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Kleppe v. Sierra Club, 427 U.S. 390 (1976)

Martha L. Harrell

doctrine, that land being put to a public use for which the present owner has been granted the power of eminent domain should not be usurped by another condemning authority, is furthered by the supreme court's new criteria; however, the criteria also serve the important function of limiting the doctrine's shield to those lands that are in actual use and necessary to the success of the public purpose for which the legislature granted the power of eminent domain.

CRAIG B. WILLIS

Environmental Law—NEPA—REGIONAL IMPACT STATEMENT IS NOT REQUIRED IN THE ABSENCE OF FORMAL PROPOSAL FOR REGIONAL ACTIVITY—*Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

Kleppe v. Sierra Club[1] concerned the applicability of the National Environmental Policy Act (NEPA)[2] to cumulative federal action in an area encompassing portions of four states: Wyoming, Montana, North Dakota, and South Dakota. Identified in the original complaint as the Northern Great Plains Region, the area contains an extremely rich basin of low sulfur coal.[3] The coal is easily accessible through strip mining. Recent energy demands make development of coal reserves a matter of vital public concern, but development of the Region's coal would have an extensive environmental impact.[4]

NEPA establishes a federal policy to maintain and restore the environment through all practicable means.[5] The act requires that environmental impact be a major factor in all federal agency decision-making; each agency report or recommendation on a proposed major federal action must include an environmental impact statement detailing the proposed action's impact, its effect on long-term productivity, and the extent to which resources will be irreversibly committed. The impact statement must also describe any unavoidable adverse effects and possible alternatives to the proposed action.[6]

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1. 427 U.S. 390 (1976), *rev'g* Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975).
2. 42 U.S.C. §§ 4331–4347 (1970).
3. The Northern Great Plains Region holds more than 48% of the nation's total coal reserve. Sierra Club v. Morton, 514 F.2d 856, 861 (D.C. Cir. 1975), *rev'd*, Kleppe v. Sierra Club, 427 U.S. 390 (1976).
4. 514 F.2d at 862.
5. National Environmental Policy Act (NEPA) § 101, 42 U.S.C. § 4331 (1970) states: [I]t is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
6. NEPA § 102(2)(C)(v), 42 U.S.C. § 4332(2)(C)(v) (1970).

Federal agency activity was essential to the exploitation of the Northern Great Plains coal reserve. Eighty-five percent of the region was under the jurisdiction of the Secretary of the Interior, who had already issued several mining leases for the region. Access to much of the region fell within the control of the Department of Agriculture and the United States Army.[7] It was not disputed that the individual leases and rights-of-way issued for the region required the preparation of impact statements, and four such separate statements had been prepared. In addition, the Department of Interior had prepared an impact statement covering its entire national coal leasing program.[8] But Sierra Club contended that the coal mining activity within the Northern Great Plains area required a *regional* impact statement as well.

In 1973 Sierra Club brought suit against the Departments of Interior, Agriculture, and the Army in the United States District Court for the District of Columbia. Declaratory and injunctive relief was sought.[9] The district court granted summary judgment for the agencies, and Sierra Club appealed to the United States Court of Appeals for the District of Columbia Circuit. Before ruling on the merits, the court of appeals issued a preliminary injunction against the approval of four mining leases in those areas for which separate impact statements had already been prepared.[10] After a hearing on the merits, the appellate court reversed the district court and outlined a four-part test for determining when judicial intervention to require preparation of regional impact statements was appropriate. The test required consideration of: (1) the likelihood that a program would be implemented and the proximity of such implementation; (2) the present availability of the information needed to determine the effects of implementation and the existence of alternatives; (3) the extent to which development of the program had already caused irretrievable commitments of resources and precluded options; and (4) the severity of environmental effects if the program were implemented.[11] Al-

7. The Department of Agriculture controls issuance of rights-of-way through national forests. The Army Corps of Engineers has jurisdiction over navigable waters. 514 F.2d at 864.

8. The national statement was incomplete when Sierra Club filed its original complaint. The final statement was issued in September 1975 and proposed a complex new leasing program. The new program is now being implemented. 427 U.S. at 398.

