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The Role of the Courts Under the National Environmental Policy Act

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COMMENT

The Role of the Courts Under the National Environmental Policy Act

When the National Environmental Policy Act[1] (NEPA) was enacted in 1970, it was widely acclaimed as a watershed in the battle to protect man's natural surroundings. The federal government had finally acknowledged the responsibility for preserving the environment. The Act crystallized environmental protection into national policy, set up procedures for federal agencies to increase their awareness of the environmental effects of their actions and established a Council on Environmental Quality to assist in the implementation of these policies. One commentator described the Act as "creating a bill of rights for the protection of the environment" and "the present keystone of the Congressional defense of ecology."[2]

Presently, some two and a half years after enactment, it is not clear that the promise of NEPA has materialized. If anything, the Act has established a formidable record as an instigator of appellate court decisions. When conservation groups and individuals affected by federal projects tried to compel the federal agencies to comply with the Act, serious questions as to its interpretation arose. For example, at the outset it was not clear that NEPA imposed any judicially cognizable duties on federal instrumentalities.[3] Another sizeable group of cases dealt with whether the procedural

1. 42 U.S.C. §§ 4321-4347 (1970), Act of January 1, 1970, PUB. L. No. 91-190, § 2, 83 Stat. 852.

2. Rheingold, *A Primer on Environmental Litigation*, 38 BROOKLYN L. REV. 113, 121 (1970). *See also* Sandler, *The National Environmental Policy Act, A Sheep in Wolf's Clothing?*, 37 BROOKLYN L. REV. 139 (1970); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

3. In Bucklein v. Volpe, 1 ELR 20043 (N.D. Cal. 1970), the court held that NEPA was no more than a declaration of congressional policy. Although a few courts followed this line, *e.g.*, Sherry v. Algonquin Gas Transmission Co., 3 ELR 20227 n.1 (D. Mass. 1972); San Francisco Tomorrow v. Romney, 342 F. Supp. 77, 81 (N.D. Cal. 1972), *modified*, 472 F.2d 1021 (9th Cir. 1973), the overwhelming authority is that NEPA is mandatory on federal agencies in at least some respects. *See, e.g.*, Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

requirements of the Act, especially the duty to prepare an environmental impact statement for each major project, applied to federal projects which were initiated before the Act became effective, but at the time of enactment were not completed.[4] However, perhaps the dispute most crucial to the viability of the Act involves the relationship between the courts and decisions made by administrative agencies under the Act. NEPA would certainly be emasculated if agencies could circumvent statutory restrictions and if the courts could not compel compliance to an effective degree.

The reason that courts have disagreed on the proper judicial attitude toward agency determinations when challenged under NEPA can be traced to the structure of the statute itself. The heart of NEPA lies in sections 101 and 102. Section 101(a)[5] recognizes the danger to the natural environment posed by urban society and asserts a continuing federal responsibility to promote harmony between man and nature. In a similar vein, section 101(b)[6] establishes a federal policy to use all practical means to

4. *See, e.g.*, Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Piritz v. Volpe, 467 F.2d 208 (5th Cir. 1972); Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971). Other points of contention involve standing, the scope of injunctive relief, and the timing of impact statements.

5. 42 U.S.C. § 4331(a) (1970):

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

6. 42 U.S.C. § 4331(b) (1970):

> In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
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> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
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> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
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> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

achieve six general long-range environmental goals, for example, assurance of safe, productive and aesthetically pleasing surroundings. To implement these goals, section 102[7] requires that, to the fullest extent possible,

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

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

7. 42 U.S.C. § 4332 (1970):

The Congress authorizes and directs that, to 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—

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5 ,United States Code and shall accompany the proposal through the existing agency processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and

federal policies, regulations and laws be interpreted and administered in light of the policies of the Act and that federal agencies undertake eight different procedures designed to create awareness and prevention of degradation of the environment. By far the most important of these, the requirement of section 102(2)(c) that an agency file a statement detailing the environmental cost of a federal action, has become the main weapon of conservationists in almost every suit brought under NEPA. Courts now agree that agencies are not free to ignore the mandate of section 102.[8] The plain language of the statute seems to clearly support this rule. However, federal agencies have frequently contended that where section 102 procedures have been carried out, the court does not have the power to review the subsequent agency decision to continue with the project regardless of the effect of the project on the environment vis-a-vis the policy set forth in section 101 of NEPA. The conservationists, on the other hand, contend that NEPA should preclude the initiation of certain federal projects because of their objectively determined degradation of natural surroundings. Can the broad general policies of section 101, set out in generalities and words incapable of precise meaning, be construed to evince a congressional intent to permit judicial supervision, for environmental purposes, of federal projects? To this day this question does not have a specific workable answer and the future of NEPA as a viable means of protection and control of the country's natural resources hangs in the balance. This paper will attempt to review and categorize how the courts have dealt with or have avoided this question. Some courts have had to struggle with a preliminary but crucial question which involves the relationship of courts and agencies, namely the so-called threshold decision or negative determination.[9] The Act requires an environmental impact statement only for "legislation or other major federal actions significantly affecting the quality of the human environment."[10] The threshold decision or negative determination is made when an agency decides that its particular project either is not a major federal action or does not significantly affect environmental values. The decisions are divided on how far a court can go in reviewing such a determination. Obviously the scope of review dramatically affects the Act's

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development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

8. Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1113 (D.C. Cir. 1971); Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164 (6th Cir. 1972).

9. The term "threshold decision" is often used to denote the preliminary decision by an agency that NEPA is or is not applicable to a particular project. When an agency decides that the requirements of the Act are inapplicable, the decision is sometimes referred to as a "negative determination."

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

use as an effective tool for appreciation of environmental values.[11] If an agency could make a unilateral, facile finding that it was not subject to impact statement requirements without the threat of a thorough judicial review, the effect, in the words of Judge J. Skelly Wright, would be to strip NEPA of its fundamental importance.[12] A survey of how the courts have reacted to this problem is also in order.

