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Environmental Law--The National Environmental Policy Act

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ENVIRONMENTAL LAW—THE NATIONAL ENVIRONMENTAL POLICY ACT

I. INTRODUCTION

We plodded on . . . and at last the lake burst upon us—a noble sheet of blue water, walled in by a rim of snow-clad peaks that towered aloft full three thousand feet higher still! . . . As it lay there with the shadows of the mountains brilliantly photographed on its still surface, I thought it must surely be the fairest picture the whole earth affords.

Mark Twain penned these lines in 1872 in *Roughing It*. The lake about which he wrote with such unabashed praise was Lake Tahoe, but at that time it could have been any one of numerous lakes in the United States. Such vivid scenes of Mark Twain's era rapidly faded into blurred memories of the past as society rushed precipitously into an epoch of rapid technological development. Replacing such scenes today are lake fronts lined with summer cottages dumping their effluvia into already contaminated waters, streams clouded with silt and discharge from factories, great expanses of land void of timber from clear cutting and crisscrossed by dusty roads, and smoke stacks belching smoke and other caustic waste into the air.

Many forces have wrought these changes, but a prime factor has been a lack of planning on the part of society and, in particular, the government. In our society, government must assume the onerous task of planning and controlling the use and allocation of our natural resources and the exploitation of our environment. A primary goal of planning must, therefore, be the protection and enhancement of man's environment.¹ Forces which threaten this goal must be expunged because the environment, once fully depreciated by man's wanton use of natural resources, cannot be adequately restored.

II. LEGISLATIVE HISTORY OF NEPA

Fully realizing the important role that judicious planning plays in protecting man's environment, Congress passed the National Environmental Policy Act (NEPA) in 1969.² The passage of NEPA was termed "the most important and far-reaching environ-

¹A. REITZ, JR., *ENVIRONMENTAL LAW* Introduction 27 (2d ed. 1972).

²42 U.S.C. §§ 4321-47 (1971).

mental and conservation measure ever enacted by the Congress.”³ It has also been criticized as establishing an equivocal, if not ineffective, mandate.⁴ The Act forces federal governmental agencies and officials to plan before they act. If a governmental agency’s contemplated actions will create environmental side effects, they must be evaluated and considered in conjunction with the agency’s primary decision to act.⁵ In this manner NEPA forces governmental officials and agencies to incorporate environmental values into the decision-making process when planning.⁶

By enacting NEPA, the United States government officially obligated itself to encourage and promote “productive and enjoyable harmony man and his environment.”⁷ However, the full impact of this obligation depends upon judicial interpretation and practical application. The promise will carry no more weight than that given it by the courts.

NEPA was the end product of numerous unsuccessful congressional attempts to establish a national environmental policy. An attempt to force the executive branch of the government to coordinate its dissipated conservation efforts was made in 1959 through the proposed Resources and Conservation Act.⁸ The Ecological Resources and Surveys Bill of 1966 was an unsuccessful attempt to remedy the inadequate use of environmental data by federal agencies.⁹ A bill similar to the Senate version of NEPA was introduced without success in 1967.¹⁰

In 1969, Senator Henry Jackson of Washington introduced the original version of the bill which ultimately was to become NEPA.¹¹ As introduced, this bill had a three-fold purpose: (1) To establish a national environmental policy; (2) to authorize research concerning natural resources; and (3) to establish a counsel of environmental advisors. However, the bill contained no procedure for implementation of a national environmental policy. It provided for “a national strategy for management of the human

³115 CONG. REC. 40,415 (1969) (remarks of Senator Jackson).

⁴Kitzmiller, *Federal Legislation: What’s Happening on Capital Hill* in ENVIRONMENTAL LAW 61, 67 (C. Hassett ed. 1971).

⁵42 U.S.C. § 4332(c) (1971).

⁶A. REITZE, JR., ENVIRONMENTAL LAW Introduction 27 (2d ed. 1972).

⁷42 U.S.C. § 4321 (1971).

⁸S. 2549, 86th Cong., 2d Sess. (1960).

⁹S. 2282, 89th Cong., 2d Sess. (1966).

¹⁰S. 2805, 90th Cong., 2d Sess. (1968).

¹¹S. 1075, 91st Cong., 1st Sess. (1969).

environment” but did not establish specific procedures for review, coordination or control of the decision-making process and its resulting activities.¹² After a single-day hearing on S. 1075 before the Senate Interior and Insular Affairs Committee, an operational measure was added to the bill.¹³ The section added requires federal agencies to prepare an environmental impact statement if any of their proposed actions might significantly affect the environment. This section has been designated by the courts as the procedural portion of the Act and has become the only means of enforcing NEPA policy since the courts have limited their review of NEPA primarily to matters arising under this section.¹⁴

