the public in order to maintain an action for the public nuisance.²⁵ This requirement protects a defendant, whose actions would create public nuisance liability, from a large number of potential plaintiffs.²⁶

Nuisances, both public and private, are often described as being "absolute" or "per se" and, therefore, are found to be nuisances without regard to the care exercised by the defendant or the circumstances surrounding the case.²⁷ These nuisances typically are statutory,²⁸ clearly unreasonable in light of the surroundings, or abnormal and unduly hazardous.²⁹ However, nuisances "per accidens," the most common type, require an investigation into the attendant circumstances.³⁰

To be actionable, both public and private nuisances must involve substantial interference with the interest invaded.³¹ Thus, most cases will necessarily involve continuing behavior³² which is offensive or harmful to a person of ordinary sensibilities.³³

There are numerous defenses to public nuisance suits, including all normal equitable defenses. It may be argued that there is no nuisance

24. *Merry-Go-Round, Inc. v. State*, 136 Fla. 278, 186 So. 538 (1939).

25. *Bair v. Central & S. Fla. Flood Control Dist.*, 144 So. 2d 818 (Fla. 1962); *Page v. Niagara Chemical Div.*, 68 So. 2d 382 (Fla. 1953); *Brown v. Florida Chautauqua Ass'n*, 59 Fla. 447, 52 So. 802 (1910) (fence across public highway blocked passage from hotel to railroad depot). Ironically, the more widespread and severe the harm, the less likely private action will be maintainable. See generally Prosser, *Private Actions For Public Nuisance*, 52 VA. L. REV. 997 (1966); Annot., 44 A.L.R.2d 1381 (1955).

26. See 4 W. BLACKSTONE, COMMENTARIES *166.

27. Annot., 44 A.L.R.2d 1381, 1388 (1955).

28. See note 20 *supra*. The legislature can also authorize behavior which would otherwise be a nuisance. See *National Container Corp. v. State*, 138 Fla. 32, 189 So. 4 (1939). However, such authorization may be the basis for inverse condemnation if the damage is so severe as to be a non-physical taking of property. See generally Comment, *Nuisance—As a "Taking" of Property*, 17 U. MIAMI L. REV. 537 (1963). Also, it has been held that a statute authorizing pollution of a river did not prevent private suit. *Hodges v. Buckeye Cellulose Corp.*, 174 So. 2d 565 (Fla. 1st Dist. 1965).

29. See section II, A, 4, a, *infra*.

30. *E.g., Knowles v. Central Allapattae Properties, Inc.*, 145 Fla. 123, 198 So. 819 (1940).

31. *Prior v. White*, 132 Fla. 1, 180 So. 347 (1938). This of course does not apply to statutory public nuisances, where the maxim, "*de minimis non curat lex*," is inapplicable.

32. *E.g., Burnette v. Rushton*, 52 So. 2d 645 (Fla. 1951). There may be instantaneous substantial harm which is actionable, as in *E. Rauh & Sons Fertilizer Co. v. Shreffler*, 139 F.2d 38 (6th Cir. 1943) (single failure of pollution control device).

33. *Grentner v. Le Jeune Auto Theatre*, 85 So. 2d 238 (Fla. 1952) (auto theater hypersensitive to neighboring light). Thus aesthetics alone will rarely sustain the action. *Anderson v. Shackelford*, 74 Fla. 36, 76 So. 343 (1917). *But see Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954) (depression from cemetery); *Merritt v. Peters*, 65 So. 2d 861 (Fla. 1953) (exercise of legislative power). See generally Note, *Aesthetic Nuisances in Florida*, 14 U. FLA. L. REV. 54 (1962). It is no defense that there are worse offenders, and the violation of a pollution control ordinance is admissible as evidence of the existence of a nuisance in fact. *Miami v. Coral Gables*, 223 So. 2d 7 (Fla. 3d Dist. 1970).

in fact, the harm not being substantial.³⁴ Or it may be that the government has acquiesced or consented to actions involving large outlays of time and money, so that injunction would be inequitable.³⁵ Although the government can declare certain acts not to be nuisances, the public nuisance action, unlike the private, cannot be defeated by prescription.³⁶

The public nuisance remedy has too often been ineffective in environmental cases, not because of inherent faults, but because the public officials have been unable or unwilling to use the tools available,³⁷ few states having private enforcement statutes such as Florida's.

b. Private Nuisance

Private nuisance is an interference with the use and enjoyment of another's land, generally by misuse of the defendant's land.³⁸ Unlike trespass, it involves no physical entry and creates no liability without substantial harm.³⁹ As compared to non-statutory public nuisance, it affects fewer persons; the difference is largely a question of scope of harm rather than of the nature of the act.⁴⁰

Private nuisance has perhaps been the most utilized of all the common law tools against pollution, yet it has severe shortcomings. First, it can be brought only by one having some interest in the property substantially affected by the nuisance.⁴¹

A second difficulty in private nuisance suits is in establishing proximate causation. While this hurdle may be relatively simple to overcome in the single source situation,⁴² it is obviously more difficult where there

34. *Miami Beach v. Texas Co.*, 141 Fla. 616, 194 So. 368 (1940).

35. See note 28 *supra*. However, the operation must be as inoffensive as practically possible. See *National Container Corp. v. State*, 138 Fla. 32, 189 So. 4 (1939) (constitutional provision). See generally Note, *Nuisance and Legislative Authorization*, 52 COLUM. L. REV. 781 (1952). The defense is especially likely where statutory tolerance levels exceed those of the common law, as for aircraft noise. Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action*, 7 HARV. J. LEGIS. 533, 541 (1970).

36. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

37. See Hill, *The Politics of Air Pollution; Public Interest and Pressure Groups*, 10 ARIZ. L. REV. 37 (1968).

38. *Beckman v. Marshall*, 85 So. 2d 552 (Fla. 1956). See generally *McRae, Development of Nuisance in the Common Law*, 1 U. FLA. L. REV. 27 (1948).

39. *Beckman v. Marshall*, 85 So. 2d 552 (Fla. 1956); RESTATEMENT OF TORTS, Introduction to ch. 40 (1939). Evidently, this is because the law does not concern itself with petty annoyances and reflects the balancing of the competing interests in the use of plaintiff's and defendant's land.

40. RESTATEMENT OF TORTS, Introduction to ch. 40 (1939); Annot., 44 A.L.R.2d 1381, 1390 (1955). See notes 25 & 26 *supra* and accompanying text. The distinction may be a remnant of the earlier policy of limiting liability to protect germinal industries.

41. The interest (and proportionate recovery) can be very small. *McClosky v. Martin*, 56 So. 2d 916 (Fla. 1951) (tenant for a term); *Brink v. Moeschl Edwards Corrugating Co.*, 142 Ky. 88, 133 S.W. 1147 (1911) (adverse possession without title). However, it must qualify as a property right. *Elliot v. Mason*, 76 N.H. 229, 81 A. 701 (1911) (licensee denied recovery).

42. Lay evidence is admissible and can be sufficient to establish causation. *Alton Box*

are many defendants, a common occurrence in pollution suits. Although the existence of even more serious offenders is no defense,⁴³ the burden of rough apportionment of the damage is usually on the plaintiff.⁴⁴ The burden of division is occasionally placed upon the defendant;⁴⁵ this should also be done in cases of negligent nuisance⁴⁶ in states which follow such a rule⁴⁷ in negligence actions.

Third, the decisive consideration in many cases, the act must be "unreasonable" in light of the circumstances and location,⁴⁸ a judicial recognition of the competing interests of the landowner and society.⁴⁹

The plaintiff in a nuisance suit normally, in addition to damages, is seeking to have the injurious acts stopped or prevented.⁵⁰

The fourth broad defect in the private nuisance suit is that, assuming the plaintiff can prove his cases, there is a substantial possibility that damages will be allowed but injunctive relief denied. First, as with all injunctions, irreparable injury and inadequate remedy at law must be shown.⁵¹ Next, the plaintiff must hurdle the normal equitable defenses⁵² and others.⁵³ Finally, the major pitfall in actions against indus-

Board Co. v. Pantya, 236 So. 2d 452 (Fla. 1st Dist. 1970); Lee v. Florida Public Utilities Co., 145 So. 2d 299 (Fla. 1st Dist. 1962). The burden can also be met by showing that the interference commenced only with the use. Richards v. Village of Edinburg, 97 Ill. App. 2d 36, 239 N.E.2d 479 (1968).

43. *E.g.*, Miami v. Coral Gables, 233 So. 2d 7 (Fla. 3d Dist. 1970); Lakeland v. State, 143 Fla. 761, 197 So. 470 (1940).

44. *E.g.*, O'Neal v. Southern Carbon Co., 216 La. 96, 43 So. 2d 230 (1949); Sam Finley, Inc. v. Waddell, 207 Va. 602, 151 S.E.2d 347 (1969). Independent polluters may be jointly liable where practical division is impossible. Harley v. Merrill Brick Co., 83 Iowa 73, 48 N.W. 1000 (1891) (smoke unreasonable only when combined); Woodyear v. Schaefer, 57 Md. 1 (1881) (pollution unreasonable only when combined); Tidal Oil Co. v. Pease, 153 Okla. 137, 5 P.2d 389 (1931) (cattle poisoned by oil).

45. Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952).

46. See section II, A, 4, b *infra*.

47. See Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); *cf.* Atkinson v. Herington Cattle Co., 200 Kan. 298, 436 P.2d 816 (1968) (joint liability for independent causes of single injury).

48. See Beckman v. Marshall, 85 So. 2d 553 (Fla. 1956); Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440; Note, *Zoning Ordinances and Common-Law Nuisance*, 16 SYRACUSE L. REV. 860 (1965).

49. "Without smoke, Pittsburgh would have remained a very pretty village." Waschak v. Moffat, 379 Pa. 441, 452-53, 109 A.2d 310, 316 (1954) (Musmanno, J.) (original emphasis), quoting Versailles Borough v. McKeesport Coal & Coke Co., 83 Pitt. Leg. J. 379 (1935).

50. Relief from threatened nuisance requires proof of a high degree of real and apparent danger of injury, practically that the operation will be a nuisance per se or necessarily a nuisance. See National Container Corp. v. State, 138 Fla. 32, 189 So. 4 (1939); Faulkner v. Brookfield, 368 Mich. 17, 117 N.W.2d 125 (1962). Useful evidence might be available from the records of suits to enjoin similar operating nuisances which have failed because of the comparative injury doctrine. See notes 55-63 *infra* and accompanying text.

51. Gibson v. Tampa, 114 Fla. 619, 154 So. 842 (1934).

52. See generally de Funiak, *Equitable Relief Against Nuisance*, 38 KY. L.J. 223 (1950); Walsh, *Equitable Relief Against Nuisance*, 7 N.Y.U.L. REV. 352 (1930).

53. Florida rejects the "coming to the nuisance" defense against injunction. Lawrence v. Eastern Airlines Inc., 81 So. 2d 632 (Fla. 1955). *But see* State *ex rel.* Knight v. Miami, 53 So. 2d 636 (Fla. 1951) (apparently considered in determination of reasonableness and exis-

trial polluters, injunction may be denied under the comparative injury or "balancing of the equities" doctrine.⁵⁴ Not all courts follow the doctrine; early courts apparently paid little mind to the possibility of substantial injury to the wrongful defendant by the injunction, being more concerned with preventing multiplicity of actions.⁵⁵ Some courts went so far as to ignore great economic loss to the community,⁵⁶ although the growth of industry tended to engender the courts' protectionism.

The great majority of courts do indeed "balance the equities," considering the possible benefit to plaintiff and harm to defendant,⁵⁷ as well as the effect upon the public.⁵⁸ It is unrealistic to expect a court to close down large facilities operating as inoffensively as possible.⁵⁹ Yet the plaintiff may suffer truly severe loss from the misuse of his neighbor's land.⁶⁰ One approach has been to create a servitude by payment for the loss from the continued nuisance.⁶¹ Of more benefit to the public would be the use of a conditional injunction, requiring the offender to meet the maximum feasible reduction of harm over a period of time.⁶²

Although the private nuisance suit has these definite limitations, it is advantageous as compared to other common law remedies in several

tence of nuisance). See generally Comment, *Torts: Defense of Coming to a Nuisance*, 9 U. FLA. L. REV. 228 (1956). However, prescription is apparently available as a complete defense. E.g., *Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 118 P. 928 (1911).

54. See generally Annot., 40 A.L.R.3d 601 (1971).

55. See *Bristol v. Palmer*, 83 Vt. 54, 74 A. 332 (1909); Annot., 61 A.L.R. 924 (1929); Annot., 31 L.R.A. (n.s.) 888 (1911).

56. E.g., *Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 118 P. 928 (1911); see Schuck, *Air Pollution as a Private Nuisance*, 3 NAT. RES. LAW. 475 (1970).

57. *Beckman v. Marshall*, 85 So. 2d 552 (Fla. 1956).

58. *Haack v. Lindsay Light & Chem. Co.*, 393 Ill. 367, 66 N.E.2d 391 (1946) (essential war production); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904). The injunction unsuccessfully sought in *Ducktown* would have closed a plant worth \$2 million, put 10,000 people out of work, and destroyed half of the county tax base to protect land worth \$1,000.

59. The chancellor is given wide discretion and should consider all of the facts and circumstances. *Seaboard All-Florida Ry. v. Underhill*, 105 Fla. 409, 141 So. 306 (1932); *Milling v. Berg*, 104 So. 2d 658 (Fla. 2d Dist. 1958). Few go beyond the weighing of capital investment and job total. It has been suggested that the demand for injunction largely is used only to increase the recovery. Keeton & Morris, *Notes on "Balancing the Equities,"* 18 TEXAS L. REV. 412, 420 (1940).

60. E.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (1970) (plaintiff's land value decreased 50%—\$185,000). *Boomer* was followed by a deluge of criticism of what was characterized as private condemnation. See, e.g., Coleman, *Possible Repercussions of the National Environmental Policy Act of 1969 on Private Law Governing Pollution Abatement Suits*, 4 NAT. RES. LAW. 647, 651-52 (1970); Note, *Judicial Grant of Easement to Pollute—An Unwelcome Precedent for New York Environmental Law*, 35 ALBANY L. REV. 148 (1970); Comment, *Injunctive Relief Denied in Private Action for Nuisance Caused by Industrial Polluter*, 45 N.Y.U.L. REV. 919 (1970).

61. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (1970). This is the approach normally used where the tortfeasor is a public activity.

62. *Id.* at 231, 257 N.E.2d at 877 (dissenting opinion); cf. *National Container Corp. v. State*, 138 Fla. 32, 189 So. 4 (1939). The standard to be used will present problems, as it may create a class of polluters who will stifle efforts to develop pollution control methods which might operate to cleanse below the set standard. Yet a strict standard may place the defendant at a competitive disadvantage under the case-by-case approach of common law.

ways. The statute of limitations is often longer than for other actions;⁶³ recovery can be had for psychic and emotional injury without a "touching;"⁶⁴ and it may be the only basis for recovery in aircraft noise cases for flights *above* the Civil Aeronautics Board minimums.⁶⁵ The private or public nuisance suit remains a viable and useful land-use control device⁶⁶ despite the proliferation of statutory restrictions.⁶⁷

3. TRESPASS

The ancient tort of trespass is occasionally alleged in environmental litigation. The suit has several attractive features growing from the need to show only an intentional, unprivileged entry, as compared with the unreasonable conduct and substantial injury requirements in a nuisance action.⁶⁸

The early common law rule of strict liability, including intrusions neither negligent nor intended,⁶⁹ has been replaced by the prevailing position that liability will be found for intentional trespass, negligence, or "abnormally dangerous" activity.⁷⁰ The intent required is merely that to bring about the act which produces the invasion, not to cause the harm⁷¹—but this includes consequential results not intended although substantially certain to follow.⁷² However, as this intent requirement is generally thought of as involving some affirmative, volitional act,⁷³ and

63. See FLA. STAT. § 95.11 (1971) (4 years for nuisance and negligence, versus 3 for trespass).

64. *E.g.*, Jones v. Trawick, 75 So. 2d 785 (Fla. 1954) (depression from cemetery).

65. See Griggs v. County of Allegheny, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

66. See generally Comment, *Nuisance as a Modern Mode of Land Use Control*, 46 WASH. L. REV. 47 (1970).

67. Some concurrently applicable anti-pollution statutes preclude the private nuisance suit, although in other jurisdictions the private action has been allowed in spite of the statutes. See Reynolds Metals Co. v. Martin, 337 F.2d 780, 784 (9th Cir. 1964); Renken v. Harvey Aluminum, Inc., 226 F. Supp. 169, 176 (D. Ore. 1963).

68. *E.g.*, RESTATEMENT OF TORTS § 158 (1934).

69. *E.g.*, Lawson v. Price, 45 Md. 123 (1876). See generally Clark, *Trespass Quare Clausum Fregit*, 12 ALA. L. REV. 301 (1960).

70. Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land . . . or causing a thing . . . to enter the land, does not subject the actor to liability to the possessor even though the entry caused harm

RESTATEMENT (SECOND) OF TORTS § 166 (1965). See Parrot v. Wells, Fargo & Co., 82 U.S. (15 Wall.) 524 (1872); Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956); National Coal Bd. v. J.C. Evans Co., [1951] 2 K.B. 861.

71. *But see* Wright v. Masonite Corp., 368 F.2d 661 (4th Cir. 1966). Another definition includes intent to cause the harm, that the harm is substantially certain to result, or that the defendant *had knowledge* of the interference. RESTATEMENT OF TORTS § 822 (1939).

72. Burr v. Adam Eidemiller, Inc., 386 Pa. 416, 126 A.2d 403 (1956) (water supply fouled by slag run-off); Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1956). See RESTATEMENT OF TORTS § 13, comment *d* (1939); De Muth, *A Comparison of the Conduct Required in Trespass to Chattels and Negligence*, 33 ROCKY MT. L. REV. 323 (1961).

73. *E.g.*, Wood v. United Airlines, Inc., 32 Misc. 2d 955, 223 N.Y.S.2d 692 (Sup. Ct. Kings Cty. 1961), *aff'd*, 16 App. Div. 2d 659, 226 N.Y.S.2d 1022 (2d Div. 1962) (no liability for crash of plane out of control).

because of the early exemption from liability for involuntary invasions,⁷⁴ the intent requirement raises a possible defense in pollution cases. Many cases involving only an escape of oil, gas, smoke or other pollutants, might permit the defendant to argue that the escape is an involuntary act creating no liability.⁷⁵

The old distinction between direct or immediate versus indirect or consequential injury in trespass and case⁷⁶ has also faded under code pleading. The trend is clearly to define trespass to include both direct and indirect invasions of a person's protected interest in real property.⁷⁷ However, the distinction may still be useful as a defense by stressing the need for a "direct" physical entry by some tangible object.⁷⁸ Thus, many courts have held that the invasion by invisible industrial dust or noxious fumes is insufficient for trespass;⁷⁹ but the trend is to allow recovery where harm is caused by even microscopic gases and particles. Trespass is defined as

any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.⁸⁰

Similarly, the requirement of "direct" injury can provide a loophole for holding that the intervention of wind or water makes the invasion indirect and outside the scope of trespass.⁸¹ More recent cases refuse this tenuous distinction.⁸²

Trespass offers other advantages. It requires no proof of actual dam-

74. *E.g.*, *Smith v. Stone*, 82 Eng. Rep. 533 (K.B. 1647) (carried onto land against will); *Carter v. Thurston*, 58 N.H. 104 (1877) (logs carried onto land by stream).

75. *E.g.*, *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E. 2d 249 (1954) (oil leakage from tank). *But see* RESTATEMENT (SECOND) OF TORTS, ch. 7, Scope Note to Topic 2, at 300 (1965): "[A]ny intrusion of foreign matter which, although not intended, is a legal consequence of a tortious act is here regarded as a trespass." See section II, A, 4, *infra*.

76. See generally B. SHIPMAN, COMMON-LAW PLEADING 70-73 (1923).

77. See, *e.g.*, *Fairview Farms, Inc. v. Reynolds Metals Co.*, 176 F. Supp. 178 (D. Ore. 1959); *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 342 P.2d 790 (1960); RESTATEMENT (SECOND) OF TORTS § 158, comment *i* (1965); Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1127, 1139-42; Note, *A Trend Toward Coalescence of Trespass and Nuisance: Remedy for Invasion of Particulates*, 1961 WASH. U.L.Q. 62.

78. This has been successful with many courts. See Note, *Deposit of Gaseous and Invisible Solid Industrial Wastes Held to Constitute Trespass*, 60 COLUM. L. REV. 877 (1960).

79. *E.g.*, *Arvidson v. Reynolds Metals Co.*, 125 F. Supp. 481 (W.D. Wash. 1954), *aff'd*, 236 F.2d 224 (9th Cir. 1956), *cert. denied*, 352 U.S. 968 (1957) (fumes); *Riblet v. Spokane-Portland Cement Co.*, 41 Wash. 2d 249, 248 P.2d 380 (1952); Annot., 54 A.L.R.2d 764, 778 (1957).

80. *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 94, 342 P.2d 790, 794 (1959), *cert. denied*, 362 U.S. 918 (1960). The reference to energy could perhaps open the door to suits for trespass by light, X-ray, microwave and other forms of energy. *But see* *Amphitheatres, Inc. v. Portland Meadows*, 184 Ore. 336, 198 P.2d 847 (1948) (light).

81. *E.g.*, *Arvidson v. Reynolds Metals Co.*, 125 F. Supp. 481 (W.D. Wash. 1954), *aff'd*, 236 F.2d 224 (9th Cir. 1956), *cert. denied*, 352 U.S. 968 (1957).

82. *Lampert v. Reynolds Metals Co.*, 372 F.2d 245 (9th Cir. 1967).

age, nominal damages being recoverable for even beneficial invasions.⁸³ Of course, compensatory damages, including immediate personal injuries,⁸⁴ are recoverable, as are exemplary damages in aggravated situations.⁸⁵ Injunction is available in proper cases involving irreparable injury and inadequate legal remedy,⁸⁶ common in pollution cases. The trespass statute of limitations may be longer than for nuisance or other actions.⁸⁷ Although both trespass and nuisance actions may be defeated by prescriptive rights,⁸⁸ trespass traditionally has had the advantage of not being burdened with the "balancing of the equities"⁸⁹ common in nuisance.

4. NON-INTENTIONAL INVASIONS OF THE USE AND ENJOYMENT OF LAND

a. Strict Liability

In a return to the form, if not the reasoning, of early common law,⁹⁰ certain acts may create liability totally without "fault."⁹¹ Of course, trespass at one time was purely strict liability in nature;⁹² nuisance law has overtones of this view.⁹³ In reality, strict liability is but one prong of each of these torts.⁹⁴

83. See, e.g., *Atlantic Coastline R.R. v. Rutledge*, 122 Fla. 154, 165 So. 563 (1935); *Leonard v. Nat Harrison Associates, Inc.*, 122 So. 2d 432 (Fla. 2d Dist. 1966). Of course, such a recovery would merely be a Pyrrhic victory in pollution control.