Courts and Agency Decisions In General

The decisions on the relationship between courts and administrative determinations under NEPA are significant when viewed in terms of the relationship between courts and agencies generally. For nearly seventy years, it has been generally accepted that courts can review findings and determinations by administrative bodies as to their correctness as a matter of law.[13] The scope of review rests on the distinction between questions of law and questions of fact. Traditionally, courts decide questions of law and agencies determine questions of fact, but the court can only look to see if the agency's findings of fact were reasonable.[14] The proper scope of review employed by a court when reviewing agency findings of fact is well established: ". . . the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."[15] However, courts do not exceed their authority by reviewing questions which cannot be neatly classified as of law or of fact. Such "mixed questions" often involve the application of a statutory term to a particular fact situation, for which the "substantial evidence" test has been deemed inappropriate. Courts have devised the so-called "rational basis" test[16] for application in these types of situations. Under this test, a court will uphold an agency determination if it has a "warrant in the record" and a "reasonable basis in fact."[17]

The Administrative Procedure Act (APA),[18] which became law in 1946,

11. Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).
12. *Id.* at 1115.
13. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958).
14. *Id.*
15. ICC v. Union Pacific R.R., 222 U.S. 541, 547-48 (1912).
16. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.01 (1958).
17. Rochester Tel. Corp. v. United States, 307 U.S. 125, 146 (1939). This rule has often been referred to as the doctrine of Gray v. Powell following a landmark Supreme Court decision. 314 U.S. 402, 412-13 (1941). *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). Professor Davis has pointed out that on occasion the courts will eschew the "rational basis" test in reviewing mixed questions of law and fact and either treat the issue as a question of fact or substitute its own judgment for that of the agency. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 30.05, 30.07 (1958).
18. 5 U.S.C. §§ 551-59, 701-06 (1970).

codified a presumption of reviewability for agency determinations and included a rather complex scope of review provision which set forth six different standards of review.[19] In 1971, the Supreme Court provided an exegesis of this provision in *Citizens to Preserve Overton Park, Inc. v. Volpe.*[20] Section 4(f) of the Department of Transportation Act[21] precludes the Secretary from approving a federal highway through parks if a "feasible and prudent" alternative exists. Highways could be put through parks only if "all possible planning to minimize harm" had been completed. A similar provision was in the Federal-Aid Highway Act.[22] The particular litigation arose when the Secretary approved a six-lane highway through Overton Park in Memphis. The plaintiffs claimed, *inter alia,* that feasible and prudent alternatives to the Overton Park route existed and that the Secretary's finding to the contrary should be set aside. The Supreme Court decided that the Administrative Procedure Act governed the standard of review. In all cases of reviewable[23] agency action, courts will set aside the agency determination if it is arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law,[24] or if it contravenes statutory, procedural or constitutional requirements.[25] Under the APA, the Court held that the traditional "substantial evidence" test,[26] applies only when the agency action to be reviewed was taken pursuant to the rulemaking or adjudicatory procedures set up in the Act. The court said that a reviewing court cannot engage in de novo review[27] unless the agency action was the result of an adjudicatory procedure and the fact-finding procedures were inadequate. The Court then applied this provision to the particular determination made by

19. 5 U.S.C. § 706 (1970):
. . . The reviewing court shall—
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
Sections 556 and 557 referred to in (E) above involve rulemaking and adjudications.
20. 401 U.S. 402 (1971).
21. 49 U.S.C. § 1653(f) (1970).
22. 23 U.S.C. § 138 (1970).
23. 5 U.S.C. § 706(1)(A) (1970).
24. 5 U.S.C. § 706(2)(A) (1970).
25. 5 U.S.C. § 706(2)(B), (C), (D) (1970).
26. 5 U.S.C. § 706(2)(E) (1970).
27. *See* 5 U.S.C. §§ 701(a), 702 (1970).

the Secretary, setting up a tripartite standard. First, the court should determine whether the Secretary acted within his authority, meaning within the range specified by Congress. Secondly, the court should apply the arbitrary and capricious standard. In deciding what is arbitrary, the court must look to see if the administrative determination considered all the relevant factors and was not a clear error of judgment. At this point, the Court felt it necessary to make a clarification which underlined the limitations on review:

> Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[28]

As its third duty, the reviewing court must decide whether the Secretary's action followed the necessary procedural requirements.[29]

The Threshold Determination

The vast majority of litigation which has arisen under NEPA to date concerns the section 102(2)(C) provision for preparation of an environmental impact statement. Impact statements are not mandated for each government project, only those which are "major federal actions" which "significantly affect" the environment. The volume of litigation indicates that conservationists and concerned citizens have widely differing views on the definition of "major" and "significant."[30] Reviewing courts have taken varying approaches when confronted by an allegation that an agency has erroneously determined that a project is not significant enough to require an impact statement.

A number of cases have held that the court can decide for itself if an agency's negative determination regarding the necessity for an impact statement is correct, as if the question were one of law. In *Scherr v. Volpe*,[31] the Secretary of Transportation approved a federally funded highway-widening project without filing an impact statement. The trial court issued an injunction and the Secretary, in moving for a suspension of the injunction, claimed that the highway program was not a major project which signifi-

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28. 401 U.S. at 416.

29. In addition, the Court held that review was not precluded by the Administrative Procedure Act, that formal findings of fact by the Secretary were not required and that review should be on the entire administrative record. This latter issue has occasionally been raised in suits under NEPA. *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, — U.S. —, 93 S. Ct. 2749 (1973).

30. *See* Note, *Threshold Determinations by Federal Agencies under the National Environmental Policy Act of 1969*, 1973 WASH. U.L.Q. 235 (1973).