9. *Id.* at 394–95. Several mining companies, public utilities, natural gas companies, an Indian tribe, and a rancher were allowed to intervene. American Electric Power System v. Sierra Club, companion case to *Kleppe*, involved most of the original intervenors. 427 U.S. at 395.

10. Sierra Club v. Morton, 509 F.2d 533 (D.C. Cir. 1975) (issuing preliminary injunction).

11. Sierra Club v. Morton, 514 F.2d at 880. This test was actually first delineated in

though it found that the first and last of these factors were ripe for determination, the appellate court felt that consideration of the remaining two yielded inconclusive results. As a result, the court continued its injunction forbidding federal action in the region and ordered the agencies to report to the district court upon the completion of a regional study then being conducted.[12] The court of appeals refused to dissolve its injunction, and the United States Supreme Court granted both the agencies' motions for a stay of the injunction and their petition for certiorari.[13]

On review of the case, the Supreme Court reversed the court of appeals. The Court found that NEPA does not require an impact statement unless a proposal for regional development has been formulated. Absent a proposal for major federal action, the Court felt that any statement prepared would amount to little more than conjecture regarding environmental impact. The Supreme Court considered and rejected Sierra Club's claim that a regional impact statement was required because the individual projects in the Northern Great Plains Region were intimately related. The Court accepted the reasoning that several projects having a cumulative effect should be treated under a cumulative impact statement, but, absent a showing of arbitrariness, agency discretion as to whether a regional statement was necessary was presumed to be appropriately exercised. The Supreme Court also rejected the appellate court's premise that at some point during agency contemplation of a program, a federal court may require that preparation of an impact statement be initiated. The Court regarded the District of Columbia Circuit's four-part test as an unauthorized departure from the statutory language of NEPA. Because the statute makes no mention of balancing factors, the Court reasoned, no such balancing test is valid. Even if such a test were valid, the Court concluded that an injunction pending consideration of the test's four

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Scientists' Institute for Public Information (SIPI) v. AEC, 481 F.2d 1079, 1094 (D.C. Cir. 1973). A similar test was suggested in Hanley v. Kleindienst, 471 F.2d 823, 830–31 (2d Cir. 1972).

12. The result of the regional study, the "Northern Great Plains Resources Program," would—it was presumed—provide the information necessary for determination of the likelihood of the project's fruition and the extent of irretrievable commitments. 514 F.2d at 881–82.

13. 423 U.S. 1047 (1976). An amici brief was filed by 22 named states in support of Sierra Club's position. Joining Sierra Club in its assertion that only programmatic impact statements made at an early stage can meaningfully affect decisionmaking, the states also emphasized the importance of programmatic statements as an informational tool for affected states. ENVT'L L. REP. 65,339 (1976) (Document Service/Pending Litigation).

14. NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(c) (1970).

factors was improper absent any showing of harm or countervailing equities.[15]

Justice Marshall wrote a separate opinion in which Justice Brennan joined.[16] While Marshall largely concurred with the majority opinion, he dissented from the majority's rejection of the appellate court's four-part balancing test. Marshall felt that in rejecting the test, the majority restricted courts' ability to adequately effectuate NEPA. Injunctions issued after agency action has been proposed are insufficient to ensure early consideration of environmental factors. Marshall concluded that the four-part test was sufficiently narrow to protect federal agencies from undue interference, while allowing court intervention to require consideration of environmental factors during the development of a proposal.

The Supreme Court's treatment of NEPA in *Kleppe* reflects a notable shift from the previously broad construction of the statute. NEPA itself contains three sections, the second of which bears significantly upon the *Kleppe* decision.[17] Section 102 declares:

> [T]o the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall . . . [fulfill certain obligations, including preparation of a detailed impact statement, designed to make environmental considerations an essential part of agency decisionmaking].[18]

The act became law on January 1, 1970, under the Senate sponsorship of Henry Jackson and the House sponsorship of John Dingell.[19] Neither the original Senate bill nor the House bill included an "action-

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15. 427 U.S. at 407–08. The Supreme Court's treatment of the injunction seems to hinge on the failure of the circuit court to define clearly any inequity which would result if the injunction were not imposed. *Id.*. The dissolving of the injunction on this basis probably has no great precedential value and will not be treated further here.