III. NEPA—SUBSTANTIVE OR PROCEDURAL?

NEPA proclaims a general statement of national environmental policy which the federal government is to achieve “in cooperation with state and local governments and other concerned public and private organizations.”¹⁵ Section 4331(b) states that it is “the continuing responsibility of the Federal Government to use all practicable means, consistent with other considerations of national policy,” to help achieve the national goals of environmental policy as set forth in the Act. Section 4331(c) states: “The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.” The wording of this portion of the Act was substituted for the more substantive language of the Senate version which stated that “each person has a fundamental and inalienable right to a healthful environment.”¹⁶ The significance of this change is that the Act creates only procedural rights requiring federal agencies to formally consider ecological factors and does not create substantive rights to a healthful environment.¹⁷

Thus, the most important “action-forcing” mechanism of the Act is section 4332, which requires all agencies of the federal government to file an environmental impact statement on “every rec-

¹²*Id.*

¹³*Id.*

¹⁴*Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971).

¹⁵42 U.S.C. § 4331(a) (1971).

¹⁶S. 1075, 91st Cong., 2d Sess. § 101(b) (1970).

¹⁷*Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971).

ommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." This procedural mechanism established to force compliance with NEPA's environmental policy must be followed "to the fullest extent possible"¹⁸ in order to ensure that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."¹⁹

In *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,²⁰ the court stated that the language, "to the fullest extent possible," did not provide an escape hatch for footdragging agencies and did not make NEPA's procedural requirements "discretionary." The court, in noting that its interpretation of the meaning of this phrase was clearly revealed by contrasting the language used in conjunction with the procedural portion of the Act with that used in conjunction with the substantive portion of the Act, stated that "unlike the substantive duties of Section 101, which require agencies to 'use all practicable means consistent with other essential considerations,' the procedural duties of Section 102 must be fulfilled to the 'fullest extent possible.'"²¹ However, the court noted that the dispositive factor in its interpretation was the view of the Senate and House Conferees who wrote the "fullest extent possible" language into NEPA. The conferees stated:

The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in . . . [Section 102(2)] unless the existing law applicable to such agency's operation 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 all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.²²

¹⁸42 U.S.C. § 4332 (1971).

¹⁹H.R. REP. No. 765, 91st Cong., 1st Sess. 10 (1969).

²⁰449 F.2d 1109, 1114 (D.C. Cir. 1971).

²¹*Id.* at 1114.

²²H.R. REP. No. 765, 91st Cong., 1st Sess. 9, 10 (1969).

IV. JUDICIAL REVIEW

NEPA does not assign the task of enforcing the policy promulgated by the Act,²³ nor does it mention judicial review. Because of these factors and the legislative history of the Act, courts have often been hesitant when dealing with the issue of judicial review and have primarily limited their review power to section 4332, the procedural portion of the Act. In *Environmental Defense Fund v. Corps of Engineers*, the court stated:

At the very least, NEPA is an environmental full disclosure law. The Congress, by enacting it, may not have intended to alter the then existing decision making responsibilities or to take away any then existing freedom of decision making, but it certainly intended to make such decision making more responsive and more responsible.²⁴

Most court actions concerning NEPA have involved two determinations: (1) Which actions are federal and fall within the ambit of the procedural portion of the Act, and (2) what elements of an environmental impact statement are necessary to fulfill the mandate of the Act. The initial determination of whether a proposed action is a major federal action that significantly affects the quality of the human environment lies in the hands of the "responsible official"²⁵ of the agency contemplating the action; however, this determination is subject to review by the courts.

Judicial review of the initial agency decision as to whether a proposed action requires the preparation of an impact statement has not been without controversy. The federal agency involved often takes the position that the determination of whether a particular action is a major federal action significantly affecting the quality of the human environment is primarily a question of fact permitting only limited judicial review of agency decisions. Environmental groups have countered this argument by contending that, due to the paramount importance of the initial decision and

²³The Council on Environmental Quality created by Subchapter II of NEPA was given the duty

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in Subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.

42 U.S.C. § 4344(3) (1971).

²³325 F. Supp. 749, 759 (E.D. Ark. 1971).

²⁴42 U.S.C. § 4332(c) (1971).

the significance of NEPA's provisions, an agency decision not to file a statement should be subject to a complete *de novo* hearing by the courts.

The federal courts have not decided which standard should be applicable. Some courts have applied the limited review standard of "arbitrary and capricious" mandated by the Administrative Procedure Act.²⁶ This standard requires that the court affirm the agency's action unless it can find that the agency acted in an arbitrary or capricious manner in reaching its decision. Although the courts in these instances applied a very limited standard of review, they placed rigid requirements upon the agencies by directing them to develop a full administrative record of their decision not to prepare a statement. One court held that the administrative record must reflect the agency's consideration of the project's qualitative, comparative environmental effects in relation to the surrounding area as well as its absolute, quantitative effects.²⁷ Under these conditions, preparation of the statement is likely to be a less arduous task for the agency than development of the record.

