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of negligence, the insurance company would be more likely to settle with an injured client than would an attorney who must bear the cost individually, and who regards the charge as an attack on his professional competence. At least in theory, an insurance company's best interests are served by paying clearly valid claims and avoiding the cost of litigation. In addition, the attorney would be protected against malpractice claims, and the public image of the bar would be enhanced.

In any event, the client now faces a variety of legal obstacles in recovering for legal malpractice. The best interests of the bar would be served by strengthening the client's protection against professional failing.

KENDALL R. VICKERS

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## LEGISLATION UNDER NEPA: PLAINTIFFS' PHYRRHIC VICTORIES DRAW CONGRESSIONAL FIRE, JUDICIAL WARNINGS\*

### I. INTRODUCTION

Many of those actively concerned with the preservation of the environment believe that litigation is the most effective, if not the only, means of stopping ecologically destructive federal projects.<sup>1</sup> In recent years groups like the Sierra Club, the Izaak Walton League, and the Environmental Defense Fund have tackled big federal agencies like the Army Corps of Engineers [hereinafter the Corps]. This environmental litigation encompasses adversary proceedings before both courts and administrative agencies, but increasingly the search has been for a judicial forum. This stems in part from a pervasive cynicism toward the federal agencies and their processes. The agencies' continued responsiveness to special interest groups and the lack of meaningful environmental input into their administrative processes has resulted in a situation in which "the problem, therefore, of restoration and maintenance of a livable environment is, to a large extent, the problem of the control of administrative agencies by the courts."<sup>2</sup> Once viewed as a panacea by liberals who felt strangled by the conservatism of the judiciary, the agencies are now characterized by bureaucratic concern with perpetuating and enlarging themselves.<sup>3</sup> Perhaps a symptom of this phenomenon is the alarming extent of cross-fertilization of personnel between the agencies and the industrial giants they were intended to regulate.<sup>4</sup>

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\* This paper was prepared for the Environmental Law Essay Contest sponsored by the Association of Trial Lawyers of America.

1. Large, *Is Anybody Listening? The Problem of Access in Environmental Litigation*, 1972 WIS. L. REV. 62, 113; Rheingold, *A Primer of Environmental Litigation*, 38 BROOKLYN L. REV. 113, 114 (1970).

2. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 615 (1970).

3. Large, *supra* note 1, at 112-13.

4. *Id.* at 73 n.49. "The Department of Agriculture has traded Clifford Hardin to the Ralston Purina Co. for Earl Butz. The swap was player-for-player, involving no draft choices." *Id.*

The significance of the National Environmental Policy Act of 1969<sup>5</sup> [hereinafter NEPA] is not only that it provides a judicial forum for particular grievances of the environmental plaintiff, but that it also permits the courts to open the administrative process to citizens and citizen groups.<sup>6</sup> Before NEPA the conservationist who tried to enjoin agency action through the courts found himself handicapped by legal doctrines that foreclosed a hearing on the merits. Ironically, some of these doctrines were developed to insulate administrative agencies from review by the "handmaidens of vested interests,"<sup>7</sup> the courts. The federal agency, in tune conceptually with corporate economic interests and armed with its own administrative procedure, has become fully equipped to insure that corporate economic values will override environmental concerns. This does not result from "evil" intent so much as from the agency's "mind set."<sup>8</sup>

Procedural obstacles have traditionally stymied the efforts of citizen groups to halt environment-damaging federal projects. The question whether agency action was subject to judicial review as well as questions of standing, sovereign immunity, laches and waiver could keep the plaintiff from ever having the merits decided. At best, the plaintiff could lose precious time because he had failed to exhaust his administrative remedies or because the agency's order was not final.<sup>9</sup>

The environmental plaintiff faced other obstacles as well. In contending, for example, that a proposed project should be abandoned because of potential environmental damage, the plaintiff must, of course, allege the violation of some right. Attempts have been made to ground such a right on the Constitution, on a public trust theory, on trespass, nuisance, or on an appropriate statute. If the plaintiff successfully stated a cause of action, he still had to bear the burden of proof and persuasion. When the defendant was a large federal agency with most of the facts and data at its disposal, the plaintiff was rather like a "David challenging Goliath."<sup>10</sup>

5. 42 U.S.C. §§ 4321-47 (1970).

6. This has been called "the single most important development in recent administrative law." Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFF. L. REV. 231, 235 (1970).

7. Large, *supra* note 1, at 113.

8. A prime example of this thinking can be seen in one of the oldest and most powerful exploiters of the environment, the Army Corps of Engineers which traces its origin to 1802. The Corps undoubtedly has a long list of credits, but apparently it has become so immersed in what it does that now "it is guided by one dominant concern: it thinks 'big water.'" LAYCOCK, *THE DILIGENT DESTROYERS* 5 (Ballentine 1970).

9. The final action rule prevents a claimant from going to court before agency procedure is completed, whereas the exhaustion rule, when applied after the agency has taken final action, may keep the plaintiff out of court indefinitely because he failed to pursue every administrative remedy available to him. See *McKart v. United States*, 395 U.S. 185 (1969).