16. *Id.* at 415.

17. The first part, Title I, § 101, is a national environmental policy statement. 42 U.S.C. § 4331. Title II establishes the Council on Environmental Quality (CEQ). 42 U.S.C. §§ 4342–4344. See note 49 *infra* for a description of CEQ's duties and authority.

18. NEPA § 102, 42 U.S.C. § 4332 (1970).

19. Senator Jackson chaired the Senate Committee on Interior and Insular Affairs, and Representative Dingell chaired the House Subcommittee on Fisheries and Wildlife Conservation of the Committee on Merchant Marine and Fisheries.

For a good summary of NEPA's legislative history, see F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 1–14 (1973); R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 10–35 (1976).

forcing" provision such as section 102.[20] The Senate bill was later amended, however, to include a provision which required federal agencies to make findings of environmental impact. This "findings" provision was eventually replaced in conference committee by the present section 102.[21] The replacement of the general findings requirement with the more explicit statement in section 102 reflects an intent by the bill's drafters to require a more than superficial consideration of the environment by federal agencies.[22]

Another conference committee amendment increased the scope of section 102. The phrase "to the fullest extent possible," which had originally modified only "the policies, regulations and public laws of the United States,"[23] was shifted to become the introductory phrase in the section. Thus, in the bill's final form, "to the fullest extent possible" also applied to those actions required of all federal agencies. In effect, the final form included a broad environmental mandate to be followed by all federal agencies unless specific authorization indicated otherwise. The changing of the phrase was interpreted in the Statement of House Managers, appended to the conference report:

> The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in [section 102 of NEPA] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. . . . Rather, the language in section 102 is intended to assure that . . . no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.[24]

20. S. 105, 91st Cong., 1st Sess., 115 CONG. REC. 3701 (1969); H.R. 12549, 91st Cong., 1st Sess., 115 CONG. REC. 17983 (1969).

21. This version of the bill, which also recognized that each person has a fundamental right to a healthful environment, was passed unanimously in the Senate. 115 CONG. REC. 19008–13 (1969). The latter provision was deleted in conference. STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE, appended to CONGRESS. REP. ON S. 1075, H.R. REP. NO. 91–765, 91st Cong., 1st Sess. 3 (Dec. 1969), *reprinted in* [1969] U.S. CODE CONG. & ADM. NEWS 2767, 2768–69 [hereinafter STATEMENT OF HOUSE MANAGERS].

22. The Senators apparently changed their position on the bill in the interim between Senate passage and conference committee consideration. This was probably a compromise with Senator Muskie. At least one source believes that the compromise was necessitated by a basic conflict between the Jackson view that the agencies should integrate environmental considerations into their procedures autonomously and the Muskie view that some external force would be necessary to make the agencies incorporate environmental concerns. R. LIROFF, *supra* note 19, at 18–20 (1976).

23. STATEMENT OF HOUSE MANAGERS, *supra* note 21, at 2769–70.

24. *Id.* at 2770. The amendment was originally presented as a compromise. Congress-

Once the modified bill was returned to the House and Senate floors, it was passed with brief debate and little opposition. No enforcement provision was included in the statute.[25] In early NEPA cases, the courts took an active role in enforcing NEPA.[26] The Supreme Court's use of an arbitrariness standard of review in *Kleppe*, however, may signal a more restricted judicial role in the future.