The United States Court of Appeals for the Fifth Circuit applied a "more relaxed rule of reasonableness" to the standard of judicial review.²⁸ The court impliedly used the "substantial inquiry test" developed by the United States Supreme Court, which permits a determination of whether the agency decision was an abuse of discretion or otherwise not in accordance with law. This standard does not permit a full *de novo* review but allows a court considerably more latitude than does the "arbitrary and capricious" standard of review.

If an agency does prepare a statement, its adequacy is also subject to judicial review. The court must ensure that the procedural requirements of NEPA have been complied with and that the substantive result of the agency's decision is consistent with a "good faith" weighing of the environmental impact of the proposed governmental action.²⁹

²⁶*Citizens for Clean Air v. Corps of Eng'rs*, 349 F. Supp. 696 (S.D.N.Y. 1972).

²⁷*Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

²⁸*Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973).

²⁹*Conservation Soc'y v. Secretary of Transp.*, 362 F. Supp. 627, 632 (1973).

V. ENVIRONMENTAL IMPACT STATEMENTS—MAJOR FEDERAL ACTION THAT SIGNIFICANTLY AFFECTS THE QUALITY OF THE HUMAN ENVIRONMENT

An action must be a major federal action significantly affecting the quality of the human environment before an environmental impact statement is necessary. A plethora of court decisions have required the preparation of such a statement. However, too few judicial opinions reveal the criteria upon which their decisions rest. The courts have considered even the most tenuous federal connection with the action sufficient to fulfill the "federal action" requirement of NEPA. Only twelve cases have been dismissed by the courts because the proposed action was found not to be a federal action.³⁰

In *Kitchen v. FCC*,³¹ a citizen's group attempted to apply NEPA to the construction of a telephone exchange building, claiming that the Communications Act of 1934 required the Federal Communications Commission's certification of the building. The court disagreed, holding that the Act did not permit the FCC to assert jurisdiction to require prior approval for construction of what was essentially a local exchange building. Thus, the court did not find the requisite federal action to bring the project within the mandate of NEPA.

In *Ely v. Velde*,³² the United States District Court for the Eastern District of Virginia found that the Law Enforcement Assistance Administration (LEAA), in approving federal funds for construction of a prison reception and medical center, was not required to consider the environmental impact of the project under NEPA, since the provisions of the Safe Streets Act are mandatory³³

³⁰Yarrington, *The National Environmental Policy Act*, 4 ENVIRONMENTAL REP. No. 26, at 21 (January 1974).

³¹464 F.2d 801 (D.C. Cir. 1972).

³²321 F. Supp. 1088 (E.D. Va. 1971).

³³The Safe Streets Act provides for planning grants to subsidize the formulation of comprehensive law enforcement plans for each state. 42 U.S.C. §§ 3721-25 (1971). Once a state has submitted its comprehensive plan to the LEAA, and the LEAA finds that the plan "conforms with the purposes and requirements of [the Safe Streets Act]," the state then becomes eligible to receive action grants to carry out its comprehensive plan. *Id.* § 3733. At this stage there are two types of action grants available—"block grants" and "discretionary grants." Block grants are allocated to all eligible states solely on the basis of population and without regard to need. Discretionary grants, on the other hand, are "allocated as the [LEAA] shall determine." *Id.* § 3766. The LEAA insisted that it was not obliged to comply nor

and the provisions of NEPA are discretionary.³⁴ However, the United States Court of Appeals for the Fourth Circuit held that the LEAA, in approving federal funds for construction of the project, must comply with the requirements of NEPA³⁵ and remanded the case to the district court for entry of an appropriate order in accord with the opinion. Virginia, in the interim, withdrew its request for LEAA funds. The district court then held that NEPA did not require the filing of an impact statement since the only federal contact was LEAA's approval of Virginia's federal funding request that was subsequently withdrawn.³⁶

The United States District Court for the District of New Mexico, in a case involving federal agency approval of otherwise non-federal action, held that the Secretary of the Interior's required

could it comply with NEPA because it had been prohibited when approving block grants from imposing any conditions not found in the Safe Streets Act. *Id.* § 3733: "The [LEAA] shall make grants under this chapter to a state planning agency if such agency has on file with the [LEAA] an approved comprehensive state plan . . . which conforms with the purposes and requirements of this chapter." (Emphasis added).

³⁴The court accepted LEAA's interpretation that the procedural duties imposed by NEPA were discretionary since the language of that section commands federal agencies to observe the procedural duties NEPA imposes "to the fullest extent possible." 321 F. Supp. 1088, 1093 (E.D. Va. 1971).

³⁵The court stated that the LEAA had overdrawn the "hands off" policy of the Safe Streets Act, which when properly read neither prohibits nor excuses compliance with NEPA. The court further noted that the procedural requirements of NEPA were not discretionary and the language "to the fullest extent possible" reinforced rather than diluted the strength of the prescribed obligations. *Ely v. Velde*, 451 F.2d 1130, 1135 (4th Cir. 1971).