31. 336 F. Supp. 886 (W.D. Wis. 1971), *aff'd*, 466 F.2d 1027 (7th Cir. 1972).

cantly affected the environment. The court decided that it could review the question de novo if it so chose for two reasons. First, although Congress could delegate discretionary powers to an administrative body, the mandate of section 102(2)(C) constituted a "flat command" to the agency. The agency could determine what section 102(2)(C) demanded, but its decision carries no weight when a party challenges its validity. Secondly, the court decided that it should review the issue as one of law rather than one of fact because a reviewing court must interpret two statutory standards, namely, "major federal action" and "significantly affecting" the environment. Thereafter, the court must apply them to a particular project and then decide whether the agency's decision violated the statute.[32] A few other cases have followed *Scherr* explicitly.[33] In a larger number of cases, courts have decided the validity of an agency's negative determination as a matter of law without any deference to agency discretion or discussion of the proper scope of review.[34] In *Students Concerned about Regulatory Agency Procedures (SCRAP) v. United States,*[35] for example, the court decided that, regardless of the agency's contention, section 102(2)(C) procedures must be followed whenever the proposed action will arguably have an adverse environmental impact. NEPA would be rendered meaningless if an agency could avoid its mandate under the statute by merely asserting that it finds no need to comply.[36]

A second line of cases holds that the "rational basis" test should govern when a court reviews a negative threshold determination. *Citizens for Reid State Park v. Laird*[37] is a leading case in this regard. The Department of Defense proposed a mock amphibious landing and bivouac by Marines at a

32. The court's language may technically be dicta, since the court decided that if it is assumed that the agency possessed some discretion, it had abused that discretion here.

33. *See, e.g.,* Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972).

34. In Kisner v. Butz, 350 F. Supp. 310 (N.D. W.Va. 1972), the court concluded that the total record before it failed to demonstrate any significant adverse effect on the environment, thus the National Forest Service's finding to that effect will be upheld. *See* Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *cert. denied, sub nom.* Hanly v. Kleindienst, 409 U.S. 990 (1972).

35. 346 F. Supp. 189 (D.D.C. 1972) (three-judge court), *stay denied sub nom.* Aberdeen & Rockfish Ry. v. SCRAP, 409 U.S. 1207 (Burger, Circuit Justice, 1972), *rev'd on other grounds,* — U.S. —, 93 S. Ct. 2405 (1973).

36. The court also finds support for its rule in the Guidelines issued by the Council on Environmental Quality, which stated that where proposed actions are likely to be "controversial" in environmental impact, § 102(2)(C) statements should be filed in all cases. 36 Fed. Reg. 7724 (1971). Reliance on the Guidelines creates some thorny legal problems. The CEQ is not authorized by statute to issue regulations, thus the Guidelines are merely advisory in nature. Nevertheless, courts will often rely on them in solving issues concerning threshold decisions and other NEPA-related questions.

37. 336 F. Supp. 783 (D. Me. 1972).

state park uniquely adapted for this purpose. After a study of the environmental consequences, an administrative officer concluded that the project was not major and did not significantly affect the environment. In considering this determination, the court decided that since it had to apply statutory terms to a particular situation, it would uphold the threshold decision if that decision had a warrant in the record and a reasonable basis in law.[38] Another district court employed the same standard in reviewing a Tennessee Valley Authority determination that filing individualized environmental impact statements for a series of coal purchases would violate a provision of the Tennessee Valley Authority Act.[39]

The third possible standard for review is the "arbitrary and capricious" test embodied in the Administrative Procedure Act. In *Hanly v. Kleindienst,*[40] the Second Circuit held that, for three essential reasons, this was indeed the proper standard in the face of the Government's claim that the "rational basis" test should prevail. First, the meaning of the term "significantly affecting" (the project was conceded to be major) can be isolated as a question of law. The significance of this point is not clear from the opinion. Following both the traditional view and the Administrative Procedure Act, a court can review de novo questions of law.[41] Apparently the court meant that since the agency decision was closer to an issue of law than of fact, the large amount of discretion which the Agency claimed for itself was not warranted. Secondly, the Supreme Court in *Overton Park* applied the "arbitrary" standard to a similar agency determination of the meaning of a statutory prohibition and an administrative finding thereon. Finally, it was argued that the "arbitrary" standard provided for the proper balance between effective judicial scrutiny and allowing an agency some leeway in applying law in the area of expertise.[42] The "arbitrary and capricious"

38. The court also applied the test of arbitrariness and found no claim for a violation under that standard.

39. Natural Resources Defense Council, Inc. v. TVA, 5 ERC 1316 (E.D. Tenn. April 17, 1973).

40. 471 F.2d 823 (2d Cir. 1972), *cert. denied,* — U.S. —, 5 ERC 1416 (May 21, 1973). The suit was brought by neighbors of the Foley Square Courthouse in New York City where the General Services Administration proposed to construct a detention center adjacent to the court building. GSA submitted a twenty-five page statement in support of its negative determination. The court concluded that more documentation was needed and remanded for further factfinding. The case had previously been before the court of appeals. Hanly v. Mitchell, 460 F.2d 640 (2d Cir) *cert. denied,* 409 U.S. 990 (1972).

41. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958); 5 U.S.C. § 706(1) (1970).

