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National Environmental Policy Act: An Ambitious Purpose, A Partial Demise

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NATIONAL ENVIRONMENTAL POLICY ACT: AN AMBITIOUS PURPOSE; A PARTIAL DEMISE

I. INTRODUCTION

In 1974 the Sierra Club and two other groups concerned with preservation of the environment,[1] brought an action in the Federal District Court for the District of Columbia alleging that the Department of the Interior and the Office of Management and Budget had violated the provisions of the National Environmental Policy Act (NEPA).[2] The plaintiffs sought a declaratory judgment that these agencies and the National Wildlife Refuge System (NWRS)[3] had failed to consider properly the environmental consequences of the annual budget request of the NWRS. The plaintiffs alleged that the "proposed curtailments in the budget of the National Wildlife Refuge Systems . . . would 'cut back significantly the operations, maintenance, and staffing of units within the System.' "[4] The plaintiffs contended, therefore, that NEPA required the preparation of an Environmental Impact Statement (EIS) to consider the environmental consequences of the System's appropriations request.[5]

Relying heavily upon the Council on Environmental Quality's (CEQ) interpretations of NEPA, the United States Supreme Court, in *Andrus v. Sierra Club*,[6] decided that an agency is not required to prepare an EIS with respect to its annual budget request.

This note will first examine the *Andrus* decision and its underlying rationale. Thereafter, analysis will be directed toward NEPA and its

1. The two other groups were the National Parks and Conservation Association and the Natural Resources Defense Council. Andrus v. Sierra Club, 99 S. Ct. 2335, 2338 n.4 (1979).

2. The National Environmental Policy Act, 42 U.S.C. § 4321 (1976), will be referred to throughout this note as either NEPA or the Act.

3. The National Wildlife Refuge System will be referred to throughout this note as either the NWRS or the System.

4. Andrus v. Sierra Club, 99 S. Ct. 2335, 2338 (1979). The primary purpose of the NWRS is environmental in nature. The System was established "to preserve endangered species and to sustain populations of migratory birds, particularly waterfowl, by maintaining intact a diverse network of their natural habitats." Sierra Club v. Andrus, 581 F.2d 895, 897 (D.C. Cir. 1978). The System's secondary purpose is educational and recreational. *Id.*

5. Sierra Club v. Morton, 395 F. Supp. 1187, (D.D.C. 1975), *aff'd sub nom.* Sierra Club v. Andrus, 581 F.2d 895 (D.C. Cir. 1978), *rev'd*, Andrus v. Sierra Club, 99 S. Ct. 2335 (1979).

6. 99 S. Ct. 2335 (1979).

legislative history, the authority of the CEQ, and the cases that have dealt with the dilemma of whether appropriations requests are proposals for legislation. The *Andrus* decision will be examined in the light of these authorities. It is the thesis of this note that the *Andrus* case was erroneously decided because its holding is in conflict with NEPA's legislative history, its purpose, and its directive which calls for preparation of an EIS at the appropriation stage of federal action. Furthermore, the Court should not have placed such weight upon the CEQ interpretation of NEPA since that interpretation clashes with the purposes of the Act as evidenced by both its language and its legislative history. It is proposed that the Court missed its opportunity to require an EIS in the early stages of the decision making process when the influence of an EIS is the greatest.

II. THE FACTUAL AND DECISIONAL BACKGROUND TO THE SUPREME COURT'S DECISION

The National Wildlife Refuge System consists of more than 350 refuges containing more than thirty million acres in forty-nine states.[7] During the 1960's, the System experienced territorial growth and increased public use of its land.[8] A policy decision was made, however, to plan for "roughly constant total expenditure."[9] "[R]esources devoted to staff and maintain the . . . System have not kept up with the rate of territorial growth."[10] This unchanging expenditure has resulted in "a 7% decrease in staffing, while the number of field stations increased by 10 percent. This has led to a substantial ($83 million) backlog of rehabilitation work, as well as unfulfilled construction work, new and replacement."[11]

The Sierra Club claimed that this unchanging nature of the NWRS budget and the corresponding reduction in the System's ability to maintain the refuges would significantly affect the environment. The Club argued that the NWRS was "required to issue a detailed statement on the environmental impact of such annual budget proposals."[12]

The Sierra Club advanced two arguments in support of its conten-

7. The System is organized under the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd-668ee (1976). The System is administered by the Fish and Wildlife Service of the Department of the Interior. Andrus v. Sierra Club, 99 S. Ct. at 2338.
8. Sierra Club v. Andrus, 581 F.2d 895, 897 (D.C. Cir. 1978).
9. *Id.* at 898.
10. *Id.* at 897.
11. *Id.* at 897-98 (footnotes omitted).
12. Sierra Club v. Morton, 395 F. Supp. 1187, 1188 (D.D.C. 1975).

tion that an EIS must be prepared to evaluate the environmental consequences of the System's unchanging budget. The Club argued:

> (a) that past and present proposals to cut down on NWRS operations are "proposals for legislation . . . significantly affecting the quality of the human environment . . ." or
> (b) that the NWRS is so vital to protection of the environment that the annual proposal on the scope and nature of its operation *per se* "significantly affect[s] the quality of the human environment."[13]

The thrust of the Club's action, therefore, was that the annual budget request came within the mandates of NEPA which require that such an EIS accompany "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . ."[14]

The district court[15] agreed with the Sierra Club and held that NEPA applied to appropriations requests because such requests are

13. Sierra Club v. Andrus, 581 F.2d 897, 898 (D.C. Cir. 1978). Embodied in the Club's second argument is the requirement that the proposed action must be major federal action. The Club advanced an additional argument that NEPA required the Office of Management and Budget (OMB) "to develop procedures to assure consideration of environmental factors in the budget process, including identification of which budget requests have significant environmental consequences and what is required of the agencies of the executive branch in submitting these requests to OMB." *Id.*

14. Section 102 of NEPA states:

> 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 decisionmaking 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 decisionmaking 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.

42 U.S.C. § 4332 (1976).

15. Sierra Club v. Morton, 395 F. Supp. 1187 (D.D.C. 1975).

both proposals for legislation[16] and "major Federal actions which clearly have a significant effect on the environment."[17] The district court agreed with the Club's *per se* argument that budget proposals relating to a major federal operation such as the NWRS have a significant effect upon the environment.[18] The court stated, simply, that "when the important interrelationship between the Refuge System and the budget process is considered, the unmistakable conclusion is that both the environmental impact of budget decisions is significant and that the federal action involved is major."[19] The court supported its conclusion by taking note of the congressional objective of ensuring executive consideration of environmental values during the "constant revision and reevaluation of ongoing projects."[20] In addition, the court found that guidelines issued by the CEQ,[21] which explicitly defined federal actions to include requests for appropriations,[22] were "a persuasive interpretation of NEPA"[23] and, therefore, entitled to considerable weight. The Department of the Interior and the Office of Management and Budget, therefore, were ordered to consider, prepare, and disseminate an EIS[24] on every annual request or recommendation they make for funding the System.