The standard of judicial review to be applied in NEPA cases was an early subject for court consideration. In *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,[27] the United States Court of Appeals for the District of Columbia Circuit used the reported views of the Senate and House conferees in its review of AEC procedures for consideration of environmental impact.[28] The phrase "to the fullest extent possible" was deemed by the court to set a high procedural standard, in contrast to the more flexible phrase "use of all practicable means consistent with other essential considerations" found in section 101 of NEPA.[29] Citing the Statement of House Managers, the court ruled that section 102 mandates full compliance with its directives unless such compliance is expressly prohibited by a pre-existing statute.[30] Such a clear procedural requirement, the court stated, created judicially enforceable rights. While an agency decision under section 101 may only be reviewable under an arbitrariness standard, "if the decision [under section 102] was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse."[31] Thus, the District of Columbia court regarded NEPA as creating a

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man Wayne Aspinall interpreted the amendment to require agencies to find that the requirements of NEPA prevailed over any existing agency authority to escape compliance. Senator Jackson's view, reflected in the STATEMENT OF HOUSE MANAGERS, won out. R. LIROFF, *supra* note 19, at 29.

25. The CEQ was created by the statute but given no enforcement authority. Many legislators apparently believed enforcement would fall to the Office of Management and Budget (OMB). OMB, however, never exercised any enforcement authority. *See* R. LIROFF, *supra* note 19, at 37–38.

26. The first United States appellate court consideration of NEPA was Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), a Fifth Circuit decision upholding the Secretary of the Army's power to deny a landfill permit for Boca Ciega Bay, Florida, on the basis of ecological considerations.

27. 449 F.2d 1109 (D.C. Cir. 1971).

28. The AEC procedures provided for consideration of environmental issues only when specifically raised by someone outside the Commission, and prohibited independent consideration of environmental impact by the AEC if other agencies' standards were satisfied. *Id.* at 1116–17.

29. 42 U.S.C. § 4331 (1970).

30. 449 F.2d at 1114–15.

31. *Id.* at 1115.

clear judicial mandate to enforce the procedural directives of section 102.

The Court of Appeals for the Eighth Circuit, in *Minnesota Public Interest Research Group v. Butz*,[32] recognized that two distinct standards of review could be applied in NEPA cases.[33] The Eighth Circuit stated that federal agency decisions to proceed with projects after adequate impact statements had been prepared would not be reversed unless those decisions were arbitrary, capricious, or unlawful.[34] Similarly, the Second Circuit had held that once a federal agency complies with the procedural mandates of section 102, a court will not overrule the agency's decision to proceed unless the decision is arbitrary and capricious.[35]

When reviewing the threshold decision of whether to prepare an impact statement, the Eighth Circuit applied not the arbitrariness standard but a standard of reasonableness. To determine whether an agency decision is reasonable, a court must closely examine the facts and circumstances surrounding the decision. The directive in section 102 that the agencies must consider environmental factors "to the fullest extent possible" requires that a court reviewing the threshold decision must consider the agency's good faith efforts. The decision whether to prepare an impact statement, the Eighth Circuit stated, was not so committed to agency discretion that the courts could not closely scrutinize the reasoning behind the decision.[36] In contrast, the Ninth Circuit in *Cady v. Morton*[37] felt that the proper standard should be that described by the Administrative Procedure Act for agency action found to be "without observance of procedure required by law."[38]

The Supreme Court in *Kleppe* applied neither the reasonableness

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32. 498 F.2d 1314 (8th Cir. 1974). The controversy in this case involved Forest Service timber sales in the Boundary Waters Canoe Area of Minnesota.

33. *See* 5 U.S.C. § 706(2) (1970), quoted in part in note 38 *infra*.

34. 498 F.2d at 1319.

35. Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 467–68 (2d Cir. 1971).

36. 498 F.2d at 1320. *See also* Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).

37. 527 F.2d 786 (9th Cir. 1975).

38. 527 F.2d at 793. Title 5 U.S.C. § 706 (1970) provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> . . . .
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> . . . .
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> (D) without observance of procedure required by law . . . .

standard of the Eighth Circuit nor the procedural standard of the Ninth Circuit. Instead, the agency decision not to prepare a regional impact study had only to meet the arbitrariness standard.[39] The Supreme Court may have restricted courts' authority to delve into the facts and circumstances surrounding an agency's decision not to prepare an impact statement by stating that it considered the less rigorous arbitrariness standard appropriate.[40]

Of greater potential impact is the Supreme Court's conclusion that, regardless of the appropriate standard for review, the time was not ripe to require the agencies to prepare an impact statement.[41] NEPA requires an impact statement whenever a federal agency becomes involved with "major Federal actions significantly affecting the quality of the human environment."[42] Much of the NEPA case law has turned on the meaning of the phrase "major Federal actions."