10. Sive, *supra* note 2, at 617, 618.. So far none of the procedural aids available to plaintiffs in stockholder's derivative actions, such as discovery procedures or counsel fees for a successful party, are available to environmental plaintiffs. See *Citizens for a Safe Environment v. AEC*, 6 ERC 1158 (3d Cir. 1974) (plaintiffs-intervenors in administrative hearing who had been denied financial assistance by the agency were unable to obtain immediate review of this denial).

Moreover, it has been almost obligatory for plaintiffs to seek a temporary injunction because judicial review is, due to the doctrine of final agency action, postponed until final administrative approval of the project, and the project, once approved, will commence at once. To obtain a temporary injunction the plaintiff must show that he is likely to prevail on the merits,<sup>11</sup> a difficult task without data and expertise. Even if the temporary injunction issued it might be too late; if the project is substantially underway, courts may be hesitant to curtail it. The courts have denied relief in some cases, not because the plaintiff has failed to convince the court of the harm, but because the project has progressed to the stage where the investment in the project outweighs the substantial detrimental effects on the environment,<sup>12</sup> or because there is no feasible alternative to the environmentally destructive plan.<sup>13</sup>

## II. NEPA TO THE RESCUE: PROCEDURAL ASSISTANCE

NEPA obviates many of the environmental plaintiff's procedural difficulties. The Act, which has been called the most effective statutory tool in litigation,<sup>14</sup> has at its core section 102.<sup>15</sup> Section 102 directs federal agencies planning major federal projects which will significantly affect the environment to provide a detailed environmental impact statement [hereinafter EIS], which must include, among other things: a) the project's anticipated impact on the environment; b) a cost-benefit analysis which shows that the benefits of the project outweigh its costs;<sup>16</sup> and c) a discussion of alternatives

11. *Yakus v. United States*, 321 U.S. 414, 440 (1944). See 7 MOORE'S FED. PRACTICE § 65.04(3).

12. *E.g.*, *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971). Compare *Sierra Club v. Froehlke*, 477 F.2d 891 (5th Cir. 1973) (characterized the dam as part of a larger project, thus making the percentage of the project completed small enough to grant injunction). *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404, 412 (W.D. Va. 1973) (decision not affected by fact project was 30 percent completed).

13. *Folmar v. Elliott Coal Mining Co.*, 441 Pa. 592, 272 A.2d 910 (1971).

14. Note, 3 *Ecol. L. Q.* 173 (1973). *But see* Large, *supra* note 1, at 111: "[T]he only effective federal legislation on the books is the Rivers and Harbors Act, [33 U.S.C. 401 et. seq. (1970)], a 70-year-old piece of legislation, originally aimed at navigation."

15. 42 U.S.C. § 4332 (1970). Senator Jackson, sponsor of the bill, called it the "action-forcing procedure" of the Act. (115 Cong. Rec. 40416 (1969)). The heart of the section is § 102 (2) (B):

The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies in the federal government shall

(B) Identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical consideration.

16. 42 U.S.C. § 4332(c) (1970) requires that the agency consider unavoidable adverse environmental effects, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, any irreversible and irretrievable commitments of resources which would be involved.

to the project.<sup>17</sup> The inadequacy of the EIS has been the most successful basis for challenging agency action. After an initial period of uncertainty,<sup>18</sup> the courts have consistently held that "the Section 102 duties are not inherently flexible."<sup>19</sup> The Act is at least "an environmental full disclosure law,"<sup>20</sup> but as explored herein, it could be more.

NEPA is of unquestioned significance in making the courts available to the environmentalist. It creates jurisdiction<sup>21</sup> and in itself establishes standing for well-established conservation groups.<sup>22</sup> Standing requirements are met when the injury plaintiffs allege is "arguably within the zone of interest to be protected by a pertinent statute."<sup>23</sup> Because NEPA grants the public the right to participate in the section 102 process, this right expands the category of injurable interests.

In the past we have often accepted the nonsequitur that where all are the intended beneficiaries of an interest, none has standing to protect it . . . Both logic and experience support the emerging view that an interest so fundamental that all are within the protected class must be permitted its champion. The National Environmental Policy Act has created such an interest.<sup>24</sup>

Judicial review of agency action is authorized because the Act neither prohibits judicial review nor is "agency action committed to agency discretion by law."<sup>25</sup> The defense of sovereign immunity has been virtually eliminated because the allegation that an agency has failed to comply with the procedural requirements of NEPA, if sustained, means that the agency has acted in excess of its statutory authority and is thus vulnerable to suit.<sup>26</sup>

17. This includes the alternative of doing nothing. *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749, 761 (E.D. Ark. 1971), modified 470 F.2d 289 (8th Cir. 1972).

18. See *Daly v. Volpe*, 350 F. Supp. 252, 257 (W.D. Wash. 1972).

19. *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

20. *Environmental Defense Fund, Inc. v. Corps of Engineers* 325 F. Supp. 749, 759 (E.D. Ark. 1971).

21. *Delaware v. Pennsylvania N.Y. Cent. Trans. Co.*, 323 F. Supp. 487 (D. Del. 1971).

22. *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356 (E.D. N.C. 1972); *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971).

23. *Association of Data Processing v. Camp*, 397 U.S. 150 (1970). Apparently, *Sierra Club v. Morton*, 405 U.S. 727 (1972), denying standing, has turned out to be a "pleading case" rather than a retreat from *Data Processing*. The suit has been refiled and an individual plaintiff added to the suit.