42. Chief Judge Friendly dissented, claiming that the majority's rule allows too many federal projects, more that Congress intended, to be labeled as of no significant environmental effect. Also, the majority's requirements might cause the negative determination to become a "mini" impact statement. As a solution, Judge Friendly sug-

test has a substantial number of adherents in threshold determination cases.[43]

The Fifth Circuit, in *Save Our Ten Acres v. Kreger*,[44] has proposed a fourth standard for review of agency decisions which have found that federal programs are not major or not significant in effect upon the natural surroundings. The court of appeals rejected the contention that the "arbitrary" standard should be employed. This standard is most appropriate, the court said, where factual determinations are under review, but it should not be applied to a "basic jurisdiction-type conclusion involved here."[45] Where imposition of statutorily mandated procedures depends on the outcome of an administrative decision, a broader scope of review is necessary:

> The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review. . . . The primary decision to give or by-pass the consideration required by the Act must be subject to inspection under a more searching standard.[46]

The court mandated the standard of "reasonableness" which is broader than the standard of arbitrariness. The court found support for its conclusion, as did the *Hanly* court, in the *Overton Park* decision. According to the *Ten Acres* opinion, the Supreme Court employed the "arbitrary and capricious" rule only with regard to the ultimate administrative decision on the merits of the project. *Overton Park* teaches that "a more penetrating inquiry" is appropriate for review of the threshold determination.[47] The *Ten Acres* opinion represents a significant departure from the classic doctrine on scope of judicial review and apparently is a maverick.

A more recent decision of the same court[48] indicates that the "reasonableness" test might not be as broad as the *Ten Acres* decision implies. The

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gested that impact statements be required in all gray areas. 471 F.2d at 837-38. The majority contended that providing for an impact statement in all controversial cases is not workable since, as in zoning cases, there is some opposition to virtually all projects, regardless of size or impact. *Id.* at 830 n.9A.

43. Echo Park Residents Committee v. Romney, 3 ERC 1255 (C.D. Cal. 1971); Maryland Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 349 F. Supp. 1212 (D.D.C. 1972); Durnford v. Ruckelshaus, 5 ERC 1007 (N.D. Cal. 1972); Rucker v. Willis, 358 F. Supp. 425 (E.D.N.C. 1973).

44. 472 F.2d 463 (5th Cir. 1973). The General Services Administration decided that the construction of a federal building in downtown Mobile did not "significantly affect" the environment. In the ensuing lawsuit, the defendants claimed that the determination was not arbitrary or capricious.

45. *Id.* at 466.

46. *Id.*

47. *Id.*

48. Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973).

case involved a proposed federally funded low and moderate income apartment complex which the Department of Housing and Urban Development concluded was not within the requirements of section 102(2)(C) procedures. In addition to the administrative record, the district court conducted a full-scale trial with additional witnesses and evidence on the correctness of the HUD negative determination. This, according to the court of appeals, distinguished the case factually from *Ten Acres*. A court need not engage in testing a threshold decision for reasonableness where the plaintiff does not raise "substantial environmental issues."[49] However, it is not clear which test the court employed, since the opinion merely concluded that the HUD determination was not erroneous as a matter of law. At a minimum the case indicates *Ten Acres* may not be as innovative as originally thought.

The ruminations of the courts on the proper scope of review of agency threshold determinations obviously does not fit into a pattern. A few general observations can be made. To begin with, courts have often shown difficulty distinguishing between the different standards when attempting to apply them.[50] Courts often will not consciously employ the standard it declares to be applicable,[51] or will apply more than one standard.[52] It is a fairly discernible trend that courts will hold for de novo review of threshold decisions where the negative determination was made by an agency as a bald assertion without any independent inquiry on its part. In the *SCRAP* case, for instance, the threshold determination amounted to one sentence in one of the contested ICC orders.[53] In *Scherr v. Volpe*, the agency defendants made no assertion, apparently, that the project was not within the statutory requirements of section 102(2)(C) until their motion for suspension of the injunction. It seems indisputable that the de novo rule is appropriate in these kinds of cases, where the court has nothing to review and consequently is encouraged to make an independent determination. The Act does not expressly compel judicial review, but it appears that the courts feel compelled as a matter of law to make their own determination.

The rationale is less understandable, however, in those decisions opting for the "rational basis" test and the standard of arbitrariness. The thresh-

49. 476 F.2d at 425.

50. *See* Morningside Renewal Council v. AEC, 482 F.2d 234 (2d Cir. 1973) (Oakes, J. dissenting).

51. *See, e.g.*, Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973).

52. *See, e.g.*, Scherr v. Volpe, 336 F. Supp. 886 (W.D. Wis. 1971), *aff'd on other grounds*, 466 F.2d 1027 (7th Cir. 1972); Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972).

53. The opinion suggests that the scope of review might be different if the ICC had conducted a detailed study and then concluded that no impact statement was necessary. 346 F. Supp. at 201 n.17.

old determination can probably be most accurately classified as a mixed question of law and fact, the application of a statutory term to particular facts. According to well-settled precedents, it should be governed by the "rational basis" test.[54] The *Hanly* opinion discussed the test with some approval,[55] but then rejected it out of hand without much explanation. The most potent argument against the "rational basis" rule is the *Overton Park* decision in which that test was not discussed regarding a similar mixed question. Whether *Overton Park* should be interpreted as *sub silento* overruling the well established line of cases supporting the "rational basis" test is a close question. It seems unlikely that the Court would have intended to reject a proposition which has become so embedded in the fabric of administrative law without some specific language to that effect. The Court has continued to insist on the "rational basis" test after the Administrative Procedure Act became effective.[56] However, in the face of the strong *Overton Park* precedent, most courts seem to have chosen the APA standard of arbitrariness.