84. *Leonard v. Nat Harrison Associates, Inc.*, 122 So. 2d 432 (Fla. 2d Dist. 1960).

85. *Hutchinson v. Courtney*, 86 Fla. 556, 98 So. 582 (1923). Such aggravating elements include malice, oppression and fraud.

86. *Carney v. Hadley*, 32 Fla. 344, 14 So. 4 (1893).

87. See, e.g., *Fairview Farms, Inc. v. Reynolds Metals Co.*, 176 F. Supp. 178 (D. Ore. 1959). But see FLA. STAT. § 95.11(5)(b) (1971), setting 3 years for trespass, 4 years for negligence and nuisance.

88. See Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1142 (1967). However, the pollution might also constitute a public nuisance, for which no prescriptive right may accrue. *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

89. E.g., *Lampert v. Reynolds Metals Co.*, 372 F.2d 245 (9th Cir. 1967) (no right to trespass despite high value). But see *Renken v. Harvey Aluminum, Inc.*, 226 F. Supp. 169 (D. Ore. 1963); *Arvidson v. Reynolds Metals Co.*, 125 F. Supp. 481 (W.D. Wash. 1954), *aff'd*, 236 F.2d 224 (9th Cir. 1956), *cert. denied*, 352 U.S. 968 (1957).

90. See Smith, *Tort and Absolute Liability*, 30 HARV. L. REV. 241 (1917); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894).

91. See generally Faust, *Strict Liability in Landowners' Cases*, 42 ORE. L. REV. 273 (1963); Wade, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233 (1968).

92. See notes 69 & 70 *supra* and accompanying text.

93. See, e.g., *E. Rauh & Sons Fertilizer Co. v. Schreffler*, 139 F.2d 38 (6th Cir. 1943). Here, the single failure of a pollution control device resulted in liability with no proof of negligence. The court reasoned that the creation of the possibility of a nuisance was in itself an intentional act sufficient for liability.

Non-statutory "absolute" or "per se" nuisances are generally similar to strict liability in nature. PROSSER, *supra* note 14, at 594. See *Jost v. Dairyland Power Co-op.*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969).

94. See notes 69 & 70 *supra* and accompanying text (trespass); see PROSSER, *supra* note

Excluding trespass, there are three theories of strict liability in the land-use context. The first is that of "absolute" or "per se" nuisance, previously discussed.⁹⁵ These terms are also applied to abnormal or ultrahazardous activities by some courts.⁹⁶

The second theory is that of *Rylands v. Fletcher*,⁹⁷ creating liability for "non-natural" use of land. The cases are diverse as to what is "non-natural" use, with few involving environmental considerations.⁹⁸

The third approach, that of the *Restatement of Torts*, allows recovery for unintentional torts only if they are "otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct."⁹⁹ Thus, the *Rylands* rule has been tightened from "non-natural" to "ultrahazardous."¹⁰⁰ This leaves the plaintiff without recovery where harmful gases unintentionally and non-negligently escape but the unnatural use is not ultrahazardous.¹⁰¹ The wise plaintiff clearly then should allege nuisance, trespass, and *res ipsa loquitur* rather than rely solely upon strict liability.

b. Negligence

The relaxation of the old forms of action has given rise to what have been called negligent trespass¹⁰² and nuisance,¹⁰³ presumably in recognition of the interests invaded. The characterization is of minor importance, as the cases are otherwise like all negligence suits, allowing recovery for personal injury unrelated to property ownership,¹⁰⁴ unlike trespass and nuisance.¹⁰⁵

The major problem in such cases is in establishing the standard of

14, at § 88 (nuisance); Keeton, *Trespass, Nuisance and Strict Liability*, 59 COLUM. L. REV. 457 (1959).

95. See notes 27-29 *supra* and accompanying text.

96. Many courts refusing by name the approach of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), accept it in this form. See Prosser, *Nuisance Without Fault*, 20 TEXAS L. REV. 399 (1942). The *Rylands* rule may be viewed as a form of single incident, substantial injury nuisance. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 488 (1949).

97. L.R. 3 H.L. 330 (1868).

98. See PROSSER, *supra* note 14, at § 77; Comment, *Air Pollution as a Private Nuisance*, 24 WASH. & LEE L. REV. 314, 315-16 n.22 (1967).

99. RESTATEMENT OF TORTS § 822(d) (1939); RESTATEMENT (SECOND) OF TORTS § 822(b) (Tent. Draft No. 17, 1971).

100. Ultrahazardous conduct necessarily involves risk which cannot be eliminated and not of common usage. RESTATEMENT OF TORTS § 520 (1939). *But see* RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964) (merely two of six factors).

101. See *Fritz v. E.I. du Pont de Nemours & Co.*, 45 Del. 427, 75 A.2d 256 (1960); *Waschak v. Moffat Coal Co.*, 379 Pa. 441, 109 A.2d 310 (1954). *But see* *Lutheringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948).

102. See note 70 *supra*.

103. PROSSER, *supra* note 14, at 596 (private nuisance); *id.* at 598 (public). *But see* *Gray v. Southern Facilities*, 256 S.C. 558, 183 S.E.2d 438 (1971).

104. *E.g.*, *Hagy v. Allied Chemical & Dye Corp.*, 122 Cal. App. 2d 361, 265 P.2d 86 (1954) (laryngeal cancer aggravated by driving through chemical smog).

105. See note 41 *supra* and accompanying text.

care. However, the courts have been helpful. In *Martin v. Reynolds Metals Co.*,¹⁰⁶ plaintiffs established the escape of fluorides from the defendant's plant. The court applied *res ipsa loquitur*, stating that "when the plaintiff proved the emanation of fluorine compounds . . . and the injury suffered by him as a result thereof, he made out a prima-facie case of negligence . . ."¹⁰⁷ The decision was affirmed¹⁰⁸ in light of testimony that normal operation would ordinarily not cause damage and because of the superior knowledge of the defendant, which creates in him a higher duty of care.¹⁰⁹

The standard of care may also be measured by statutory requirements,¹¹⁰ industry standards,¹¹¹ or perhaps by some measure of the state of the art of pollution control. One expression of the latter standard, made in a trespass case, is that the defendant must show that the pollution "was unavoidable or that it could not be prevented except by the expenditure of such vast sums of money as would substantially deprive it of the use of its property."¹¹²

Causation is a second vexatious element in negligence pollution cases, particularly in urban air pollution injuries.¹¹³ Once again, however, the courts have eased the burden, this time by shifting it to the polluter upon establishment of a prima facie case. In *Hagy v. Allied Chemical & Dye Corp.*,¹¹⁴ defendant's sulphuric acid smog allegedly caused plaintiff's latent laryngeal cancer to "light up." The court affirmed a verdict for plaintiff, stating:

The burden did not rest upon [plaintiff] to prove that the removal of [plaintiff's] larynx would not have been necessary but for her exposure to the smog; the burden was rather upon

106. 135 F. Supp. 379 (D. Ore. 1952), *aff'd sub nom.* Reynolds Metals Co. v. Yturbide, 258 F.2d 321 (9th Cir.), *cert. denied*, 358 U.S. 840 (1958).

107. *Martin v. Reynolds Metals Co.*, 135 F. Supp. 379, 382 (D. Ore. 1952).

108. Reynolds Metals Co. v. Yturbide, 258 F.2d 321 (9th Cir.), *cert. denied*, 358 U.S. 840 (1958).

109. RESTATEMENT (SECOND) OF TORTS § 289(b) (1965).

110. See PROSSER, *supra* note 14, at § 35. Such violation can be negligence per se (majority), presumptively negligent, or merely evidence of negligence. In Florida, violation of a statute enacted to protect a class of persons is negligence per se, while violation of one to protect the public at large is prima facie evidence of negligence. Seaboard Coast Line R.R. v. deJesus, 266 So. 2d 108 (Fla. 2d Dist. 1972); Baldrige v. Hatcher, 266 So. 2d 112 (Fla. 2d Dist. 1972).

111. The failure to use a well-known pollution control system may "permit an inference that failure to use that better system at that time constituted negligence." Reynolds Metals Co. v. Yturbide, 258 F.2d 321, 329 (9th Cir.), *cert. denied*, 358 U.S. 840 (1958).

The custom of the industry standard might perpetuate a polluting industry, as a recent survey of pollution control device manufacturers revealed "the almost universal complaint . . . that industry was not willing to invest in the latest, most adequate control technology." Esposito, *Air and Water Pollution: What to Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 34 (1970).

112. Renken v. Harvey Aluminum, Inc., 226 F. Supp. 169, 174 (D. Ore. 1963).

113. See generally Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere*, 33 BROOKLYN L. REV. 17 (1966).

114. 122 Cal. App. 2d 361, 265 P.2d 86 (1964).

[defendants] to convince the jury that the operation would have been ultimately necessary in any event, even though the cancerous larynx had not been traumatized . . .¹¹⁵

The negligence action, then, has many drawbacks as a land-use control device, but it can be effectively used by creative counsel where personal injury unrelated to land ownership is involved.

5. RIPARIAN RIGHTS

Use of land which interferes with the water rights of others, affecting quality or quantity, can result in common law liability.¹¹⁶ The law historically, but illogically,¹¹⁷ has distinguished watercourses, surface water, and both percolating and underground streams of subterranean water.¹¹⁸ The principles applied to watercourses, the doctrine of riparian rights,¹¹⁹ are illustrative.¹²⁰

The term "riparian rights" denotes two distinct theories. The natural flow theory, a common law and minority view, is that each abutting land owner has the right to have the water remain in substantially its natural state of quantity and quality.¹²¹ The reasonable use theory, which is the majority view of the doctrine of riparian rights, maintains that each riparian proprietor has an equal right to make maximum use of the water, affecting both quantity and quality in the absence of unreasonable interference with the rights of others.¹²² This view obviously is more likely to aid economic development and fit the frontier psychology of unlimited resources.¹²³ This standard appears to be a form of water nuisance, requiring substantial interference to create liability.

115. *Id.* at 370, 265 P.2d at 92. This is perhaps an outgrowth of the "take your victim as you find him" concept of the RESTATEMENT (SECOND) OF TORTS § 461 (1965). Much the same approach was taken in an action for brain damage by carbon monoxide to a bus passenger. *Greyhound Corp. v. Blakely*, 262 F.2d 401 (9th Cir. 1958).

116. See generally RESTATEMENT (SECOND) OF TORTS, ch. 41 (Tent. Draft No. 17, 1971); B. Gindler, *Water Pollution and Quality Controls*, in 3 WATERS AND WATER RIGHTS ch. 13 (R. Clark gen. ed. 1967) [hereinafter cited as B. Gindler]; Busby, *American Water Rights Law*, 5 S.C.L.Q. 106 (1952).

117. Maloney & Plager, *Florida's Ground Water: Legal Problems in Managing a Precious Resource*, 21 U. MIAMI L. REV. 751 (1967).

118. *E.g.*, *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 So. 780 (1896).

119. The term is properly applicable to a stream of water flowing in a definite direction or course in a channel with banks and bed. *Libby, McNeil & Libby v. Roberts*, 110 So. 2d 82 (Fla. 2d Dist. 1959). The same term is often applied to littoral owners, those on the shore of a sea or a lake. See *City of Eustis v. Firster*, 113 So. 2d 260 (Fla. 2d Dist. 1959).

120. See generally Hunt, *Riparian Rights in Florida*, 8 U. FLA. L. REV. 393 (1955); Maloney & Plager, *Florida's Streams—Water Rights in a Water Wonderland*, 10 U. FLA. L. REV. 294 (1957).

121. *E.g.*, *City of Richmond v. Test*, 18 Ind. App. 482, 48 N.E. 610 (1897). The theory is based upon the maxim *aqua curret et debet currere in modo quo currere solebat*—water flows and ought to flow as it has been wont to flow. *Goble v. Louisville & N.R.R.*, 187 Ga. 243, 200 S.E. 259 (1938).

122. *E.g.*, *Merrifield v. City of Worcester*, 110 Mass. 216 (1872); *Townsend v. Bell*, 167 N.Y. 462, 60 N.E. 757 (1901).

123. In the water-short western states a contrary rule is followed, that of prior appro-

The exact difference between the standards is as elusive as the difference between ordinary and gross negligence:

Most courts, either not realizing that there are two distinct theories or not fully grasping their fundamental differences, attempt to apply both theories, with results that are not only illogical but weirdly inconsistent at times.¹²⁴

More charitably, most courts have been in a state of transition from the older natural flow to the reasonable use theory, albeit subliminally.¹²⁵ Also, the natural flow theory is not entirely distinct from the reasonable use standard, as it does not require complete purity, only that the water be fit for the lower owner's domestic and natural uses, including drinking.¹²⁶

The riparian rights doctrine, especially in the reasonable use form, is intertwined with nuisance. Thus, the riparian owner can affect the quality of the water to some degree, being liable only for substantial adverse impact.¹²⁷ Also, as with nuisance, unintentional invasions do not create liability, despite substantial harm, in the absence of ultrahazardous activity¹²⁸ or negligence.¹²⁹ Special injury must be shown for private equitable relief.¹³⁰ The right is subject to prescription,¹³¹ although statutory authorization to deposit wastes and effluents does *not* prevent the tort action.¹³² Also, as for nuisance, the courts generally reject aesthetic

priation—first come, first served. However, the majority of states follow the riparian rights doctrine. *E.g.*, *Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921).

124. RESTATEMENT OF TORTS, Scope Note to ch. 41, at 346 (1939).

125. Florida, with few cases, has no clear position. An early case seems purely natural flow. *See Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 48 So. 643 (1909). Yet an even earlier dictum stated that "it is therefore only for an unauthorized and unreasonable use . . . that any one has just cause to complain." *Tampa Waterworks v. Cline*, 37 Fla. 586, 595, 20 So. 780, 782 (1896). The recent cases are reasonable use oriented, all uses being equal and subservient to domestic purposes of home or farm. *See Taylor v. Tampa Coal Co.*, 46 So. 2d 392 (Fla. 1950); *Brown v. Ellingson*, 224 So. 2d 391 (Fla. 2d Dist. 1969); *Lake Gibson Land Co. v. Lester*, 102 So. 2d 833 (Fla. 2d Dist. 1958).

126. *E.g.*, *Tennessee Coal, Iron & RR. v. Hamilton*, 100 Ala. 252, 14 So. 167 (1893).

127. *Id.* The reasonable use theory carries with it the right to discharge wastes. *See, e.g.*, *Donnelly Brick Co. v. New Britain*, 106 Conn. 167, 137 A. 745 (1927); *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 42 N.W. 448 (1889).

The question of reasonableness depends not alone upon the extent and nature of the impurities projected into this stream, but upon the location of the plaintiff's land, the use to which it was devoted, the effect upon it . . . and the extent to which pollution of the waters may have been attributable to other sources. . . .

Townsend v. Bell, 167 N.Y. 462, 471, 60 N.E. 757, 760 (1901).

128. *See American Cyanamid Co. v. Sparto*, 267 F.2d 425 (5th Cir. 1959) (alternative holding).

129. *See generally* B. Gindler, *supra* note 116, at § 211.2.

130. *See Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 48 So. 643 (1909). This is because the waters navigable in fact belong to the state, so that most wrongs are to the public. *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 So. 428 (1912). *See* notes 25 & 26 *supra* and accompanying text.

131. Annot., 46 A.L.R. 8, 69 (1927).

132. *Hodges v. Buckeye Cellulose Corp.*, 174 So. 2d 565 (Fla. 1st Dist. 1965), *appeal dismissed*, 382 U.S. 160 (1965). This is *contra* to the rule of nuisance. *See* note 28 *supra*.

considerations in favor of economic utility, because the "riparian owner has no proprietary right in a beautiful scene presented by a river any more than any other owner of land could claim a right to a beautiful landscape."¹³³

6. THE PUBLIC TRUST DOCTRINE

The public trust doctrine¹³⁴ is yet another minor common law restriction upon use of land. Basically, it is the judicial recognition of a trustee-beneficiary relationship between the government and public relating to the disposition of public land, primarily submerged lands in navigable¹³⁵ waters.¹³⁶

The trust attaches to such land held by the government so that mandamus will lie, after exhaustion of administrative remedies, to compel use or disposition of the property in accordance with the public interest.¹³⁷ The trust also remains as a quasi-easement upon public lands which have passed to private ownership.¹³⁸ However, this "easement" cannot serve as the basis to deny a dredge and fill permit unless the adverse effect upon the public interest would be material.¹³⁹

The doctrine has been severely limited in scope—largely to land

133. *International Shoe Co. v. Heatwole*, 126 W. Va. 888, 892-93, 30 S.E.2d 537, 540 (1944).

134. See generally Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313 (1918); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Note, *Conveyances of Sovereign Lands Under the Public Trust Doctrine: When Are They in the Public Interest?*, 24 U. FLA. L. REV. 285 (1972); Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

135. Florida requires that they be navigable in fact, although in practice, the courts have only required capability of navigation. *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927); *Lopez v. Smith*, 145 So. 2d 509 (Fla. 2d Dist. 1962). See generally F. MALONEY, S. PLAGER & F. BALDWIN, *WATER LAW AND ADMINISTRATION* 35-44 (1968).

136. The great majority of cases involve such lands, although the doctrine includes all public property of a "special character." *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (1893). One example of special character property is a public park. *Paepcke v. Public Building Comm'n*, 46 Ill. 2d 330, 263 N.E. 2d 11 (1970); *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E. 2d 114 (1966).

137. E.g., *In re Crawford County Levee & Drainage Dist. No. 1*, 182 Wis. 404, 196 N.W. 874, cert. denied, 264 U.S. 598 (1924).

138. "When the sovereign grants or conveys the title to land under navigable water, such title passes subject to the public easements, and to the riparian rights allowed by law." *Broward v. Mabry*, 58 Fla. 398, 410, 50 So. 826, 830 (1909). See also *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (1893). No such cases involving lands not under water have been found.

139. *Zabel v. Pinellas County Water & Nav. Control Auth.*, 171 So. 2d 376 (Fla. 1965). However, the statute authorizing the sale granted fill rights, raising the spectre of taking without compensation. The case is criticized in Little, *New Attitudes About Legal Protection for the Remains of Florida's Natural Environment*, 23 U. FLA. L. REV. 459, 495 (1971). Fortunately, the Army Corps of Engineers stepped into the breach (for once) and denied the permit on ecological grounds. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). See notes 219-20 *infra* and accompanying text.

beneath navigable waters—and in effectiveness, as courts are loath to review administrative discretion in the absence of fraud, corruption, bad faith or unfair dealings.¹⁴⁰ Professor Sax suggests that the courts can and should grasp the public trust doctrine and use it wherever governmental regulation is involved, that the doctrine applies “in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and to strip mining or wetland filling on *private lands* in a state where governmental permits are required.”¹⁴¹ While an early Supreme Court case indicated that the doctrine was limited to property of special character,¹⁴² the duty of state officers to consider environmental factors in granting permits is clear in some state constitutions,¹⁴³ providing ample reason to extend the public trust doctrine.

7. CONCLUSION

This overview of common law land-use control devices is far from exhaustive. New tools may possibly be forged in the courts¹⁴⁴ despite or in conjunction with the legislative response. Yet the devices leave much to be desired from all points of view. For the environmentalist, the rights are too rigid and encrusted with the 19th Century judicial concern for embryonic industries. Private suits, especially against large industries, are notoriously slow and expensive; proof can be burdensome, especially in multiple source situations; injunction is difficult to obtain; and threatened harms can rarely be interdicted.

For the landowner also, the common law devices are deficient. The defense of such suits is as expensive and time-consuming as the prosecution, especially as long-established defenses are eroding. The suits, being *ex post facto*, provide little of the certainty so urgently sought by business persons and their counsel.

Yet the existence and usefulness of these actions cannot be overlooked. They will continue to be the major tool in individual rights oriented land-use disputes although limited in number. The newer regulatory remedies discussed in the following sections complement, rather than supplant, the common law and traditional statutes.¹⁴⁵ They have and

140. *E.g.*, *Rogers v. City of Mobile*, 277 Ala. 261, 169 So. 2d 282 (1964). *But see* *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966).

141. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556-59 (1970) (emphasis added). The professor also suggests that where competing public interests are involved, the courts should in effect remand the question to the legislature. J. SAX, *DEFENDING THE ENVIRONMENT* ch. 5 (1971).

142. See note 136 *supra*.

143. FLA. CONST. art. II, § 7 (1968) provides: “It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. . . .” See also MICH. CONST. art. 4, § 52 (1963); N.Y. CONST. art. XIV, § 4 (1970).

144. See, *e.g.*, Beckman, *Right to a Decent Environment Under the Ninth Amendment*, 46 L.A.B. BULL. 415 (1971); Comment, *Quo Warranto to Enforce a Corporate Duty Not to Pollute the Environment*, 1 ECOL. L.Q. 653 (1971).

145. See Miller & Barchers, *Private Lawsuits and Air Pollution Control*, 56 A.B.A.J.

will continue to provide a crucible for litigation in which the issues and solutions will be refined.

B. *Traditional Statutory Land-Use Control Devices*

The complexity, expense and uncertainty of land-use control litigation led to the proliferation of statutes and regulatory devices. This tendency was given impetus by the landmark case of *Village of Euclid v. Ambler Realty Co.*,¹⁴⁶ validating zoning. However, in light of a 1306 statute which made the burning of sea coal a capital offense,¹⁴⁷ it could be argued that environmental statutes have mellowed over the years. The number and variety of statutes in some way affecting the use of land can be staggering, even within one state.¹⁴⁸ This section will merely present an overview of the more common forms of traditional legislation, with emphasis upon the innovative trends within each form.

1. FACTORS AFFECTING THE VALIDITY OF LAND-USE CONTROL STATUTES

Numerous land-use control statutes have been held to be invalid exercises of the police power, many being labeled as takings without just compensation. This terminology is probably misapplied¹⁴⁹ in the great majority of cases, as the constitutional compensation clauses¹⁵⁰ were intended to apply to and specifically limit the exercise of the otherwise absolute¹⁵¹ power of eminent domain.¹⁵² It is submitted that most of the statutes held invalid violate substantive¹⁵³ or procedural due process. This is reflected in the three broad requisites¹⁵⁴ for proper exercise of the police power: (1) a proper objective, within the scope of protection

465 (1970); Comment, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968).

146. 272 U.S. 365 (1926).

147. Mentioned in *State v. Mundet Cork Corp.*, 8 N.J. 359, 365, 86 A.2d 1, 4 (1952).

148. See, e.g., Comment, *Survey of Environmental Legislation*, 26 U. MIAMI L. REV. 778 (1972), providing an overview of Florida statutory law.

149. See Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

150. E.g., U.S. CONST. amend. V, cl. 4; FLA. CONST. art. 10, § 6 (1968).

151. E.g., *Ponder v. Graham*, 4 Fla. 23 (1851). But see *Riverside Military Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870 (1944), suggesting in dictum that the due process clause would require compensation for the exercise of the power of eminent domain in the absence of a compensation clause.