24. E. Harts & J. Hanks, *An Environmental Bill of Rights: The Citizen and the National Environmental Policy Act of 1969*, 24 *RUTGERS L. REV.* 230, 248 (1970). *Accord* *Cape May Co. Chapter, Izaak Walton League v. Macchia*, 329 F. Supp. 504, 513 (D.N.J. 1971).

25. *Administrative Procedure Act* § 10, 5 U.S.C. §§ 701, 702 (1972).

26. *Environmental Defense Fund, Inc. v. Corps of Engineers* 325 F. Supp. 749, 763 (E.D. Ark. 1971); *vacated and appeal dismissed*, 342 F. Supp. 1211 (E.D. Ark. 1972), cert. denied, 412 U.S. 931 (1973). *Cape May County Chap. v. Macchia*, 329 F. Supp. 504, 513 (D.N.J. 1971) (paramount interests of NEPA outweigh sovereign immunity); *Brooks v. Volpe*, 329 F. Supp. 118 (W.D. Wash. 1971), *rev'd*, 460 F.2d 1193 (9th Cir. 1972). There are still cases which hold otherwise, e.g., *U.S. ex rel Sierra Club v. Hickel*, Civil No. C 70-971 (N.D. Ohio, Sept. 16, 1971).

Laches may not be a viable defense because the strong public interest behind NEPA outweighs competing considerations.<sup>27</sup> The doctrine of exhaustion of administrative remedies would appear, logically, to be inappropriate to NEPA proceedings, which by definition involve the court early, but it is still viable, as in the final order doctrine.<sup>28</sup> One court justified the use of the latter doctrine by noting that it was the agency that ran the risk of reversal by not allowing plaintiff's testimony at its hearing.<sup>29</sup> The plaintiffs, however, are the ones likely to be aggrieved by sham proceedings "moving" to an illusory final order<sup>30</sup> because the project may be already under construction.

One might suppose that under NEPA injunctive relief would be more readily available. Since section 102 establishes "a strict standard,"<sup>31</sup> failure to prepare an adequate EIS would seem to mandate enjoining the project. This has in fact been the view of most courts, resulting in a modification of the requirement that the plaintiff show that he is likely to prevail on the merits.<sup>32</sup> Since the amount of work already completed on the project is considered in determining whether to abandon a project, a number of courts recognize that this means that the test of "irreparable harm" to the plaintiff is met whenever an agency ignores the "no construction" alternatives in its EIS and continues to build.<sup>33</sup> The general rule has been that under NEPA "unless there are strong equities to the contrary," projects proceeding in violation of the statute should be enjoined until the mandate of the law has

27. *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972); *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356 (E.D. N.C. 1972); *Sierra Club v. Hardin*, 325 F. Supp. 99, 117 (D. Alas. 1971) (all causes of action except that based on NEPA barred by laches); *Cape May County Chap. v. Macchia*, 329 F. Supp. 504, 515 (D. N.J. 1971).

28. The exhaustion doctrine was recognized in *New York v. United States*, 337 F. Supp. 150, 164 (E.D.N.Y. 1972). The final order doctrine barred the plaintiffs in *Citizens for Safe Environment v. AEC* (6 BNA 1974 *Environmental Rep. Cases* 1158 (2d Cir. 1973)); *Greene Co. Planning Board v. FPC*, 6 BNA 1974 *Environmental Rep. Cases* 1172 (2d Cir. 1973).

29. *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970).

30. *Greene Co. Planning Bd. v. FPC*, 6 BNA 1974 *Environmental Rep. Cases* 1172 (2d Cir. 1973), in which the dissent stated that when agencies use procedural cat and mouse games in an effort to avoid final agency action, the agency's action should be considered sufficiently final to permit review. *Accord*, *Environmental Defense Fund, Inc. v. Rucklehaus*, 439 F.2d 584 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (final order doctrine rejected because deleterious to plaintiff's rights).

31. *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749, 756 (E.D. Ark. 1971), *vacated and appeal dismissed*, 342 F. Supp. 1211 (E.D. Ark. 1972), *cert. denied*, 412 U.S. 931 (1973).

32. *Lathan v. Volpe*, 455 F.2d 1111, 1116 (9th Cir. 1971) (reversing district court because of strong Congressional policy behind NEPA). *Accord*, *Northside Tenants Rights Coalition v. Volpe*, 346 F. Supp. 244 (E.D. Wis. 1972). *Cf.* *Citizens Association of Georgetown v. Washington*, 6 BNA 1974 *Environmental Rep. Cases* 1171 (D. D.C. 1974) (failure to show likelihood of prevailing on merits precludes injunction).