The issue has been resolved on a case-by-case basis, a major federal action being determined with reference to specific facts and circumstances rather than by application of a general definition.[43] Broadly, a major federal action is one that requires substantial planning, time, resources, or expenditure.[44] For example, agency leasing of submerged federal lands for private operations has been declared a major federal action which requires an impact statement.[45]

In *People of Enewetak v. Laird*,[46] the District Court of Hawaii, considering nuclear weapons testing on Enewetak Island, concluded that several related federal actions of minor individual impact may have a

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39. The applicability of the arbitrariness standard was conceded at oral argument. 427 U.S. 390, 412. In their briefs, the federal agencies stated that federal courts had unanimously held this to be the appropriate standard. Brief for Petitioners at 47.

40. The arbitrariness standard was previously adopted by the Seventh and Second Circuits. Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 229–30 (7th Cir. 1975); Hanly v. Kleindienst, 471 F.2d 823, 828–30 (2d Cir. 1972).

41. 427 U.S. at 405–06.

42. NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(c).

43. *See, e.g.*, Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971) (federal aid to construction of expressway across parkland); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) (issuance of a permit to fill in 11 acres of tideland in Boca Ciega Bay); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971) (construction of the Cross-Florida Barge Canal).

44. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (federal approval and funding of a watershed project); Citizens Organized to Defend the Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (S.D. Ohio 1972) (federal approval of a mining company permit to cross over an interstate highway).

45. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

46. 353 F. Supp. 811 (D. Hawaii 1973). Enewetak is a small Pacific atoll administered by the United States. The Enewetakese were removed so that the atoll could be used as a nuclear testing site. *Id.* at 813.

significant collective impact.[47] The court's decision turned on a recognition that, as each individual project progresses, federal investment of time, money, and other resources increases; and as the commitment of resources increases, the probability that the actions will be stopped decreases despite "environmental considerations."[48] If a series of *minor* actions having a joint impact may require an impact statement, it seems logical that a series of *major* actions should also require an impact statement.

The Council on Environmental Quality (CEQ)[49] recognized in its 1973 guidelines that federal action, whether major or minor, must not be viewed in isolation. Rather, the CEQ advised that federal agencies, in complying with NEPA, should view their actions in terms of cumulative impact.[50] The District of Columbia Circuit relied on these guidelines in *Scientists' Institute for Public Information [SIPI] v. AEC.*[51] The *SIPI* court stated that a single programmatic statement is appropriate when a new program being developed will include several actions. Therefore, the court required preparation of a cumulative impact statement for the entire national Liquid Metal Fast Breeder Reactor Program,[52] even though the program was still in the planning stages and individual statements were to be prepared for each proposed facility. The Congress intended NEPA to make environmental problems a vital concern in all aspects of federal decisionmaking, including proposals, policy statements, and expansions or revisions of ongoing programs.[53] The *SIPI* decision reflects a recognition that broad issues concerning an overall program may differ substantially from localized issues relevant to a single facility.[54]

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47. *Id.* at 821.

48. *Id.*; *accord*, Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971).

49. Specifically authorized functions of the CEQ include: advising the President; preparing annual environmental reports; appraising federal compliance with the policy statement of NEPA § 101; and doing environmental research. Additional CEQ duties were delineated in Executive Order 11514, 3 C.F.R. 271–72 (1974). CEQ guidelines for impact statements are not strictly binding on the agencies, but those guidelines have been highly persuasive for many courts. *See, e.g.*, Scientists' Inst. for Pub. Information, Inc. [SIPI] v. AEC, 481 F.2d 1079, 1088 (D.C. Cir. 1973); Greene County Planning Bd. v. FPC, 455 F.2d 412, 421 (2d Cir. 1972). For a good discussion of CEQ's role, see R. LIROFF, *supra* note 19, at 36–73.