152. See Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). The professor's test would limit the right to compensation for non-physical takings to any act which "enhances the economic value of some governmental enterprise." *Id.* at 67; see, e.g., *City of Plainfield v. Borough of Middlesex*, 69 N.J. Super. 136, 173 A.2d 785 (Super. Ct. 1961) (zoning as playground). However, many statutes invalidated as "takings without compensation" lack this element of de facto appropriation.

153. Even the United States Supreme Court seems to have abandoned its position, adopted in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), of ignoring questions of substantive due process. See *Roe v. Wade*, 93 S. Ct. 705 (1973).

154. See Garton, *Ecology and the Police Power*, 16 S.D.L. REV. 261, 263-67 (1971).

of public health, safety, morals or general welfare;¹⁵⁵ (2) means reasonably related to the object;¹⁵⁶ and (3) reasonable exercise of the power.¹⁵⁷ The majority of invalid "takings without compensation" reflect the courts' position that the questioned statute is an arbitrary, unreasonable or "unfair" exercise of the police power, seemingly a question of due process, not compensation.¹⁵⁸

Looking beyond the juristic reasoning, the ultimate question is whether the land-use control statute will be upheld. As the courts, with the exception of criminal cases, tend to be more solicitous of property rights than of personal rights,¹⁵⁹ the cry of "Taking without compensation!" can be a wise tactic. In this light, there are a number of characteristics common to statutes invalidated on the stated basis of taking without compensation; although perhaps none is sufficient fault in itself to be fatal, any combination will often tip the scale. The most important element is the severity of the impact of the regulation upon the value of the property.¹⁶⁰ While a large decrease is but rarely sufficient of itself,¹⁶¹ it is present in the great majority of successful attacks upon such statutes.¹⁶²

The invalid land-use control statutes may violate equal protection by regulating or eliminating only one form of a type of activity,¹⁶³ or perhaps by favoring existing businesses.¹⁶⁴ With other statutes, the government has effectively turned private property into its own without a physical entry.¹⁶⁵ Occasional cases involve wrongful or malicious intent

155. *E.g.*, *Berman v. Parker*, 348 U.S. 26 (1954).

156. *See, e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). Very few statutes are invalidated on this substantive due process basis, the courts requiring merely a "fairly debatable" or other limited showing. *E.g.*, *Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941). *But see* *Starr v. Linzell*, 71 Ohio L. Abs. 84, 129 N.E.2d 659 (Ct. of C.P. 1955).

157. *E.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

158. *See generally* Comment, *Per Curiam Decisions of the Supreme Court: 1958 Term*, 27 U. CHI. L. REV. 128, 160-62 (1959).

159. *But see* *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970) (no substantial federal question where statute banning sale of hides of non-indigenous endangered species was passed without hearings); *A.E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 264 N.E.2d 118, 315 N.Y.S.2d 625 (1970).

160. *E.g.*, *State v. Johnson*, 265 A.2d 711 (Me. 1970).

161. *E.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87 1/2% decrease); *Consolidated Rock Prod. Co. v. Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962) (destroyed all "appreciable economic value" but no substantial federal question). *But see* *Safer v. Jacksonville*, 237 So. 2d 8 (Fla. 1st Dist. 1970) (costs beyond reasonable relation to public welfare).

162. Of course, minor diminution in value by governmental regulation must be borne by the owner, for "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (Holmes, J.).

163. *E.g.*, *Eskind v. Vero Beach*, 159 So. 2d 209 (Fla. 1963) (ban only on signs advertising lodging rates).

164. *E.g.*, *Abdo v. Daytona Beach*, 147 So. 2d 598 (Fla. 1st Dist. 1962) (limiting commercial uses to fully developed areas). This type of discrimination also opens the regulation to attack for lack of a rational basis.

165. These are especially distasteful cases, leaving the tax burden but taking the value

on the part of a governing body.¹⁶⁶ Finally, the courts are extremely wary of avant-garde means or ends; the innovative statute is likely to be held invalid unless its advocates carefully prepare the courts.¹⁶⁷ Each of these elements can be found in certain forms of the major traditional land-use control statutes to be discussed.

2. ZONING

The land-use control device which is most common¹⁶⁸ and least popular with city planning experts is zoning, although most communities treat zoning and planning as coterminous.¹⁶⁹ Zoning as a viable American institution was spawned in the tumultuous invasion of Fifth Avenue by the garment industry, ruffling the sensitive carriage trade;¹⁷⁰ indeed zoning

was no more than a rational and comprehensive extension of public nuisance law, with the great advantage [over the common law nuisance] of providing all landowners with knowledge

of the property. See *Forde v. Miami Beach*, 146 Fla. 676, 1 So. 2d 642 (1941). Examples include de facto creation of a game preserve by closed seasons, *Alford v. Finch*, 155 So. 2d 790 (Fla. 1963); zoning as a park, school or playground, *City of Plainfield v. Borough of Middlesex*, 69 N.J. Super. 136, 173 A.2d 785 (Super. Ct. 1961); zoning as a water storage pond, *Hager v. Louisville & Jefferson County Planning & Zoning Comm'n*, 261 S.W.2d 619 (Ky. 1953); and prohibition upon alteration of "landmark" buildings, *Trustees of Sailors' Snug Harbor v. Platt*, 53 Misc. 2d 933, 280 N.Y.S.2d 75 (Sup. Ct. N.Y. County 1967).

166. While most courts insist that they refuse to inquire into the motives behind statutes valid on their face, many indeed do pierce the veil. Compare, e.g., *Miami v. Romar*, 73 So. 2d 285 (Fla. 1954), with *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So. 2d 483 (1947), and *Board of Comm'rs of State Inst. v. Tallahassee Bank & Trust Co.*, 108 So. 2d 74 (Fla. 1st Dist. 1958), *aff'd*, 116 So. 2d 762 (Fla. 1959).

167. A prime example is the line of cases involving aesthetics as the sole object of the police power. Early courts held such purposes to be without the scope of the police power; later courts diligently searched for some pendant public welfare, health or morals objective; and the modern trend is to accept aesthetic purposes as within the ambit of the general welfare. See Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149 (1954). A rather ludicrous scramble to find a rationale for upholding a billboard ban led one court to solemnly state, *inter alia*, that people hid behind them to commit immoral acts! *Murphy, Inc. v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944). The fathers of zoning were careful to establish a line of cases upholding the concept. S. TOLL, *ZONED AMERICAN* ch. 7 (1969).

168. The only major city without zoning is Houston, Texas, which accomplishes much the same result by extensive private restrictive covenants, enforced by discretionary issuance of building permits. See R. BABCOCK, *THE ZONING GAME* 25-28 (1966); Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 71 (1970); Comment, *Houston's Invention of Necessity—An Unconstitutional Substitute for Zoning?*, 21 BAYLOR L. REV. 307 (1969).

169. More cynically, the sole planning objective of most communities is the insulation and protection of the single-family residential area, adequately achieved by zoning. See generally R. BABCOCK, *THE ZONING GAME* (1966). This was admitted by one of the fathers of zoning: "Every one knows that the crux of the zoning problem lies in the residential district, and that when we speak of amenity we have in mind residential preference." Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 ILL. L. REV. 135, 146 (1929).

170. See S. TOLL, *ZONED AMERICAN* (1969).

before the fact of what they could and could not do with their land.¹⁷¹

Of course, certainty can be a mixed blessing in the eyes of the landowners, as reflected in the notorious abuses of the exception and variance procedures.¹⁷²

Zoning, intended to protect residential and commercial uses from incompatible intrusions, is a negative device, increasingly ineffective and inflexible in the face of changing demands of society.¹⁷³ It has almost invariably been of the Euclidean form,¹⁷⁴ based upon uniform grid-iron districts laid out in accordance with a comprehensive plan.¹⁷⁵ As one court stated, the result "resembles the design achieved by using a cookie cutter on a sheet of dough."¹⁷⁶

The inflexibility of zoning spurred the development of a galaxy of modifications of the traditional Euclidean zoning. It could be argued that these changes result in a creature far removed from zoning; yet the term accurately can include far more than the stereotyped conventional territorial division of land according to suitability of use, with uniform use within each district. The minimum and irreducible requirement would seem to be a comprehensive plan of some form to allay charges of arbitrary exercise of the police power.¹⁷⁷

One weakness of most plans providing for greater discretion and flexibility in the zoning officials is the likelihood of attacks upon the device as an invalid delegation of legislative power. This line of attack looks especially promising against the "shrinking zone" approach, in which the zoning board is allowed to vary the bulk and density requirements for an area as small as an individual lot.¹⁷⁸ While this clearly overcomes the carbon copy, "cookie cutter" effect, it resembles spot zoning too much to survive in the courts which universally frown upon the latter concept.¹⁷⁹

A major variation used to provide flexibility in zoning is the floating zone. It involves the definition and description of a zone for a cer-

171. R. BABCOCK, *THE ZONING GAME* 4 (1966).

172. See, e.g., Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969); Comment, *Zoning: Variance Administration in Alameda County*, 50 CAL. L. REV. 101 (1962); Comment, *Zoning Variances in New York City*, 3 COLUM. J.L. & SOC. PROB. 120 (1967).

173. See Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972).

174. This was the type of zoning in the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

175. See Haar, "In Accordance With a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955).

176. *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 629, 241 A.2d 81, 83 (1968).

177. See, e.g., *Rockhill v. Chesterfield Twp.*, 23 N.J. 117, 128 A.2d 473 (1957).

178. See Mandelken, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 89-91.

179. See note 186 *infra* and accompanying text in particular.

tain use, generally of a community service type, but with no exact location on the zoning map. When a landowner offering to meet the conditions of the floating zone makes application, the zone is then "anchored" upon his land.¹⁸⁰ While this technique has been held invalid for failure to be in accordance with a comprehensive plan,¹⁸¹ the majority of courts uphold the device,¹⁸² especially where the state enabling act makes express provision for it.

A more complex form of the floating zone is the Planned Unit Development (PUD).¹⁸³ This approach allows the developer to burst the bonds of lot-by lot zoning by submitting a proposal for a relatively large scale development. The most common restriction is that the density of development remain fixed, but the developer is allowed to cluster and mix housing types—injecting the potential for creativity, flexibility, and variety. As with floating zones, the PUD met early resistance,¹⁸⁴ but this is giving way even in the absence of express provision in zoning enabling acts.¹⁸⁵

180. See generally Aloï, *Floating Zones*, in ZONING AND LAND USE 63 (PLI No. 54, 1972); A. RATHKOFF, *THE LAW OF ZONING AND PLANNING* 9-10 (Supp. 1971); Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963); Comment, *The Floating Zone: A Potential Instrument of Versatile Zoning*, 16 CATH. U.L. REV. 85 (1966); Report, *Planned Unit Development and Floating Zones*, 7 REAL PROP. PROB. & TR.J. 61 (1972).

181. E.g., *Eves v. Zoning Bd. of Adjustment*, 401 Pa. 211, 164 A.2d 7 (1960). While the court distinguished comprehensive *planning* from the comprehensive *plan* required by statute, the true rationale of the decision may have been the fear of "situations in which the personal predilections of the supervisors or the affluence or political power of the applicant . . . would control." *Id.* at 218, 164 A.2d at 11. But see *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968). The device, especially as applied to smaller areas, also resembles invalid spot zoning and may mislead a cautious court. See note 173 *infra* and accompanying text. See generally Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or An Inflexible Judiciary?*, 74 HARV. L. REV. 1552 (1961).

182. *Sheridan v. Planning Bd.*, 159 Conn. 1, 266 A.2d 396 (1969); *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957); *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951); *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W. 2d 533 (1970).

183. See generally Symposium, 114 U. PA. L. REV. 1 (1965) (excellent); Aloï, *Legal Problems in Planned Unit Development*, 1 REAL ESTATE L.J. 5 (1972); Comment, *Planned Unit Development*, 35 MO. L. REV. 27 (1970); Report, *Planned Unit Developments and Floating Zones*, 7 REAL PROP. PROB. & TR.J. 61 (1972).

184. E.g., *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 162 Cal. App. 2d 222, 69 Cal. Rptr. 251 (Ct. App. 1968). Relatively few cases squarely hold the device invalid, although a number have found evidentiary or procedural errors. The arguments for and against, and an analysis of their success, are compiled in Report, *Planned Unit Developments and Floating Zones*, 7 REAL PROP. PROB. & TR.J. 61, 63-64 (1972).

Another problem in presenting a PUD proposal is convincing the zoning authority that its benefits outweigh the detriments. An organized and documented cost-benefit analysis is most persuasive. The format followed in an actual presentation is analyzed in Crouch & Weintraub, *Cost-Benefit Analysis of a PUD*, 32 URBAN LAND No. 6 at 3 (June 1973).

185. E.g., *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1st Dist. 1970); *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (3d Dist. 1969). The 1925 model planning law, copied in many states, contains a section which may provide for PUD development. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 79-85 (1965).

There must still be, however, some form of comprehensive plan. For example, an at-

The term "spot zoning" has been used by many courts in holding floating zones and PUD's invalid. The abuses of spot zoning, basically singling out a small parcel of land for a substantially different use absent the public welfare, but with favoritism in mind, are not as likely with the larger areas involved in these devices. Rathkopf suggests that the term has no real meaning, being only "a word of opprobrium used by the courts to describe or justify the result which they have reached in a particular situation, rather than as the definition of a particular concept of law."¹⁸⁶

Another zoning innovation is the definition of land-use regions, not by express uses or types of use, but by performance standards, specifying maximum levels of noxious by-product production to which any use within the zones must conform.¹⁸⁷ If used as the sole means of use definition, much greater intra-zone diversity is possible. This runs counter to a trend against cumulative zoning, in which higher, generally residential, uses are being barred from lower use districts.¹⁸⁸ However, it is likely that, at least in residential areas, the traditional exclusionary limitations would be continued in light of the "extraordinary sensitiveness of property to its surroundings"¹⁸⁹ in America. This is in contrast to Europe, where

[p]eople do not mind a little store around the corner a bit. . . .
We wouldn't have that in this country because it is not con-

tempt to zone the entire area for a limited number of uses but grant variances for beneficial "Special Uses" has been held to be an invalid delegation of legislative power to the zoning board. *Rockhill v. Chesterfield Twp.*, 23 N.J. 117, 128 A.2d 473 (1957). Nor can the permitted uses of the PUD itself be left open to special permitting. *Marshall v. Village of Wappingers Falls*, 28 App. Div. 542, 279 N.Y.S.2d 654 (2d Dept. 1967).

186. 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 26-1 (1960). The courts rarely object to rezoning of small plots where there is no evidence of abuse, as in case-by-case gas station siting. *See, e.g., Green Point Sav. Bank v. Board of Zoning Appeals*, 281 N.Y. 534, 24 N.E.2d 319 (1939), *appeal dismissed*, 309 U.S. 633 (1940); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963). Indeed, spot zoning is a useful tool in situations where the only permitted use is not feasible. Platt, *Valid Spot Zoning: A Creative Tool For Flexibility of Land Use*, 48 ORE. L. REV. 245 (1969).

187. *See generally* Gillespie, *Industrial Zoning and Beyond: Compatibility Through Performance Standards*, 46 J. URBAN L. 723 (1969); Hirsch, *Measuring the Good Neighbor: A New Look at Performance Standards in Zoning*, 2 LAND USE CONTROLS Q. 5 (1968); McDougal, *Performance Standards: A Viable Alternative to Euclidean Zoning?*, 47 TUL. L. REV. 255 (1973); Comment, *A Model Ordinance to Control Urban Noise Through Zoning Performance Standards*, 8 HARV. J. LEGIS. 608 (1971). Without clearly defined standards the performance zoning statute will be void for vagueness. *Phillips Petroleum Co. v. Anderson*, 74 So. 2d 544 (Fla. 1954).

188. *See Plum v. City of Healdsburg*, 237 Cal. App. 2d 308, 46 Cal. Rptr. 827 (1st Dist. 1965). The majority of statutes are cumulative, allowing higher uses in all lower use districts upon the erroneous belief that the higher uses can be of no detriment to the lower uses. Thus, the supposed benefit to the higher uses can be evaded and the lower use also will be inhibited. *See Babcock, Classification and Segregation Among Zoning Districts*, 1954 U. ILL. L.J. 186; Note, *Industrial Zoning to Exclude Higher Uses*, 32 N.Y.U.L. REV. 1261 (1957).

189. Discussion with E. Freund, in W. FELL, *PLANNING PROBLEMS OF TOWN, CITY AND REGION* 79 (1929).

formable with our ideas. . . . I think it is connected with our democratic institutions; where you haven't got natural class differences you make [them] artificially, but I think the fact is undeniable.¹⁹⁰

Another device used to encourage creativity in zoning is contract or conditional zoning. This is really little more than a bargaining situation in which the landowner, prior to a desired zoning amendment, agrees to permanent restrictive covenants which are conditional upon the rezoning.¹⁹¹ As the government cannot bargain away its power, the covenants must be made before and without promise of rezoning. The device is also open to attack as spot zoning or as being an improper delegation of power to the board,¹⁹² but it has often been upheld.¹⁹³

An innovative concept related to zoning is the dwelling unit right. Under this system, the planners determine the desired population and correlative number of dwelling units. This latter number of rights to build dwelling units is equally spread over the residential land. The rights are freely transferable, so that one who buys rights from the landowners to build high density housing thus leaves vacant or less densely developed land elsewhere.¹⁹⁴ This approach limits population, may avoid the inequities to those prevented from building by emergency moratoria, and may lead to a more even distribution of the profits of land development.

3. OPEN SPACE ZONING

The environmental damage inflicted by urban sprawl and the appearance of the megalopolis led to the adoption of a large variety of statutes aimed at preservation of open space and ecological balance: wetland and flood plain zoning, scenic preservation zones, coastal protection districting, and various forms of rural reserve and "green belt" areas are typical. Although these are primarily variations upon the zoning theme, their severe impact upon land value is obvious and sparks anguished cries of "taking without compensation."¹⁹⁵ The courts have

190. Discussion with E. Freund, in W. FELL, *PLANNING PROBLEMS OF TOWN, CITY AND REGION* 79 (1929).

191. See generally Shapiro, *The Case For Conditional Zoning*, 41 *TEMPLE L.Q.* 267 (1968); Trager, *Contract Zoning*, 23 *MD. L. REV.* 121 (1963); Comment, *Zoning and Concomitant Agreements*, 3 *GONZAGA L. REV.* 197 (1963); Comment, *Contract Zoning: A Flexible Technique For Protecting Maine Municipalities*, 24 *ME. L. REV.* 263 (1972).

192. See *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956); *New Products Corp. v. City of North Miami*, 241 So. 2d 451 (Fla. 3d Dist. 1970).

193. E.g., *Sylvania Electric Products, Inc. v. City of Newton*, 344 Mass. 428, 183 N.E. 2d 118 (1962). *Church v. Town of Islip*, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

194. *Miami Herald*, June 21, 1973, § A, at 6, col. 3 (letter from Morris C. Tucker, president of the Broward Citizens for Environmental Preservation, Inc.); *id.* at col. 1 (editorial, *A New Approach to 'Stop-Growth'*).

195. See the analysis of 500 randomly selected cases in Kusler, *Open Space Zoning:*

been highly receptive to this argument in many situations, so that careful drafting, innovative approaches, and skillful advocacy are necessary to insure open space preservation.¹⁹⁶

The statutes forbidding the filling or other substantial "improvement" of wetlands, although lacking the physical invasion generally characteristic of true takings, do present the conversion to public use aspect of invalid takings.¹⁹⁷ The wetlands cases reflect the problems found in all such open land statutes. The courts, sensitive to the sharp diminution in value and denial of nearly all reasonable use,¹⁹⁸ have held the majority of such statutes invalid.¹⁹⁹

The courts do not seem to be insensitive to environmental considerations or to the necessity of preserving wetlands; rather, they are using a balancing test which requires some element of direct and immediate public harm²⁰⁰ beyond that to the ecology before allowing such harsh regulation *without compensation*. Thus a showing of public nuisance or danger to the owner may be needed to tip the scales, although the courts are beginning to accord much greater weight to ecological considerations.²⁰¹ This reflects the awakening of the courts to environmental problems²⁰² as well as the greater recognition of aesthetics as a

Valid Regulation or Invalid Taking, 57 MINN. L. REV. 1, 3-4 n.4 (1972) [hereinafter cited as Kusler]. See section II, B, 1 *supra*.

196. See generally Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1 (1972) (excellent coverage of the necessity for wetlands protection); Kusler, *supra* note 182 (excellent and thorough coverage of the factors involved); Schroeder, *Preservation and Control of Open Space in Metropolitan Areas*, 5 IND. LEGAL F. 345 (1972); One of the better books on the subject of open space preservation is W. WHYTE, *THE LAST LANDSCAPE* (1968).

197. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); see note 165 *supra* and accompanying text.

198. Many of these statutes restrict the owner to conservation uses such as forestry and wildlife sanctuaries, harvesting of wild crops, installation of docks and the like. *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

199. E.g., *Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964); *State v. Johnson*, 265 A.2d 711 (Me. 1970); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963); *Hafkin v. White-marsh*, 42 Pa. D. & C.2d 417 (Montgomery County Ct. 1967).

The later cases reveal a leaning toward preservation of vital ecological features. *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). Compare *In re Spring Valley Development*, 300 A.2d 736 (Me. 1973), with *State v. Johnson*, 265 A.2d 711 (Me. 1970). Perhaps the *avant garde* line of attack, note 167 *supra*, is beginning to wear thin. See generally *Council on Environmental Quality, Fourth Annual Report* ch. 4 (1973).

200. See, e.g., *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962) (nuisance-like use); *Spiegle v. Borough of Beach Haven*, 46 N.J. 479, 218 A.2d 129 (1966) (unsafe to build on area, subject to storm damage). See generally Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1 (1972); Garton, *Ecology and the Police Power*, 16 S.D.L. REV. 261, 285-89 (1971); Kusler, *supra* note 195, at 21-28.

201. The California courts, while speaking the balancing test, have heavily shifted the emphasis from the private loss to the public good. *Candlestick Properties, Inc. v. San Francisco Bay Const. & Dev. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1st Dist. 1970).

202. See note 199 *supra*. "Courts will not pretend to be more ignorant than the rest of mankind." *Marshall Field & Co. v. City of Chicago*, 44 Ill. App. 410, 411 (1892).

valid object of the police power.²⁰³ Occasionally other factors will militate against the validity of statutes, as where courts reject the use of large minimum lot sizes, useful in open space planning,²⁰⁴ because of the fear of economic and racial exclusionary zoning.²⁰⁵ However, the major line of attack must be that the restriction is a taking, an argument which can be overcome by creative use of easement purchase,²⁰⁶ eminent domain, tax adjustments, more selective and flexible definition of forbidden uses,²⁰⁷ and similar devices.²⁰⁸

4. SUBDIVISION CONTROLS AND EXACTIONS

There is no longer much disagreement with the substantive right of communities to require mapping and approval of subdivisions, and the majority of states have statutes so requiring.²⁰⁹ The map approval normally is conditioned upon the installation of much of the infrastructure at the developer's expense, with or without express sanction in the state enabling act. Because the developer often is bargaining for zoning variance, litigation of a local ordinance or practice, under which the city "suggests" or requires dedication of land, is rare. In the cases where the question has arisen, the great majority of courts have upheld the conditioning of map approval upon the installation, at the developer's expense, of streets, sewers or similar improvements.²¹⁰

203. Florida has upheld aesthetic regulation in view of the importance of the tourist trade. *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941).