33. *Scherr v. Volpe*, 336 F. Supp. 882, 886 (W.D. Wisc. 1971), *aff'd* 466 F.2d 1027 (7th Cir. 1972).

been met.<sup>34</sup> A recent district court opinion,<sup>35</sup> however, held that the NEPA does not require that an injunction issue upon a finding that the EIS is inadequate. This decision creates serious problems for the plaintiff, since the EIS is improved (slowly) while the project goes on (quickly), thus lessening plaintiff's chances of prevailing on the merits.<sup>36</sup>

### III. INADEQUACY OF THE EIS: SUBSTANTIVE RIGHTS

Section 102 of NEPA and the creation of the Council on Environmental Quality, which sets environmental guidelines for the agencies to consider throughout their processes, create a substantive basis for environmental lawsuits. The heart of the act is the requirement of ecological evaluation by the agency; the issue is whether the agency has properly performed this evaluation. Agencies have tried to avoid the EIS requirement by arguing that the project was not a "major federal project,"<sup>37</sup> that the agency was excluded from the scope of section 102 because it was an agency dedicated to environmental concerns,<sup>38</sup> or that its ultimate decision was no longer subject to review because Congress had already appropriated funds.<sup>39</sup> For the most part the courts have rejected these arguments.

Once it has been determined that an EIS is required, there is some disagreement whether the agency can delegate its preparation to another body.<sup>40</sup> A very recent decision approved an EIS prepared by the agency even though the data used was collected by the very company that was to develop the project!<sup>41</sup>

A more significant question is what role the environmental plaintiff plays with regard to the preparation of the EIS. Surely, he is not to research it and write it for the agency, but there is an uncomfortable feeling from some decisions that if the plaintiff does not raise a particular issue, it

34. *Brooks v. Volpe*, 350 F. Supp. 269, 282 (W.D. Wash. 1972), *aff'd*, 487 F.2d 1344 (9th Cir. 1973). *Accord*, *Environmental Defense Fund, Inc. v. TVA*, 468 F. Supp. 1164 (6th Cir. 1972); *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1332 (S.D. Tex. 1973); *Stop H-3 Ass'n. v. Volpe*, 353 F. Supp. 14, 18 (D. Haw. 1972); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749, 753 (E.D. Ark. 1971), *vacated and appeal dismissed*, 342 F. Supp. 1211 (E.D. Ark. 1972), *cert. denied*, 412 U.S. 931 (1973).

35. *Environmental Defense Fund v. Froehlke*, 348 F. Supp. 338, 353 (W.D. Mo. 1972) (*Truman Dam*), *aff'd*, 477 F.2d 1033 (8th Cir. 1973).

36. *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1321 (S.D. Tex. 1973) (court found that the Corps explicitly chose to continue the project full speed ahead while working on an acceptable EIS).

37. *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 464 (5th Cir. 1973).

38. *Kalur v. Resor*, 335 F. Supp. 1 (D. D.C. 1971).

39. *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 353 (8th Cir. 1972) (*Cache River*) (appropriations act cannot change substantive provisions of NEPA); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971).

40. *Delegation disapproved in Green County Planning Board v. Federal Power Comm'n*, 455 F.2d 412, 420 (2d Cir. 1971), *cert. denied*, 409 U.S. 849 (1972); *Conservation Soc'y v. Secretary of Transportation*, 362 F. Supp. 627, 631 (D. Vt. 1973). *Delegation was approved in Lathan v. Volpe*, 455 F.2d 1111, 1112 (9th Cir. 1972).

41. *Florida Audubon Society v. Calloway*, 6 BNA *Environmental Rep. Cases* 1320, 1325 (M.D. Fla. 1974).

may later be found to have been waived.<sup>42</sup> Few decisions discuss the burden of proof under NEPA, but one case logically contends that it should be placed on the agency once the plaintiff has made a prima facie case of a violation of the Act.<sup>43</sup>

The substantive question of adequacy of an EIS has, surprisingly, been judged under rather exacting standards by the courts. Although not always comfortable in doing so, the courts have enjoined construction until agencies complied to the requirements of the Act in more than pro forma fashion.<sup>44</sup> Judicial power to force the agencies to produce "weightier" documents is not, of course, the same thing as reviewing the desirability of the project itself and possibly compelling its abandonment. In dealing with federal agencies financed with tax dollars it is naive to suppose that mere delay—by insisting on an adequate EIS—will force the agency's abandonment of the project. This is illustrated by an Eighth Circuit decision involving the Gillham Dam, where the district court rejected one cursory EIS after another until the Corps understood that the requirements of section 102 were "not flexible, but established a strict standard of procedure."<sup>45</sup> The original EIS contained only 12 pages of discussion, whereas the final EIS as approved by the district court

comprised 2000 pages of discussion and included voluminous appendices containing: all correspondence and transcripts of public meetings; photographs; environmental elements . . . listings of the literature cited in the discussion; court proceedings and transcripts . . . .<sup>46</sup>

Even a good EIS which discloses the total ecological impact of a proposed project and all possible alternatives does not represent a "victory" for the plaintiff. The Gillham Dam project remained substantially the same after all the litigation. Nevertheless, after the Eighth Circuit had imposed strict standards for compliance with NEPA, enthusiasm ran high, causing one writer to state that "no single piece of legislation has had as great an impact on environmental improvement as the NEPA of 1969."<sup>47</sup> Others were not so optimistic, predicting that when the agency "read[s] the relevant provisions [it] will discover that NEPA is a full disclosure Act, not pro-

42. *Environmental Defense Fund, Inc. v. Froehke*, 6 BNA *Environmental Rep. Cases* 1074, 1080 (W.D. Mo. 1973) (see text accompanying note 95 *infra*). Cf. *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (rejecting AEC argument that if not raised by party, objection is waived).