50. 40 C.F.R. § 1500.6(d)(1) (1976).

51. 481 F.2d 1079 (D.C. Cir. 1973).

52. A liquid metal fast breeder reactor is a nuclear reactor which uses liquid sodium as a coolant and as a heat-transfer agent. *Id.* at 1083.

53. *Id.* at 1088.

54. Preparation of a programmatic impact statement does not satisfy the requirement for impact statements on each major action performed as part of the broader program. *Id.* at 1085.

The Ninth Circuit in *Cady v. Morton*[55] followed this logic. Reviewing the adequacy of an impact statement covering a single mining plan within two large tracts leased from an Indian tribe, the court found "that the environmental consequences of several strip mining projects extending over twenty years or more within a tract of 30,876.45 acres will be significantly different from those which will accompany . . . activities on a single tract of 770 acres."[56]

The Supreme Court in *Kleppe* voiced agreement with the *SIPI* and *Cady* premise that comprehensive impact statements are required "[w]hen several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency . . . ."[57] But *Kleppe* was distinguished from *SIPI* and *Cady*: in *SIPI* and *Cady* the agencies involved admitted the existence of agency projects; in *Kleppe* the agencies denied that a project existed.[58] If the Supreme Court had limited its discussion to a finding that no agency project existed, the *Kleppe* decision could be easily restricted to its facts. But the Court emphasized that absent any project proposal or recommendation, an impact statement was not required.[59] The suggestion seems to be that, to avoid the impact statement requirement, federal agencies need only refrain from designating any study or memorandum as a proposal for a federal project.

Section 102(2)(c) of NEPA states that a detailed impact statement shall be included "in every recommendation or report on proposals for . . . major Federal actions."[60] In *Calvert Cliffs'*,[61] the District of Columbia Circuit assumed that the impact statement would accompany a proposal through all stages of agency decisionmaking. The court emphasized the integration of environmental considerations at an early stage in order to minimize environmental costs; in fact, the court felt that NEPA demanded early analysis of environmental factors.[62]

In the *SIPI* case, the District of Columbia Circuit again considered the issue of the timing of impact statement preparation.[63] The court recognized that while an impact statement prepared after a proposal has been developed might be thorough, it would have little impact on

55. 527 F.2d 786 (9th Cir. 1975).

56. *Id.* at 795.

57. Brief for Petitioners at 41–42, 427 U.S. 390 (1976).

58. 427 U.S. at 410.

59. *Id.* at 405–06. The Interior Department had focused on regional actions in an earlier study, but it had made no recommendation for activity on a regional basis.

60. 42 U.S.C. § 4332(2)(c) (1970).

61. 449 F.2d 1109 (D.C. Cir. 1971).

62. *Id.* at 1117–18.

63. 481 F.2d at 1093–98.

agency decisionmaking. Acknowledging that preparation of an impact statement is also impractical at the initial idea stage, the *SIPI* court suggested a four-part test for deciding when to evaluate impact. Agencies should consider the following factors: 1) the likelihood of the action's feasibility and how soon it will be found to be feasible; 2) the present availability of meaningful information; 3) the extent to which irretrievable commitments are being made and options precluded; and 4) the severity of environmental effects if the action proves feasible. This test was not designed to abrogate the primary agency responsibility of deciding when a statement should be prepared. Rather, the test provided the courts with some method of deciding whether the time was ripe to require an impact statement.[64] Realizing that environmental factors must be considered early in the decisionmaking process, the *SIPI* court formulated the four-part test to ensure that the protections offered by NEPA would not be frustrated.[65]

Two years later, however, in *Aberdeen & Rockfish Railroad v. Students Challenging Regulatory Agency Procedures* [*SCRAP II*],[66] the Supreme Court took a narrower view of NEPA. The Court stated that section 102(2)(c) required only that an impact statement be prepared at the time an agency makes its formal proposal for action. The statute, the *SCRAP II* court stated, refers only to the final impact statement which is to be included with a recommendation or report on an agency proposal. Since NEPA does not mention the time at which impact statements should be begun or at which draft statements should be prepared, courts can require only that a final statement accompany formal agency proposals; to the extent that the *Calvert Cliffs'* court required more, it conflicted with NEPA.[67]