204. The environmental benefits of large lot zoning are discussed in Kusler, *supra* note 195, at 57-61. Such a device also reduces the severity of the landowner's loss and "taking."

205. There is a large amount of literature on the topic, but a thorough coverage is found in Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9, reprinted in ZONING AND LAND USE 241 (PLI No. 54, 1972), and updated in Aloi & Goldberg, *Notes For a Revised Article: Exclusionary Zoning: Recent Developments and Approaches to Litigation*, ZONING AND LAND USE 343 (PLI No. 54, 1972).

206. See generally Comment, *Preserving Rural Land Resources*, 1 ECOLOGY L.Q. 330 (1971); Comment, *Easements to Preserve Open Space Land*, 1 ECOLOGY L.Q. 728 (1971).

207. One flexible approach is being tested in Manatee County, Florida. The plan, Optimum Population and Urban Growth (OPUG), splits the county into four zones. Development is encouraged in the "existing urban" and "urban growth" areas. But in the "urban frontier" and "rural reserve" areas, developers must show that the development would be self-sufficient and not harmful to the existing community; further, dedication of land for public facilities, preliminary planning, economic appraisal and an *environmental impact statement* would be required. This would allow flexibility and allow a wider range of reasonable uses, blunting the taking argument. The structure obviously would be applicable primarily to less developed areas. *Miami Herald*, July 16, 1973, § A, at 6, col. 1 (editorial, Manatee OPUGs the Floodgates).

208. See generally Kusler, *supra* note 195, at 61-81. Of course, many plans may not be worth saving, for they may achieve the wrong ends or protect the wrong people. See e.g., Cooke & Power, *Why Florida's Green Belt Law Won't Work*, 2 REAL ESTATE REV. 84 (1972).

209. See, e.g., FLA. STAT. §§ 163.206-290 (1971); FLA. STAT. ch. 177 (1971), as amended, Fla. Laws 1971 ch. 71-339. See generally Fitzgerald, *The Regulation of Subdivisions*, 14 WM. & MARY L. REV. 249 (1972); Yearwood, *Accepted Controls of Land Subdivisions*, 45 J. URBAN L. 217 (1967).

210. E.g., *Deerfield Estate, Inc. v. Township of East Brunswick*, 60 N.J. 115, 286 A.2d 498 (1972) (first impression). This type of improvement or expense is easily justifiable, as public welfare demands such items and it is reasonable to require the one creating the need to fill it. Recreational lands and similar dedications are perhaps less vital to the public wel-

The negotiation process more often breaks down where the municipality attempts to exact dedication of land for recreational or park uses in the absence of express provision for such exactions in the enabling act. Many courts hold such terms to be *ultra vires*.²¹¹ However, other courts, recognizing the impact of subdivisions upon the surrounding areas, uphold provisions requiring on-site dedications if reasonably related in amount to the burden created by and "uniquely attributable" to the developer's activity.²¹²

Even greater problems arise where the municipality exacts fees instead of or in addition to land dedication; the fees normally are for off-site improvements necessitated by the subdivider's activity, such as the upgrading of parks and utilities. Where the fees bear a reasonable relationship to the use of the facilities by future inhabitants the fees are more likely to be upheld, being treated as in lieu of land dedication.²¹³ Improperly limited exactions are extremely vulnerable to attack as unauthorized taxes,²¹⁴ as arbitrary and confiscatory,²¹⁵ or as discriminatory.²¹⁶

fare and more suspect as exactions. *Cf. Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So. 2d 483 (1947), an eminent domain case where condemnation for a hunting preserve was invalidated, public desire being held unequal to the required public necessity.

211. *E.g.*, *Admiral Development Corp. v. Maitland*, 267 So. 2d 860 (Fla. 4th Dist. 1972) (but indicates exactions would be valid if statute authorized such an ordinance or practice). This decision was based upon a lack of inherent power, despite the home rule provision of FLA. CONST. art. 8, § 2. *Cf. City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972) (rent control invalid). This holding may be changed by the "Home Rule Bill," Fla. Laws 1973, ch. 73-129, amending FLA. STAT. ch. 166 (1971).

212. *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 273 A.2d 880 (1970); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961). *See generally* 3 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* ch. 71, § 7 (3d ed. 1972); 3 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 19.25-.36 (1971); Johnston, *Constitutionality of Subdivision Control Exactions: The Quest For a Rationale*, 52 CORNELL L.Q. 871 (1967). Many commentators feel that the exactions are invalid or improper. *See, e.g.*, Harvith, *Subdivisions Dedication Requirements—Some Observations and an Alternative: A Special Tax on Gain From Realty*, 33 ALBANY L. REV. 474 (1969); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); Comment, *Forced Dedications in California*, 20 HASTINGS L.J. 735 (1969).

213. *See Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); *Haugen v. Gleason*, 226 Ore. 99, 359 P.2d 108 (1961). The *Walnut Creek* court also implied that purchase of parks in other areas with the fees would be allowed if the proximate facilities were adequate. *Walnut Creek, supra* at 64 n.6, 484 P.2d at 606 n.6, 94 Cal. Rptr. at 636 n.6.

214. *Haugen v. Gleason*, 226 Ore. 99, 359 P.2d 108 (1961).

215. *East Neck Estates, Ltd. v. Luchsinger*, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. Suffolk Cty. 1969) (required dedication of all shorefront land as public beach, reduced value 50%).

216. Flat rate fees or dedications are more likely to be invalid, resembling taxes. *See Newport Building Corp. v. City of Santa Ana*, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (4th Dist. 1962) (\$50 per lot, much of ordinance dealt with taxes); *Frank Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970) (7% flat rate). Apportionment purely by population may be invalid because needs vary with composition by age and wealth. *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

5. PERMITS

One who undertakes a development of any appreciable size faces a bewildering morass of regulation, most of which requires the acquisition of permits. It has been estimated that the developer in Dade County, Florida, may have to obtain as many as 27 permits—each with its own procedure and terminology.²¹⁷

While few permits involve actions of major, direct environmental impact, the cumulative effect of mis-issue can be severe. Yet the traditional systems function independently, with no coordination nor “eye in the sky” to consider the combined effects. Few have requirements of environmental responsibility. More importantly, even those permitting agencies whose decisions necessarily have substantial ecological impact have historically been little concerned with such considerations. The Army Corps of Engineers has permitted and encouraged projects of extremely detrimental impact;²¹⁸ indeed, it was recently incorrectly²¹⁹ held that the Corps had no power to deny permits on ecological grounds.²²⁰ Fortunately, this view was promptly rejected, so that the Corps can and should deny permits for actions which damage the ecology.²²¹

Fragmentation and ecological apathy render the traditional permitting systems both frustrating to the developer and ineffective for ecological protection. Rationalization and simplification, combined with environmental impact statements, would benefit all concerned.

217. Address by Harvey Ruvin, Environmental Land Management Study Commission meeting, June 11, 1973, Dade County, Florida. The permit sequence chart of a major Florida developer for coastal shore development reveals that the minimum time from project concept to actual sales is 20 months, with more than 15 local, state and federal agencies involved.

218. See, e.g., Miller, *Rape of the Oklawaha* 96 READ. DIG. 54 (Jan. 1970). The Corps can play an important role in environmental protection. See *House Comm. on Gov't Opn's, Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Destruction and Pollution*, H.R. REP. No. 91-917, 91st Cong., 2d Sess. (1970).

219. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), upholding the Corps' denial of a permit to dredge and fill on Boca Ciega Bay in Florida despite lack of adverse effect on navigation. See *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933), allowing denial of a permit interfering with the public interest in a parkway or recreational area.

220. *Coastal Petroleum Co. v. Resor*, 315 F. Supp. 845 (S.D. Fla.), overruled, *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). The *Zabel* trial court at least had allowed only damages rather than allowing the plaintiff to mine the bed of Lake Okeechobee, Florida, despite the concurrent mining operations of the Corps and a flood control district.

Zabel is clearly the correct view; although the Corps is primarily involved with actions affecting navigation, it must consult with the Fish and Wildlife Service but retains final authority. 16 U.S.C. § 662(a) (1970). Although the situation is much improved, the Service rarely even sought denial of permits, presumably out of frustration, as all but 120 of 28,250 permits sought were issued in the period 1962-66. *Hearings on H.R. 26 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. 32 (1967). The Service objected to 81 of the approximately 300 permit applications submitted to it in the same period; 11 were denied. *Id.* at 129.

221. See note 220 *supra*.

6. CONCLUSION

The traditional statutory land-use controls are little more effective than the common law devices for minimizing ecological damage. Few were designed to affect the environment as such. Zoning was meant to protect business and residential districts from incompatible uses; subdivision exactions were largely aimed at placing the costs of subdivisions on those living in them; and many actions requiring permits only tangentially affect the environment. However, the open space zoning techniques, currently meeting strong resistance, eventually will become accepted as reasonable, useful conservation tools.

The statutory devices are being modified to meet the demands of environmental protection. Yet few make provision for the input of environmental information needed. The terminology and procedures vary wildly from statute to statute and county to county. One county within a region may, in an attempt to gain a short term advantage or from ignorance, act adversely to its neighbors.²²² The traditional statutory devices, unless regionalized and rationalized, can provide neither the protection needed nor the efficiency desired.

III. FEDERAL ENVIRONMENTAL LAWS

Four major federal environmental laws have taken effect in the past decade: The National Environmental Policy Act of 1969 (NEPA);²²³ the Clean Air Act of 1970;²²⁴ the Federal Water Quality Act Amendment of 1972;²²⁵ and the Coastal Zone Management Act of 1972.²²⁶ In addition, a National Land Use Policy Act has been under consideration.²²⁷ The act passed the Senate in each of the past two years but was rejected both times by the House.

The enacted laws have basically accomplished four things. First, they have made all federal agencies take an interdisciplinary approach which includes evaluation of the environmental effects of proposed projects throughout the course of the agency's decision making process.²²⁸ Second, these laws have provided substantive air and water quality standards.²²⁹ Third, they have provided for the abatement of air and

222. See, e.g., Bowe, *Regional Planning Versus Decentralized Land-Use Controls—Zoning for the Megalopolis*, 18 DE PAUL L. REV. 144 (1968); Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957).

223. 42 U.S.C. § 4321 *et seq.* (1970).

224. 42 U.S.C.A. § 1857 (Supp. 1973).

225. 33 U.S.C.A. § 1251 *et seq.* (Supp. 1973).

226. 16 U.S.C.A. § 1451 *et seq.* (Supp. 1973).

227. S. 268, 93d Cong., 1st Sess. (1973).

228. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (1970), requires agencies to prepare an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." This document must accompany the proposal through the agency review process. See discussion of NEPA, section III, *infra*.

229. See 33 U.S.C.A. § 1311 (Supp. 1973); 42 U.S.C.A. §§ 1857f-5a to f-6j (Supp. 1973).

water pollution over a period of years.²³⁰ Fourth, and most importantly, they have provided for a land regulation scheme based on clean air and water standards.²³¹

The question these acts raise is to what extent the federal laws will modify the common law and statutory devices discussed previously, either through replacement of some old remedies with provisions of the act, or with the creation of new rights under the old remedies.

A. *The National Environmental Policy Act of 1969 (NEPA)*

1. PURPOSE OF THE ACT

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological system and natural resources important to the Nation; and to establish a Council on Environmental Quality.²³²

* * * *

The Congress recognizes that each person should enjoy a healthful environment and that every person has a responsibility to contribute to the preservation and enhancement of the environment.²³³

The two sections of NEPA reproduced above represent more than mere expressions of national policy. NEPA is the first piece of national legislation which recognizes the importance of a clean environment to the national health and welfare. It signals an end to a two hundred year period in American history in which our natural resources were considered infinitely exploitable.²³⁴ This does not mean that NEPA gives a private citizen a cause of action for the deterioration of his environment.²³⁵ Rather, the Act requires federal agencies to include the environmental costs of a proposed action in an environmental impact statement which is used in a cost-benefit analysis to determine whether a project will be undertaken.²³⁶

230. *Id.*

231. 33 U.S.C.A. § 1361a (Supp. 1973); 42 U.S.C.A. § 1857g (Supp. 1973).

232. National Environmental Policy Act of 1969. 42 U.S.C. § 4321 (1970) [hereinafter cited as NEPA].

233. *Id.* at § 4331(c).

234. See UDALL, *THE QUIET CRISIS* (1963).

235. *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728, 755 (E.D. Ark. 1971), *rev'd*, 470 F.2d 289 (8th Cir. 1972).

236. 42 U.S.C. § 4332(2)(c) (1970). See discussion of environmental impact statements, *infra*. See also Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972); Seeley, *The National Environmental Policy Act: A Guideline for Compliance*, 26 VAND. L. REV. 295 (1973) [hereinafter cited as Seeley].

Even though NEPA applies only to federal agencies, its provisions extend to the private sector of our society.²³⁷ Thus, a land developer who has any connection with a branch of the federal government, should ascertain whether an environmental impact statement²³⁸ is required before he begins work on the development.²³⁹ Failure to do so could leave him vulnerable to an injunction until the impact statement is filed.²⁴⁰ Since preparation of the statement can take as long as six months or more,²⁴¹ the consequences of failing to comply with the act in this respect are self-evident.

Section 102(c)²⁴² is the critical part of the Act. It sets out the requirements for the environmental impact statement, which is the document which accompanies the proposed project through the agency's review process from its inception.²⁴³ Section 102(c) requires that:

[T]o the fullest extent possible . . .

- (2) all agencies of the Federal government shall— . . . (C) include in every recommendation or report on proposals for legislation and other *major Federal actions significantly affecting the quality of the human environment*, a detailed statement by the responsible official on—
 - (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental affect which cannot be avoided should the proposals be implemented,
 - (iii) alternatives to the proposed action,

237. See, e.g., *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973) (private developer enjoined from cutting trees on land until federal funding agency filed environmental impact statement). See also Environmental Protection Agency [hereinafter cited as EPA] rules, 40 C.F.R. § 6.21 (1973); Council on Environmental Quality [hereinafter cited as CEQ] guidelines for preparation of environmental impact statements, 40 C.F.R. ch. V, § 1500 *et seq.* (1973). See note 249 *infra* and accompanying text.

Although NEPA requires that federal agencies file environmental impact statements only when there is major federal action significantly affecting the quality of the human environment, the definition of federal action has been interpreted so expansively in the regulations, guidelines and cases that mere licensing by a federal agency may invoke the procedural provisions of the act. E.g., *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) (an impact statement must be prepared before any permit is issued by the Army Corps of Engineers to dump sewage in navigable waters); *Davis v. Martin*, 469 F.2d 593 (10th Cir. 1972) (approval of a lease of 1200 acres of Indian lands).

238. An environmental impact statement is the name of the document required by section 102(c) of NEPA. 42 U.S.C. § 4332(2)(c) (1970). This document is used to incorporate the environmental costs and benefits of a proposed project into the agency's general cost-benefit analysis. See Note, *Cost-benefit analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972).

239. See *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973), discussed in section III, *infra*.

240. *Id.*

241. Obviously, the length of time it will take for an agency to prepare an impact statement will depend on a number of variable factors, not the least of which are the size and complexity of a project. As an example of one extreme, it took 18 months for the Secretary of the Interior to prepare an impact statement for the Alaska pipeline project. See Jaffe, *Ecological Goals and the Ways and Means of Achieving Them*, 75 W. VA. L. REV. 1, 26 (1972).

242. 42 U.S.C. § 4332(2)(c) (1970).

243. *Id.*

- (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.²⁴⁴

The section further provides that before a detailed statement is made, the lead agency should obtain comments from any other federal or local agency which has special expertise or jurisdiction with respect to the environmental impact involved. Copies of the statement are then to be made available to the Council on Environmental Quality (CEQ) and the public, "and shall accompany the proposal through the existing agency review process."²⁴⁵

The impact statement was emphasized by the court in *Committee to Stop Route 7 v. Volpe*.²⁴⁶ Plaintiffs sought an injunction against the completion of a highway, fifty percent of which was financed by the federal government. While the highway had been planned prior to the enactment of NEPA, two segments had not been approved by the Federal Highway Agency until after the act became effective.

Finding that design approval was a major federal action, the court granted an injunction until an impact statement was filed. It refused to be swayed by the argument that to require an impact statement would increase costs due to delay of the project. The fallacy in this argument, said the court, is that it assumes the two segments of the highway would be completed as planned regardless of the contents of the impact statement.²⁴⁷ The purpose of the impact statement is not to add paperwork to the agency's decision process, but to ensure that the agency considers possible environmental effects carefully.

2. WHEN MUST AN IMPACT STATEMENT BE FILED?

a. What Constitutes Federal Action?

If an impact statement is required for a "major federal action significantly affecting the quality of the human environment . . .,"²⁴⁸ then, what constitutes federal action? The CEQ guidelines²⁴⁹ provide that

"actions" include but are not limited to . . . [n]ew and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through

244. *Id.* (emphasis added).

245. *Id.*

246. 346 F. Supp. 731 (D. Conn. 1972).

247. *Id.* at 738.

248. 42 U.S.C. § 4332(2)(c) (1970).

249. 40 C.F.R. ch. V, § 1500 *et seq.* (1973). The CEQ guidelines are advisory because CEQ does not have authority to prescribe regulations governing compliance with NEPA. *Green County Planning Bd. v. Federal Power Comm'n*, 455 F.2d 412 (2d Cir. 1972).

Federal contracts, grants, subsidies, loans, or other forms of funding assistance . . . ; or involving a federal lease, permit, license, certificate or other entitlement for use²⁵⁰

It is clear that a private development could become the subject of an impact statement if it met the above criteria for major federal action. For example, any major land development in Florida could require an impact statement if there were dredge and fill operations which were required to obtain federal permits²⁵¹ under the Rivers and Harbors Act of 1899.²⁵² To this end, the Army Corps of Engineers has given notice to a major Florida developer that an impact statement would be required for normal maintenance dredging of existing canals in its development. This dredging is necessary, because without it, the canals would silt up and become unusable. Query whether the drafters of the act intended the requirement for impact statements to go this far. Given the size of the staff at the Environmental Protection Agency, the filing of many statements of this nature may result in a rubber stamp on most statements due to lack of review capabilities. Thus, this application of the Act may have degraded it into just another permit procedure, which is inapposite to its purpose.

b. Major Federal Action Significantly Affecting the Quality of the Human Environment

Once it is established that there is federal action in a project, the next logical steps are to determine whether such action is major and whether it significantly affects the quality of the human environment. While some courts may argue that the question of whether an action is major is separate from that of the significance of its environmental impact,²⁵³ it is very difficult to logically separate these two interrelated

250. 38 Fed. Reg. 20551 (1973).

251. See *Banker's Life & Cas. Co. v. Village of N. Palm Beach*, 469 F.2d 994 (5th Cir. 1972.)

252. 33 U.S.C. § 401 *et seq.* (1970). Section 403 reads in part: "[I]t shall not be lawful to excavate or fill . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." See *Zabel v. Tabb*, 430 F.2d 199 (5th Cir.), *cert. denied*, 401 U.S. 910 (1970), where the court held that the Corps of Engineers had authority to deny a permit, basing the denial on environmental instead of navigational considerations. Since the suit was originally brought before the enactment of NEPA, the Act did not apply. However, the court did mention NEPA and to some degree appeared to rely on it as a basis for its holding.

253. See, e.g., *Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3616 (U.S. March 5, 1973), where the court rejected the argument that if a federal action is "major," then it automatically follows that it "significantly affects the . . . environment." See also *Goose Hollow Foothills v. Romney*, 334 F. Supp. 877 (D. Ore. 1971). In *Goose Hollow* the court said "[s]tatements are required by the Act if the proposed project is 'major' and if it will have 'a significant effect upon the quality of the human environment.'" *Id.* at 879 (emphasis added). *Accord*, *Julius v. City of Cedar Rapids*, 349 F. Supp. 88 (N.D. Iowa 1972). *But see* *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

questions.²⁵⁴ If an action is major then there is a great probability that it will significantly affect the quality of the human environment. Conversely, it is difficult to imagine a federal action which would significantly affect the quality of the human environment that is not major.²⁵⁵ Possibly, it could be argued that "major" implies some threshold of size and importance to the agency.²⁵⁶ But this type of definition would be in conflict with the spirit of the CEQ guidelines²⁵⁷ which provide that section 102

254. See, e.g., *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972), where the court stated:

Although in some circumstances the terms "major" and "significantly affecting . . . the . . . environment" have to be considered separately, . . . the Department of Transportation has determined that any action significantly affecting the environment is major, . . . and that any approval of a project taking parkland is one significantly affecting the environment Even apart from the Transportation Department's Order, however, there is no difficulty in concluding that this is the type of action which requires an impact statement. As the cost of the viaduct section alone would be over \$14,000,000, of which the federal government is asked to contribute 60%, there is no question that this is major action, . . . and it cannot be disputed that a taking of eleven acres of parkland in a thickly settled city significantly affects the human environment.

Id. at 698 (citations omitted). For a good discussion of how the courts have interpreted section 4332(2)(c), see Seeley, *supra* note 236.

255. *But see* Seeley, *supra* note 236:

Finding a major federal action does not render inevitable the preparation of an impact statement because the action may not have a significant effect on the environment. Superficially, it seems unlikely that a non major action could have a significant effect on the environment. This assumption fails to recognize the possibility of minor federal participation in projects having a significant environmental impact—a federal research grant of a few thousand dollars to study erosion control during the construction of a major state or municipally funded facility. This example may be analyzed either by reasoning that the *federal action* does not *significantly* affect the environment or by making the simpler determination that the action is not major. The 2-tiered level of NEPA inquiry simplifies the decision-making process by requiring no agency action for non-major actions, negative declarations for major actions without significant effects, and a full-scale statement only for major actions with significant effects.

Id. at 302 n.41.

256. Several courts have attempted to define the word "major" in section 4332(2)(c). In *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356 (E.D.N.Y. 1972), the court, finding a project requiring \$700,000 of federal funding and taking several years to complete to be a major federal action, said, "[a] 'major federal action' is federal action that requires substantial planning, time, resources, or expenditure." *Accord*, *Citizens Organized to Defend Environment, Inc. v. Volpe*, 352 F. Supp. 520 (D. Ohio 1972). *Compare* *Julius v. Cedar Rapids*, 349 F. Supp. 88 (N.D. Iowa 1972), which stated that, "by using the term 'major' Congress reasonably intended to limit the Act to those federal actions of superior, larger, and considerable importance, involving substantial expenditure of money, time and resources," *with* *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), where the court argued that "the only involvement necessary by the federal government to constitute major federal action is approving or licensing the project."