43. *Sierra Club v. Froehke*, 359 F. Supp. 1289, 1334 (S.D. Tex. 1973), citing as authority for its position *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971); *Ely v. Velde*, 451 F.2d 1130, 1138-39 (4th Cir. 1971).

44. See e.g., *Lathan v. Volpe*, 350 F. Supp. 262 (W.D. Wash. 1972): "These requirements have been imposed by Congress; this court did not legislate them, but it is duty bound to enforce them". *Id.* at 265.

45. *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971).

46. Emery, *NEPA of 1969, An Attempt to Tailor the Governmental Processes to Environmental Needs*, 26 OKLA. L. REV. 141, 153 (1973). Mr. Emery is District Counsel for the Tulsa District Corps of Engineers.

47. Note, 3 *ECOL. L. Q.* 173 (1973).



tective, which requires no more of the agencies than they append to their decisions a statement of the impact of their project on the environment."<sup>48</sup>

Disclosing the environmental impact of and feasible alternatives to a given project does not guarantee that these concerns will be seriously considered by the ultimate decision makers. There must be a weighing process, the result of which must demonstrate, by its cost-benefit analysis, that the project is justified. Common sense tells us, however, that no matters how sophisticated and improved the analysis used by the agency is,<sup>49</sup> comparing a project's anticipated benefits with the anticipated ecological damage is like comparing apples and oranges. A celebrated apologist for administrative experts gives the following rationale for his belief that environmental decision making is best made by agencies rather than courts:

It may not be worthwhile to spend an additional \$50,000,000 to save \$5,000,000 worth of fish . . . . What will be required is a process . . . under the auspices of an administrative machinery [to] develop acceptable standards . . . .<sup>50</sup>

This ignores the fact that the administrative agency may be reluctant, if not incapable, of extending its analysis beyond hard economic data. Further, there is already evidence of actual manipulation of the cost-benefit analysis by agencies. The Corps has been known to place a monetary value on environmental benefits which would result from their project and yet place no monetary value on the economic loss which would result from the destruction of other environmental values.<sup>51</sup>

If the Army Corps of Engineers is determined to spend more money and energy to avoid the requirements of NEPA instead of furthering its fundamental philosophy, more will be required than mere disclosure. NEPA contemplates that disclosure to the public and to the decision makers be accompanied by a broader outlook in the agency itself,<sup>52</sup> but apparently the Corps has found it difficult to pursue objective analysis and has lost "the ability to decide *not* to build a dam."<sup>53</sup> Some have argued, however, that the full disclosure requirement itself, while mandating no particular kind of project, does produce, even if begrudgingly, an increased consciousness about concerns traditionally ignored by agencies.<sup>54</sup> Others believe that it is naive to expect a pure biologist who joins the Corps not to become a member of the "big water" team:

If we want the fullest data to be presented, we must ensure that the data gatherers have no incentives that bind them regularly to any particular client group. . . . [W]e can expect laws like NEPA to produce little except fodder for law review writers and contracts for that newest of growth industries, environmental consulting.<sup>55</sup>

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48. Large, *supra* note 1, at 112.

49. Emery, *supra* note 46, at 155.

50. Jaffe, *supra* note 6, at 235 (1970).

51. *Sierra Club v. Froehle*, 359 F. Supp. 1289, 1368-69 (S.D. Tex. 1973).

52. *See* 42 U.S.C. § 4332 (A), (B) (1970).

53. Laycock, *supra* note 8, at 7 (emphasis added).

54. Emery, *supra* note 46, at 155.

55. Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239, 248 (1973).

#### IV. SCOPE OF REVIEW UNDER NEPA

If the preparation of the EIS is merely a delaying tactic for the defendant, then the court's scope of review is of special urgency. Assuming that the agency's EIS sets out the environmental effects of a given project and also discusses alternatives, yet, based on its cost-benefit analysis, decides to go on with the project as planned, to what extent may the court review this decision?

In the original *Gillham Dam* decision the district court held that section 102 was intended to give the courts the right to determine whether the procedural requirements of the act were met, but also said that section 101 did not create substantive rights to "safe, healthful . . . pleasing surrounding."<sup>56</sup> This was in line with the judicial approach to section 101 taken in other courts, applying the language as precatory, rather than directory.<sup>57</sup> After the original *Gillham Dam* decision, however, a number of district courts began to recognize that section 101(b),<sup>58</sup> combined with section 102, allowed for at least limited judicial review of the agency decision.<sup>59</sup> This expanded measure of review under section 101 was expressed in an important decision by the Court of Appeals for the District of Columbia:

[R]eviewing courts probably cannot reverse a substantive decision on its merits under Section 101, unless it be shown that actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.<sup>60</sup>

The same court went further in *Committee For Nuclear Responsibility, Inc. v. Seaborg*,<sup>61</sup> holding that despite the fact the EIS had been found adequate and that Congress had already appropriated the funds, NEPA mandates review on the merits under section 101 throughout the process of the project planning.<sup>62</sup> In 1972 the Eighth Circuit, in *Environmental Defense*

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56. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749, 755 (E.D. Ark. 1971).

57. *Bucklein v. Volpe*, 2 BNA *Environmental Rep. Cases* 1082, 1083 (N.D. Cal. 1970).

58. This section, 42 U.S.C. § 4331(b), sets out the policy of the Act, declaring it to be the "continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans [to] . . .