Following *SCRAP II*, the Supreme Court vacated the Second Circuit's judgment in *Coleman v. Conservation Society, Inc.*[68] with instructions to the lower court to reconsider its 1974 decision in light of *SCRAP II*. The Second Circuit then reversed its original decision that an overall impact statement was required for a 280-mile highway corridor even though only a 20-mile segment was then being planned.[69] Since the Transportation Department had made recommendations re-

64. *Id.* at 1094.

65. *Id.* at 1093 & n.60.

66. 422 U.S. 289 (1975).

67. *Id.* at 321 n.20. Justice Douglas, in a dissenting opinion, felt that the majority in *SCRAP II* ignored the provisions of § 102(2)(A), which require integration of environmental planning into agency decisionmaking, by requiring an impact study only when the decisionmaking process was almost complete. *Id.* at 328–31.

68. 423 U.S. 809 (1975), *vacat'g* Conservation Soc'y v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974).

69. Conservation Soc'y v. Secretary of Transp., 531 F.2d 637 (2d Cir. 1976).

garding only the 20-mile segment, which was solely of local utility, no programmatic impact statement was deemed necessary. The court stated that the limited commitment of federal resources which would occur during construction of the smaller segment would not cause an irreversible commitment by the agency to further development of the entire 280-mile corridor.[70]

In reversing the District of Columbia Circuit's decision in *Kleppe*, the Supreme Court relied heavily on *SCRAP II*. The court of appeals' decision, however, had not been entirely inconsistent with *SCRAP II*. Like the Supreme Court in *SCRAP II*, the lower court recognized that every suggestion for agency action could not, in all practicality, require preparation of an impact statement—some proposals are too tentative to make an impact statement necessary. The court of appeals stated that an impact statement must be prepared early enough "that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action. An impact statement is designed to aid agency decisionmaking, not provide an *ex post facto* justification for it."[71] Therefore, the lower court applied the *SIPI* four-part test to determine whether agency proposals for the Northern Great Plains had reached a stage at which a statement was necessary.[72] But the Supreme Court rejected the court of appeals' test; instead it adhered to the strict *SCRAP II* interpretation of section 102, holding that an impact statement can be required only at the time an agency recommendation or report on a proposal is made.[73]

By strictly construing the timing requirements of the statute, the United States Supreme Court in *Kleppe* further weakened the effectiveness of NEPA. If the courts must wait for the agencies themselves to announce a project before section 102 can be judicially enforced, agencies may effectively delay preparation of an impact statement until federal resources have been committed. As long as an impact statement exists when a formal recommendation on a proposal is made and the statement includes the required elements, only arbitrary agency actions will be reversed by the courts. Even an agency decision *not* to

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70. Some authorities have argued that the Second Circuit reversal of *Conservation Society* was not warranted by the *SCRAP II* decision. *E.g.*, * ENVT'L L. REP. 10081 (1976); A. Miller, F. Anderson, & R. Liroff, *The National Environmental Policy Act and Agency Policy Making: Neither Paper Tiger Nor Straitjacket*, 6 ENVT'L L. REP. 50020 (1976).

71. Sierra Club v. Morton, 514 F.2d at 879.

72. *Id.* at 880–81.

73. 427 U.S. at 406. The Supreme Court has granted review of Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 539 F.2d 824 (2d Cir. 1976). 45 U.S.L.W. 3647 (March 29, 1977). In this case, the Second Circuit rejected an agency's interim leasing program pending completion of an impact statement on wide-scale environmental effects. 539 F.2d at 845–46.

prepare a statement cannot be reversed unless the decision is in clear violation of a very literal construction of NEPA. The courts' role as watchdog over agency compliance has been diminished.