It seems, from a perusal of the majority of the cases involving failure of an agency to file an impact statement, that the courts are reading the section 4332(2)(c) requirement expansively. In *Julius v. Cedar Rapids*, 349 F. Supp. 88 (N.D. Iowa 1972), the court found that funding a project for 14 blocks of street construction at a cost of \$300,000 to the federal government was not major federal action. Contrast this result with that in *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972), where the court held that conversion of 12 miles of a two-lane highway to four lanes was major federal action. In the majority of the cases on this point, the courts are much more in line with the decision in *Scherr* than that in *Julius*.

257. 40 C.F.R. § 1500.6(a) (1973).

is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be highly controversial should be covered in all cases.²⁵⁸

The guidelines never define what a "major" action is, although they do say that "the words 'major' and 'significantly' are intended to imply a threshold of importance and impact that must be met before a statement is required."²⁵⁹ Thus, the guidelines only outline what should be considered by the agency.²⁶⁰

In light of the uncertainty created by this definitional problem, it is at least arguable that some other criteria could be used to trigger the application of the Act. One suggested solution is to require agency action only in cases which exceed a certain cost. For example, if the action would cost more than *X* dollars, an impact statement would be required in all cases. If the cost would be less than *X* dollars, the agency could use its discretion in deciding whether an impact statement would be appropriate. In such a case, a citizen's group suing to compel the filing of a statement would have the burden of proving why an impact statement should be required if the agency had decided that it is not necessary.

While the model suggested may be overly simplified, it has certain benefits as compared to the CEQ's current definitions. First, a fixed dollar test for the most part eliminates the uncertainty of whether an impact statement should be prepared. By eliminating uncertainty, the costs of environmental protection could be lowered. For example, one of the cost reductions would be the elimination of a great number of citizens' suits to compel an agency to file an impact statement before it proceeds with its project. Furthermore, costs would be lowered, because the decision whether to prepare an impact statement would be largely taken out of the hands of the agency, where it now rests. Since the agency is likely to be biased²⁶¹ in favor of its own proposed action, under the present guidelines, it is possible that some agencies will decide not to prepare an impact statement unless they are compelled to do so. Conversely, some agencies may be preparing statements to cover actions that do not come within the statutory phrase merely to avoid a lawsuit over the question of whether one should be prepared.

The possibility that an agency's action could fall below the dollar

258. *Id.*

259. 40 C.F.R. § 1500.6(c) (1973).

260. Also, the guidelines are not binding because the CEQ lacks the power to promulgate regulations to implement NEPA. See note 249 *supra*.

261. Clingan, *Law Affecting the Quality of Marine Environment*, 26 U. MIAMI L. REV. 323 (1971).

amount and still be damaging to the environment must be considered since no impact statement would be required under the model presented. However, the probability of this occurrence would be minimized by defining the financial threshold in such a way as to favor the preparation of environmental impact statements in "gray areas." Besides, with less expensive projects, the chance of a significantly adverse impact statement would be minimal.

It is obvious that any solution like the model presented must be more comprehensive to prevent abuses. For example, a method would have to be devised for identifying cumulative actions, each one of which falls short of the cutoff, but which pose a significantly adverse affect to the environment when grouped together. A possible solution to this problem would be to have the agency file a yearly report on all projects which fall beneath the cutoff. The report could be much less inclusive than the environmental impact statement, but it could be of value in determining whether the system was functioning properly. The cost of this and other deviations from the model would have to be balanced against the benefits in changing the system.

The above suggestion is presented to point out the problems present in deciding whether an impact statement is needed. Something should be done to provide the agencies and the public with more certainty in the decision-making process, as the costs in time and money of unnecessary litigation are enormous.²⁶² What is needed now are not guidelines which are not binding on anyone, but concrete regulations. Perhaps the Act itself should be changed to be less ambiguous. Certainty in the application of section 102 would be beneficial to all concerned and would lower the costs of protecting the environment.

3. STANDING TO SUE UNDER NEPA

Courts have held that citizens have standing to challenge an agency which fails to file an impact statement when one is required under the terms of the Act.²⁶³ Since section 102(c)²⁶⁴ provides that a copy of the statement is to be made available to the public, it has been recognized as granting a right in the public to enjoin an action until compliance with the Act has been achieved.²⁶⁵

262. See *BUSINESS WEEK*, Apr. 21, 1973, at 56, on the delays affecting the construction of nuclear power plants.

263. See, e.g., *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356 (E.D.N.Y. 1972) (failure to prepare impact statement for \$1.5 million project for channelization of 66 miles of a creek); *Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972) (failure to prepare statement for maintenance dredging of a harbor); Note, *America's Changing Environment—Is NEPA a Change for the Better?*, 40 *FORDHAM L. REV.* 897, 906 (1972).

264. 42 U.S.C. § 4332(2)(c) (1970).

265. See, e.g., *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971). "In order to have standing, groups interested in conservational factors must allege that these factors have not been

Once standing is granted, the next question involved is whether the citizens group has made a sufficient allegation under section 10 of the Administrative Procedure Act (APA), which provides: "A person suffering legal wrong because of agency action, or *adversely affected* or *aggrieved* by agency action within the meaning of the relevant statutes is entitled to judicial relief thereof."²⁶⁶ In *Sierra Club v. Morton*,²⁶⁷ the United States Supreme Court answered the question of "what must be alleged by persons who claim injury of a non-economic nature to interests that are widely shared."²⁶⁸ The Sierra Club had brought suit under section 10 on the theory that the suit was a public action involving the use of natural resources and that the club's history of environmental involvement was sufficient to give it standing. The Court rejected this argument and held that to have standing to sue, the Sierra Club must show that it is "adversely affected" or "aggrieved" within the meaning of the APA. To do this the club must show that it (1) suffered injury in fact and (2) that this injury was arguably within the zone of interests protected by the statute.²⁶⁹

It was not enough for the club to allege that a road built through Sequoia National Park "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations,"²⁷⁰ because such an allegation did not show that *the club* suffered any injury. To come within the Court's mandate, the club should also have alleged that its members used the park and that such use would be adversely affected if the road were built.

The *Sierra Club* suit was not brought under NEPA, but under other federal statutes regulating the uses of federal park land.²⁷¹ Applying *Sierra Club's* two-pronged test to NEPA, it was readily apparent that violation of the public right derived from section 102(c)²⁷² would satisfy the "zone of interests" test in a suit to force an agency to file an impact statement. But, it was not so apparent how the injury in fact test might be applied.

The Supreme Court again provided the answer. In *United States v. Students Challenging Regulatory Agency Proceeding* (SCRAP),²⁷³ an unincorporated association of five law students sought to enjoin the Interstate Commerce Commission from granting an across the board rate increase of 2.5% to the railroads. Since railroad rates already discrim-

properly considered by an administrative agency." *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356, 368 (E.D.N.Y. 1972). See also Seeley, *supra* note 236, at 298.

266. 5 U.S.C. § 702 (1970) (emphasis added).

267. 405 U.S. 727 (1972).

268. *Id.* at 734.

269. *Id.* at 733.

270. *Id.* at 734.

271. *E.g.*, Administrative Procedure Act, 5 U.S.C. § 702 (1970).

272. 42 U.S.C. § 4332(2)(c) (1970).

273. 93 S. Ct. 2405 (1973).

inated against recyclable goods, SCRAP argued that the rate increase would aggravate the effects of this discrimination on the environment. To establish standing, SCRAP claimed that "each of its members 'suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure'"²⁷⁴

The Court found that these pleadings sufficiently showed that SCRAP was "adversely affected" or aggrieved within the meaning of section 10 of the APA." The Court emphasized that SCRAP was not to be denied standing merely because the injury to its members in the use of the park was suffered in common with all others who used it. "[T]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody. We cannot accept that conclusion."²⁷⁵ The Court also rejected the argument that since SCRAP could never prove that a general increase in rates would have a detrimental effect on the environment, the allegations were a ploy to avoid the need to show an injury in fact. On these pleadings alone, the Court could not say that SCRAP could not prove its allegations. If, in fact, the government could show that the allegations were untrue, then it "should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were a sham and raised no genuine issue of fact."²⁷⁶

Finally, the Court rejected the plea from the government to limit standing under the APA to those who have been "significantly" affected by agency action. In a footnote the Court discussed this point:

(E)ven if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote . . . a five dollar fine and costs . . . and a \$1.50

274. *Id.* at 2411.

Specifically, SCRAP alleged that each of its members was caused to pay more for finished products, that each of its members uses the forests, rivers, streams, mountains, and other natural resources both surrounding the Washington metropolitan area and . . . his legal residence, for camping, hiking, fishing, sightseeing and other recreational [and] aesthetic purposes," and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.

Id. at 2411.

275. *Id.* at 2416.

276. *Id.* at 2417.

poll tax While these cases were not dealing specifically with § 10 of the APA, we see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."²⁷⁷

Therefore, it is clear that any citizens' group can challenge an agency that fails to file an impact statement where it appears that one should be filed. All the group need show is "injury in fact" using the guidelines in *Sierra Club* and *SCRAP*, because the "zone of interests" test is satisfied by showing a failure to file the statement.

It is not so clear, however, what a citizens' group should do if an agency has filed an impact statement and is going ahead with the project in spite of a conclusion in the impact statement that the action to be undertaken will have a detrimental environmental effect. As mentioned previously, NEPA, by its terms, only requires the agency to consider the environmental effects of its action in the total cost-benefit analysis of the project.²⁷⁸ There is no affirmative duty for a federal agency to abandon a project which will have a detrimental effect.²⁷⁹

277. *Id.* at 2417 n.14.

278. See note 236 *supra* and accompanying text. See also *Conservation Council v. Froelke*, 473 F.2d 664 (4th Cir. 1973) (preparation of impact statement held sufficient to allow continuation of a dam project the cost of which exceeded its benefit); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 348 F. Supp. 916 (N.D. Miss. 1972) (impact statement for the Tennessee Tambigbee waterway held to satisfy the requirements of NEPA); *Citizens Airport Comm. v. Volpe*, 351 F. Supp. 52 (E.D. Va. 1972) (impact statement for airport satisfies NEPA even though it provides no solution for environmental problems the airport would create).

279. It now appears that the trend is to subject the agency's action to judicial review. In *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972), plaintiffs brought an action to enjoin completion of a flood control project. The project was enjoined by the district court after it found that the Corps had failed to prepare an impact statement. When the Corps finally presented the statement to the district court, the court dissolved the injunction. Plaintiffs appealed to the Eighth Circuit on the basis that NEPA had not been complied with in that (1) the statement was deficient and (2) the administrative determination by the Corps that the dam should be constructed was reviewable by the court on the merits.

The Eighth Circuit held that the impact statement was objectively prepared and that it sufficiently presented alternative courses of action. But the court backed away from the district court's holding that NEPA requires agency officials to be selectively impartial. The court stated that NEPA assumes as inevitable an institutional bias in favor of the project and "erects the procedural requirement of § 4332 to insure 'that there is no way [the decision-maker] can fail to note . . .'" the environmental consequences of its action. *Id.* at 295, citing *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

As to the lower court's holding that the agency's decision to proceed with the project was not subject to judicial review, the court of appeals disagreed.

The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full disclosure law. NEPA was intended to effect substantial changes in decision making. . . . § 101 [§ 4331] sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment. . . . The procedures included in § 102 [§ 4332] of NEPA are not ends in themselves. They are intended to be "action forcing."

One problem is whether the citizens' group will have standing to challenge the agency's action as inconsistent with the impact statement. Assuming the group makes the required *Sierra Club* showing that its members will be injured in fact if the project is completed, the zone of interests test must still be satisfied. Because section 102(c) of NEPA does not require an agency to abandon a environmentally detrimental action so long as an impact statement is filed, it cannot be said that the failure to follow the mandate of the impact statement is an injury falling within the zone of interests that the statute was designed to protect.²⁸⁰

Given an agency obligation to carry out the substantive requirement of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits. Whether we look to common law or the Administrative Procedure Act, absent "legislative guidance as to reviewability, and administrative determination affecting legal rights is reviewable unless some special reason appears for not reviewing." Here, important legal rights are affected. NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.

Id. at 297-99 (citations omitted). This decision was followed by the Fourth Circuit in a per curiam decision in *Conservation Counsel v. Froelke*, 473 F.2d 664 (4th Cir. 1973). *But see* *Bradford Township v. Illinois State Toll Highway Auth.*, 463 F.2d 537 (7th Cir. 1972); *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971). *See also* *National Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972); *Calvert Cliff's Coordinating Comm. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Scenic Hudson Preserv. Conf. v. FPC*, 453 F.2d 463, 468-69 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

While the Eighth Circuit would review the merits of an agency's decision under the "arbitrary and capricious" standard, the Tenth Circuit is in disagreement. In *National Helium Corp. v. Morton*, 486 F.2d 995 (10th Cir. 1973), the court found an impact statement prepared by the Secretary of the Interior to be sufficient after applying the following tests:

- (1) Whether FES discusses all of the five procedural requirements of NEPA.
- (2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.
- (3) Whether the statement contains a reasonable discussion of the subject matter involved in the five reviewed areas.

Although not clear from its opinion, the court seemed to refuse to review the agency's decision on its merits. As stated in a concurring opinion by Judge Breitenstein:

I believe that judicial review of an impact statement is limited to a determination of whether the statement is a good faith, objective and reasonable presentation of the subject areas mandated by NEPA. The courts should not second-guess the scientists, experts, economists and planners who make the environmental statement.

Id. at 1006.

Apparently the Ninth Circuit has also decided that a decision by an agency to proceed with a project after a sufficient impact statement has been filed is not reviewable on the merits. In *Environmental Defense Fund v. Armstrong*, 487 F.2d 814 (9th Cir. 1973), the court commented in a footnote that,

We do not read the National Environmental Protection Act to give to the courts the ultimate authority to approve or disapprove construction of a properly authorized project where an adequate EIS has been prepared and circulated in accordance with the NEPA requirements We have taken the view that final judgments of project justification are not subject to review in an action to consider the adequacy of an EIS statement under NEPA. *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1276, 1279-80 (9th Cir. 1973). Congress in reauthorizing the project and in determining whether to proceed in the light of the EIS must consider many other factors in addition to the environmental effects. These questions are not before us and properly so.

Id. at 822 n.13.

280. See note 269 *supra* and accompanying text.

However, the policy statement in section 101²⁸¹ of the Act says, *inter alia*, that "each person should enjoy a healthful environment. . . ."²⁸² It could be argued that the failure of an agency to follow the mandate of its own impact statement is "an injury within the zone of interests protected by the statute."

This argument must, to a certain extent, hinge on whether section 101 creates a public right, at least for the limited purpose of finding standing. There are only two federal district court cases which have considered this question, and, although both hold that section 101 does not create private substantive rights, neither addresses itself to the question of standing to sue a federal agency. In *Tanner v. Armco Steel Corp.*,²⁸³ private individuals sought five million dollars in damages due to injuries from air pollutants emitted by defendant's factories. The court found that section 2²⁸⁴ did not create a substantive right to a clean environment since Congress made no mention of rights, duties or remedies.²⁸⁵ Based on this reasoning the court also found that section 101(c)²⁸⁶ and (b)²⁸⁷ did not create substantive rights.²⁸⁸ As to section 101(c)²⁸⁹ the court said

[T]hese words are almost precatory in nature. Had the Congress intended to create a positive and enforceable legal right or duty, it would have said so, and would not have limited itself to words of entreaty. In absence of any clear statement, this Court must assume that no such intention existed. Although such a reading stands by itself as the only plausible construction, it is interesting to note that it is supported by the legislative history of the provision in question. Originally, the Senate version, Senate Bill 1075, provided that "(t)he Congress recognizes that each person has a *fundamental and inalienable right to a healthful environment. . . .* However, these strong words did not survive the conference committee, where they were deleted lest they be interpreted to create legal consequences which the Congress did not intend."²⁹⁰

In *Virginians for Dulles v. Volpe*,²⁹¹ a district court refused to find that

281. 42 U.S.C. § 4331 (1970).

282. 42 U.S.C. § 4331(c) (1970).

283. 340 F. Supp. 532 (S.D. Tex. 1972).

284. 42 U.S.C. § 4321 (1970).

285. *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972), citing *J.I. Case Co. v. Borok*, 377 U.S. 426 (1964); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Okla. 1946).

286. 42 U.S.C. § 4331(c) (1970).

287. 42 U.S.C. § 4331(b) (1970).

288. Here the court cited *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728, 755 (E.D. Ark. 1971), which has been reversed in part by *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972.)

289. 42 U.S.C. § 4331(c) (1970).

290. *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 538-39 (S.D. Tex. 1972) (emphasis added).

291. 344 F. Supp. 573 (E.D. Va. 1972).

minor decisions involved in running an airport constituted "major federal action." In passing, the district judge stated: "Moreover, I do not interpret § 101 of the Act as creating any substantive private right."²⁹²

Yet, it may not be necessary to show a substantive right to a clean environment in order to have standing if the Eighth Circuit's decision in *Environmental Defense Fund, Inc. v. Corps or Engineers*²⁹³ is followed. There the court argued that section 102(c)²⁹⁴ is not only a procedural requirement for agencies, but it is intended to be "action forcing" in requiring agencies to act within the guidelines of section 101.²⁹⁵ The question of the plaintiff's standing was not raised in this decision, probably because the plaintiff had originally sued to enjoin a project where no impact statement had been prepared. After the statement was submitted by the Corps, the district court dissolved the injunction. The plaintiff appealed, asking for review on the merits of the Corps' decision and also claiming that the statement was insufficient. Because it is clear that a citizen has standing to challenge the sufficiency of a report he has a right to receive, the question of plaintiff's standing as to the question of judicial review on the merits may have been overlooked.

Even if a citizens' group cannot satisfy the "zone of interests" test under NEPA, there are ways to avoid it. For instance, if the proposed federal action will have the effect of violating standards under the Clean Air Act²⁹⁶ or the Water Quality Act,²⁹⁷ then the group can claim violation of a substantive right under those acts, which give private citizens standing to sue.²⁹⁸ Alleging these acts, in concert with NEPA, should fulfill the requirement of the test. If, however, the environmental qualities which will be affected by the agency action are aesthetic, then, absent some special provision in the agency's enabling act,²⁹⁹ there is no federal act which creates a substantive right to aesthetic quality, and the zone of interests test may preclude judicial review.³⁰⁰

292. *Id.* at 578.

293. 470 F.2d 289 (8th Cir. 1972). See note 279 *supra*.

294. 42 U.S.C. § 4332(2)(c) (1970).

295. 42 U.S.C. § 4331 (1970).

296. 42 U.S.C.A. § 1857 *et seq.* (Supp. 1973).

297. 33 U.S.C.A. § 1251 *et seq.* (Supp. 1973).

298. 33 U.S.C.A. § 1365 (Supp. 1973); 42 U.S.C.A. § 1857h-2 (Supp. 1973).

299. *Cf.* 23 U.S.C. § 138 (1970); 49 U.S.C. § 1653(f) (1970).

300. A bill, H.R. 7592, 93d Cong., 1st Sess. (1973), to amend NEPA to include a provision for citizen's suits is opposed by Alan G. Kirk, II, acting administrator for enforcement and general counsel of the EPA, because he thinks the bill would give private citizens the primary role in enforcement of agency standards. He thinks that citizens should be able to sue only after state and federal agencies are notified of a violation and take no action.

Congressman Paul N. McCloskey (R.-Cal.) argues that the role of the private citizen in enforcement could be lessened if the public could maintain a high degree of faith in the regulatory process. In view of the "Watergate Affair" and the subsequent revolving leadership in the Justice Department, his argument is well taken.

The bill purports to grant standing in environmental suits to persons who are adversely affected by an action or "who speak knowingly of environmental values." Suits brought under the bill would have to be supported by the affidavits of at least two persons who are technically qualified and who state that the activity which is the subject of the suit would

4. COURT DECISIONS INVOLVING HOUSING

There have been several recent cases involving the application of NEPA to HUD-financed developments.³⁰¹ While most of the cases involve failure to file impact statements, one did consider the question of the adequacy of a statement submitted. In *San Francisco Tomorrow v. Romney*,³⁰² the Ninth Circuit found that there was no major federal action and, hence, no requirement to file an impact statement. Funds had been advanced by HUD in 1962 so that a study could be made for a redevelopment project. The original plan was submitted to HUD in 1964 and was finally approved by the City of San Francisco and by HUD in 1966.

HUD retained rights to monitor the project and make amendatory grants to defray rising costs. The plaintiffs argued that the subsequent decisions by HUD pursuant to these retained rights constituted major federal action. The court disagreed. It held that the major federal action was the original decision to make the grant and loan. Since the only purpose of the retention of right was to ensure that the project would be completed as expected, the decisions made thereunder did not constitute major federal action. The court further held that such retention of rights did not make NEPA retroactive to the original decision date.³⁰³

impair environmental quality. A registry would be established of persons "interested in environmental quality" who would be notified of suits in particular regions.

Under the bill, the citizens could sue to enforce existing standards, or, if no standards exist, courts could enjoin activity if either (1) the environmental and economic costs of the action outweigh the benefit or (2) if the purpose of the activity could be accomplished in a reasonable alternative manner. 4 ENVIR. REP., CURRENT DEVS. 1068 (Oct. 26, 1973).

One must question the utility of the proposed bill. It is not certain whether Congress can grant standing to persons "who speak knowingly of environmental value" in light of the Supreme Court's decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972). Standing is a court made rule designed to limit cases brought before the courts to those involving people with a real interest, economic or aesthetic, that has been invaded. Another problem is the provision which grants the courts power to enjoin the proposed action when the costs outweigh the benefits. How are such environmental costs to be measured? Doesn't this provision simply substitute the court's judgment for that of the federal agency, which admittedly has more expertise in its domain? See Note, *Cost-Benefit Analysis and the Natural Environment Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972).

301. See, e.g., *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973); *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973); *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973).

302. 472 F.2d 1021 (9th Cir. 1973).