³⁶*Ely v. Velde*, 363 F. Supp. 277 (E.D. Va. 1973). Although Virginia withdrew its request for federal funds and made it clear that it intended to construct the center totally with its own funds, it noted that it intended to use those funds previously earmarked for the center for other purposes. Plaintiffs contended that Virginia was indirectly using federal funds for the center by substituting for its construction State funds originally destined for another project and then funding the other project with the federal funds previously allocated to the center. Plaintiffs also contended that the initial approval by the LEAA of federal funds for the center made the project irrevocably federal in nature, so that the requirements of NEPA could not be avoided by a subsequent repudiation of such funds for the center. The court held that the plaintiffs had not sustained the burden of proof on their first contention, and it could not conclude that a project which has become tentatively federal necessarily must remain that way. The court noted, however, that some courts have held that there may be situations where a project becomes irrevocably federal at a time prior to the actual transfer of funds. The underlying theory of these cases is that there may be so many federal contacts with a project after its tentative federal sanction that the project becomes so imbued with a federal character as to preclude it from being viewed as anything but federal.

approval of Indian leases was not a major federal action under NEPA.³⁷ However, the United States Court of Appeals for the Tenth Circuit reversed the district court by holding the Secretary's approval to be major federal action.³⁸

In *Bolston v. Volpe*, the United States Court of Appeals for the First Circuit held that a "tentative allocation" of funds by the Federal Aviation Administration to a state agency for a state project did not so federalize the project as to constitute major federal action.³⁹ In a district court decision, a city's street construction project, financed partly by federal funds but which required no right of way or park land acquisition and which constituted merely an improvement to the existing roadway, was held not to be a

³⁷*Davis v. Morton*, 3 E.R.C. 1546 (D.N. Mex. 1971). The provisions of 25 U.S.C. § 415 (1971) require the Secretary of the Interior to approve all leases of Pueblo Indian lands. According to the court, the United States was not an actual party to the lease, but was acting only through the Secretary as a fiduciary or guardian of the interests of the Pueblos in the lease, and this did not constitute "major federal action." It appears from the language of the opinion that the court based its decision on the "major" criterion rather than on the "federal" criterion, as it stated that the only federal action was in approving the lease, and this did not constitute major federal action.

³⁸*Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972). Appellees contended that, since the United States did not initiate the lease, was not a party, possessed no interest in either the lease or the development of the land, and did not participate financially or benefit from the lease in any way, the action did not constitute federal action. They maintained that before federal action could constitute major federal action under the mandates of NEPA, the government must initiate, participate in or benefit from the project. In rejecting appellee's contention, the court noted the following:

The lease refers to the United States government countless times. All notices and approvals must be made by the Pueblo and the United States. The Secretary is required to give written approval before encumbrances can be made on the leased land. The lease protects the United States government against damage or injury to people or property on the leased premises. Certainly the fact the United States government might be held liable for injury or damages incurred on the Indian land unless the lease provides otherwise makes the government more than an impartial, disinterested party to the contract between Pueblo and Sangre.

Id. at 596. In rendering its opinion, the court also referred to two cases that shed light on what constitutes major federal action under NEPA. These decisions held that the only involvement necessary to constitute major federal action was approval by a governmental department of a project under its jurisdiction. *Planning Bd. v. Federal Power Comm'n*, 455 F.2d 412 (2d Cir. 1972); *Izaak Walton League of America v. Schlesinger*, 337 F. Supp. 87 (D.D.C. 1971).

³⁹464 F.2d 254 (1st Cir. 1972).

major federal action.⁴⁰

The court, in *Transcontinental Gas Pipeline Corp. v. Development Commission*,⁴¹ upheld the Federal Power Commission's (FPC) decision that the issuance of a certificate approving construction of a privately owned liquified natural gas storage facility was not a major federal action. The application for certification was submitted in December, 1969, prior to the effective date of NEPA, which was January 1, 1970. The certificate was issued on March 12, 1970, at which time neither the FPC nor the Council on Environmental Quality (CEQ) had promulgated any guidelines whatsoever, the CEQ's Interim Guidelines being issued on April 23, 1970.⁴² Thus, at the time of issuance of the certificate, it was questionable whether the granting of a certificate or other entitlement for use was a major federal action. The court concluded by stating that this was certainly not the type of action which most reasonable men would conclude, without any guidelines, to be "major," or even an "action."

Only a very few other cases have held NEPA inapplicable for lack of federal action. All were highway cases in which promotion, planning and construction had been financed with state funds only or in which federal funding was anticipated at some future time

⁴⁰*Julis v. Cedar Rapids*, 349 F. Supp. 88 (N.D. Iowa 1972). The court noted that Congress, in using the word "major" intended to limit NEPA to those federal actions of superior, larger and considerable importance, involving substantial expenditure of money, time, and resources. Since this project only required the taking of land up to 4½ feet wide from the property owners, no one was displaced from his home, no park land was disturbed, and federal expenditures were only \$300,000, the court felt the project was not major federal action.