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

(3) attain the widest range of beneficial uses of the environment without degradation . . .

(4) preserve important historic, cultural, and natural aspects of our national heritage . . .

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

59. *Akers v. Resor*, 339 F. Supp. 1375 (W.D. Tenn. 1972); *Brooks v. Volpe*, 350 F. Supp. 269 (W.D. Wash. 1972); *Lathan v. Volpe*, 350 F. Supp. 262 (W.D. Wash. 1972).

60. *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

61. 463 F.2d 783 (D.C. Cir. 1971).

62. *Id.* at 785. See *Environmental Defense Fund, Inc. v. Froehke*, 473 F.2d 346 (8th Cir. 1972) (appropriation act is mere pro tan to approval, unless Con-

*Fund, Inc. v. Corps of Engineers*,<sup>63</sup> the Gillham Dam case, affirmed the lower court's finding that the Corps' EIS was adequate (finally) under section 102, but reversed as to the scope of review which was to be afforded the agency's final decision on the project. The appellate court held that it was within its function to engage in a substantive inquiry to determine whether there has been a "clear error of judgment."<sup>64</sup> This view was also expressed in *Environmental Defense Fund, Inc. v. Froehlke*<sup>65</sup> (Cache River), and has been approved by the Fourth Circuit.<sup>66</sup> Although the Fifth Circuit appeared to reject such a scope of review in *Pizitz v. Volpe*,<sup>67</sup> a recent district court decision in the Fifth Circuit was the broadest review of a cost-benefit analysis so far undertaken by any court.<sup>68</sup> Focusing on the NEPA mandate to give "presently unquantified" environmental values appropriate consideration, the court closely scrutinized the quantitative analysis presented by the Corps, and found that it had ignored a duty that went beyond mere disclosure:

To the extent that NEPA does not articulate acceptable levels of air, water . . . this is an accurate position [that NEPA does not create substantial rights]. But to the extent that it would allow the agencies merely to disclose the likely harm without . . . a substantive effort to prevent or minimize environmental harm, it is not an accurate position of the role of the courts under NEPA . . . NEPA states indirectly, but affirmatively that under some circumstances . . . agencies must mitigate some and possibly all of the environmental impacts arising from a proposed project.<sup>69</sup>

This case marks the outer perimeter of judicial review of the agency's decision while setting the highest standard for agency responsibility.

#### V. BACKLASH: ". . . THE COURT TAKETH AWAY . . ."

As the scope of judicial review of agency decisions has expanded from merely imposing strict compliance with the procedural requirements of NEPA to a review of the merits of the project itself under the arbitrary and capricious standard, a legislative and judicial backlash appears to be building. A recent district court decision, *Environmental Defense Fund, Inc. v. Froehlke*<sup>70</sup> (Truman Dam), warned:

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gress exempts from the Act. One court has gone so far as to hold that expansion of a project during advanced planning was so great as to be unlawful without further authorization from Congress, but that court was reversed on appeal. *U.S. v. Acres*, 309 F. Supp. 887, *rev'd*, 432 F.2d 1286 (5th Cir. 1970). *But see Allison v. Froehlke*, 470 F.2d 1123 (5th Cir. 1972), for the proposition that substantial deviation from the original proposal warrants enjoining a project although already appropriated by Congress. *But cf. Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971), expressing the more widely held view that it is the sole prerogative of Congress to say that the Corps exceeded its authority and built a substantially different project.

63. 470 F.2d 289 (8th Cir. 1972).

64. *Id.* at 298.

65. 473 F.2d 346 (8th Cir. 1972).

66. *Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664 (4th Cir. 1973).

67. 467 F.2d 208 (5th Cir. 1972).

68. *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973).

69. *Id.* at 1339.

70. 6 BNA ENVIRONMENTAL REP. CASES 1074, 1079 (W.D. Mo. 1973).

'[C]hronic faultfinding' by itself will not invalidate an EIS, and if a detailed study has been made in accord with the requirements of NEPA, the duty of the court will then be to determine whether the decision to proceed was arbitrary and capricious and not whether another scientific study should be made.<sup>71</sup>

In *Froehlke* (Truman Dam), Judge Oliver acknowledged that limited review was available, but emphasized that the EIS would be found adequate if it discussed all the viable alternatives in sufficient detail to enable "reasonable and informed decision makers to fairly and intelligently decide whether or not they wished to continue the project in its present form."<sup>72</sup> This is not in itself a new concept,<sup>73</sup> but the case can be read as a retreat from more aggressive decisions which tackled the difficult task of demanding full compliance before a project could proceed. Although noting the stricter language of *Calvert Cliffs* and earlier Corps cases,<sup>74</sup> the court landed solidly on the proposition that "emotional environmentalism must be tempered with rational realism."<sup>75</sup>

One might hope that the quality of the Corps EIS's have improved so much that a judicial hard-line approach is now warranted to prevent plaintiffs from litigating mere nuisance objections. Yet, Professor Large may have been correct in his predictions not only as to the ultimate outcome of the Gillham Dam project, but as to the future Corps approach to the EIS.<sup>76</sup> That is, although the original EIS preparation in the earlier suits had been ridiculously, almost flagrantly, deficient, the Corps has perhaps learned to "play the game," thereby satisfying the courts and effectively bringing NEPA litigation to a grinding halt.