303. NEPA may be applied to ongoing projects if the court can find a decision or act to be made by a federal agency which constitutes major federal action. If the court does find that section 4332(2)(c) is applicable, then it will determine if it is "practicable" for the agency to prepare an impact statement. If the project is so far along that preparation of a statement would serve no purpose, then the court will use its equitable powers and refuse to grant the injunction. Thus, it is not a question of whether NEPA should be applied retroactively, but a question of whether there is a major federal action. See, e.g., *Ragland v. Mueller*, 460 F.2d 1196 (5th Cir. 1972) (act inapplicable where only 4 miles of a 20 mile segment of highway remain to be completed); *Concerned Citizens v. Volpe*, 459 F.2d 332 (3d Cir. 1972) (act does not apply where federal decision made before effective date of NEPA); *Green County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir. 1972) (NEPA applies to all major federal actions taken after January 1, 1970); *Named Individual Members of*

In *Silva v. Romney*,³⁰⁴ a federal district court in Massachusetts enjoined HUD from giving any assistance to a housing project until an environmental impact statement was filed. HUD had been asked to provide and had approved a mortgage guarantee in the amount of \$4,000,000 and an interest grant of \$156,000 for the project, but the closing had not taken place. Evidence of a controversy over the project's drainage facilities between HUD officials and the owners of adjacent property was sufficient to establish that the project was controversial within a department guideline defining "major federal actions significantly affecting the quality of the human environment."³⁰⁵

While the district court enjoined the agency from further action,³⁰⁶ it did not so enjoin the private developer who proceeded to cut down trees on about three acres of the tract. Plaintiffs then filed a "Motion for Relief Preserving Status Quo" to temporarily enjoin the developer's action until HUD filed its impact statement. The district court declined to grant the injunction, presumably because it thought it was without the power to prevent the developer from "doing as he wishes" with his own property. The court was obviously persuaded by the First Circuit's opinion in *City of Boston v. Volpe*³⁰⁷ where that court said that "agencies may be subject to duties concerning a proposed federal action at a time when an applicant may not yet be enjoined from activity on his own."³⁰⁸

On appeal the First Circuit per Chief Judge Coffin reversed.³⁰⁹ *City of Boston* was distinguished from the present case because the administrative process had gone no further than an intra-agency tentative allocation of funds. Here the agency's allocation of funds had been finally approved, subject only to the closing which had not yet taken place. Since the arrangements had reached the point where the federal government became a "partner" with the potential grantee, the court held that the district court had the power to issue the injunction. The case was remanded to give the developer an opportunity to present evidence of the possibility of injury to him if the injunction was issued.

While not necessary to its decision, the court made a plea to federal agencies to draft "status quo" regulations to guide agencies, private developers, and the general public whenever proposed "major federal actions" are involved.³¹⁰ As demonstrated in the instant case, prepartner-

San Antonio Conservation Soc'y v. Texas Highway Dept., 446 F.2d 1013 (5th Cir. 1971); *Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972) (requirement of section 4332(2)(c) must be enforced by injunction whenever the proposed project poses a substantial risk of damage to the environment and there exists a reasonable possibility of alternative action, unless there are extraordinary equities on the side of the government).

304. 342 F. Supp. 783 (D. Mass. 1972).

305. *Id.* at 784.

306. *Id.*

307. 464 F.2d 254 (1st Cir. 1972).

308. *Id.* at 258.

309. *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973).

310. *Id.* at 288.

ship regulations are in the interests of all parties concerned. The government has an enormous investment in complying with the terms of NEPA, both in time and money. This interest could be materially damaged if the private developer were able to proceed with actions that could damage the environment.³¹¹

In the instant case HUD agreed to fund a project and was then required to file an impact statement before final funding could be granted. If the developer had been allowed to proceed with his actions, there is a possibility that the environment would have been harmed. Had the impact statement revealed that the project would have an adverse effect on the environment, the agency could have withdrawn its funds from the project. The result could have been an environment damaged by the developer's action, an incompleting housing project due to the withdrawal of the agency's funds and a host of unnecessary expenses for both the developer and the agency.³¹²

Preplanning guidelines would be a better solution to the problem than piecemeal court action, while still controlling the private developer. Such guidelines would extend to all developers planning projects which could involve major federal action. As the court in *Silva* noted, the power of a court to enjoin private action, when there is the possibility of vetoing the project due to an adverse impact statement, should not depend on technicalities, such as whether a contract has been signed with the agency.³¹³ Also, the guidelines would make a private developer more aware of the effect his proposed project would have on the environment before he begins. This result would be in accord with NEPA's policy declaration of preservation of the environment.³¹⁴ It is obvious that this result cannot be reached without integrated planning between the public sector, which is directly under NEPA's mandate, and the private sector, which is not.

These cases demonstrate the extent to which the section 102 requirement has been extended. They should serve as a warning to all land developers to analyze their projects in terms of whether there is any federal action involved and whether such action is of sufficient size to justify the preparation of an impact statement. As an injunction can be economically damaging, it would be wise for developers to assess the environmental consequences of all large projects so that if there is federal action, the federal agency will be in a better position to make an environmental assessment to decide whether an impact statement should be prepared. The environmental data accumulated by the developer could also be made available to the public. This disclosure could help prevent bad feelings which lead to citizen's suits, and could also be used as a selling point to subsequent purchasers.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

5. CONTENTS OF THE IMPACT STATEMENT

a. Rules

The EPA has issued proposed rules³¹⁵ covering the contents of the impact statements. Briefly, they are:

- (a) The description of the proposed action.
- (b) The environmental impact of the proposed action.
- (c) Adverse impact which cannot be avoided should the proposal be implemented.
- (d) Alternatives to the proposed action.
- (e) Relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity.
- (f) Irreversible and unretrievable commitment of resources which would be involved in the proposed action should it be implemented.
- (g) A discussion of problems and objectives raised by other Federal, State and local agencies and by private organizations and individuals in the review process.³¹⁶

The EPA reasserts the proposition that

[i]mpact statements shall not be justification documents for proposed agency funding or actions. Rather, they shall be objective evaluations of actions and their alternatives in light of all environmental considerations. Environmental impact statements shall be prepared using a systematic inter-disciplinary approach. Statements shall incorporate all relevant analytical disciplines and shall provide meaningful and factual data, information, and analysis. The presentation should be simple and concise, yet all facts necessary to permit independent evaluation and appraisal of the beneficial and adverse environmental effects of alternative actions. Statements shall not be drafted in a style which requires extensive scientific or technical expertise to comprehend and evaluate the environmental impact of an Agency action.³¹⁷

b. Case Law

Prior to the promulgation of the proposed rules, the contents of impact statements had been discussed in several cases.³¹⁸ The statements

315. 40 C.F.R. part 6 (1973). See also Kross, *Preparation of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81 (1972); CEQ Guidelines, 38 Fed. Reg. 20550 (1973).

316. 37 Fed. Reg. 883 (1972).

317. *Id.*

318. See, e.g., *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (failure to discuss alternatives); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 83 (D.C. Cir. 1971) (responsible opposing views must be presented); *Calvert*

were attacked mainly for lack of objectivity, which consisted of failure to give all the facts and failure to consider viable alternative causes of action.³¹⁹

When these decisions are read together with the proposed rules³²⁰ and CEQ guidelines,³²¹ it is clear that impact statements must meet the following requirements: (1) The statement must not contain unsupported conclusions. Any conclusions in the statement must be supported by facts from which a reasonable objective observer would reach the same results;³²² (2) the reasonable alternatives presented may not be deemphasized by the agency in an attempt to justify its course of action. The statement must contain a text of *reasonable* alternatives with an accompanying discussion of the environmental impact of each one. The depth of the discussion is governed by a "rule of reason" which weighs the depth of evaluation in proportion to the degree of impact.³²³

c. Who Must Prepare the Statement

The federal agencies and the courts have different views as to who must prepare the statement. The leading case is *Green County Planning Board v. FPC*,³²⁴ in which the Second Circuit held that the FPC must prepare its own statement and could not rely on the applicant to do so. This case made it clear that the burden of preparing the statement is on the agency. However, prospective applicants should be aware that the proposed rules require them to submit an "environmental assessment" statement before the agency will decide whether or not to issue the grant.³²⁵ The cost burden of the additional engineering consultant time required to make the assessment will be shared by the agency and the applicant in a proportion matching that of the grant to the cost of the whole project.³²⁶

Also, *Greene County* has not been uniformly followed by the courts.

Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 342 F. Supp. 1211 (D. Ark. 1972) (statement must be objective, it cannot be slanted by the agency); *City of New York v. United States*, 337 F. Supp. 150, *aff'd on rehearing*, 344 F. Supp. 929 (E.D.N.Y. 1972) (phrase "to the fullest extent possible" is not intended to permit agencies to shirk obligation of section); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) (Corps of Engineers cannot rely on state water standards but must perform own study).

319. *E.g.*, *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

320. 37 Fed. Reg. 879 (1972).

321. 38 Fed. Reg. 20550 (1973).

322. *See, e.g.*, *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289, 296 (8th Cir. 1972) (the test of compliance with section 4332 is one of good faith objectivity rather than subjective impartiality); *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973) (conclusory statement must be supported).

323. *E.g.*, *Natural Resources Defense Fund v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

324. 445 F.2d 412 (2d Cir. 1972).

325. 37 Fed. Reg. 881 (1972).

326. *Id.*

For example, in *Iowa Citizens for Environmental Quality v. Volpe*,³²⁷ the Eighth Circuit held that NEPA was satisfied by the Federal Highway Administration's review, modification, and adoption of a federal-aid highway project's environmental impact statement that was initially prepared by a state highway agency.

6. PROBLEMS OF NEPA

NEPA is deficient in a number of respects, but in relation to land use, its greatest shortcoming is that it is not adequate as a planning device. While the requirement of an impact statement for ecologically controversial federal actions may prevent ecological disasters (such as a jetport being built in the Great Cypress Swamp, or an extension of the Florida Canal System), the Act itself does not provide the mechanism for the solution of the fundamental problem: the lack of a homogeneous land use plan. The reason NEPA is deficient in this respect is twofold. First, the Act applies only to "federal action."³²⁸ Although this text has shown that a large percentage of private enterprise may be tied to federal action, as by federal licensing and funding,³²⁹ a great many land use decisions are not. It is conceivable that NEPA's reach could be extended through judicial decisions beyond the limits provided in the CEQ guidelines. It is arguable that wherever the acts of private persons are federally regulated, an impact statement should be filed, even though the federal agency makes no decision itself. This could be supported by holding the decision made in promulgating the regulation to be sufficient to support the requirement for an impact statement when private action is taken pursuant to the regulation. Such a result, analogous to the extension of the Interstate Commerce clause³³⁰ to *Ollie's Barbecue*,³³¹ would cover most projects in the public sector, although the costs of filing impact statements would be enormous. Thus, it is likely that the concept of major federal action will not be extended much further than presently provided by the CEQ guidelines.

The second reason that NEPA is inadequate as a planning device for land use is that it adopts a piecemeal approach to environmental protection. As mentioned in the introduction, fragmentation is one of the causes of environmental harm, particularly in the aesthetic degradation of our cities.³³² A project-by-project analysis does not provide positive land planning. Like nuisance,³³³ it merely serves to negate the worst

327. 487 F.2d 849, 853-54 (8th Cir. 1973) (excellent discussion of state agency's duty to prepare impact statement).

328. See section III, A, 2, a *supra*.

329. *Id.*

330. U.S. CONST. art. I, § 8.

331. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

332. See note 8 *supra* and accompanying text.

333. See section II, A, 2 *supra*.

project and will let the others "slide" through the agency's cost-benefit analysis.

Perhaps the greatest problem with NEPA's requirement for an impact statement is that it imposes enormous costs on agency action which may not be offset by a commensurate benefit to the environment.³³⁴ Since the Act does not require that agencies abandon projects which are shown to be detrimental to the environment,³³⁵ it is arguable that the Act has degenerated into a requirement for a "rubber stamp" document. The Act requires only that the impact statement be included as a part of the agency's cost-benefit analysis of the project. There may already be a built in bias in the agency in favor of the project,³³⁶ and, if so, the agency could undervalue the cost of whatever degradation of the environment is involved, since many aspects of the environment, such as aesthetic beauty are almost impossible to value in terms of dollars.³³⁷ Also, if the only control over abuse of agency discretion is a citizen's suit challenging the sufficiency of the impact statement, then effective advertising by special interest groups may curtail the incentive of such groups to file suit. For example, in view of the present energy shortage, oil companies are advertising that anti-pollution controls account for 9% of all energy used in the United States.³³⁸ This advertising is meant to blunt the demand for clean air in favor of less gasoline use. What the advertisement fails to mention, however, is that if automobile weight was reduced, then more than enough gasoline could be saved to offset that which is needed for pollution control. Moreover, if citizens do sue, the court must find an abuse of discretion by the agency before it can reverse the decision to go ahead with the project.³³⁹ It is unclear, absent a collateral statute, whether proceeding with a project in the face of an adverse impact statement should constitute an abuse of discretion.³⁴⁰

334. The statement, posing as it does controversial issues, has also led to demand for hearings even where the statute does not so provide. Agencies, as presently constituted, may not have expert staffs versed in the ecology of their fields. Since impact statements can degenerate into conventional boiler-plate, there will be a need for improving these staffs.

On the other hand, there is already a claim that the demands made upon the impact statement may become excessive. The most controversial and open-ended statutory requirement is that the statement must report on alternatives to the proposed action. There is a sense in which the alternatives to proposed action are infinite depending on how the end in view is stated.

Jaffe, *Ecological Goals and the Ways and Means of Achieving Them*, 75 W. VA. L. REV. 1, 27 (1972). See also Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972).

335. See note 55 *supra* and accompanying text. But see Calvert Cliff's Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). See also Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (2d Cir. 1971).

336. Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972).

337. *Id.*

338. 3 ENVIR. REP. CURRENT DEVS. 1314 (March 2, 1973).

339. See cases cited in note 255, *supra*.

340. *Id.*

B. Other Federal Laws

There are three other recent federal environmental laws which affect land use. They are, the Clean Air Act of 1970,³⁴¹ the Federal Water Pollution Control Act Amendment of 1972,³⁴² and the Coastal Zone Management Act of 1972.³⁴³ And, as previously mentioned, a National Land Use Act³⁴⁴ has now passed the Senate and is under consideration in the House of Representatives.

1. POLLUTION CONTROL LAWS

The Clean Air and Water Acts are both designed to abate pollution. They are similar in that both have effluent control standards for point sources;³⁴⁵ both have provisions for citizens' suits;³⁴⁶ and both give the Administrator of the Environmental Protection Agency the power "to prescribe such regulations as are necessary to carry out his functions under this Act."³⁴⁷ An analysis of the application of the Administrator's regulatory power under the Clean Air Act provides an example of how land-use management is tied to the problem of both air and water quality control.

Air pollution is primarily caused by the incomplete conversion of fuel into energy and the emission of the unconverted fuel into the air. The amount of pollution depends on (1) the type of fuel used, (2) the efficiency of the conversion process, (3) the efficiency of the steps taken to inhibit the unburned particles from escaping into the air, and (4) the number of sources, stationary or mobile, which carry on the process.³⁴⁸

Once the causes of air pollution are known, abatement procedures can be prescribed. First, the polluting source can change from a dirty

341. 42 U.S.C.A. § 1857 *et seq.* (Supp. 1973).

342. 33 U.S.C.A. § 1251 *et seq.* (Supp. 1973).

343. 16 U.S.C.A. § 1451 *et seq.* (Supp. 1973).

344. S. 268, 93d Cong., 1st Sess. (1973).

345. 33 U.S.C.A. § 1311 (Supp. 1973) provides:

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1318, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works (B) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(6) of this title . . .

(2) (A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (B) shall require the application of the best available technology economically available for such category or class toward the national goal of elimination of all pollutants

See also 42 U.S.C.A. §§ 1857f-5a to f-6e (Supp. 1973) (relating to emission control for motor vehicles).

346. 33 U.S.C.A. § 1365 (Supp. 1973); 42 U.S.C.A. § 1857h-2 (Supp. 1973).

347. 33 U.S.C.A. § 1361a (Supp. 1973); 42 U.S.C.A. § 1857g (Supp. 1973).

348. 3 ENVIR. REP. CURRENT DEVS. 102 (1972).

fuel to a clean fuel. The problem with this procedure is that the demand for clean fuel will increase beyond the available supply, thus causing shortages and price increases. The recent energy crisis has amply demonstrated this point, as sources which converted from coal to oil will be forced to reconvert as the supply of oil becomes limited.³⁴⁹ One can only wonder whether the crisis would have been averted if the price of oil had not been held artificially low by the government, because a change to more efficient smoke stack pollution control devices might have accomplished the same result as converting to a cleaner fuel.

A second possible approach would be to increase the conversion ratio of energy produced to fuel burned. For example, most generators in conventional power plants have a ratio of only 40%.³⁵⁰ If the ratio could be increased, less fuel could be used to produce the same amount of energy, and less fuel burned means less air pollution. However, the problem with increasing the conversion ratio is the great amount of research and time required to effectuate it. Thus, this method of abatement will pay off in the years ahead but will not accomplish an immediate improvement in the quality of the air.

The third alternative, the use of control devices such as smokestack controls and catalytic converters in automobiles, has limits because they lower the conversion ratio, discussed above. Spokesmen for the oil industry now estimate that pollution control devices will account for up to nine percent of the total energy demand by 1985.³⁵¹ While this estimate may be high, no responsible person will dispute the claim that the emission controls do use a significant amount of energy.

Perhaps the most promising method of achieving environmental quality control is to decrease the number of pollution-causing sources. This method is tied to land-use planning and can be easily demonstrated by the new EPA regulation³⁵² for enforcement of the Clean Air Standards. The regulations provide for a review by responsible state pollution control agencies of all construction projects which may generate a significant amount of automobile traffic. The affected facilities are highways, roads, parking lots, garages, shopping centers, recreational centers, amusement parks, sports stadiums, airports, commercial and industrial development and all other traffic-generating sources.³⁵³ The regulations are not designed to curtail the building of such facilities, but to control their placement in such a way as to minimize the number of

349. 3 ENVIR. REP. CURRENT DEVS. 1220 (1973).

350. Weaver & Kristof, *The Search for Tomorrow's Power*, 142 NAT'L GEOGRAPHIC 650, 675 (1972).

351. 3 ENVIR. REP. CURRENT DEVS. 1314 (March 2, 1973).

352. Regulations for states to carry out pre-construction reviews of indirect air pollution sources were proposed by the EPA. 38 Fed. Reg. 29893 (1973).

353. State review procedures would apply to designated and non-designated areas. A designated area is one which could exceed any air quality standard for the next 10 years. The EPA estimates that about 350 shopping centers and 150 parking lots would be subject to review. 4 ENVIR. REP. CURRENT DEVS. 1093 (1973). See generally 40 C.F.R. part 52 (1973).

vehicular miles traveled. This reduction means a corresponding reduction in the consumption of gasoline, which leads to a reduction in automobile emissions.

While this result is beneficial in terms of air quality control, it is questionable whether these regulations can be justified on the basis of a cost-benefit type of analysis from the point of view of a land planner. As will be shown in the discussion of state-land use laws and regulations,³⁵⁴ there are myriad state and local land-use regulations, most of which are unrelated in purpose. The interjection of additional agencies in the permitting process is an extra cost that will be added to the facility being constructed. In addition, the increase in the degree of fragmentation of the governmental decision process increases the possibility of conflicting requirements by two or more agencies which might cause the abandonment of the proposed project, a result the regulations were never intended to have.³⁵⁵

In addition to the problem of fragmentation, the regulations do not provide for the positive type of land planning which could eliminate the problem in the first place. In contrast, a regional planning agency with broad powers could anticipate demand for shopping facilities and work with private developers to find the most appropriate site, rather than merely having the power to reject a proposal to build a shopping center on a particular piece of land. Furthermore, such an agency could coordinate the building of suburban communities with the development of public transit systems between such communities and business districts. The end result would be the same as that which the present regulations accomplish, a reduction of automobile emissions. But, in addition, interdisciplinary land planning could also provide aesthetic and recreational benefits which cannot be achieved by simple pollution control standards. While the present regulations are a step in the right direction, it is evident that without broader land use regulations, the problem of achieving optimal air and water quality will increase.

2. LAND PLANNING LAWS

The coastal zone, defined as the area in which coastal waters and adjacent shoreland strongly affect each other,³⁵⁶ has been recognized as a fragile ecological system which is extremely vulnerable to the detrimental impact of man's activities.³⁵⁷ In response to a growing concern over the degradation of this area by overuse, Congress enacted the

354. Section IV *infra*.

355. Russell Train, the interim administrator of the EPA, stressed that the proposed regulations are not predicated on a no growth policy. 4 ENVIR. REP. CURRENT DEV'S 1093 (Nov. 2, 1973).

356. Coastal Zone Management Act of 1972, 16 U.S.C.A. § 1453a (Supp. 1973).

357. 16 U.S.C.A. § 1451 (Supp. 1973). See Comment, *Land-Use Management in Delaware's Coastal Zone*, 6 J. LAW REFORM 233 (1972).

Coastal Zone Management Act of 1972.³⁵⁸ The Act provides for federal funding assistance to the coastal states that develop management programs in accord with the guidelines set out in the Act.³⁵⁹ In order to obtain funding, a state must show that it has developed a coordinated program which includes input from local, state, and regional sources.³⁶⁰ It must demonstrate that a single agency has the power to generally administer the act, designate certain coastal areas for preservation, and condemn such designated land to the public use.³⁶¹ The most interesting requirement is that the state demonstrate that the agency has the power, directly or indirectly, to regulate both land and water use in the coastal zone.³⁶² This is directly at odds with the traditional approach of vesting zoning and similar regulatory power in local political entities.³⁶³ Obviously, this requirement is meant to curtail the political abuses which have been so evident in the implementation of zoning laws. It is questionable, however, whether a zoning program set up under state control would cure the abuses present in local level administration since the effectiveness of such a program must finally depend on the local officials administering the program.

IV. STATE ENVIRONMENTAL LAWS AFFECTING LAND USE

A. *California Follows NEPA (CEQA)*

1. INITIAL PROBLEMS

California became the first state to consider a NEPA-type statute when the California Environmental Quality Act was introduced in the California legislature in April of 1970 (CEQA).³⁶⁴ Because of the con-

358 16 U.S.C.A. § 1451 *et seq.* (Supp. 1973).

359. 16 U.S.C.A. § 1454b (Supp. 1973).

360. 16 U.S.C.A. § 1455c (Supp. 1973).

361. 16 U.S.C.A. § 1455d (Supp. 1973).