For essentially the same reasons, few courts are likely to adopt the "reasonableness" test promulgated in the *Ten Acres* case. The rule is an extension of the rationale employed by courts when faced with a threshold determination made without an administrative inquiry and is based on a policy of preventing easy circumvention of statutory restrictions. Such an extension might not be warranted where agency expertise has been employed in the threshold decision. Furthermore, the reliance on *Overton Park* seems misplaced. The *Ten Acres* opinion asserted that the Supreme Court established a bifurcated standard, one for the ultimate decision, *i.e.* whether the project should be undertaken and another for the preliminary one, *i.e.* is an impact statement required. However, it seems that only one administrative finding was challenged in *Overton Park*, the decision of the Secretary under the "prudent and feasible alternative" clause. The same is true in *Environmental Defense Fund, Inc. v. Corps of Engineers*,[57] which *Ten Acres* cites for further support.[58] The state of the law on the whole question is by no means clear and must await further judicial clarification.[59]

54. *See* text accompanying note 16 *supra*.
55. 471 F.2d at 829.
56. Zemel v. Rusk, 381 U.S. 1 (1965); Udall v. Tallman, 380 U.S. 1 (1965); NLRB v. United Ins. Co. of America, 390 U.S. 254 (1968); Thorpe v. Housing Authority, 393 U.S. 268 (1969).
57. 470 F.2d 289 (8th Cir. 1972).
58. 472 F.2d at 466 n.5.
59. A whole body of case law has developed under § 102(2)(C) in which standards have been set up to determine when, as a matter of law, a project comes within the meaning of the crucial terms of that provision. Some of the major cases are:

The Ultimate Decision on the Merits of a Project

The foregoing survey of scope of review cases regarding agency threshold determinations might suggest that courts stand ready to prevent an obvious circumvention of section 102 requirements. The court decisions indicate that mere satisfaction of procedural duties does not assure compliance with the NEPA objectives. The procedures of section 102 seem to envision modification of the environmentally damaging aspects of a project or even termination of the project if it has a sufficiently serious effect on the natural surroundings. In the words of the Act's sponsor, the procedural requirements were intended to be "action-forcing."[60] However, no provision in the Act compels modification or termination of environmentally undesirable programs. This lack of express direction could conceiveably precipitate the frustration of the underlying purpose of NEPA, because agencies could satisfy the statutory mandate merely by considering, albeit in good faith, deleterious environmental consequences of proposed actions in an impact statement and then proceed to complete the program, giving no weight to the environmental factors. In addition, agencies would not be forced to establish a series of standards under which future projects could be judged.

Consequently, courts have been forced to consider whether NEPA limits in any way the agency's discretion to undertake a major federal project which has a substantial effect on its surroundings. Courts which have entertained the question have viewed it from two different vantage points: what is the proper scope of review of a substantive agency determination on the merits of a project vis-a-vis the policies of NEPA; or does the Act, especially the policy provisions of section 101, bestow on plaintiffs substantive rights to a good environment which can be judicially enforced against federal agencies. The essence of both questions is the same. Does NEPA intend that federal projects which inflict serious damage on the environmnt be terminated or modified merely because of the amount of environmental harm involved? The usefulness of NEPA as a tool of environmental control depends on the answer.

The Scope of Review Cases

Calvert Cliffs and Its Progeny

The District of Columbia Circuit issued the first major systematic analysis

Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537 (7th Cir.), *cert. denied*, 409 U.S. 1047 (1972); City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973); Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971); Kisner v. Butz, 350 F. Supp. 310 (N.D. W. Va. 1972).

60. 115 CONG. REC. 19009 (1969) (remarks of Senator Jackson).

of NEPA on an appellate court level in *Calvert Cliffs Coordinating Committee, Inc. v. AEC.*[61] This case, which has become a landmark in all of environmental law, said that the substantive decision by an agency to proceed with a given project was subject to a limited form of judicial review. That standard of judicial review has since been elaborated by subsequent opinions by the same court.

The scope of review enunciated by the court in *Calvert Cliffs* relates directly to its perception of the structure of section 101 and 102. The policy statements in section 101 impose an explicit duty on the government. However, the duty is a flexible one; it leaves room for a "responsible exercise" of agency discretion.[62] In contrast, the procedural duties of section 102 are not inherently flexible and do establish a strict standard of compliance. Furthermore, implicit in the procedural duties of section 102(2) is a duty to consider environmental issues in the agency's decision-making process which in turn demands a "finely-tuned" and "systematic" balancing analysis of the costs and benefits in each individual case.[63]

Because of the mandatory nature of Section 102 courts must make a careful review of the compliance with it, while only limited review can be afforded under section 101:

> The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was *arbitrary or clearly gave insufficient weight to environmental values.*[64] (emphasis added)

The court's duties under section 102 are not as restricted:

> But if the decision 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.[65]

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

62. *Id.* at 1112-13 n.9.

63. *Id.* at 1113. In support of his view of NEPA, Judge J. Skelly Wright relied on the language of the Act together with its legislative history, especially the statements of Senator Jackson, the Act's sponsor.

64. *Id.* at 1115.

65. *Id.* In addition to the tentative nature of some of the language, the court's conclusions on the scope of review is further weakened as a solid precedent since they are technically dicta. Neither a substantive agency decision nor an alleged failure to meet procedural requirements was at issue. The suit involved four regulations established by the AEC to implement compliance by the AEC with NEPA. One rule stated that the hearing board need not consider environmental factors where not raised by the parties in a licensing procedure; another prohibited consideration of the environmental factors by the hearing board at proceedings which were officially noticed before March 4, 1971. A third regulation precluded consideration of environmental consequences which were in the domain of other agencies. The final rule provided for preparation of impact statements by the parties rather than by the agency. The court

The District of Columbia Circuit has subsequently stated that the judicial review of what *Calvert Cliffs* called the "substantive agency decision" is narrow. The issue arose in the litigation concerning the underground test of a nuclear warhead at Amchitka Island, Alaska.[66] In a per curiam opinion, the court of appeals reversed the lower court's grant of summary judgment because the environmental impact statement issued by the AEC was inadequate, but not without issuing a disclaimer:

> On the ultimate issue whether a project should be undertaken or not, a matter involving the assessment and weighing of various factors, the court's function is limited.[67]

Again, in *Natural Resources Defense Council, Inc. v. Morton,*[68] the court reaffirmed the discretion of the agency. As long as agencies take a "hard look" at environmental conservation, the court did not seek to "impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken."[69]

A number of other jurisdictions have adopted, practically verbatim, the *Calvert Cliffs* test.[70] A larger number of courts have accepted the District of Columbia Circuit's view of the flexible and inflexible nature of section 101 and 102 respectively, although they failed to reach the question of scope of review. It seems likely that they would be in accord with *Calvert Cliffs* on that issue also.[71]

The Administrative Procedure Act Cases

The *Calvert Cliffs* decision is notable in that it did not consider the application of the "arbitrary and capricious" standard to the review of the substantive agency decision.[72] According to *Overton Park*, that scope of re-

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found that each regulation violated either the spirit or letter of NEPA and that the AEC regulations were an especially blatant attempt to circumvent the strictures of NEPA.

66. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).

67. *Id.* at 786-87.

68. 458 F.2d 827 (D.C. Cir. 1972).

69. *Id.* at 838. The court's pronouncement here must also be viewed as dicta, since the decision turned on the legal sufficiency of the impact statement and not whether the Secretary's decision to institute the project, here the approval of offshore oil and gas leases, was in compliance with the overall policy of the Act.

70. *See, e.g.*, Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y. 1972).

71. *See, e.g.*, Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164 (6th Cir. 1972).

72. The Supreme Court's decision [in Overton Park] was issued March 3, 1971, about four months prior to the *Calvert Cliffs* decision on July 7.

view standard applied to agency determinations reviewable under the Act. The particular nature of the administrative decision subjected to the APA in *Overton Park* is similar to the agency decision to undertake a project. Both require the exercise of administrative judgment and expertise within the bounds of statutory prescriptions. Indeed, a fairly large number of cases have applied the "arbitrary and capricious" standard to the ultimate administrative decision on federal projects; most have done so either without comment or by merely citing the Supreme Court decision. For example, in *Silva v. Lynn*,[73] which reviewed an attack on the compliance with NEPA of a federally assisted housing project, the court said:

> In any event, the judicial inquiries are whether the agency's findings and conclusions . . . are arbitrary, capricious, and abuse of discretion, or not otherwise in accordance with law. . . .[74]

Calvert Cliffs and the cases which follow it do not give a satisfactory explanation as to why the APA standard of arbitrariness should not apply to agency decisions which concern the initiation of major projects. However, one court has expressed doubt concerning the APA "substantial evidence" standard in preference for the "arbitrary" and "clearly insufficient weight" test of *Calvert Cliffs*.[75] The court suggested that although under established precedent, the Interstate Commerce Commission's abandonment order should be reviewed under the "substantial evidence" test as incorporated into section 10(e) of the APA, for purposes of review under NEPA the *Calvert Cliffs* test is applicable. The court explained that since an agency decision under NEPA is not made pursuant to fact finding procedures, the "substantial evidence" test is inappropriate.[76] However, the reasoning fails to explain why the standard of arbitrariness should not apply. Ultimately, the distinction may be academic since the *Calvert Cliffs* and APA standards differ only in minor degree.

The decisions following both the APA and *Overton Park* standards have failed to discuss a question which is a condition precedent to judicial scrutiny under the scope of review section of the APA, reviewability.[77] Un-

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73. 482 F.2d 1282 (1st Cir. 1973).

74. *Id.* at 1655. *Accord*, Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 145 (N.D. Ga. 1971); National Forest Preservation Group v. Butz, 343 F. Supp. 696 (D. Mont. 1972); Brooks v. Volpe, 350 F. Supp. 269 (W.D. Wash. 1972).

75. City of New York v. United States, 344 F. Supp. 929 (E.D. N.Y. 1972) (three-judge court).

76. The opinion noted that the congressional conference committee substituted the requirement of a "finding" with the requirement of a "detailed statement" in the final version. Neither Judge Friendly, who authored the opinion, nor the sponsors themselves seemed clear as to what the significance of the change was. *Id.* at 940.

77. 5 U.S.C. § 701(a) (1970).

der the APA not all agency action is subject to review, only those actions where statutes do not preclude it or where the action is not "by law committed to agency discretion."[78] Although a respectable argument might be made that the decision whether or not to undertake a particular project was committed by law to the discretion of the agency initiating the project, it is not clear that courts have actually considered this line of argument.

The Substantive Rights Cases

Conservationists have frequently argued that the declaration of congressional policy of continuing responsiblity for preservation of the natural surroundings bestows on the individual the right to a certain level of environmental quality against encroachment by federal instrumentalities.[79] When confronted by this contention, courts have adopted completely conflicting viewpoints. The courts which hold that NEPA creates no rights other than those procedural rights correlative to the duties imposed on agencies in section 102 of the Act are fairly numerous.[80] The reasons against an interpretation which finds substantive rights in NEPA are marshalled in *Environmental Defense Fund v. Corps of Engineers, Inc.*[81] a lawsuit arising out of the construction of Gillham Dam on the Cossatot River in Arkansas. Although the decision was reversed by the court of appeals specifically on the question of substantive rights, the opinion of Judge Eisele contained one of the first major comprehensive treatments of NEPA and has exerted persuasive influence on other courts. The plaintiffs alleged that the damming of the Cossatot, which by the admission of all concerned parties would make the stream no longer suitable for canoeing and fishing, violated section 101(b)(4) of NEPA since it reduced "diversity and variety of choice," one of the goals set for the federal government by the Act. Consequently, the plaintiffs

78. In *Overton Park*, the Supreme Court held that an agency decision was by law committed to its discretion when the relevant statutes provided "no law to apply" to the decision. The Court found that there was in the Department of Transportation Act sufficient statutory restrictions on the Secretary to render his decision reviewable. For a good argument that substantive agency decisions under NEPA should likewise be reviewable, *see* Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act*, 3 ELR 50028 (1973).

79. Some commentaries have asserted the existence of a constitutional right to environmental protection. *See also*, note 82 *infra*.

80. Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537 (7th Cir.), *cert. denied*, 409 U.S. 1047 (1972); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971); Piritz v. Volpe, 4 ERC 1195 (M.D. Ala.), *aff'd*, 467 F.2d 208 (5th Cir. 1972); Citizens for Mass Transit Against Freeways, v. Brinegar, 357 F. Supp. 1269 (D. Ariz. 1973); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971).

81. 325 F. Supp. 749 (E.D. Ark. 1971), *injunction vacated*, 342 F. Supp. 1211 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, — U.S. —, 93 S. Ct. 675 (1973).

asked the court to prohibit construction of the dam. The court denied that it had the power or duty to enjoin construction for two basic reasons. First, NEPA was the product of a congressional compromise which replaced a stronger[82] bill with an act which only declared the national policy on the environment. Secondly, nothing in the Act purports to vest rights in the plaintiff or anyone else, or to give the court the power to reverse an agency determination on the merits of its program.

> If the Congress had intended to leave it to the courts to determine such matters; if indeed, it had intended to give up its own prerogatives and those of the executive agencies in the respect, it certainly would have used explicit language to accomplish such a far-reaching objective.[83]

In the court's view, the statute is not left without some teeth. While NEPA may not have altered existing decision making responsibilities or may not have taken away any freedom of decision making, it is at the very least an "environmental full disclosure law."[84] Although agency officials can choose to ignore environmental factors under NEPA, they must indicate that they are doing so with open eyes. In a subsequent opinion in the same case, Judge Eisele reaffirmed his view of NEPA:

> . . . the plaintiffs here cannot look to the judiciary to reverse or modify any decision with respect to the building of the [dam] . . . it must be [modified] . . . through . . . the executive or legislative branches.[85]

A district court in Mississippi reached a similar conclusion in a case involving the building of the Tennessee-Tombigbee Waterway[86] in which some additional arguments were advanced against an interpretation that NEPA conferred substantive rights. In addition to noting the ambiguous language of section 101, the court claimed that the phrase "to use all practicable means" as found in section 101 vests broad discretion in administrative officers to adopt environmental goals to other national policies[87] and

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82. A provision in the Senate bill stated that: "each person has a fundamental and inalienable right to a healthful environment . . . ." However, the corresponding compromise language in section 101(c) was adopted because the House conferees were unsure of the "legal scope" implicit in the above provision. 2 U.S. CODE CONG. & AD. NEWS 2768-69 (91st Cong. 1969).

83. 325 F. Supp. at 755.

84. *Id.* at 759. Despite its disclaimer of power to halt the project, the court found a way to enjoin the construction, holding that the Corps of Engineers violated the procedural requirements of NEPA in at least ten different ways.

85. Environmental Defense Fund, Inc. v. Corps of Engineers, 342 F. Supp. 1211, 1216 (E.D. Ark. 1972).

86. Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972).

87. Sections 104 and 105 clearly state that the duties imposed by the Act are not substitutes for prior existing statutory duties and are supplemental to the goals and

leaves the ultimate decision on a project to the agency.

The foremost authority for the proposition that NEPA did create substantive rights is the opinion of the Eighth Circuit in the Gillham Dam case.[88] Chief Judge Matthes, writing for the court, rejected, on the basis of the language and legislative history of NEPA, the lower court holding that the Act created no substantive rights. After a review of the salient points of section 101 and section 102, and noting that the section 102 procedures were intended to implement section 101 policy, the court concluded:

> The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill government archives.[89]

Implementation of substantive policy necessitates the balance of environmental good and harm in the decision making process.

The second argument advanced in support of the existence of substantive rights was the "presumption of reviewability" doctrine, rooted in either common law or the APA and under which any administrative determination affecting legal rights is reviewable unless there is a special reason for not so doing.[90] The opinion said that judicial review should be granted for three reasons: NEPA was silent about review, there was no special reason to cut off judicial scrutiny, and legal rights were affected by the agency's decision.[91] The court's ruling indicates that the plaintiff's substantive rights are rights to judicial scrutiny of the agency decision of the merits of a project. The standard under which judicial review operates is, according to the court, the familiar test of arbitrariness as set out in the APA and applied in *Overton Park*. Where NEPA is specifically involved, the *Calvert Cliffs* "arbitrary or clearly insufficient weight" rule applies.[92] The view that the court

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policies already set out in the existing authorizations of federal agencies.

88. 470 F.2d 289 (8th Cir. 1972), *cert. denied*, — U.S. —, 93 S. Ct. 2749 (1973). For a good summary of the case for substantive rights under NEPA, *see* Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act*, 3 ELR 50028 (1973).

89. 470 F.2d at 298.

90. The opinion cites Professor Davis, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 18, 25 (1958).

91. The court also relies on the *Calvert Cliffs* line of cases, *Overton Park*, the opinion of the CEQ, and commentaries on the Act. A number of subsequent decisions have adopted the substantive rights interpretation: Conservation Council of North Carolina v. Froehlke, 473 F.2d 664 (4th Cir. 1973); Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va. 1973); Environmental Defense Fund, Inc. v. TVA, 5 ERC 1183 (E.D. Tenn. March 21, 1973).

92. The court of appeals went on to hold that the Corps of Engineers' decision to complete the dam was not arbitrary and thus no relief was appropriate. The environmentalist plaintiffs thus won the substantive rights battle but lost the Gillham Dam war.

construed the substantive rights as no more than a right to a limited review of an ultimate agency decision was supported in a subsequent opinion by the same court. In *Environmental Defense Fund, Inc. v. Froehlke*,[93] which concerned a channelization project along the Cache River, the court reiterated the holding in the Gillham Dam case, but stressed that review was limited to the standards applied in that case and asserted that the court was not empowered to substitute its judgment on the merits of the project, the same kind of language which is often found in the "no substantive rights" cases.[94]

The last shot in the battle over substantive rights has by no means been fired. Recently, in *Sierra Club v. Froehlke*,[95] a district court in Texas found that NEPA imposed a substantive duty and a correlative right different from the right to limited judicial review. Under the Act, the court held that federal agencies must mitigate some and possibly all of the environmental impacts likely to arise from a particular project. The court drew this conclusion from the "all practicable means" language of section 101(b) and the Council on Environmental Quality Guidelines and proposed regulations of the Environmental Protection Agency which state that the purpose of the impact statement procedure is to avoid adverse effects.[96] The cases which have held that there are no substantive rights are valid only to the extent that NEPA does not give the courts the final decision on the advisability of a particular project. But the court argues that, to the exent that this position allows the agencies merely to "disclose the likely harm without reflecting a substantial effort to prevent or minimize environmental harm, it is not . . . . [accurate]."[97] Whether this position will gain judicial adherence remains to be seen.