⁴¹464 F.2d 1358 (3d Cir. 1972).

⁴²CEQ Guidelines provide that the following criteria will be employed by agencies in deciding whether a proposed action requires the preparation of an impact statement:

- (a) "Actions" include but are not limited to:
 - (i) Recommendations or reports relating to legislation and appropriations;
 - (ii) Projects and continuing activities; Directly undertaken by Federal agencies; Supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance.
- Involving a Federal lease, permit, license, certificate or other entitlement for use;
Policy—and procedure-making.

Guidelines § 5(a), 36 Fed. Reg. at 7724-25 (1971).

but had not yet been realized.⁴³ Claims that a proposed freeway project through Spokane, Washington, violated NEPA because an impact statement had not been prepared were held premature on the grounds that the sole federal participation in the project was the financing of a transportation study pursuant to title 23, section 134 of the United States Code.⁴⁴ The court noted that the project was proceeding with state funds only, no final approval had been sought from the Department of Transportation for the project, and there was no immediate plan to seek federal financial participation. The court concluded that while the plaintiff's claims might form a valid basis for an injunction at some future time, they did not yet raise justiciable issues that justified the issuance of an injunction.

A difficult problem arises out of proposed highway construction projects that will extend for vast distances but for which federal funds are only requested in a piecemeal fashion for small segments. The difficulty lies not in determining whether to require an impact statement but rather in whether to require a separate statement for each individual segment, one for the entire project, or both. There is also a problem in ascertaining the stage of planning or construction at which the project becomes federal action.

In *Indian Lookout Alliance v. Volpe*,⁴⁵ the court held that NEPA permitted division of a federal-aid highway project into segments for purposes of preparing environmental impact statements. In making its decision, the court had to meet plaintiff's contention that division of a highway into segments precludes meaningful compliance with the statutory mandate to assess in detail environmental impacts because each segment that is approved limits the alternatives for each succeeding segment. The court provided that each segment for which a statement was prepared must be long enough to possess independent utility and must end in logical terminal points, such as present major highways or cities. Although noting that no case had yet decided the question of the earliest time that a state highway plan becomes a major federal action, the court cited several cases holding a highway is federal when it receives location approval from the Federal Highway Administration. The court added that any project for

⁴³Yarrington, *The National Environmental Policy Act*, 4 ENVIRONMENTAL REP. No. 26, at 21 (January 1974).

⁴⁴*Northeast Area Welfare Rights Organization v. Volpe*, 2 E.R.C. 1704 (E.D. Wash. 1970).

⁴⁵484 F.2d 11 (8th Cir. 1973).

which federal funds have been approved or committed constitutes federal action, and some cases have held that projects in the planning stage constitute federal action.⁴⁶ However, these cases have involved single projects as opposed to the numerous individual projects involved in the planning and construction of a major state highway system. In *Indian Lookout*, the court held that the requirements of NEPA and related acts applied when the State Highway Department sought location approval for the proposed highway but that plans for the entire system were too tentative to be considered a federal action.

The determination of whether a project or program is a "major federal action significantly affecting the quality of the human environment" is made by considering the cumulative effect of an action on the environment.⁴⁷ In general, federally directed or contracted construction projects require the preparation of an impact statement. The cancellation as well as the creation of federal government contracts has been held to require a statement.⁴⁸ The granting of federal permits, licenses, and authorizations to engage in certain activities may require an impact statement even though no federal funds are involved. Impact statements must be filed before the Federal Power Commission can grant permission for the construction of natural gas⁴⁹ or power lines.⁵⁰ Activities supported in whole or in part by federal funds have often been held to require a statement. The mere funding of preliminary studies involving a proposed project does not require an impact statement⁵¹ unless the studies themselves have an impact⁵² or represent a commitment of federal funds that is unlikely to be withdrawn, such as condemnation proceedings involving federally funded projects.⁵³

⁴⁶*Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

⁴⁷Guidelines § 5(b), 36 Fed. Reg. at 7724-25 (1971).

⁴⁸*National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971). The cancellation of helium production contracts was held major federal action which significantly affected the quality of the human environment because it represented a potential loss of a natural resource into the atmosphere.

⁴⁹*Arkansas Louisiana Gas Co.*, 3 E.R.C. 1735 (Fed. Power Comm'n 1972).

⁵⁰*Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463 (2d Cir. 1971).

⁵¹*Northeast Area Welfare Rights Organization v. Volpe*, 2 E.R.C. 1704 (E.D. Wash. 1970).

⁵²*West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971). A permit for mineral testing was held to constitute major federal action.