The United States Court of Appeals for the District of Columbia agreed with the district court that Congress intended the EIS requirement of NEPA to apply to the budget preparation process.[25] The court disagreed, however, with the district court's application of the EIS requirement to *every* budget request. The court felt that such an application to the annual operation of an agency whose activities may have a

16. *Id.* at 1189.
17. *Id.*
18. Sierra Club v. Andrus, 581 F.2d 897, 898 (D.C. Cir. 1978).
19. Sierra Club v. Morton, 395 F. Supp. 1187, 1189 (D.D.C. 1975).
20. *Id.* at 1188.
21. 40 C.F.R. § 1500 (1979).
22. 40 C.F.R. § 1500.5 (1979).
Types of Actions covered by this Act.
(a) "Actions" include but are not limited to:
(1) Recommendations or favorable reports relating to legislation *including requests for appropriations.* The requirement for following the section 102(2)(C) procedure as elaborated in these guidelines applies to both (i) agency recommendations on their own proposals for legislation . . . and (ii) agency reports on legislation initiated elsewhere.
40 C.F.R. § 1500.5 (1979) (emphasis added).
23. Sierra Club v. Morton, 395 F. Supp. 1187, 1188 (D.D.C. 1975).
24. " 'Environmental Impact Statement' means a detailed written statement as required by Sec. 102(2)(C) of the Act." 40 C.F.R. § 1508.11 (1979).
25. Sierra Club v. Andrus, 581 F.2d 895 (D.C. Cir. 1978).

significant environmental impact "would trivialize NEPA."[26] In order to limit the broad scope of the district court's holding, the court of appeals concluded that NEPA's reference to proposals for legislation should be understood to encompass only those proposals "for taking new action which significantly [change] the status quo, not for a routine request for budget approval and appropriations for continuance and management of an ongoing program."[27] Thus, the court of appeals held that unless the appropriations request would change existing conditions, there is no need to require the preparation of an EIS.[28] In addition to its concern with reducing the effect of NEPA, the court indicated that the mandates of the Act could be overburdened by applying its requirements to every appropriations request.[29] The court of appeals noted that NEPA's rule of reason[30] "does not require an annual EIS on routine operation and maintenance of every program with significant environmental ramifications. [The Act] . . . does not demand rethinking of everything all the time."[31]

The Supreme Court granted certiorari[32] and reversed.[33] The Court held that an EIS was not required to accompany an appropriations request because such a request is neither a proposal for legislation nor a proposal for major federal action.[34] Federal agencies are not, therefore, required to attach an EIS to a budget request because the requirements of NEPA are aimed at the processes of "planning and decisionmaking"[35] and do not apply to requests which merely "fund actions already proposed."[36]

III. The Supreme Court's Decision

The Supreme Court's unanimous decision in *Andrus v. Sierra Club*[37] provided a final answer to the longstanding question of whether NEPA's EIS requirement should apply to the federal appropriations process. The Court's reasoning provides a solid base from which to

26. *Id.* at 903.
27. *Id.*
28. *Id.* at 902.
29. *Id.* at 903.
30. *Id.*
31. *Id.* at 906.
32. 439 U.S. 1065 (1978).
33. Andrus v. Sierra Club, 99 S. Ct. 2335 (1979).
34. *Id.* at 2343.
35. 42 U.S.C. § 4332(2)(A) (1976).
36. 99 S. Ct. at 2343.
37. 99 S. Ct. 2335 (1979).

analyze the decision. The Sierra Club argued that the NWRS, by its very nature, size, and scope, is a vital part of the environment and that proposals for reducing its budget necessarily have significant effects upon the environment and require an EIS.[38]

The Court ignored the Club's environmental contentions[39] and focused on the narrower question of whether an appropriations request is a "recommendation or report on proposals for legislation . . . [or] other major Federal actions significantly affecting the quality of the human environment . . . ."[40] An affirmative answer would demand that an EIS be prepared as required by NEPA.[41] The Court held that appropriations requests are neither proposals for legislation nor proposals for major federal actions.[42] The Court disregarded the Act's legislative history because no direct evidence could be found expressly specifying that appropriations were to be considered as proposals for legislation.[43] The Court was remiss in not acknowledging the essence of the legislative history which repeatedly advocated preparation of an EIS early in the decision making process.[44] At the appropriations stage, a knowledge of environmental consequences might be a deciding factor in a decision to allocate funds.[45]

The Court reached its holding by finding that appropriations "have the limited and specific purpose of providing funds for authorized programs"[46] and are not, therefore, proposals for legislation.[47] Building upon that premise, the Court found that appropriations did not constitute proposals for major federal actions "since appropriation requests do not 'propose' federal actions at all; they instead fund actions already proposed."[48]

The Court's conclusion is weakened because it does not admit that legislation can be changed in the appropriations process, through funding increases and decreases, and the attachment of riders, without any

38. *Id.* at 2338-39.
39. The Court reasoned that the significant effects upon the quality of the environment could not be predicted because of the variety of respones to a budget reduction. 99 S. Ct. at 2344.
40. 42 U.S.C. § 4332(2)(C) (1976).
41. *Id.*
42. 99 S. Ct. at 2343.
43. *Id.* at 2340.
44. *See* notes 71-94 *infra* and accompanying text.
45. *See* notes 4-5 *supra* and accompanying text.
46. 99 S. Ct. at 2343 (*quoting* TVA v. Hill, 437 U.S. 153, 190 (1978)).
47. 99 S. Ct. at 2343.
48. *Id.*

apparent change in the existing statutes.[49]

The Court relied upon *TVA v. Hill*[50] for its definition that appropriations "have the limited and specific purpose of providing funds for authorized programs."[51] The *Hill* action was brought to enjoin construction of the Tellico Dam project because it had been determined that the snail darter, an endangered species, lives only in that portion of the Little Tennessee River that would be completely inundated by the reservoir created by the Tellico Dam.[52] It had been unsuccessfully argued that Congress overrode the Endangered Species Act, which protected the snail darter, by approving appropriations for the dam after it had learned of the snail darter's possible extinction. The Court, however, was "unable to conclude that the Act ha[d] been in any respect amended or repealed."[53] The Court affirmed the court of appeals' ruling that the Endangered Species Act required the halting of all activities incident to the project which might destroy the habitat of the snail darter "until Congress, by appropriate legislation, exempts Tellico from compliance with the Act."[54] It is ironic that when the Senate decided to follow the court of appeals' suggestion and exempt the Tellico Dam from the Endangered Species Act, the Senate attached the exemption to, of all things, an appropriations bill.[55]

The *Andrus* Court did, however, note a situation in which it would be feasible to require that an EIS accompany an appropriations request. The Court stated:

> For example, if an agency were to seek an appropriation to initiate a major new program that would significantly affect the quality of the human environment, or if it were to decline to ask for funding so as to terminate a program with a similar effect, the agency would have been required to include EISs in the recommendations or reports on the proposed underlying programmatic decisions.[56]

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49. The Agricultural Marketing Service once had its entire appropriation for marketing services cut because of a dispute over poultry inspection. *See* A. WILDAVSKY, BUDGETING 45-46 (1975) (partisan controversies are the largest single cause of shifts in relationships between the Agencies and Congress). The Bonneville and Southeast Power Administrations were consistently denied funds for construction of new facilities but their appropriations began to increase after 1956 when they agreed to purchase private power. *Id.*

50. 437 U.S. 153 (1978).