Conclusion

The state of the law on the relationship between the courts and the ultimate agency decision to undertake the proposed program is neither consistent nor well-defined. A few conclusions can be asserted. First, most courts, especially those which have faced the issues more recently, will subject the ultimate administrative decision to some limited form of judicial scrutiny. Generally, some kind of standard of arbitrariness is employed based on the APA or the language of *Calvert Cliffs*. Although the position of the

93. 473 F.2d 346 (8th Cir. 1972).
94. *See* note 80 *supra*.
95. 359 F. Supp. 1289 (S.D. Tex. 1973).
96. CEQ Guidelines § 2, 36 Fed. Reg. 7724 (1971), Proposed EPA Reg. § 6.45(b)(2), 37 Fed. Reg. 883 (1972). The court pointed out that it had been advised that all proposed EPA regulations were then in effect. 359 F. Supp. at 1323, n.109.
97. 359 F. Supp. at 1340.

courts on their relationship to administrative determinations under NEPA remains crucial to the viability of the Act, the degree of judicial scrutiny or the existence of substantive rights has not ultimately determined whether a given federal project can be undertaken. In no major opinion except one, where the function of the courts under NEPA was discussed at length, did the final disposition turn on the court's conclusions on that issue. In *Calvert Cliffs,* for example, the decision was based, not whether the agency decision to construct the proposed project was arbitrary, but whether four AEC rules designed to implement NEPA failed to comport with the procedural requirements of the Act.[98] Two cases following *Calvert Cliffs, Morton*[99] and *Committee for Nuclear Responsibility, Inc. v. Seaborg,*[100] enjoined the respective projects because the impact statements filed were inadequate as a matter of law, not because of any inherent degradation which would be visited upon the environment. The same holding was reached in *Silva v. Lynn,*[101] the case which adhered to the APA. Although it found no substantive rights, the district court in the Gillham Dam case enjoined the project because of numerous violations of section 102 duties.[102] However, the court of appeals in the same case decided which standard of review was proper and then applied it to determine the outcome of the plaintiff's challenge to the project. This is the only example of a major NEPA case in which the standard of review selected was crucial to the court's decision.[103]

It should be noted that in no case here discussed, nor in any case which has come to light, have the courts set aside an ultimate agency decision on the sole ground that it violated substantive rights or because it was arbitrary or clearly gave insufficient weight to environmental factors. Plaintiffs have not succeeded by proceeding against the ultimate agency decision alone. The road to victory under NEPA, where victory has occurred, has clearly involved allegations of procedural violations of the impact statement requirements. The implications for environmental suits are twofold: 1) projects which have severe repercussions on the natural surroundings will be difficult to halt permanently under NEPA, since eventually the agency will conform the deficient statement or procedure to the mandate of the courts; 2) predicting the outcome of NEPA suits will be harder, because the necessary components of a legally adequate impact statment are not

98. *See* note 65 *supra.*
99. 458 F.2d 827 (D.C. Cir. 1972). *See* note 69 *supra.*
100. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).
101. (1st Cir. 1973).
102. 325 F. Supp. 749 (E.D. Ark. 1971).
103. 470 F.2d 289 (8th Cir. 1972), *cert. denied,* — U.S. —, 93 S. Ct. 675 (1973).

clear, and the criteria employed are less easily quantifiable. The following examples demonstrate the disparity among courts on the issue. In the Gillham Dam case,[104] the lower court held that a legally sufficient impact statement must discuss all environmental aspects of the proposed action. The court found numerous violations, including the failure to explore injury to fish and wildlife as well as the use of the wrong interest rate in determining the cost-benefit ratio. On the other hand, in the Tombigbee Waterway case,[105] the court required a legally sufficient impact statement to discuss only significant aspects of probable environmental effects of the project. Thus, an environmental impact statement which did not discuss the effect of the project on all the wildlife in the area and which did not discuss the loss of geological and archeological treasures, was approved.

If anything, the foregoing analysis of the courts' treatment of both threshold and substantive decisions by agencies suggests that courts will act to prevent facile circumvention of an important policy statute nevertheless fraught with vagueness and verbal loopholes. However, courts must take the next step of applying a broader scope of judicial review to administrative decisions which could have a detrimental environmental effect. A broader review on such decisions is justified by the congressional mandate for environmental preservation which NEPA embodies. The extent of review afforded environmentally related decisions, as of the present, does not vary substantially from that given to other agency decisions under the general principles of administrative law. Even the "substantive right" holdings generally go no further than to restrain federal projects in which the decision to undertake the project was so unsupported as to be arbitrary. Furthermore, the cases indicate a tendency to apply the same standard of review to both the threshold determination and the substantive decision, a further indication that there exists no special "environmental" standard for courts to employ.

As far as generalization is possible, the courts in enforcing NEPA have occupied a middle ground. Judicial inquiry will pierce the administrative veil to prevent obvious circumvention of the policies of NEPA, but will not tread where some agency discretion could be exercised.

Richard M. Ashton

104. 325 F. Supp. 749 (E.D. Ark. 1971).

105. Environmental Defense Fund, Inc. v. Corps. of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972).