362. 16 U.S.C.A. § 1455e (Supp. 1973) provides:

(e) Prior to granting approval, the Secretary shall also find that the program provides:

(1) for any one or a combination of the following general techniques for control of land and water uses within the coastal zone;

(A) state establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

(B) direct state land and water use planning and regulation; or

(C) state administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(2) for a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

363. See section II *supra*.

364. California A.B. 2045 was introduced by its author, Assemblyman John Knox, on April 2, 1970. It is interesting to note that while the California Act was being debated and amended, Puerto Rico passed its Public Policy Environmental Act in June of 1970, as a near verbatim version of NEPA Public Policy Environmental Act, 12 L.P.R.A. §§ 1121-27 (1970). This act became effective July 1, 1970.

troverly surrounding the bill, it was not signed into law until September.³⁶⁵ During that interim period numerous versions were considered and amended. These amendments such as the simple change of the word "program" to "project" were to assume considerable importance as was seen in the case of *Friends of Mammoth v. Board of Supervisors*.³⁶⁶

CEQA is divided into four chapters. The first two merely set out the legislative intent and policy.³⁶⁷ The last two are the operative chapters which deal with state agencies, boards and commissions, as well as local agencies.³⁶⁸

Section 21100 is the very heart of the operative portion of the Act and it provides that,

all state agencies, boards, and commissions * * * shall prepare or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out . . . or approve which may have a significant effect on the environment. . . . Such a report shall include a detailed statement setting forth the following.³⁶⁹

The section sets forth six elements or factors that must be considered in this detailed environmental impact report.³⁷⁰ Five were copied verbatim from NEPA,³⁷¹ the only addition being a requirement that the impact report set forth mitigation measures proposed to minimize the impact.³⁷² Where NEPA requires a detailed environmental statement in "major federal actions,"³⁷³ CEQA, on its face, only requires an impact report on "projects" agencies *propose to carry out*.³⁷⁴ Since CEQA was not approved until September of 1970, the Interim Guidelines of NEPA had already been adopted.³⁷⁵ In those Interim Guidelines, "actions"

365. Environmental Quality Act of 1970, CAL. PUB. RES. CODE §§ 21000-21051 (West 1970). This Act was approved on September 18, 1970, and is now amended as CAL. PUB. RES. CODE §§ 21000-21174 (West Supp. 1974). The amended version was approved and filed on December 5, 1972, to be effective immediately as an urgency statute.

366. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) [hereinafter cited as *Friends of Mammoth*]. This is the opinion as modified. See the original opinion at 104 Cal. Rptr. 16 (1972).

367. Environmental Quality Act of 1970, CAL. PUB. RES. CODE, §§ 21000-001 and § 21050 (West Supp. 1974).

368. Environmental Quality Act of 1970, CAL. PUB. RES. CODE, §§ 21100-107 and §§ 21150-51 (West Supp. 1974).

369. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21100 (West Supp. 1974).

370. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21100(a)-(f) (West Supp. 1974).

371. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21100(a), (b), (d), (e), and (f) (West Supp. 1974), is identical to NEPA's 42 U.S.C. § 4332(i)-(v).

372. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21100(c) (West Supp. 1974).

373. 42 U.S.C. § 4332(c) (1970).

374. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21100 (West Supp. 1974).

375. 35 Fed. Reg. 7390 (1970).

was defined to include among other things, three types of "projects": (1) those "projects" directly undertaken by the federal government; (2) those "projects" financed by the federal government; (3) and those "projects" which required some type of federal approval.³⁷⁶ Consequently, the choice of the word "projects" by the California legislature, rather than the word "actions" which was used in NEPA, seems to be intentional, particularly in light of the verbatim adoption of other parts of NEPA. However, the conclusion could be drawn that the CEQA's requirement to prepare an environmental impact report on "projects" the agencies propose to carry out substantially mirrors NEPA's requirement for a detailed statement on "projects" and continuing activities "directly undertaken by Federal Agencies."³⁷⁷ Except for this distinction, Chapter 3 of CEQA is generally in line with NEPA.

Chapter 4 of CEQA applies only to *local agencies*. It instructs *state agencies* to require environmental impact reports from local agencies prior to the allocation of funds to them where the local agency was undertaking a project that may have a significant effect on the environment.³⁷⁸

Because CEQA was adopted prior to *Calvert Cliffs' Coordinating Commission v. AEC*³⁷⁹ and *Green County Planning Board v. FPC*,³⁸⁰ it contained many of NEPA's weaknesses. For example, no mention was made of how data for the impact report should be collected or who should actually bear the costs of preparation. While the federal interim guidelines remedied some of the definitional weaknesses of NEPA within three months of its enactment,³⁸¹ it was more than two years before the CEQA guidelines were adopted.³⁸² This was the setting for *Friends of Mammoth*.³⁸³

In *Friends of Mammoth*, a private developer applied for and was granted a permit to build a relatively modest 184 unit condominium complex in an undeveloped section of a rural county. The plaintiffs, who were residents of the area, objected to its issuance and demanded that the commission make an environmental impact report. Had the county included a conservation element in its general plan, it would have been absolutely exempted from making an impact statement under sec-

376. 35 Fed. Reg. 7390 at ¶ 5(a) (1970).

377. 35 Fed. Reg. 7390 at ¶ 5(a)(2) (1970).

378. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21150 (West Supp. 1974). The one exception to this requirement is provided in § 21151, where the local agency has adopted a conservation element in its general plan.

379. 449 F.2d 1109 (D.C. Cir. 1971) [hereinafter cited as *Calvert Cliffs*].

380. 455 F.2d 412 (2d Cir. 1972) [hereinafter cited as *Green County*].

381. 35 Fed. Reg. 7390 (1970).

382. The Resources Agency of California adopted the Guidelines for Implementation of the California Environmental Quality Act of 1970 on Feb. 5, 1973. 6 CAL. ADMIN. CODE tit. 14, §§ 1500-15166 (1973).

383. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). See the original opinion at 104 Cal. Rptr. 16 (1972).

tion 21151.³⁸⁴ Since the county had none, the key issue became whether the local agency activity of granting a building permit to a private developer was equivalent to a "project [the agency] proposed to carry out . . ." ³⁸⁵ Or more simply, was the issuance of a building permit by a local agency a "project" for purposes of CEQA? ³⁸⁶

Since the word "projects" rather than "actions" was specifically chosen after the interim guidelines to NEPA had been approved, the court's reasoning is questionable. Undoubtedly there are many who applaud the result, but even they must admit that the court stretched the common sense meaning of the word "projects." In all fairness to the court, it should be pointed out that in chapter 1 of CEQA, a non-operative chapter, the legislature declared its intent to be "that all agencies of the state government which regulate activities of private individuals, . . . shall regulate such activities so that major consideration is given to preventing environmental damage." ³⁸⁷ But even that section was not directly applicable, because no *state agency* was involved in the *Friends of Mammoth* case. ³⁸⁸

It is not within the scope of this article to examine the gyrations of the court in arriving at its holding. Suffice it to say that lightning had struck California: CEQA would henceforth require that all local governmental agencies prepare environmental impact reports on any private development that may have a significant effect on the environment prior to the issuance of a building or zoning permit. By analogy, the same would apply to any state agencies which issue permits or licenses to private developers.

The court held that private construction projects were subject to the impact report requirements of CEQA.

The first bolt hit California's freewheeling real estate developers and mortgage lenders, ³⁸⁹ and then labor. ³⁹⁰ The reaction of local governmental officials was near panic. Since the guidelines had not been published yet, some counties and cities refused to issue building or zoning permits of any kind. ³⁹¹ The magnitude of the additional burden placed on state and local agencies by requiring them to prepare, comment on, or review the environmental impact reports is best illustrated

384. See note 378 *supra*.

385. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21100 (West Supp. 1974).

386. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

387. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21000(g) (West Supp. 1974).

388. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

389. *TIME*, Jan. 1, 1973, at 45.

390. See *TIME*, Jan. 1, 1973, at 45; *Miami Herald*, May 24, 1973, § D, at 1, col. 4.

391. See the draft work-paper for an address by Donald G. Hagman, *URBAN LAW ANNUAL*, Annual Banquet, April 7, 1973 (Wash. Univ., St. Louis, Mo.); *Santa Monica Eve-*

by the fact that Los Angeles alone had issued more than 45,000 building permits in 1971.³⁹²

Consequently the Attorney General submitted a brief *Amicus Curiae* in response to the petition for rehearing filed by the Board of Supervisors of Mono County. Although the Attorney General admitted that the court's holding had coincided with his position as *Amicus Curiae*, he argued that because of the difficulties attendant upon the transition toward full implementation, the holding should be prospective only.³⁹³

On rehearing, the court did in fact modify its opinion³⁹⁴ but refused to adopt the Attorney General's argument and declined to apply the decision prospectively only, on the grounds that developers were protected by either local statutes of limitations or the doctrine of laches.³⁹⁵

The court even refused the Attorney General's request to stay the effective date of their decision to give the government agencies an opportunity to gear up for full implementation of the Act.³⁹⁶ In doing so, the court made the incorrect and naive assumption that because governmental agencies had been performing their duties in the *public sector* prior to the decision, this experience in preparing environmental impact statements would aid in solving the problems of implementation in the *private sector*.³⁹⁷

The worst was not over for developers because one day after the very limited modification in *Friends of Mammoth*, California's voters approved an initiative to control all development within 1,000 feet of California's entire coastline.³⁹⁸

But conservationists should never underestimate political pressure when, as California Lieutenant Governor Reinecke said: "Hundreds of millions of dollars of construction are being stopped."³⁹⁹ With that caveat, it is interesting to note that Assemblyman John Knox, who had been the principal author of CEQA, had already introduced a bill⁴⁰⁰ in

ning Outlook, Sept. 27, 1972, at 1, col. 3; Los Angeles Times, Oct. 1, 1972, § C, at 8, col. 1; TIME, Jan. 1, 1973, at 45. San Jose, Los Angeles and the City of Walnut Creek either stopped or held up different type permits, and all new construction was halted in Santa Barbara County.

392. Los Angeles Times, Oct. 1, 1972, § C, at 8, col. 1.

393. Brief for State of Cal. as Amicus Curiae at 3, *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

394. On rehearing the court modified its original opinion, 104 Cal. Rptr. 16 (1972), by several minor additions and by deleting footnote 10. That footnote had stated that although the holding did not imply that an environmental impact report was actually required, the particular project seemed to require one.

395. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 272, 502 P.2d 1049, 1066, 104 Cal. Rptr. 761, 778 (1972).

396. *Id.*

397. *Id.*

398. The Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE § 27000 *et seq.* (West Supp. 1974); See TIME, Jan. 1, 1973, at 45.

399. TIME, Jan. 1, 1973, at 45.

400. A.B. 889. This bill was introduced in the 1972 regular session of the California Legislature on March 13, 1972.

March 1972 to amend CEQA only shortly after the California Supreme Court had issued their order to hear the *Friends of Mammoth* case. Consequently, all attention was directed to the legislature in its efforts to amend the Act.

2. THE AMENDED CEQA

The Knox amendment was finally approved and was signed into law effective December 5, 1972.⁴⁰¹ The bill, as amended, is considerably longer and more complex. The environmentalists complained⁴⁰² because it provided for a four month moratorium on the application of the Act to private projects.⁴⁰³ On the other hand, the amendment did add a degree of certainty. For example, various terms were defined, including the word "project," which was defined to include all activities by governmental agencies involving the issuance of leases, permits, licenses, certificates or other entitlements for use to private developers.⁴⁰⁴ The amendment also added a new element to be considered in the impact report by requiring a statement which must discuss the growth-inducing impact of the proposed action.⁴⁰⁵

The amendment also cleared up some ambiguities concerning the collection of data. Whereas the federal courts in *Calvert Cliffs*⁴⁰⁶ and *Green County*⁴⁰⁷ had held that the federal agencies must collect their own data independently, section 21160 of CEQA now provides that the governmental agency may require the applicant to submit data and information, or to actually prepare the environmental impact report. Section 21089 answers the question of who should bear the costs incurred in preparation of the report, for it provides that the governmental agency may charge the applicant the reasonable costs of its preparation. The economic consequence of this added cost to small developers may have a catastrophic effect in terms of competitive advantage. Furthermore, even though it is reasonable to assume that the large, well financed developers will be able to absorb this additional front-end cost, it would be unreasonable to conclude that the cost will not be passed on to the ultimate buyers or users of the development, particularly in light of any reduced competition.

401. Letter from John D. Hoffman, Staff Attorney for the Sierra Club Legal Defense Fund, Inc. to John R. Dwyer, Jr., February 28, 1973.

402. *Id.*

403. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21171 (West Supp. 1974).

404. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21065 (West Supp. 1974). This essentially codified the holding in *Friends of Mammoth*, and expanded it to include the permit granting activities of state agencies as well.

405. Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21100 (West Supp. 1974).

406. 449 F.2d 1109 (D.C. Cir. 1971).

407. 455 F.2d 412 (2d Cir. 1972).

Obviously there are costs associated with any legislation such as CEQA, but it is for the legislature to decide when benefits outweigh those costs. This issue is dependent upon whether the environmentally beneficial effect of requiring the preparation of an impact report outweighs the total economic consequences: (1) to the governmental agency involved in preparing or commenting on an environmental impact report; (2) to the real estate, construction, and lending industries; (3) to labor; and (4) to the ultimate consumer.

In analyzing the beneficial effects of the impact statements, one other factor must be considered. None of the NEPA-type statutes provide citizens with a clear substantive right to enjoin an agency from issuing a permit for a development that will cause irreparable and irreversible harm to the environment, even when such adverse consequences can be mitigated.⁴⁰⁸ If an agency prepares and considers a thorough impact report, there apparently is no remedy for a citizen, other than alleging that the agency official abused his discretion under the Federal Administrative Procedure Act⁴⁰⁹ and similar state standards. However, violation of clean air and water standards might provide citizens with a remedy.⁴¹⁰

Although *Friends of Mammoth* did not present the question of substantive rights, the court commented that if adverse environmental consequences could be mitigated, the development should not be approved.⁴¹¹ The court did hold that the approving agency must prepare a written statement of the "supportive facts" on which the agency made its decision.⁴¹² One might infer a substantive effect by combining the dicta with the holding, and conclude that the impact report should be the controlling factor when agencies approve private developments.

Guidelines for compliance with CEQA were finally issued on February 3, 1973, more than two years after the Act was passed.⁴¹³ This lethargy, which had given rise to much uncertainty and resulting litigation and economic loss, could have benefited the environmentalists if the court's dicta, concerning substantive rights, had been incorporated into its decision or followed by another court. Unfortunately this was not done.

One particularly noteworthy issue presented by the guidelines is whether the word "environment" should be limited to physical conditions as suggested in section 21060.5. In the cover letter transmitting the guidelines, the Secretary for Resources pointed out that section 21083(c),

408. See section III, A, 3 *supra*.

409. 5 U.S.C. § 702 (1970).

410. See section III note 298 *supra* and accompanying text.

411. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 262 n.8, 502 P.2d 1049, 1059 n.8, 104 Cal. Rptr. 761, 771 n.8 (1972).

412. *Id.* at 270, 502 P.2d at 1065, 101 Cal. Rptr. at 777.

413. Guidelines for Implementation of the California Environmental Quality Act of 1970, were issued by the Resources Agency of California on Feb. 3, 1973.

which spoke of adverse effects on human beings, and section 21100(g), dealing with growth-inducing impacts, indicated that the legislature did not intend to limit "environment" to physical effects. The probable result of this construction will be that courts will require future environmental impact reports to contain a cost-benefit analysis which balances the socio-economic benefits of a development against the adverse effects on human beings because of damage done to the physical environment. Thus, consideration of the environment is perhaps the principal benefit of NEPA-type statutes, but this benefit must also be weighed against the socio-economic costs of the legislation before its true value or effectiveness can be determined.

B. Florida's Regulatory Problem

Florida, with its extensive coastline and wetlands, its incredible population growth and development, and its continuing water problem, is long overdue for effective land-use and enlightened environmental legislation. Hopefully, the Florida legislators will be able to learn from the experiences of other states as well as from the federal environmental legislation and eventually adopt what will be the model for environmental legislation in years to come.

Perhaps Florida's concern for pollution control and environmental quality can best be illustrated by the fact that over two hundred bills concerning ecological problems were considered by the 1971 sessions of the Florida legislature.⁴¹⁴ Of these, thirty were passed⁴¹⁵ and they ranged from the permit powers of the Pollution Control Department⁴¹⁶ to junkyard control⁴¹⁷ and regulations on stone crabs.⁴¹⁸

Article II, section 7 of the Florida Constitution clearly establishes Florida's policy to conserve and protect natural resources and scenic beauty, and to abate air, water, and noise pollution. In spite of the simplicity of this charge, there is a tremendous proliferation and fragmentation of the responsibility for enforcing the varied, complex, and overlapping regulations. For example:

- (1) Florida Statutes, chapter 403 charges the Pollution Control Department with a permit function in the areas of air and water pollution,⁴¹⁹ ocean outfall or disposal wells for sanitary sewage disposal⁴²⁰ or industrial waste treatment,⁴²¹ and the importation of aquatic plants or seeds.⁴²²

414. Preliminary Staff Study for the Florida Subcommittee on Environmental Affairs and National Resources Management, at 10 (Aug. 1971).

415. *Id.*

416. FLA. STAT. § 403.087 (1973).

417. FLA. STAT. § 339.241 (1973).

418. FLA. STAT. § 370.13 (1973).

419. FLA. STAT. § 403.061(13) (1973).

420. FLA. STAT. § 403.085(1) (1973).

421. FLA. STAT. § 403.085 (1973).

422. FLA. STAT. § 403.271 (1973).

- (2) The Natural Resources Department and its division of interior resources are charged with a permit function for any coastal construction,⁴²³ for construction and operation of certain types of canals,⁴²⁴ for drilling or exploring for oil,⁴²⁵ for extracting minerals from the land,⁴²⁶ for operating a terminal facility,⁴²⁷ and for dredge or fill activities;⁴²⁸ and the department has the responsibility of organizing flood control districts and establishing water levels in all state waters.⁴²⁹
- (3) The Transportation Department is charged with preserving and enhancing the environment and conserving natural resources including scenic, historical and recreation assets through proper planning of transportation facilities.⁴³⁰
- (4) The Board of Trustees of the Internal Improvement Trust Fund is charged with a permit function for any construction of islands or extension of lands bordering on or in navigable waters in the state,⁴³¹ and for any extraction of minerals, timber, water⁴³² or petroleum⁴³³ from state land.

The foregoing is but a brief sample of the myriad of agencies and statutory provisions that attempt to further the state's environmental policy as set out in the constitution. The status of effectiveness of Florida's complex regulatory system is further burdened by additional complications introduced by the overlapping regulations administered by each of the different agencies.

On the brighter side, Florida has recently made some very important but long-overdue policy decisions for effective land development regulations.⁴³⁴

1. THE FLORIDA ENVIRONMENTAL LAND AND WATER MANAGEMENT ACT OF 1972

The most notable step forward was the enactment of The Florida Environmental Land and Water Management Act of 1972.⁴³⁵ The Act

423. FLA. STAT. § 370.02(2)(d) (1973), and FLA. STAT. § 161.041 (1973).

424. FLA. STAT. § 373.194(1) (1973), and FLA. STAT. § 374.051(1) (1973).

425. FLA. STAT. § 377.242(1) (1973).

426. FLA. STAT. § 377.242(2) (1973).

427. FLA. STAT. § 376.06(1) (1973).

428. FLA. STAT. § 370.033 (1973).

429. FLA. STAT. § 378.01 (1973).

430. FLA. STAT. § 334.02 (1973).

431. FLA. STAT. § 253.124(1) (1973).

432. FLA. STAT. § 253.45(1) (1973).

433. FLA. STAT. § 253.47 (1973).

434. Address by Ernest R. Bartley, AIP Planning Consultant to the Florida Environmental Land Management Study Committee, ELMS Committee Miami Marriott meeting, June 11, 1973. In Mr. Bartley's absence, Mr. Daniel O'Connell, Executive Director of the ELMS Committee, read the address.

435. Fla. Stat. § 380.012 *et seq.* (1973).

declares that the state has proper concerns in land development and that the state will accept its responsibility to guide growth and development in order to protect the environment of the state.⁴³⁶

Florida's approach to the problem of environmental protection under this Act is different from the NEPA-type statutes. It focuses on the "positive goal of proposing land development regulations and a land resource management system which encourages environmental protection consistent with a sound economic pattern of well planned development."⁴³⁷

The Act establishes an administrative commission,⁴³⁸ a state land planning agency,⁴³⁹ and regional planning agencies⁴⁴⁰ to administer its provisions. The state land planning agency may recommend to the administrative commission specific areas of critical state concern.⁴⁴¹ Once land is designated as such, no person can undertake a development there,⁴⁴² unless approval is given by the local government.⁴⁴³ However, before approval the local government must insure that the development complies with the land development regulations for the area.⁴⁴⁴ Before this statute developments had to be submitted and approved by the state land planning agency.⁴⁴⁵

If a developer wishes to begin a project in an area not of critical state concern, the Act will not affect him unless the development will be one of regional impact.⁴⁴⁶ These developments are defined as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety or welfare of citizens of more than one county."⁴⁴⁷ The guidelines, which will be discussed later, outline several types of developments with regional impact,⁴⁴⁸ and provide that if a developer is in doubt, he may request a binding letter of interpretation from the state land planning agency.⁴⁴⁹ If the development is one of regional impact, section 380.06(5)-(11) sets forth a procedure that must be followed if the developer wishes to undertake the project. It is noteworthy that these procedures require the regional planning agency to prepare and submit to the local government a report with recommendations on the regional impact of the proposed development.⁴⁵⁰

436. *Id.*

437. Fla. ELMS Comm., Interim Rep. to the Fla. Legis., at 5 (March 1973).

438. FLA. STAT. § 380.07(1) (1973).

439. FLA. STAT. § 380.07(2) (1973).

440. FLA. STAT. § 380.07(2) (1973).

441. FLA. STAT. § 380.05 (1973).

442. FLA. STAT. § 380.05(13) (1973).

443. FLA. STAT. § 380.06(10) (1973).

444. FLA. STAT. § 380.06(10) (1973).

445. FLA. STAT. § 380.05(5) (1973).

446. FLA. STAT. § 380.06 (1973).

447. FLA. STAT. § 380.06(1) (1973).

448. See Rules, Fla. Admin. Comm'n 22F-1.01 and 22F-2.01 to .12 March 7, 1973), effective July 1, 1973, implementing Fla. Stat. §§ 380.04, .06, and .10 (Supp. 1972).

449. FLA. STAT. § 380.06(4)(a) (1973).

450. FLA. STAT. § 380.06(8) (1973).

This report is analogous to an environmental impact statement in that the regional agency must consider the impact on the environment,⁴⁵¹ the economy,⁴⁵² water availability and waste disposal,⁴⁵³ public transportation facilities,⁴⁵⁴ and availability of housing.⁴⁵⁵ Since the burden of preparing the report is on the regional planning agency⁴⁵⁶ rather than the developer, perhaps it is more analogous to NEPA than to CEQA. However, there does seem to be some room for an interpretation that would allow the agency to charge the applicant reasonable costs for its preparation.⁴⁵⁷

Once the report is submitted to the local government, that agency must consider the extent to which the development: (1) unreasonably interferes with the objectives of the state land development plan; (2) is consistent with the local land development plan; and (3) is consistent with the report and recommendations of the regional land planning agency.⁴⁵⁸ Although the local government may approve a development contrary to the recommendations contained in the regional agency's report, section 380.07(11) could be used to give a much more substantive effect to the impact report than that provided in the California statute. In other words, the courts could impose a duty on the local agency to consider the report on the regional impact in good faith. Thus the courts could effectively achieve what the *Friends of Mammoth* court suggested in dicta, to prohibit approval of any development if the adverse environmental consequences could be mitigated.⁴⁵⁹

It should also be noted that Florida Statutes section 380 (1973) also provides for a speedy administrative appeal of the local orders to the Florida Land and Water Adjudicatory Commission (the governor and cabinet), which has the power to override such an order. Although there is a movement to limit the review to *denying* such orders, as the provision currently stands, the commission has the power to require siting of unpopular but regionally beneficial and necessary projects such as nuclear power plants, low cost housing and industrial plants.