51. *Id.* at 190. *See* notes 100-09 *infra* and accompanying text.

52. 437 U.S. at 161.

53. *Id.* at 189.

54. Hill v. TVA, 549 F.2d 1064, 1075 (6th Cir. 1977).

55. N.Y. Times, Sept. 16, 1979, § 4 at E-7.

56. Andrus v. Sierra Club, 99 S. Ct. at 2344 n.22.

It would seem, therefore, that if an agency, in its appropriations request, announces the initiation of a new program, then that request would be a "report or recommendation" requiring an EIS. Similarly, the termination of a major program would require an EIS. A cutback in the NWRS budget would result in the termination of some of the System's programs. One wildlife refuge administrator involved in the budgetary process of the Fish and Wildlife Service stated:

> The various component programs in the refuge system's budget contribute directly to . . . the preservation and conservation of wildlife . . . . Thus, decisions whether or not to include hunting programs as a part of the refuge program and concomitant decisions whether or not to provide staff to regulate and supervise such hunting programs have significant environmental effects. Similarly, budgetary decisions to vacate refuges may involve direct losses in wildlife production; decisions to defer purchases of disappearing wetlands may contribute directly to the loss of the national migratory bird populations; decisions to eliminate staffing for active management of wildlife habitat may mean such deterioration of habitat that wildlife is lost; deferment of a program for maintenance and rehabilitation of facilities such as water impoundments may mean the direct loss of wildlife habitat and diminished wildlife production; and decisions to eliminate access to certain size or low priority refuges directly affects public use of such refuges for educational and recreational purposes.[57]

The *Andrus* Court was in error by not recognizing that the effect of the NWRS static funding was the equivalent of the Court's example of declining to ask for funding so as to terminate a program. The expansion of the System, coupled with its zero budget growth, would obviously have a significant effect upon the quality of the human environment. It was this type of effect that the EIS was intended to measure. The Court nullified the need for an EIS because the variety of ways in which to respond to a budget request made it "impossible to predict whether . . . any particular budget cut will in fact significantly affect the quality of the human environment."[58]

Another reason for the Court's reluctance to require an EIS at the appropriation stage was a desire to avoid bureaucratic repetition. The Court indicated that preparation of an EIS to accompany a budgetary

57. Brief for Respondent at 24 n.16, Andrus v. Sierra Club, 99 S. Ct. 2335 (1979).
58. 99 S. Ct. at 2344.

curtailment of an ongoing project such as the NWRS would result in repetitive EISs. In other words, an EIS prepared to accompany the annual appropriations request, and subsequent to the initial EIS prepared at the time the project was undertaken, would result in repetitive treatment of many environmental issues. On eight occasions the Court noted the redundancy that would occur if an EIS was required at the appropriation stage.[59]

Apprehension over the EIS becoming redundant and concern with the inability to predict the environmental effects of a budget curtailment could have been alleviated if the Court had emphasized tiering in the EIS process.

> "Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.[60]

If the NWRS had prepared tiered EISs, the Court, by studying the most current tier, could determine the specific effects of a budget reduction. The Court could determine whether the budget cut would have a significant effect upon the environment. The CEQ regulations, to which the Court referred for its definition of legislation, encourage tiering in order to avoid repetition.[61] Thus, the tiering process would prevent the expected flood of repetitive EISs because the new EIS would refer only to the specific alteration in the overall policy. It should also be noted that tiering would not require an EIS concerning "the annual budget request for virtually every ongoing program"[62] because the basic requirement that the proposal must be one "significantly affecting the quality of the human environment"[63] would still be applicable to

59. The following statements indicate the Court's concern with trivializing NEPA: "An EIS on the annual budget request . . . would trivialize NEPA."; "[S]uch an interpretation would be a '*reductio ad absurdum* . . . .'" *Id.* at 2341. "Any other result would create unnecessary redundancy."; "[T]he resulting EISs would merely recapitulate . . . ." *Id.* at 2343. "[A]n EIS at the appropriation stage would only be repetitive."; "[W]ould merely be redundant."; "An EIS . . . at the appropriation stage would add nothing."; "Moreover, this redundancy . . . ." *Id.* at 2344.

60. 40 C.F.R. §§ 1508.28 (1979).

61. The new CEQ regulations encourage tiering "to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review . . . ." 40 C.F.R. § 1502.20 (1979).

62. 99 S. Ct. at 2341.

63. 42 U.S.C. § 4332(2)(C) (1976).

exempt many agencies from the EIS requirement.

The *Andrus* Court went to great lengths to base its decision on new CEQ regulations which stated that "the Council in its experience [had] found that preparation of EISs is illsuited to the budget preparation process."[64] Previous CEQ guidelines had stated that agencies were required to prepare an EIS to accompany appropriations requests. The *Andrus* Court, pursuant to an executive order declaring the CEQ regulations to be binding on the agencies,[65] treated the CEQ interpretations as being authoritative, as opposed to being merely influential.[66] The *Andrus* Court, therefore, set precedent in its treatment of the CEQ's interpretation of EIS preparation with respect to appropriations requests. The *Andrus* decision firmly established that the CEQ's interpretation is authoritative. No longer will the CEQ's viewpoint be only one among others to be considered.[67] Any future challenges to the regulations will be facing a presumption of validity. The courts should still, however, require the Council to show that the regulation does not violate NEPA's intent.[68] Such reasoning may become circular in light of the *Andrus* Court's decision to ignore the legislative history and to rely instead upon the CEQ interpretation of the Act. The dominant role given to the CEQ regulations is not warranted given the scant justification for the CEQ's position[69] and the contrary expressions found in the legislative history.[70]

The Court does not provide adequate support for its assertions that appropriations requests do not fall within the mandate of NEPA. Rather, the Court seems to have reached a conclusion and then cited facts in its support. The purpose of the following analysis is to examine the National Environmental Policy Act, its legislative history, and relevant cases decided under it. This analysis will reveal the error in the Court's decision and the CEQ guidelines upon which it is based. It will demonstrate that NEPA mandates an EIS at the appropriations stage of federal action.