A close reading of the *Froehlke* (Truman Dam), however, indicates that the court was not so much influenced by the caliber of the EIS as it was by the political ramifications of the increased litigation that NEPA has produced. The court was particularly concerned with plaintiffs insistence that the Congressional policy articulated in NEPA should be given exclusive priority. The court mentioned the practical consequences which might flow from acceptance of such a notion—Congressional reversal.<sup>77</sup> The court, warning about possible Congressional disenchantment with NEPA, quoted a disgruntled Congressman from an article in the *New York Times*:<sup>78</sup>

71. *Id.* at 1078.

72. *Id.* at 1081.

73. *E.g.* Lathan v. Volpe, 350 F. Supp. 262, 269 (W.D. Wash. 1972):

"This court is fully aware that environmental laws may be misused by those who would like to see, not merely compliance by government officials with the law, but the disruption, delay and destruction of highway projects in general."

74. *E.g.*, "consideration of environmental matters must be more than a pro forma ritual . . ." *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1128 (D.C. Cir. 1971); "[P]urely mechanical compliance with the provisions of 102 is not sufficient to satisfy provisions of NEPA". *Environmental Defense Fund v. Corps of Engineers* 470 F.2d 289, 298 (8th Cir. 1972).

75. *Environmental Defense Fund, Inc. v. Froehlke*, 6 BNA ENVIRONMENTAL REP. CASES 1074, 1078 (W.D. Mo. 1973) quoting *Brooks v. Volpe*, 350 F. Supp. 269, 277 (W.D. Wash. 1972).

76. See Large, note 1 *supra*.

77. *Environmental Defense Fund, Inc. v. Froehlke*, 6 BNA ENVIRONMENTAL REP. CASES 1074, 1079 (W.D. Mo. 1973).

78. *Id.* at 1079, quoting *New York Times*, April 17, 1972.

I do not know how they (federal judges) go about resting these insipid and multitudinous suits filed in these courts.' Citing one project, in particular, that had been halted because the Army Corps of Engineers had failed to comply with the requirement of NEPA the same Congressman stated that the suit 'showed what a bunch of ignoramuses' were on the bench and the frivolous injunctions that were prepared to issue in environmental cases.<sup>79</sup>

Judge Oliver added that he did not mean "to suggest that courts should tailor their construction and application of NEPA to accommodate Congressional complaints. . . ." <sup>80</sup> Nevertheless, it was his view that "Congress did not intend to enact a statute which guaranteed that the views of plaintiffs in environmental cases would prevail over the considered judgment of the ultimate decision makers."<sup>81</sup> One wonders why, if Congressional complaints are not controlling, he included the Congressman's comments and why he does not substantiate his view of the legislative intent behind NEPA.

Judge Oliver's views would be easier to accept if one believed that he, like the agencies, had been captured by some special interest group, or as suggested earlier, that he had been truly impressed by a lengthy or weighty EIS. On the contrary, it would appear that the court was genuinely concerned with the result of the "apparent victory" in *San Antonio Conservation Society v. Texas Highway Department*<sup>82</sup> and similar cases. As that court had predicted: "litigation may result in substantial legislative retreat on the part of Congress."<sup>83</sup> Conservatism and fear of legislative reprisal marked the opinion: "The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation."<sup>84</sup>

*Froehlke* narrows judicial review and broadens what will constitute "adequacy" under section 102 for the EIS. The court avoided review of the cost-benefit analysis on the assumption that the ultimate resolution of cost-benefit questions was for the decision makers, not the courts. The plaintiffs had alleged that the Corps' claim that reservoir development would "increase the rate of growth of per capita income of residents of counties where such reservoirs are located" was unsubstantiated.<sup>85</sup> The court claimed that it was "simply unrealistic" to assume that "this or any other Court is going to . . . resolve conflicts of this nature."<sup>86</sup> But the courts have resolved these same kinds of conflicts. In *Conservation Society v. Secretary of Transportation*<sup>87</sup> the court found that the EIS' prediction of economic gains to

79. *Environmental Defense Fund, Inc. v. Froehlke*, 6 BNA ENVIRONMENTAL REP. CASES 1074, 1079 (W.D. Mo. 1973).

80. *Id.*

81. *Id.*

82. 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972). Plaintiffs were successful in halting a proposed federal highway project in Texas based on the failure of the Secretary of Transportation to prepare an EIS.

83. 348 F. Supp. 338, 355 (W.D. Mo. 1972).

84. *Id.* at 358, *quoting* *Aberdeen & Rockfish R. Co. v. SCRAP*, 409 U.S. 1207, 1217 (1972).

85. *Environmental Defense Fund, Inc. v. Froehlke*, 6 BNA ENVIRONMENTAL REP. CASES 1074, 1077 (W.D. Mo. 1973).