The Act also created an Environmental Land Management Study Committee (ELMS).⁴⁶⁰ This committee was charged with the responsibility of studying

all facets of land resource management and land development
regulation with a view toward insuring that Florida's land use

451. FLA. STAT. § 380.06(8)(a) (1973).

452. FLA. STAT. § 380.06(8)(b) (1973).

453. FLA. STAT. § 380.06(8)(c) (1973).

454. FLA. STAT. § 380.06(8)(d) (1973).

455. FLA. STAT. § 380.06(8)(e) (1973).

456. FLA. STAT. § 380.06(8) (1973).

457. *Id.* This inference could be drawn by a court because the Act makes no reference as to who should bear the cost.

458. FLA. STAT. § 380.07(11)(a)-(c) (1973).

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

460. FLA. STAT. § 380.09(1) (1973).

laws give the highest quality of human amenities and environmental protection consistent with a sound and economic pattern of well planned development, and shall recommend such new legislation or amendments to existing legislation as are needed to achieve that goal.⁴⁶¹

The ELMS committee was additionally charged with the duty under Florida Statutes section 380.09(5) (Supp. 1972) of submitting a report to the governor and legislature, covering, *inter alia*, review of other relevant state-commissioned studies and reports. Although not specifically delegated the duty, the ELMS committee, in conjunction with the state land planning agency, prepared the initial standards and guidelines which were adopted by the administrative commission⁴⁶² and approved by the legislature on March 7, 1973.⁴⁶³

2. ANALYSIS OF THE FLORIDA ACT

In analyzing the ultimate weaknesses and strengths of the Florida approach, the key will be the performance of the ELMS committee and how forcefully it can present its conclusions and recommendations to the legislature.

At the initial meeting of the ELMS committee in June 1972, the Governor put forth a challenge to the community to show Florida how the state can continue to enjoy solid economic growth and at the same time preserve and enhance its unique natural resources. He stressed the positive purpose of the committee "to encourage environmental protection consistent with a sound and economic pattern of well-planned development."⁴⁶⁴

But even with such a broad charge, several weaknesses have become apparent. Although the Act was extremely liberal in its definition of what types of activities are included in the term "development,"⁴⁶⁵ ELMS was severely restrictive in defining the very vital concept of what developments were to be presumed to have a regional impact.⁴⁶⁶ For example, only twelve different types of developments are listed in the guidelines as developments of regional impact,⁴⁶⁷ and for one reason or another, no mention was made as to whether the list of twelve was inclusive or not. Quite possibly, the courts will treat the twelve as all inclusive.

Even though the list purports to contain developments of regional

461. FLA. STAT. § 380.09(2) (1973).

462. As required by FLA. STAT. § 380.06(2) (1973).

463. As required by FLA. STAT. § 380.10(1) (1973).

464. The Fla. ELMS Comm., Interim Rep. to Governor, at 1 (Dec. 1972).

465. FLA. STAT. § 380.04 (1973).

466. See Rules, Fla. Admin. Comm'n 22F-2.01 to .12 (March 7, 1973).

467. The developments listed in Rules, Fla. Admin. Comm'n 22F-2.01 to .12 (March 7, 1973), include such developments as airports, electrical generating facilities, hospitals, and petroleum storage facilities.

impact, the standards were set at such a high level that developers (other than Disney) can work around them easily. For example the list includes residential developments.⁴⁶⁸ Yet, under ELMS standards, in counties such as Dade with population in excess of 500,000, only developments of 3,000 dwelling units or more are considered to be developments of regional impact.⁴⁶⁹ It would certainly behoove a developer to limit his development to 2,999 units, because the committee has declared that there will be no substantial regional effect below 3,000 units. When questioned on this conservative position taken by the committee, Mr. Daniel O'Connell, Executive Director of ELMS, responded that the levels were set high to give the responsible agencies some experience until proper financing and staffing is provided at the regional levels.⁴⁷⁰ Perhaps a more candid answer would have been that land use planning is policy and policy cannot be divorced from politics.⁴⁷¹ It may be naive to hope that the committee members will be able to rise above the back-room elements of politics, but if they do not, their credibility and effectiveness with the legislature will be of marginal value. Possible evidence of their effectiveness to date was the response received in a request for funding. The committee recommended that the regional agencies be funded to the level of 1.2 million dollars. The legislature only provided \$450,000.00.⁴⁷²

Consequently, the regional planning agencies which have the responsibility of preparing the environmental impact reports, must begin work understaffed and short of funds. Perhaps Daniel O'Connell's response, that the definitions of what were developments of regional impact were restrictively set to give experience until proper financing was provided, will prove to be a fortunate decision.

Even though the effectiveness of Florida's Environmental Land and Water Management Act will depend primarily upon the effectiveness of ELMS, the Act itself has several apparent weaknesses from the viewpoint of an environmentalist.

First, the Act has no provision that guarantees standing to private citizens or groups to challenge the decision of state or local agencies, even where a serious irreversible environmental effect will occur. The legislature may have relied on the provisions of the Florida Environmental Protection Act of 1971 to provide standing.⁴⁷³ However, that Act

468. Rules, Fla. Admin. Comm'n 22F-2.10 (March 7, 1973).

469. *Id.*

470. This response was given by Mr. O'Connell during a public question and answer discussion period at the ELMS Committee meeting at the Miami Marriott Hotel, June 12, 1973.

471. See R. BABCOCK, *THE ZONING GAME* (1966); See generally Hagman, *Race, Poverty, and Planning and Development Control Law: Past, Present and Future*, in *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 470 (1971).

472. Address by Allan Milledge, Chairman of the ELMS Committee, ELMS Committee Miami Marriott meeting, June 11, 1973.

473. FLA. STAT. § 403.412 (1973).

may be of no benefit to private citizens as an effective device to get a court to weigh environmental costs against the developers' right to develop if the local approving agency has actually considered the regional agencies report and recommendations,⁴⁷⁴ since it provides that the doctrine of *res judicata* shall apply.⁴⁷⁵ Thus, even though private citizens have a right to intervene *prior* to the agency's decision, it seems that if the local agency adhered to the procedural steps of Florida Statutes chapter 380 and awarded a permit, citizens would have no cause of action under the Environmental Protection Act of 1971.

Whether or not this conclusion is correct, the Florida legislature should clarify the ambiguous relationship between chapters 380 and 403.412 of the Florida Statutes, so that citizens, developers, and the courts will understand the rights involved. There seems to be a need for some degree of certainty other than waiting to see if the courts will give a substantive effect to the environmental report and require the local agency to follow the regional agency's recommendations.

The uncertainty of the present statute has definite economic costs that should be considered by the legislature. However, such costs are beyond the scope of this paper. It must be noted that some efforts were made by the draftsmen of the Florida Act of 1972⁴⁷⁶ to give a higher degree of certainty than NEPA or CEQA. For example, section 380.06(4)(a) allows a developer to request a binding letter of interpretation if he is in doubt whether his development will be one of regional impact. On its face a Florida developer appears to be in a more favorable position than a California developer or one who comes under NEPA. However, Federal Securities Law provides for a similar device which is scarcely used, since even if a favorable ruling is rendered, slight changes will destroy the binding effect. Therefore, unless the provision is administered fairly, and proper safeguards are set up, the legislature has done little more than throw the poor dog a bone.

C. *Significant Developments in Other States*

The Maine Site Location and Development Law⁴⁷⁷ requires developers of tracts with more than 20 acres in area to notify the state's Environmental Improvement Commission before commencing construction or operation.⁴⁷⁸ The theory behind the law is that because sizable developments have a great capacity to do environmental harm if placed in an improper region, location of a development is too important a decision to be left to a private party who is motivated out of economic

474. FLA. STAT. § 380.06(11)(c) (1973).

475. FLA. STAT. § 403.412(4) (1973).

476. The Florida Environmental Land & Water Management Act of 1972, FLA. STAT. § 380.012 *et seq.* (1973).

477. ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1973).

478. *Id.* at § 482.

considerations alone. Thus, the state, under its police powers, is granted authority to regulate the placement of large developments.⁴⁷⁹ The developer is charged with the duty of notifying "in writing of his intent and of the nature and location of the development, together with such information as the commission may by regulations require."⁴⁸⁰ Notice and hearing are provided for in case the commission is not notified and wishes to proceed against the developer.⁴⁸¹

The major difference between the Maine and Florida Acts lies in the definition of the size of a project which is large enough to have sufficient potential of environmental harm to justify the intervention of the government in the decision of where to locate the development. In this respect, Maine looks to the area to be covered by the project,⁴⁸² and Florida concentrates on the number of units to be built.⁴⁸³ It is questionable whether either standard accomplishes the purpose of subjecting all potentially damaging projects to governmental review while not subjecting small developments to an unnecessary amount of paper work.

The Maine Act was recently upheld as constitutional by the Supreme Judicial Court of Maine in *In Re Spring Valley Development*.⁴⁸⁴ There the owner of a 92 acre tract of land was ordered, after a hearing by the Environmental Improvement Commission, to halt development of a subdivision until it applied for and received approval by the Commission as provided for in the Act.

First, the court found that the Act applied to residential developments, including the mere subdivisions of lands for the future building of homes. It then addressed the question of whether the Act was constitutional under the police powers of the state.

It seems self-evident in these times of increased awareness of the relationship of the environment to human health and welfare that the state may act—if it acts properly—to conserve the quality of air, soil and water.

To do so the state may justifiably limit the use which some owners may make of their property. . . .⁴⁸⁵

The court then examined whether the state had exercised its authority in a proper manner. It found that the Act was constitutional as applied to a mere subdivider because the connection between the purpose of the Act and its applications to the subdivider was clear and reasonable. It also rejected the developer's argument that to set the threshold for application of the Act at 20 acres was a denial of equal protection. The court did find one part of the Act to be unconstitutional. It said that in

479. *In re Spring Valley Development*, 300 A.2d 736, 749 (Me. 1973).

480. ME. REV. STAT. ANN. tit. 38, § 483 (Supp. 1973).

481. *Id.*

482. *Id.* at § 482(2).

483. See note 469 *supra* and accompanying text.

484. 300 A.2d 736 (Me. 1973).

485. *Id.* at 746.

determining whether a development would harm the environment, the commission could not take the possibility of depreciation of property value into consideration because property value does not have a close enough connection with the purpose of the Act.

This decision is of some importance because it demonstrates that a land use planning law does not necessarily have to run afoul of the fifth amendment. Here, the court rejected the contention that the application of the Act to a subdeveloper was a taking without compensation. However, the only certain effect of the Act in this case was that the land could not be subdivided and sold according to its present plan without the approval of the Commission. It would be a different question if the developer was restrained from developing the land at all. Since taking is a term of art, it remains to be seen how much the court will allow land use to be restrained in the name of preserving the environment, without requiring payment of compensation.

Another example of how a general environmental protection statute might be applied to a land development was presented in *Irish v. Green*.⁴⁸⁶ There, a developer was enjoined from building a 745 unit residential housing project unless three court imposed conditions were met. The plaintiffs had filed suit under Michigan's Environmental Protection Act of 1970⁴⁸⁷ which allows any person or other legal entity to maintain an action for protection of the state's natural resources.

Here, it was shown that the development, if completed as planned, would result in pollution of the water supply because of the extraordinary underground flow of water. The court held that if more than 40% of the development was completed there must be a central sewage and water supply installed. It also required that an improved access road would have to be opened to preserve a parallel scenic road that would otherwise be the only access to the development.

This decision demonstrates the utility of a general purpose environmental law for controlling land-use abuses. Compared with the California, Florida, and Maine acts outlined above, its operation appears to be much less complex. First, no government management agency is directly created by the Act to control land use. This saves the taxpayers the money required to operate the agency and it also saves developers the funds needed to hire lawyers to comply with a more elaborate system of regulation. Second, land developers are not restricted in choices of action by bureaucratic guidelines. Thus, the market determines the use of the land up to the point that an ecologically detrimental proposed use raises such an adverse reaction that an individual brings suit. The net effect of such a law should be to impose legal-environmental costs only on those who actually threaten the environment.

Upon the foregoing analysis one might conclude that the public

486. 4 ENVIR. L. REP. 1404 (Mich. Cir. Ct. Emmet Cty. 1972).

487. MICH. COMP. LAWS ANN. § 691.1201 (Supp. 1973-74).

would be better served by a scheme of environmental laws which would protect the environment mainly through the authorization of citizen suits. This analysis, however, is deficient in a number of respects. First, the cost calculation fails because it does not take into account the possibility that organizations opposed to any kind of growth will bring suit under color of the statute to enjoin any major development, regardless of what effect it will have on the land resources involved. Thus, "nuisance" suits would encompass more developments and generate unnecessary costs. The second flaw in the analysis is that it does not take into account the need for uniform action in protecting areas of critical environmental concern, such as wetlands. This lack of uniformity, where such uniformity is needed, is an additional cost to be added to the lawsuit method of protection. The final shortcoming, which is somewhat tied to the lack of uniformity, is the uncertainty inherent in a scheme of regulation which is based on citizen suits. Not only is the developer faced with the possibility of "nuisance" suits, but he is also without a set of standards which would detail the types of projects to be avoided in a given area so as to avoid degrading the environment and being subjected to court action.

Obviously, one of the lessons to be learned from the analysis of the laws discussed above is that a more thorough understanding of the social and economic effects of environmental legislation is required if the benefits of a legislative system for protecting our land resources is to outweigh its costs. Furthermore, a better understanding of the nature of the problem with which we are dealing must be developed.

V. NATIONAL LAND USE MANAGEMENT—A NEW APPROACH

Two years ago, Russell Train, Chairman of the CEQ, called land use "the most important environmental issue remaining substantially unaddressed as a matter of national policy."⁴⁸⁸ Since that statement was made, considerable efforts, such as those discussed in the previous section, have been made to include land-use regulation as part of the existing system of environmental controls. Also, several pieces of legislation have been introduced in Congress,⁴⁸⁹ and one bill in particular, S. 268,⁴⁹⁰ has had some success. Sponsored by Senator Jackson and others, the bill was passed by the Senate in each of the past two years, but failed to pass the House, presumably because the issues of the limitations imposed by the fourteenth amendment and the degree of sanctions to be imposed for non-compliance by the states were not resolved.

Briefly, the bill would provide for the establishment of a new agency under the Secretary of the Interior to administer a series of

488. COUNCIL ON ENVIRONMENTAL QUALITY, 4th ANNUAL REPORT 122 (1973).

489. See, e.g., S. Doc. No. 268, 93d Cong., 1st Sess. (1973); H.R. Doc. No. 7211, 92d Cong., 2d Sess. (1972); H.R. Doc. No. 10294, 93d Cong., 1st Sess. (1973).

490. S. Doc. No. 268, 93d Cong., 1st Sess. (1973). For a summary of the bill, see 4 ENVIR. L. REP. CURRENT DEVS. 123 (1973).

grants-in-aid to the states. The agency would be responsible for making studies of land resources, developing a standard system for cataloging such resources, developing a federal land-use information and data center, and monitoring the methods adopted by state and local governments to develop adequate statewide land-use planning processes and subsequently land-use programs to meet the requirements for continued eligibility for grants. Basically, the land-use planning process comprises the action to be taken by states in establishing a permanent program to deal with the use of their land. The concept of the process is the essence of the bill and will be examined in detail because it demonstrates the complexity of the considerations which must go into forming a unitary approach to land management.

First, the process would include the preparation of inventories of the state's resources, including both its natural resources and its human resources available for the establishment of management programs. Tied closely to these inventories are projections of the needs of the state, including agricultural, industrial, recreational, transportation, energy and economic considerations. In other words, a complete study would have to be made of the supply of *all* of the state's resources, both natural and human, and a projection would be made of the total demand from all sources to be placed on those resources. This shows the recognition by the drafters of the bill that in order for any management program to be successful, it must be conducted by people who have an adequate arsenal of information. In terms of environmental management, this concept has been too often overlooked in the past. However, it must be realized that the collection of all of the information specified above will require an enormous amount of funding. And it must also be realized that if the bill is eventually passed, and is underfunded, the net result may be that decisions will be made which are based on incomplete data. Such decisions usually create as many problems as they solve.

The second major element in the process is the development of the capability to identify environmentally significant resources and to control proposed actions which pose a threat to those resources. Thus, the state is required to identify areas of "critical environmental concern" and must demonstrate that it can, pursuant to its police powers, prevent all development which threatens the integrity of these areas. Along the same line, the state must also demonstrate that it has the machinery available to identify large scale development of more than local impact and to ensure that such development is not at odds with the state land-use program. It is the enforcement of these provisions which poses the fourteenth amendment problem.

The final elements of the process deal with funds for training government personnel to handle the program and for methods of coordinating the interests of the home state with those of the federal government, other states, and private interests that are affected by the development

of the land-use planning process. These provisions ensure that the programs for federally owned lands will be in harmony with state use of lands which are contiguous with the federal lands. They also provide a continuity of land-use patterns between different states, a feature which is critical if a national land-use management system is to be achieved.

As mentioned before, the land-use planning process is the procedure of organizing a permanent land management program. The bill gives the states five years to develop a program which embodies most of the features of the planning process.

The previous discussion should emphasize the enormous costs involved in implementing a bill having provisions this complex. As might be expected, it has evoked a great deal of controversy in the Congress. Senator Jackson described the bill as "the nation's last chance to preserve and invigorate local land use decision-making and insure that basic property rights are not infringed by bureaucrats in places as far removed as Washington, D.C."⁴⁹¹ Opponents have said that if enacted, the bill would be an administrative nightmare, that it would shift too much power to the federal government, that it would hinder utilization of underground resources, and that it places too much power in the Environmental Protection Agency, which has a veto power over appropriations if a state's plan is not in accord with EPA goals.⁴⁹²

Every piece of legislation has its proponents and opponents, so the presence of diverging views is not unique in this case. However, the nature of the arguments indicates that there are some problems which should be dealt with before a land management act becomes law. First, the drafters must be certain that the correct inter-governmental balance is achieved between federal, state and local units. Otherwise, the regulatory input will not balance the desires of the different interest groups with the need for ecological protection. Second, the drafters should commission a study to determine the optimal procedures for balancing the resources with social goals. If a hastily drafted bill becomes law, bureaucratic shortcomings could prevent those goals from being achieved by creating an imbalance in input from the various sectors of society having an interest in the use of a particular resource. It should be remembered that a land management program will substitute another governmental control over the free market. Excessive costs involved in the operation of this control mechanism would certainly aid special interest groups in emasculating the law and could seriously harm the environmental movement. Environmental laws are already becoming a scapegoat for the energy crisis, but a poorly drafted land management bill has the capacity of causing even greater outcry. This country has a much stronger heritage of private ownership and use of land than it does in the ownership of the family automobile.

491. 4 ENVIR. L. REP. CURRENT DEVS. 216 (1973).

492. *Id.*

VI. CONCLUSION

Effective land management will involve a combination of federal, state, and local controls in order to minimize regulatory costs and maximize protection and efficient use of resources. To accomplish this cooperation, it is necessary to fully understand the management role of each governmental unit. After this is understood, it will then be necessary to repeal old laws and redistribute traditional government functions in accordance with the master plan.

To this end, it appears that the proper role for the federal government in land management is twofold. First, it should set up very broad guidelines for states to follow in organizing their land-use programs. Second, it should perform those functions such as data collection and regional coordination which are more efficiently performed by a governmental unit having broad powers. Thus, a land-use management bill considered by Congress should include provisions which consolidate the land-use functions of all other federal laws related to pollution, federal lands, energy, transportation, and procedure. From the framework of these existing laws, and other primarily federal considerations, guidelines should be issued which require the states to operate their land management programs in harmony with these objectives.

Each state should be required to have one governmental unit responsible for all aspects of land-use management including conservation of natural resources, overall housing and building standards, and all licensing functions related to land use. This agency should have the power to institute regional planning to coordinate multi-county areas affected, and to control those projects which have more than a local impact. Of utmost importance would be the power to protect areas of critical environmental concern by limiting or completely prohibiting development, or by setting maximum population densities in certain regions. However, if the areas of critical environmental concern were immediately identified, developers would be forewarned and future developments could be placed in such a way to minimize the impact on these areas. While there would be the temporary cost of dealing with the taking aspect of the fourteenth amendment, this cost will be outweighed in the long run by public information made available by the state which will aid the private sector to plan more efficiently.

The largest impact of a statewide oriented land-use management program will be felt on the local level of government because many traditional functions will be curtailed or severely restricted. For example, the presence of a zoning type power in a state agency will probably curtail zoning by local government to some extent for the sake of consistency. Ideally, local zoning as it now operates should end for a variety of reasons. First, it has usually failed to preserve the integrity of a neighborhood as variances have been granted and non-conforming uses

tolerated where expediency permitted. Second, because of changing economic conditions, the early plans have become outdated and require revision. Thus, it can probably be said that zoning has had much less to do with the use of land than market forces, and in fact has added a cost which has probably outweighed any benefits. As to protection of environmental and aesthetic values, local zoning will no longer be needed if there is a proper state land-use program.

Aside from the zoning question, which will probably arouse a great deal of political controversy, the local government should still perform a variety of functions. It should perform ministerial administration of a centralized code which dispenses all federal and state permits, including but not limited to building, dredge and fill, sewage disposal, bridge and road construction, and utility connections. It should also perform a quasi-zoning function by controlling population density in certain areas for the purpose of maintaining adequate water supplies, open space, roads and other utilities.

A final consideration which would greatly affect local government is a change in the tax structure. The property tax has been attacked as being an incentive for municipalities to encourage uses of the land which tend to raise the value of land and hence the tax base. This form of incentive can have adverse environmental consequences because open space, pathland, and aesthetic considerations are not as appealing as land use for business and industry. While the end result of complete development is a higher income, there can be an appreciable decrease in the quality of life without the presence of land which is unused in the tax sense. Perhaps if the property tax were replaced with graduated state income tax, the same amount of money could be raised and distributed to local government to fund the same functions as is done by the property tax.

Effective land-use management is not a matter of choice, but a necessity if the quality of life is to be maintained and our natural resources conserved. At no time in the past has there been the inherent necessity and capacity for society to create such enormous changes in the use of land in such a short period of time. If these actions are not controlled in an orderly and rational manner, irreplaceable natural resources will be lost, and the loss will not be fully realized until it is too late. State and federal land-use management programs will require an adjustment by individuals and may, in their infancy, slow the rate of growth in certain areas of the economy. Those who think that this cost is too great should ponder the risk of proceeding in the same haphazard, unorganized manner in which we have been operating. Prime farmland is among the natural resources endangered by rampant development. How much can we safely afford to pave over and still meet the demand for food thirty years from now?