64. 43 Fed. Reg. 55,978, 55,989 (1978).
65. Exec. Order No. 11,991, 3 C.F.R. 123 (1978).
66. Sierra Club v. Lynne, 502 F.2d 43 (5th Cir. 1972) (CEQ guidelines, although highly persuasive, do not govern compliance with NEPA); Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412 (2d Cir. 1972) (CEQ guidelines are merely advisory).
67. *See* notes 114-54 *infra* and accompanying text.
68. *See* notes 71-113 *infra* and accompanying text.
69. *See* notes 139-54 *infra* and accompanying text.
70. *See* notes 114-16 *infra* and accompanying text.

IV. SCOPE AND PURPOSES OF NEPA

NEPA was enacted when public interest in the quality of the environment was rising. The Santa Barbara oil spill had recently occurred, the Cuyahoga River had caught fire, and the news had been laden with stories of environmental disasters.[71] "A primary purpose of the bill [was] to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment."[72] A legislator's vote for NEPA was responsive to public concern inasmuch as it symbolized a vote for a clean and healthy environment. The Act quickly became the legal cutting edge of what some labeled an "environmental revolution."[73] The reforming spirit, however, did not explode until Earth Day, 1970. Then, much of the nation's citizenry joined campus activists, scientists, and politicans in recognizing the value of a clean environment and the danger of the forces threatening it.[74]

As is evident from the language of the Act, NEPA is directed at federal actions and not those of private individuals.[75] NEPA forbade nothing specifically but only mandated formal public consideration of environmental values in all major federal projects. The Act has consistently been interpreted to apply to federal actions involving large construction programs, provisions of services, and federal grants and loans.[76] Difficulties arise, however, in attempts to apply NEPA to situ-

71. R. LIROFF, A NATURAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 5 (1976). The following editorial appeared in the New York Times:

> By land, sea and air, the enemies of man's survival relentlessly press their attack. The most dangerous of all these enemies is man's own undirected technology. The radioactive poisons from nuclear tests, the runoff into rivers of nitrogen fertilizers, the smog from automobiles, the pesticides in the food chains, and the destruction of topsoil by strip mining are examples of the failure to foresee and control the untoward consequences of modern technology.

N.Y. Times, May 3, 1969, at 34, col. 2.

72. S. REP. No. 296, 91st Cong., 1st Sess. 8 (1969) [hereinafter cited as S. REP. No. 296].

73. N.Y. Times, Dec. 30, 1979, § 12 at 10, col. 1.

74. *Id.*

75. "By its terms NEPA applies only to the federal agencies." F. ANDERSEN, NEPA IN THE COURTS, A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 57 (1973).

76. *See id.* at 57-58, 76-77. For examples of the virtually unlimited types of actions to which NEPA has been applied see Comment, *The Developing Common Law of "Major Federal Action" Under the National Environmental Policy Act*, 31 ARK. L. REV. 254, 259 (1977). The Supreme Court has recently ruled that NEPA is not applicable when an agency's rules create a clear statutory conflict. In Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976), a land developer's statement of record was to become effective 30 days after being filed with the Department of Housing and Urban Development (HUD) unless found to be incomplete or inaccurate. The Court concluded that the 30 day deadline was too short a time for HUD to complete an EIS.

ations in which the proposed action is arguably non-major or non-federal or where it is unclear that action or a proposal for action has occurred at all.[77] Courts often find that a federally funded project is major federal action if it requires substantial time, resources, or expenditures by a federal agency.[78] This test "refers to the cost of the project, the amount of planning that preceded it, and the time required to complete it."[79] These are easily quantifiable factors and application of the test is straightforward. *Natural Resources Defense Council v. Grant*[80] is an example of an application of this test. In *Grant*, 706 thousand dollars were contributed in conjunction with multi-agency planning for the construction of sixty-six miles of channel. This federal involvement constituted substantial planning, time, resources, and expenditures and amounted, therefore, to major federal action covered by the strictures of NEPA.[81] Courts often utilize this test without enunciating its application. This conclusion is reached because it is apparent from the magnitude of the project that the court is finding that the requirements of the test have been met.[82]

In order to ensure governmental consideration of environmental values, President Nixon, in 1970, submitted to Congress a plan to consolidate widespread federal environmental protection efforts into a single Environmental Protection Agency (EPA). The EPA rapidly grew into the largest federal regulatory unit with a staff of more than 10,000 persons. During the decade following NEPA's enactment, statutes[83]

Inasmuch as the Secretary of HUD had the power to suspend the statement of record if it was incomplete it could be argued that the Secretary was not complying with the requirements of NEPA to the fullest extent possible. *See* Calvert Cliffs' Coord. Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir., 1971). "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." *Id.* at 1115.

77. Comment, *Federal Environmental Litigation in 1977: National Environmental Policy Act*, 2 HARV. ENV'T'L L. REV. 199, (1978).

78. *See, e.g.*, Sierra Club v. Lynne, 502 F.2d 43 (5th Cir. 1974) (HUD commitment to guarantee 18 million dollars in bond obligations is major federal action); Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972) (EIS required because government to contribute 60% of fourteen million dollars). *See* Note, *Negative NEPA: The Decision Not to File*, 6 ENVT'L L. 309, 322-39 (1975).

79. Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

80. 341 F. Supp. 356 (E.D.N.C. 1972).

81. *Id.* at 365-66.

82. *See* note 78 *supra* and accompanying text.

83. NEPA laid the foundation for subsequent statutes designed to protect the environment. Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1976). Clean Air Act, (codified in various sections of 42 U.S.C.); Federal Water Pollution Control Act Amendments of 1972, (codified in various sections of 33 U.S.C.).

were enacted which required expenditures, both governmental and private, of more than 200 billion dollars.

The wide scope to which Congress intended the EIS to apply is evidenced by congressional analysis of section 102(2)(C):

> Each agency which proposes any major action, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or *revision of ongoing programs*, shall make a determination as to whether the proposal would have a significant effect upon the quality of human environment.[84]

The Senate report indicates a very broad range of categories to which the EIS was intended to apply. The clear intent of Congress to require an EIS to accompany a proposal for reduction of the NWRS budget can be seen in the Senate report language requiring an EIS to evaluate the environmental consequences of the *revision of an ongoing program*.