⁵³*Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *United States v. 247.37 Acres*

Projects of the Department of Agriculture which have been held major federal actions include timbering,⁵⁴ land exchanges,⁵⁵ the use of pesticides to aid crop protection,⁵⁶ and private exploratory activities in national forests by the Soil Conservation Service.⁵⁷ The Corps of Engineers has been required to file impact statements for practically all of its projects, including dam,⁵⁸ reservoir,⁵⁹ and canal construction projects⁶⁰ and waterway improvements.⁶¹ Department of the Interior programs held to constitute major federal actions include off-shore oil leasing,⁶² mining claim contests,⁶³ and work affecting parks.⁶⁴

Although the phrases "major federal action" and "significantly affect the quality of the human environment" involve two separate criteria, it is difficult to distinguish between the two in interpreting judicial decisions. Although it is conceivable that a federal action could be major and not significantly affect the quality of the human environment or vice versa, it is relatively safe to assume that if the court finds one of these criteria to be present, it will most likely find the other present also.

A major federal action is one which "requires substantial planning, time, resources or expenditure."⁶⁵ The determination of what constitutes substantial planning, time, resources or expenditures has been a question each court has answered based upon the particular facts of the case before it.

In deciding whether a major federal action will significantly

of Land, 3 E.R.C. 1098 (S.D. Ohio 1971).

⁵⁴*Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971).

⁵⁵*National Forest Preservation Group v. Butz*, 343 F. Supp. 696 (D. Mont. 1972).

⁵⁶*Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401 (D.D.C. 1971).

⁵⁷*West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971).

⁵⁸*Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971).

⁵⁹*Id.*

⁶⁰*Environmental Defense Fund, Inc. v. Corps of Eng'rs.*, 324 F. Supp. 878 (D.D.C. 1971).

⁶¹*Sierra Club v. Laird*, 1 E.L.R. 20,085 (D. Ariz. 1970).

⁶²*Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 165 (D.D.C. 1971).

⁶³*Henry v. Gerritson*, 2 E.R.C. 1893 (I.B.L.A. 1971).

⁶⁴*Berkson v. Morton*, 3 E.R.C. 1121 (D. Md. 1971).

⁶⁵*Citizens Organized to Defend the Environment, Inc. v. Volpe*, 353 F. Supp. 520 (S.D. Ohio 1972).

affect the quality of the human environment, one court suggested that two factors be considered: (1) "[T]he extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it"; and (2) "the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area."⁶⁶ Stated somewhat differently, the court, in *Citizens Organized to Defend the Environment, Inc. v. Volpe*, said that "a federal action 'significantly affecting the quality of the human environment' . . . is one that has important or meaningful effect, directly or indirectly, upon any of the many facets of man's environment"⁶⁷ . . ."

Examples of federal actions held not to be major include projects involving the construction of a 4.3 mile road in a national forest⁶⁸ and the minor repair of city streets with a small portion of the work being federally funded.⁶⁹ In addition to the cases in which the courts have held the action not to be major, there are a few which have held that particular actions would not have a significant effect upon the environment.⁷⁰

Although clear guidelines have not evolved and probably will not evolve since each case involves a factual determination based upon its individual merits, the courts have generally been liberal in deciding which projects are major federal actions that significantly affect the quality of the human environment. The relatively few cases in which the courts have held that a particular project or activity was not sufficiently federalized to constitute major federal action indicate the latitude of judicial interpretation of the phrase "major federal actions." From the vast majority of activities held to constitute major federal action requiring the preparation of an impact statement, it can be concluded that this type of

⁶⁶Hanly v. Kleindienst, 471 F.2d 823, 824 (2d Cir. 1972).

⁶⁷353 F. Supp. 520, 522 (S.D. Ohio 1972).

⁶⁸Kisner v. Butz, 350 F. Supp. 310 (N.D.W. Va. 1972).

⁶⁹Julis v. Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972).

⁷⁰Morningside Renewal Council, Inc. v. AEC, 482 F.2d 234 (2d Cir. 1973) (operating license for university nuclear reactor); Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973) (HUD's determination to construct a housing project); First Nat'l Bank v. Watson, 363 F. Supp. 466 (D.D.C. 1973) (preliminary approval of a charter for a national bank); Groton v. Laird, 353 F. Supp. 344 (D. Conn. 1972) (Navy construction of a housing project); Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972) (Navy's mock amphibious landing on a beach); Howard v. EPA, 4 E.R.C. 1731 (W.D. Va. 1972) (sewage treatment plant).

federal action will seldom provide a basis for excusing the agency from filing an impact statement. This willingness on the part of the judiciary to interpret even the slightest federal involvement as requiring the preparation of an environmental impact statement is in harmony with the policy of the Act.

VI. IMPACT STATEMENT ADEQUACY

A. Detailed Statement and Full Disclosure

The impact statement required by NEPA must be:

- . . . a detailed statement by the responsible official on—
- (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - (iii) alternatives to the proposed action,
 - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
 - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁷¹

NEPA also requires the responsible federal official to consult with other federal agencies which have jurisdiction or special expertise with respect to the environmental impact prior to making a detailed statement.⁷² Copies of the environmental impact statement and the comments and views of the federal, state and local agencies authorized to develop and enforce environmental standards must be made available to the President, the Council on Environmental Quality, and the public.⁷³ In addition, the statement must accompany the proposal through the review process. To satisfy the mandate of NEPA, an agency must comply with these provisions "to the fullest extent possible."⁷⁴

NEPA requires that the impact statement be a "detailed statement." The courts have construed this language to require full disclosure.⁷⁵ Full disclosure by a detailed statement means

⁷¹42 U.S.C. § 4332(c) (1971).