As pointed out in Justice Marshall's dissent in *Kleppe*, adequate impact statements cannot be prepared in a short period of time.[74] The environmental data essential to a statement must be collected, weighed, and recorded. A thorough study of environmental impact is no less time-consuming than thorough consideration of political or economic impacts. If an environmental impact study is delayed until just before the agency plans to make a report on a project proposal, a hurried study of environmental impact is likely. Yet the *Kleppe* court indicates that earlier environmental study cannot be required. NEPA was intended to integrate *efficacious* environmental consideration into agency decisionmaking. Rushed collection of data and analysis of environmental factors, after analysis of other factors is almost complete, does not effect this objective.

In addition, once agency time and money have been expended in preparing a proposal, implementation of the proposal will be delayed if the agency then has to stop and make an environmental analysis. Efficiency requires that all pertinent factors, including environmental factors, be considered simultaneously. Such a process would enable an agency to balance all factors against one another. This would minimize the risk that a proposal would be halted—due to unforeseen environmental factors—after the decisionmaking process is almost complete. If all factors are considered from the very early stages of decisionmaking, agencies would more likely give environmental factors an equivalent consideration.[75]

This assessment of *Kleppe*'s impact may be overly pessimistic. The arbitrariness standard will mean that NEPA cannot be completely disregarded. Also, it is possible that the Court viewed coal mine leasing as an activity which could be conducted on a lease-by-lease basis, without any preexisting, comprehensive, agency program.[76] The

74. 427 U.S. at 415. Justice Marshall noted that if a regional impact statement were to be prepared for the Northern Great Plains coal mining operations, the preparation would take at least three years.

75. *See* A. Miller, F. Anderson, & R. Liroff, *supra* note 70.

76. *Cf.* 427 U.S. at 414–15 & n.26. The Court suggests that, though other leases are pending for the same region, a single mining lease may be approved before a comprehensive regional leasing program is proposed or the cumulative environmental impact studies evaluated. An agency need not consider cumulative impacts until a second lease is actually approved. Possibly only the cumulative impact of those two leases need be considered. If agencies are allowed to evaluate cumulative regional impact in such a piecemeal fashion, a complete regional impact statement might not be prepared until the final lease is approved. At some point an agency would become committed to the approval of subsequent leases. Without a clear idea of probable regional impact before

existence of a national coal-leasing impact statement, as well as individual statements for several leases within the Northern Great Plains region, may have convinced the Court that this situation did not warrant a regional impact statement. Under another set of circumstances, the Court may feel that an agency's actions so suggest the existence of a proposal for action that the Court will require compliance with section 102 before the agency itself announces the proposal.

The *Kleppe* decision offered some support for advocates of regional impact statements. The Supreme Court recognized that some coal-leasing activities could be so interconnected that the cumulative impact would require a joint impact statement.[77] Although the court referred specifically to coal-related actions, the same requirement should be applicable to other types of proposals as well. Furthermore, the court acknowledged that the cumulative impact of several projects may differ, in degree and character, from the sum of their individual impacts. Recognition by the courts of the interrelationships between actions taken in a single geographic area should encourage agencies to give close consideration to cumulative impact. Court recognition of regional impact also affords the public a basis for challenging agency decisions made without consideration of such impact. Admittedly, *Kleppe* leaves the environmental advocate the heavy burden of proving agency arbitrariness. The *Kleppe* opinion suggests, however, that in some situations agency decisions not to prepare a regional impact statement may be arbitrary. If the burden of proof is met, agency action at the independent project level may be stopped pending determination of cumulative impact.

In effect, *Kleppe* diminishes the courts' role in enforcing NEPA but does leave some basis on which subsequent NEPA challenges may be made. While a federal court may no longer scrutinize the reasonableness of agency decisions, it may consider whether agency actions within a single region are so interrelated as to make consideration of cumulative impact judicially enforceable. The Supreme Court gives no clear indication, however, of the factors which will be considered in determining whether a regional impact statement is required. Delineation of these factors has been left for subsequent litigation.

MARTHA L. HARRELL

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the first lease is approved, therefore, the point of commitment may be passed long before a cumulative regional impact study is made.

77. 427 U.S. at 410.