It is unlikely that Congress intended to instill environmental awareness into every area of federal decision making except the influential budget process. Budget requests have a substantial effect upon the environment. For example, when budgetary levels for particular wildlife refuges are lowered, "the result is generally to reduce sharply the ability of the refuge to support wildlife populations and ultimately to require the replacement of facilities at much higher cost than that of maintenance and rehabilitation."[85] The Senate report indicates, therefore, that the circumstances surrounding the *Andrus* cause of action required the preparation of an EIS. The effect of the unchanging expenditure allocated to the NWRS had the effect of revising an ongoing program. Unchanging total expenditures had not permitted the System to continue to perform its duties to as great a degree as it had been able to do at the time the decision was made to allocate equal amounts of funds in each succeeding year. Thus, the System would be unable to maintain the same operations and efficiency in 1979 that it had been able to maintain in 1974 when the decision for future funding of the System was made. In addition, there is a special relationship between the policy behind NEPA, which attempts to promote an aesthetically pleasing environment,[86] and the purposes of the System in attempting to fulfill that goal. This relationship is further emphasized by the Sen-

84. S. REP. No. 296, *supra* note 72, at 20 (emphasis added).

85. Affidavit of John S. Gottschalk, former Director of the Fish and Wildlife Service, Brief for Respondent at 23-24, Andrus v. Sierra Club, 99 S. Ct. 2335 (1979).

86. S. REP. No. 296, *supra* note 72, at 18.

ate Report statement that "an important aspect of national environmental policy is the maintenance of physical surroundings which provide present and future generations of American people with the widest possible opportunities for diversity and variety of experience and choice in cultural pursuits, in recreational endeavors, in esthetics and in living styles."[87]

The drafters of NEPA recognized that environmental factors had frequently been omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors. As a result, the Senate Report stated that "unless the results of planning are radically revised at the policy level . . . environmental enhancement opportunities may be foregone and unnecessary degradation incurred."[88] Congress recognized that the policy and goals of requiring an EIS could only be achieved "if [the EIS was] incorporated into the ongoing activities of the Federal Government in carrying out its other responsibilities to the public."[89] The purpose of section 102 was to ensure "that the existing body of federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act."[90] Federal agencies were expected to comply with this purpose[91] through the preparation of an EIS that would consider all relevant environmental factors and points of view in the planning and conduct of federal activities.

The consideration of environmental costs during the stage when economic resources are being allocated would fulfill the intent of NEPA. Congress was familiar with the policy implications of agency budget decisions and intended those critical decisions to be influenced by the consideration of environmental factors.[92] The preparation and consideration of an EIS at the appropriation stage would demonstrate that environmental factors had been considered prior to the allocation of federal funds.

It would appear, therefore, that, in situations such as that in the *Andrus* case, the environmental effects of constant total expenditure should have been considered in making the determination of whether

87. *Id.*
88. *Id.* at 20.
89. *Id.* at 19.
90. *Id.* at 19-20.
91. *Id.* at 19.
92. A. WILDAVSKY, BUDGETING 45-46 (1975).

the annual budget should be approved. Thus, the Sierra Club's arguments that the System's annual budget would have a significant effect upon the human environment should have been considered. While it is true that the *Andrus* Court may not have been able to predict the exact effects of the constant expenditures and which programs would be terminated as a result thereof, the Court should have required agency consideration of those environmental consequences before an annual budget proposal was approved. Such a decision by the Court would have upheld the purposes of the Act in the sense that the environmental consequences of an appropriations request would be considered, through the preparation of an EIS, at the important stage of allocating funds to federal projects. The *Andrus* Court acknowledged that the primary purpose of the NWRS was to "provide a national program 'for the restoration, preservation, development and management of wildlife and wildlands habitat.' "[93] The Court, however, refused to order the implementation of NEPA and the preparation of an EIS so as to assist the System in fulfilling its purpose.[94]

The initial decision to file an EIS usually rests with the agency. An agency's decision not to file an EIS is the event that prompts a legal controversy. The CEQ, as authorized by executive order,[95] issues guidelines to aid an agency in its determination whether to file an EIS. Although the legislative history of the Act gives some insight into the congressional intent with respect to the role of the CEQ, it does not appear to indicate the extent of CEQ's authority, the weight to be accorded to its interpretations, and how its guidelines relate to the decision to file an EIS.

In relation to the *Andrus* decision, the question as to the CEQ's authority arises because the CEQ had recently issued regulations which stated that no EIS was required to be prepared with respect to a request for appropriations.[96] The issue related to these regulations is whether appropriations requests are, in fact, proposals for legislation which require the preparation of an EIS. As previously stated, the *Andrus* Court painstakingly drew the distinction between requests for appropriations and proposals for legislation.[97] The status of appropriations requests, as contrasted with proposals for legislation, has been ad-

93. 99 S. Ct. at 2338.
94. *Id.* at 2345 (The NWRS had a budget of 200 million dollars.).
95. Exec. Order No. 11,514, 3 C.F.R. 902 (1970).
96. 40 C.F.R. § 1508.17 (1979).
97. *See* notes 38-49 *supra* and accompanying text.

dressed by the courts through the application of a "distinctional approach."[98] This approach probes the differences, if any, between appropriations requests and proposals for legislation.[99]

The courts have utilized two analyses under the distinctional approach. The first distinguishes appropriations from legislation by defining the former as routine authorizations to disburse funds for projects previously undertaken. Thus, appropriations are not within the scope of NEPA.[100] This distinction has recently been expressed in *TVA v. Hill*,[101] the snail darter case. The United States Supreme Court utilized this analysis in refuting a claim that Congress had impliedly overridden the Endangered Species Act by approving appropriations for the Tellico Dam project subsequent to learning of the possible extinction of the snail darter. TVA's argument was that Congress had expressed a desire to change its policy and had indicated its intent by allocating funds to a project that violated the Endangered Species Act. The Court rejected this argument because it could find no authority for the proposition that Congress had repealed or overridden the Endangered Species Act.[102]

The importance of the *Hill* decision, as it relates to the *Andrus* case, can be found in the Court's treatment of an appropriations request as a proposal for legislation. The *Hill* Court did not require the preparation of an EIS because "appropriations measures . . . have the limited and specific purpose of providing funds for authorized programs."[103] Support for the Court's determination of the purpose of appropriations can be found in the rules of Congress. The Court cited rule twenty-one, section two, of the Rules of the House of Representatives which states:

> No appropriation shall be reported in any general appro-

98. Another possible approach, the technical-procedural approach, requires no analysis by a court. This method would simply rely upon the CEQ guidelines and decide the case strictly according to those guidelines. *See* Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973).

99. Unfortunately, such cases are limited because, despite the mandate in NEPA and the reinforcing guidelines stated by the CEQ, administrative agencies have virtually ignored the legal requirement of compiling an EIS to accompany an appropriations request. *See* F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.02(1)(a)(ii) (1974); Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 238, 274 (1974). *See generally* Note, *NEPA's Forgotten Clause: Impact Statements for Legislative Proposals*, 58 B.U.L. REV. 560 (1978) (expressing the view that the EIS requirement for legislative proposals is possibly the best tool for NEPA's successful penetration of the early decision making process).

100. TVA v. Hill, 437 U.S. 153 (1978).

101. *Id.*

102. *Id.* at 189.