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971).

that the statement should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public, and Congress to all known possible environmental consequences of the proposed agency action.⁷⁶ In *Lathan v. Volpe*, the district court went beyond this definition and interpreted full disclosure to permit the public to play an active role in the formulation of an impact statement.⁷⁷ Agency officials must give more than a cursory consideration to the public's suggestions and comments on the draft impact statement in the preparation of the final impact statement. If the final impact statement substantially fails to provide satisfactory answers to relevant and reasonable comments, it will not meet the minimum statutory requirements.⁷⁸ In *Hanly v. Kleindienst*, the United States Court of Appeals for the Second Circuit added support to the *Lathan* decision giving the public an active part in formulating the statement. The appellate court held that prior to reaching a decision on whether to file an impact statement, "the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision."⁷⁹

The courts have uniformly held that, at a minimum, the responsible federal agency must make a good faith effort to comply with NEPA's provisions. NEPA does not permit impact statements to be "'consciously slanted or biased' since a 'contrary view would negate the requirement of good faith.'"⁸⁰ The purpose of NEPA's impact statement requirements is to ensure that the decision maker is fully aware of all pertinent facts, problems, and opinions with respect to the environmental impact of a proposed action.⁸¹

In *Environmental Defense Fund, Inc. v. Corps of Engineers*,⁸² although the court sanctioned the "good faith" requirement, it felt that in order to satisfy the full disclosure requirements of NEPA, a statement need not be as fair, impartial, and objective as it would be if it were compiled by a disinterested person. However,

⁷⁶*Id.* at 759.

⁷⁷350 F. Supp. 262 (W.D. Wash. 1972).

⁷⁸*Id.* at 265.

⁷⁹471 F.2d 823, 836 (2d Cir. 1972).

⁸⁰*Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 342 F. Supp. 1211, 1214 (E.D. Ark. 1972).

⁸¹*Id.*

⁸²*Id.*

the statement must involve an objective weighing of all the facts, pro and con. The test of compliance with the procedural portion of NEPA is one of "good faith objectivity rather than subjective impartiality."⁸³

Neither NEPA nor the Council on Environmental Quality provides any guidelines as to the amount of detail required in impact statements. The statement should gather in one place the discussion of environmental impacts and alternatives⁸⁴ so that it may serve as a comprehensive document upon which responsible agency officials and others might rely in making the required balance between environmental and nonenvironmental factors.⁸⁵

There has been a slight judicial difference of opinion as to what constitutes a sufficiently detailed statement. One court required a discussion of "all known *possible* environmental consequences,"⁸⁶ while another limited the statement to a discussion of "the *significant* aspects of the *probable* environmental impact."⁸⁷ One federal district court, in *Sierra Club v. Froehlke*, said a reasonable test would be that an impact statement should contain all possible significant effects on the environment.⁸⁸ The larger the physical size of the environmental amenity, the greater the likelihood it will be dealt with, especially if it is endangered or rapidly diminishing.⁸⁹ Even if the physical size is miniscule, the statement should deal with any significant environmental impact.⁹⁰ This will permit the statement to be sufficiently detailed so that, if challenged, the courts will not have to guess as to what is involved and whether the requirements of NEPA have been met.⁹¹

Impact statements are designed to assist in rational, thoroughly informed decision making by various individuals, some of whom may not possess the technical expertise of those who prepare the statements.⁹² For this reason, all features of the statement

⁸³*Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1342 (S.D. Tex. 1973).

⁸⁴*Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972).

⁸⁵*Id.* at 833-35.

⁸⁶*Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

⁸⁷*Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 348 F. Supp. 916, 933 (N.D. Miss. 1972).

⁸⁸359 F. Supp. 1289, 1342 (S.D. Tex. 1973).

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.* at 1343.

must be "written in language that is understandable to non-technical minds and yet contain enough scientific reasoning to alert specialists to particular problems within the field of their expertise."⁹³ Therefore, an agency must to the fullest extent possible and in good faith, fully disclose all relevant facts concerning a proposed federal project in an objective manner. The public must be fully apprised of the project and afforded an opportunity to offer its comments and views.

B. Environmental Impact—Adverse Effect

NEPA requires a detailed statement on the environmental impact of proposed federal action.⁹⁴ A statement is inadequate if it does not set forth any environmental impact which is known to the agency by its own investigations or which has been brought to its attention by others.⁹⁵ At least one court stated that NEPA requires an agency to conduct research that would be adequate to expose the potential but unknown environmental impact of proposed actions and to disclose the results of the research in an impact statement.⁹⁶ Such a requirement should prevent agencies from relying upon the phrase "known environmental impact" as an excuse for not including relevant environmental impact information in the statement.