86. *Id.*

87. 362 F. Supp. 627 (D. Vt. 1973).

the area was not supported by the evidence.<sup>88</sup> It can be argued that when a court cannot resolve conflicts of benefit and cost, as suggested by Judge Oliver, it is probably because the detailed support for the findings required by NEPA is not present. Since the court acknowledged that it must review the final decision under the arbitrary and capricious standard,<sup>89</sup> it cannot logically slacken the "not flexible" requirements of section 102 of detailed analysis all the way through the EIS. Without this detail in the EIS the "court cannot ascertain whether the administrative action taken was arbitrary or capricious."<sup>90</sup>

Perhaps the most distressing aspect of this decision is that the court relegated the environmental plaintiff to a minor, yet burdensome, role in the evolution of a given project. The court proposed that plaintiffs should concentrate on

the preparation of their comments on the draft EIS so that the final EIS document will clearly and accurately set forth their contentions in order that their views . . . may be given appropriate consideration by the decision makers at a later time.<sup>91</sup>

This statement implies that there is an affirmative duty on the part of the plaintiffs to get environmental considerations into the EIS. If this is what the court meant, it would represent real back-sliding. The court in *Calvert Cliffs* made it clear that the agency is the party responsible for getting environmental issues into the decision-making process.<sup>92</sup> This does not mean, of course, that a potential litigant may sit back and let the agency through all its actions, never offering any input as the EIS is being prepared, and then come into court and attack the EIS.

While insisting that "waiver" is not an appropriate doctrine in this area,<sup>93</sup> the court in *Froehlke* (Truman Dam) approved an earlier opinion which stated:

[When those commenting on the draft EIS] fail to make reference to the need for further discussion of a particular subject, then it is reasonable to take this fact into consideration in passing on any deficiency that is later alleged to exist in the treatment given the subject in the impact statement.<sup>94</sup>

88. See also *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973). But Cf. *Iowa Citizens v. Volpe*, 6 BNA ENVIRONMENTAL REP. CASES 1088 (8th Cir. 1973).

89. See text accompanying note 71 *supra*.

90. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972); *Brooks v. Volpe*, 350 F. Supp. 269, 276 (W.D. Wash. 1972).

91. *Environmental Defense Fund, Inc. v. Froehlke* 6 BNA ENVIRONMENTAL REP. CASES 1074, 1080 (W.D. Mo. 1973).

92. *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

93. In most cases these environmentalists are teachers, laborers, professors, housewives, etc., who must spend the vast majority of their employment time in occupations other than watching the agencies. On the other hand, the agency employees spend their employment time performing tasks related to the very subject matter and activities upon which environmental issues are based.

*Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1335 (S.D. Tex. 1973).

94. *Natural Resources Defense Council v. TVA*, 5 BNA ENVIRONMENTAL REP. CASES 1669 (1973).

Such a principle appears to be uncomfortably similar to waiver.

Another implication of *Froehlke* is that the court's role in environmental litigation is mainly as a guarantor that the plaintiff's views will be included and passed on by the ultimate decision makers. In its earlier decision on the project the court had already retreated from the general position that an injunction was the appropriate remedy for inadequate EIS.<sup>95</sup> It is often argued that the courts are not the proper forum for deciding "hard problems of how much to pay for what."<sup>96</sup> But in view of the very technical and prolonged involvement of the courts in this type of law suit, the court is more likely to have both the expertise and objectivity than the bureaucrat upon whose signature the whole project rests.

## VI. CONCLUSION: THE ALTERNATIVES

If Congressmen are getting irked with litigation, so is the environmentalist becoming dismayed with the net result of these "pestiferous" suits. As always, there is no lack of theoretical alternatives. Those with faith in the administrative process believe that even if the agencies are currently "captured" by interest groups, they can once more become "effective organs for reform."<sup>97</sup> Others believe that as long as agencies have the dual mandate of environmental protection and economic development in their particular field, environmental concerns are bound to come out on the short end.<sup>98</sup> Because neither agencies nor courts have environmental expertise, it would seem that courts would at least be the fairer forum since they do not suffer from the dual mandate like the agency. A possible alternative is coordinating and expanding existing administrative agencies or creating a new agency whose constituency is conservational principles. For many, however, there is real doubt that any administrative procedure can take the place of litigation in the courts.<sup>99</sup>

The question that remains is what heed ought to be given to the advice of the court in *Froehlke* (Truman Dam)? Do environmental plaintiffs now run the risk of having the legislature pull the rug out from under their cause of action? Even if this is so, abandonment of the judicial forum should not result. Litigation is of immense value because it focuses maximum attention on major federal projects, attention which is often shunned by institutions like the Corps which would like the public's first awareness of a dam project to be at the ribbon-cutting ceremony.

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95. *Environmental Defense Fund, Inc. v. Froehlke*, 348 F. Supp. 338, 355 (W.D. Mo. 1972).

96. Jaffee, *The Administrative Agency and Environmental Control*, 20 *BUFF. L. REV.* 231, 235 (1970).

97. *Id.* at 231; Murphy, *The National Environmental Policy Act and the Licensing Process: Environmental Magna Carta or Coup de Grace*, 72 *COL. L. REV.* 963 (1972).

98. Oakes, *Environmental Litigation: Current Developments and Suggestions for the Future*, 5 *CONN. L. REV.* 531, 546 (1973).

99. Large, *Is Anybody Listening? The Problem of Access in Environmental Litigation*, 1972 *Wis. L. REV.* 62, 112: "If a Stewart Udall or Wally Hickel gets fired because he took his oath seriously and neglected to parcel out goods to timber, oil and coal industries, then plaintiffs and legislators cannot expect to erase a long-developed exploitation ethic."