103. *Id.* at 190.

> priation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order.[104]

The *Hill* Court offered no other authority to support its narrow definition of an appropriations bill. The Court did suggest, however, that it was motivated by a desire not to increase the workload of Congressmen.[105] The Court believed that under its definition of appropriations, legislators would not be required to "review exhaustively the background of every authorization before voting on an appropriation . . . ."[106] The Senate Appropriations Committee Reports cited in *Hill* illustrate, however, that Congress does, in fact, exhaustively review the policy ramifications of appropriations requests before voting on them.[107] An EIS would, therefore, be very informative at the appropriations stage.

Unfortunately, the *Andrus* Court used the narrow definition of appropriations stated in *Hill* to conclude that no review of policy decisions or changes in the substance of legislation occurs during an appropriations process. Based upon this narrow definition, taken in conjunction with the CEQ's new regulations that an EIS was not required to accompany an appropriations request, the *Andrus* Court decided that no EIS would be required to analyze the environmental consequences of the System's annual budget.

It appears, therefore, that the *Andrus* Court closed its eyes to both the environmental arguments advanced by the Sierra Club and the political realities of the legislative process. The Court placed too much reliance upon the congressional definition of appropriations. In addition, the Court's strict application of that congressional rule was unwarranted. It may be true that there is, in fact, a distinction between proposals for legislation and requests for appropriations, but the Court's rigid application of the distinction frustrates the purposes of NEPA. This application fails to account for the major environmental consequences that can result from the failure of funding to keep up with the needs of an agency. Had the Court been willing either to deal with the Sierra Club's environmental contentions or to take note of the

104. *Id.* at 191. *See also* Standing Rules of the United States Senate, Rule 16(4).
105. 437 U.S. at 190.
106. *Id.*
107. *Id.* at 163-64.

political realities in Congress, then the Court would have been better able to fulfill the purposes of NEPA by requiring the preparation of an EIS to evaluate the environmental consequences resulting from the unchanging funds allocated to the NWRS.

The second analysis utilized in the distinctional approach recognizes no distinction between requests for appropriations and proposals for legislation. This approach was taken in *Environmental Defense Fund v. TVA*.[108] In affirming the district court's ruling that construction of the Tellico Dam project should be enjoined until it conformed to the requirements of NEPA,[109] the Sixth Circuit required an EIS to accompany the annual appropriations request for an ongoing project. Inasmuch as construction of the dam was begun prior to the enactment of NEPA, it was argued that the dam was exempt from the Act. The court, however, found that the Act's reference to "proposals for legislation," was broad enough to include TVA's annual appropriations request. The injunction was lifted when TVA finally complied with NEPA through the preparation of an EIS.

The Sixth Circuit's decision in *Environmental Defense Fund v. TVA* took into account the practical aspects of appropriations requests and determined that they were within the meaning of the term "proposals for legislation."[110] The court felt that the rules of Congress did not provide a sufficient basis for making a decision. The court believed that, at most, the rules were only useful for "purposes of determining procedural matters such as deciding the proper committee to which to refer a bill or the time or duration of legislative debate."[111] The court declared that the rules did "not require [it] to close [its] eyes to the commonly accepted meaning of the word 'legislation'—the making or giving of laws—or to the clearly expressed congressional purpose of the NEPA."[112] The reality of the political process demonstrated to the court that policy changes can readily be made through the appropriations process without any ostensible change in the substance of the existing statutes.[113] Unlike the Supreme Court's *Andrus* decision, the

108. 468 F.2d 1164 (6th Cir. 1972). *Accord*, Environmental Defense Fund v. Froehlke, 477 F.2d 1033 (8th Cir. 1973); Scientists Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).

109. Environmental Defense Fund v. TVA, 339 F. Supp. 806 (E.D. Tenn. 1972).

110. Environmental Defense Fund v. TVA, 468 F.2d 1164, 1181 (6th Cir. 1972).

111. *Id.* at 1181.

112. *Id.*

113. *See generally* Knapp, *Congressional Control of Agricultural Conservation Policy: A Case Study of the Appropriations Process*, 71 POL. SCI. Q. 257 (1956); M. KIRST, GOVERNMENT WITH-

Sixth Circuit's holding correctly accounted for the political reality that laws can be changed through appropriations, and required that an EIS accompany an appropriations request. The court's holding, therefore, reflected and carried out the purposes of NEPA in the sense that it required that environmental factors be considered at the appropriations stage. The holding is indicative of congressional awareness of the policy decisions and implications that surround agency budget requests and the intent to have those decisions influenced by environmental considerations.

In *Andrus*, the environmental impact of budget decisions was significant because they had a direct bearing upon how the Refuge System would be staffed, managed, and maintained. In addition, the nature and size of the System's thirty million acres is a significant part of the environment. When taken in conjunction, these two factors indicate that the inflexible nature of the System's budget would have a significant effect upon the quality of the human environment.

V. The Status of CEQ and the Effect of its Guidelines

When NEPA authorized creation of the CEQ, it did not specify that the Council could make whatever rules and regulations were necessary to carry out the Act's purpose. CEQ's function was to further the provisions of NEPA through "conduct[ing] investigations, studies, surveys, research and analyses relating to ecological systems and environmental quality."[114] The Act provided for a series of duties of CEQ,

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OUT PASSING LAWS 118 (1969). These authorities discuss how policy choices can be readily made through appropriations without any ostensible change in the declaration of existing statutes.

114. Section 204 of the Act provides:

It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;

(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;

(4) to develop and recommend to the President national policies to foster and pro-

only one of which applied to implementation of NEPA.[115] CEQ's authority can only be *inferred* from NEPA, because the Act was designed to be self-effectuating. The legislative history points to the CEQ as a board of review capable only of recommending changes "when they appear to be appropriate."[116]

NEPA's directives as to the role of the CEQ raise the question of how much weight a court should give to the CEQ guidelines.[117] An executive order[118] is the primary basis of the CEQ's authority to implement NEPA and to promulgate guidelines. These guidelines have been described as "not simply parallel to and separate from the judicial interpretations of NEPA, but are instead a kind of hybrid creation—an administrative-judicial gloss on the statutory language of NEPA."[119] Even those courts that have relied upon the CEQ guidelines for support have never explicitly directed agencies to comply with the guidelines.[120]

Warm Springs Dam Task Force v. Gribble[121] sheds some light on the question of the weight to be accorded to CEQ guidelines. *Gribble*

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mote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, report thereon, and recommendations with respect to matters of policy and legislation as the President may request.

42 U.S.C. § 4344 (1976).

115. Of the eight specified functions of the Council, six delegate responsibility for gathering information, analyzing data and preparing reports. One delegates responsibility for compliance with NEPA's purposes and one for recommending policies to foster environmental quality. 42 U.S.C. § 4344 (1976).