NEPA also requires the statement to discuss any "adverse environmental effects which cannot be avoided should the proposal be implemented."⁹⁷ Judicial interpretation of this section has developed a minimum requirement that federal agencies discuss all known and foreseeable, unavoidable, adverse environmental consequences of the proposed action. In *Sierra Club v. Froehke*,⁹⁸ the court said that section 101(b) of the Act read in conjunction with section 101(2)(c)(ii) created a requirement that the statement discuss in detail the aesthetically or culturally valuable surroundings, human health, standards of living, or environmental goals set forth in section 101(b) that would be sacrificed to the project.

⁹³*Id.* at 1342-43.

⁹⁴42 U.S.C. § 4332 (1971).

⁹⁵*Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971).

⁹⁶*Environmental Defense Fund, Inc. v. Hardin*, 325 F. Supp. 1401, 1402 (D.D.C. 1971).

⁹⁷42 U.S.C. § 4331(c) (1971).

⁹⁸359 F. Supp. 1289 (S.D. Tex. 1973).

The impact statement must not only mention the environmental consequences of a project, but it must also discuss these consequences adequately. In *Natural Resources Defense Council Inc. v. Grant*,⁹⁹ the court said that it was not sufficient for the Soil Conservation Service to merely point out that the project would increase the amount of sediment carried downstream. The statement must also discuss and analyze the environmental effects of increased sedimentation. In *Daly v. Volpe*,¹⁰⁰ the court said that the statement must review harmful effects that cannot be avoided and also indicate what measures can be taken to minimize the harm.

C. Alternatives

The United States Court of Appeals for the District of Columbia explained NEPA's requirement to discuss alternative courses of action in the following language:

This requirement, like the 'detailed statement' requirement, seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal 'detailed statement' and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place, and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.¹⁰¹

The district court, in *Environmental Defense Fund Inc. v. Corps of Engineers*,¹⁰² also noted that the impact statement must discuss the possibility of total abandonment of the project. The range of alternatives to be considered must extend from the alternative of rejecting the proposed action up to and including alternatives that would fully accomplish the goal of the proposed action but would avoid all of its objectionable features.¹⁰³ In *Natural Resources Defense Council Inc. v. Morton*, the court said that federal agencies

⁹⁹341 F. Supp. 356 (E.D.N.C. 1972).

¹⁰⁰326 F. Supp. 863 (W.D. Wash. 1971).

¹⁰¹*Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

¹⁰²325 F. Supp. 728 (E.D. Ark. 1971).

¹⁰³*Id.*

could not disregard alternatives simply because they "do not offer a complete solution to the problem."¹⁰⁴ The search for alternatives need be neither exhaustive nor speculative and remote, but a thorough exploration of every reasonable alternative must be made.¹⁰⁵ The court in *Sierra Club v. Froehlke* said, in connection with discussing alternatives that do not offer complete solutions:

It is not necessary that a particular alternative offer a complete solution to all technical, economic and environmental considerations. If a portion of the original purpose of the project, or its reasonably logical subcomponent, may be accomplished by other means, then a significant portion of the environmental harm attendant to the project as originally conceived may be alleviated.¹⁰⁶

Although NEPA is somewhat less than explicit with regard to the degree and kind of compliance required of the federal agencies when discussing alternatives to proposed agency actions, the courts have filled in the gaps rather effectively.

The final requirements of NEPA with regard to impact statement adequacy are that the statement must discuss the relationship between local short-term uses of man's environment and enhancement of long-term productivity, and any irreversible and irretrievable commitment of resources involved should the proposed action be implemented.¹⁰⁷ There has been virtually no specific reference by the courts to these two requirements. Although the judiciary has given scant attention to these requirements, it must be assumed that they are no less important than the other requirements of the procedural section of NEPA, since all must be compiled with to the "fullest extent possible."

VII. CONCLUSION

The generality of NEPA has allowed considerable judicial interpretation resulting in the creation of an extremely complex body of law. The emerging pattern is a very liberal interpretation of which actions require preparation of an environmental impact statement, a requirement of increased administrative disclosure, more detailed analysis, and a greater awareness of environmental

¹⁰⁴458 F.2d 827, 836 (C.A.D.C. 1972).

¹⁰⁵*Id.*

¹⁰⁶359 F. Supp. 1289, 1344 (S.D. Tex. 1973).

¹⁰⁷42 U.S.C. § 4332 (A)(IV) (1971).

consequences resulting from any action that requires filing of a statement.

NEPA and the court's interpretation of its provisions represent a very important first step toward solving man's extremely complex and important environmental problems. However, it must be remembered that NEPA is only a beginning and not a complete solution. A reevaluation of societal goals and a spirited commitment toward improving the environmental quality of life will be necessary before man can solve his environmental problems.

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