116. S. REP. No. 296, *supra* note 72, at 24.

> [T]he Board shall periodically review and appraise Federal Programs, projects, activities, and policies which affect the quality of the environment. Based upon its review, the Board shall make recommendations to the President. . . . [I]t is intended that the Board will periodically examine the general direction and impact of Federal programs in relation to environmental trends and problems and recommend general changes in direction or supplementation of such programs when they appear to be appropriate.

Id. at 24-25.

117. *See generally* Comment, *The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act*, 23 CATH. U.L. REV. 547 (1974).

118. Exec. Order No. 11,514, 3 C.F.R. 902 (1970).

119. Comment, *The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act*, 23 CATH. U.L. REV. 547, 573 (1974).

120. *See, e.g.*, Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301 (1974) (Douglas, Circuit Justice); Environmental Defense Fund. v. TVA, 468 F.2d 1164 (6th Cir. 1972).

121. 417 U.S. 1301 (1974) (Douglas, Circuit Justice).

was an action brought to enjoin construction of a dam project on the ground that the EIS filed by the Army Corps of Engineers did not adequately deal with alleged water poisoning and seismic problems presented by the project. Mr. Justice Douglas, sitting as Circuit Justice, found CEQ's interpretation of NEPA to be entitled to substantial deference. Justice Douglas stated that CEQ "has taken the unequivocal position that the [EIS] in this case is deficient, despite the contrary conclusions of the District Court. That agency determination is entitled to great weight, . . . and it leads me to grant the requested stay pending appeal."[122] Thus, Justice Douglas' opinion indicates that CEQ interpretations of NEPA are entitled to great deference.[123] The negative implication to be drawn from this principle, however, is that CEQ interpretations are not binding on either the judiciary or an agency.[124]

The circuit courts of appeal have not been uniform in their deference[125] to CEQ's guidelines. In *Environmental Defense Fund v. TVA*,[126] the Sixth Circuit, after stating that a CEQ interpretation of NEPA "is entitled to great weight,"[127] went on to emphasize that it was also relying upon TVA regulations which were derived from the CEQ regulations.[128] The fallacy of this argument is that if the original CEQ regulations are found to be not binding, then the agency's version should also be considered nonbinding because they are virtually identical.

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122. *Id.* at 1310.

123. Support for the CEQ interpretation may have been strengthened by the fact that the proposed dam would have been constructed atop an earthquake fault and that "[a] town of 5,000 people [was] . . . below the dam and the wall of water it [would] restrain." 417 U.S. at 1303.

124. *See* notes 129-55 *infra* and accompanying text.

125. In other administrative areas in which the Supreme Court has deferred to administrative guidelines, there have been one or more factors involved to support the guidelines. In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Court deferred to the Department of Housing and Urban Development's guidelines because they were a consistent administration of the Act. *Id.* at 210. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court deferred to the Equal Employment Opportunities Commission guidelines and added that "[s]ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." *Id.* at 434. Moreover, in Udall v. Tallman, 380 U.S. 1 (1965), the Court stated it was showing great deference to the administrative interpretation. Great respect is due to such interpretations "when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Id.* at 16.

126. 468 F.2d 1164 (6th Cir. 1972).

127. *Id.* at 1178.

128. *Id. See also* Environmental Defense Fund v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971). The court, in supporting the administrative interpretation, relied on the fact that recent decisions "support the view that NEPA was intended to be applied in such circumstances as those before the Court." *Id.* at 744.

The Fifth Circuit, on the other hand, has, on several occasions, down-played the significance of the CEQ guidelines. In *Sierra Club v. Lynn*,[129] the CEQ required a 30 day circulation period for public comment upon the completed EIS before the Department of Housing and Urban Development (HUD) could issue a bond guarantee for a San Antonio housing development. HUD issued the bond guarantee before the 30 day period expired. The court refused to invalidate HUD's premature action. The court's rationale was that enough time, though less than the required 30 days, had been allowed for the EIS to circulate.[130] The court replied to HUD's violation of CEQ guidelines by stating that "the Council on Environmental Quality guidelines, although highly persuasive, do not govern compliance with NEPA."[131] In a later case, the Fifth Circuit further diluted the impact of the CEQ guidelines by stating that they "are merely advisory, because the CEQ does not have the authority to prescribe regulations governing compliance with NEPA."[132] The Second Circuit, in *Greene County Planning Board v. Federal Power Commission*,[133] also found that the guidelines were "merely advisory."[134] The court stated a test of "not lightly" suggesting that CEQ misconstrued NEPA.[135] The Second Circuit standard, however, sheds little light on the proper weight to be given the CEQ guidelines. The standard would allow trial court discretion to disregard CEQ guidelines almost at will.

To add more controversy to the issue of the authority of the CEQ guidelines, there occurred a unique turn of the screw during the *Andrus* litigation. The guidelines which were then in effect specifically provided that the types of actions covered by the Act include "[r]ecommendations or favorable reports relating to legislation *including requests for appropriations*."[136] In 1977, President Carter ordered the Council to replace the prior guidelines with mandatory regulations

129. 502 F.2d 43 (5th Cir. 1972), *cert. denied*, 421 U.S. 994 (1975). *Accord*, Sierra Club v. Callaway, 499 F.2d 982, 991 (5th Cir. 1974).

130. Sierra Club v. Lynn, 502 F.2d at 58.

131. *Id.*

132. Hiram Clarke Civic Club v. Lynn, 476 F.2d 421, 424 (5th Cir. 1973).

133. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

134. 455 F.2d at 421.

135. "[W]e would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies . . . has misconstrued NEPA. Although the Commission's interpretation of 10(e) of the Guidelines is superficially appealing, it flies in the face of Section 102(2)(C) of NEPA which explicitly requires the agency's *own* detailed statement to 'accompany the proposal through the existing agency review process.'" *Id.*

136. 40 C.F.R. § 1500.5(a)(1) (1977) (emphasis added) (These guidelines have remained unchanged since 1973.).

in order to direct the efforts of federal agencies attempting to comply with the requirements of NEPA.[137] The new guidelines contained a reversal in the CEQ's posture toward the status of both proposals for legislation and requests for appropriations in their relation to the preparation of an EIS. The new guidelines stated that a proposal for legislation "includes a bill or legislative proposal . . . by or with the significant cooperation and support of a Federal Agency, *but does not include requests for appropriations*."[138]

CEQ's reversal in policy with respect to the status of appropriations requests was first announced in proposed regulations published June 9, 1978, three weeks after the *Andrus* decision rendered by the court of appeals. The final rule was issued November 29, 1978, after the petition for certiorari was filed with the Supreme Court. In the final rules and regulations, effective July 30, 1979, the CEQ offered the following as the sole justification for this major reversal in policy embodied in its interpretative rulings:

> Section 1508.16 defined legislation to exclude requests for appropriations. Some commenters felt that this exclusion was inappropriate. Others noted that environmental reviews for requests for appropriations had not been conducted in the eight years since NEPA was enacted. On the basis of traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors, the Council decided not to alter the scope of this provision. The Council is aware that this is the one instance in the regulations where we assert a position opposed to that in the predecessor Guidelines. Quite simply, the Council in its experience found that preparation of EISs is illsuited to the budget preparation process. Nothing in the Council's determination, however, relieves agencies of responsibility to prepare statements when otherwise required on the underlying program or other actions.[139]

A standard to determine the correctness of interpretative rulings was laid down by the Supreme Court in *General Electric Co. v. Gilbert*.[140] In *General Electric*, a 1972 guideline of the Equal Employment Opportunity Commission stated that those disabilities arising from

137. Exec. Order No. 11,991, 3 C.F.R. 123 (1978) (amending Exec. Order No. 11,514, 3 C.F.R. 902 (1970)).
138. 40 C.F.R. § 1508.17 (1979) (emphasis added).
139. 43 Fed. Reg. 55,978, 55,989 (1978).
140. 429 U.S. 125 (1976).

pregnancy could not be excluded from an employer's disability plan.[141] The Court found that the guideline was in conflict with earlier Commission pronouncements and was inconsistent with prior interpretations issued by the Wage and Hour Administration with respect to Title VII and its legislative history.[142] The Court stated that "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give power to persuade, if lacking power to control."[143]

General Electric is similar to *Andrus* because in both cases the authority to promulgate the regulations was not conferred by the enabling legislation. The *General Electric* Court interpreted this to mean that courts may properly accord less weight to such guidelines than to those administrative regulations which Congress has declared shall have the force of law or those regulations which are provided for in the agency's enabling statute.[144] The *General Electric* Court, after applying the above stated criteria, did not follow the Commission's dictates involved in that case.[145] The *General Electric* decision should have provided precedent for the Court's *Andrus* decision. The CEQ's inconsistent treatment of appropriations requests, in relation to its prior interpretations, and the lack of reasoning evident in its interpretation[146] of NEPA should have led the *Andrus* Court to disregard the CEQ guidelines.

The conclusion that the *Andrus* Court should have disregarded the CEQ guidelines because they were contrary to the purposes of NEPA is further illustrated by *Asarco v. EPA*.[147] In that case, the United States Court of Appeals for the District of Columbia set out specific duties to be undertaken by an appellate court in reviewing agency interpretative rulings. The EPA had issued regulations defining a stationary source of pollution to include "any combination of facilities"[148] while the lan-

141. The guidelines upon which respondents relied stated: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, child birth, and recovery therefrom are, for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment . . . ." 29 C.F.R. 1604.10(b) (1975).

142. 429 U.S. at 140-45.

143. *Id.* at 142. (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

144. 429 U.S. at 141.

145. The Equal Employment Opportunity Commission guidelines failed to meet all three of the criteria set by the Court. 429 U.S. at 140-45.

146. *See* note 139 *supra* and accompanying text.

147. 578 F.2d 319 (D.C. Cir. 1978). *Accord*, Central of Ga. R.R. v. OSHA, 576 F.2d 620 (5th Cir. 1978).

148. 40 C.F.R. 602(d) (1976).

guage of the Clean Air Act defined it as "any building, structure, facility or installation which emits or may emit any air pollutant."[149] The court believed that although the EPA's interpretation of the Clean Air Act is to be given considerable deference, a reviewing court has the responsibility to carefully examine the words of the Act, its legislative history, and the reasons advanced by the agency to justify its new interpretation in order to determine whether an agency's interpretation is sufficiently reasonable that it should be accepted by the court.[150]

If the *Andrus* court had utilized the above tests it would have found that CEQ's decision to reverse its prior interpretation was based upon what the Council considered unwise or impractical. Such opinions as to impracticality are of little relevance to the question of whether Congress intended agency requests for appropriations to be proposals for legislation.[151] In addition, such sterile considerations of impracticality frustrate the purposes of the Act. Moreover, before a court will defer to an agency's interpretation that conflicts with an earlier interpretation, made contemporaneous to the enactment of the statute, it is essential that the agency put forth a reasoned analysis for its change of direction.[152] This reasoned analysis does not appear in the CEQ's brief statement of impracticality. The circumstances surrounding CEQ's abrupt reversal of its interpretation, along with the questionable nature of the agency's purported justifications for the change, provide indications that the new policy may not be well founded. Furthermore, the unsupported nature of the reversal dictates that, in order to advance the purposes of the Act, the Court should have ignored the new CEQ interpretation and required the preparation of an EIS to accompany the System's budget request.

An agency interpretation that conflicts with an earlier pronouncement of the agency generally faces a court[153] that is not willing to validate the new interpretation unless the agency is "faced with new developments."[154] In substance, it appears that a court will be more likely to accept an agency's reversal in statutory interpretation if it can

149. Asarco v. EPA, 578 F.2d at 326.
150. *Id.* at 325-26.
151. For congressional purposes of the Act see notes 30-36 *supra* and accompanying text.
152. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970).
153. West Helena Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 417 F. Supp. 220 (E.D. Ark. 1976) (interpretation by FHLB would not be given weight where its interpretations had not been uniform). *See also In re* Pacific Homes, 456 F. Supp. 851 (C.D. Cal. 1978) (court may disregard comments by advisory committee on bankruptcy when they conflict with the Bankruptcy Act).
154. American Trucking Ass'n v. Atchison, T. & S.F. Ry., 387 U.S. 397, 416 (1967).

be shown that, under changed circumstances, the new interpretation is *consistent with the purposes of the statute*. CEQ's explanation for its reversal in statutory interpretation did not include any changed circumstances that would justify its reversal. The CEQ simply stated that experience indicated to it that the preparation of an EIS was ill-suited to the appropriations process. The Court should not have deferred to the CEQ's statement of its experience because the Council admitted that it had never received an EIS with an appropriations request.[155] Without any changed circumstances to support the Council's reversal, it is apparent that the new interpretation is inconsistent with the purposes of the Act. NEPA demands consideration of environmental factors and the preparation of an EIS when decisions are being made. The Council's new interpretation exempting appropriations requests from the EIS process serves to thwart NEPA's ambitious purpose.

VI. CONCLUSION

The mere fact that federal agencies have widely ignored the EIS requirement for proposals for legislation should have led the Court to take a firm stand rather than simply affirm the status quo. The *Andrus* decision means that the purposes of the Act will not be fulfilled in the sense that NEPA's goal to protect and enhance the quality of the environment will not be fulfilled. In that view, the *Andrus* decision represents a lost opportunity. The Court was presented with a situation in which federal agencies were violating the provisions of NEPA by failing to consider the environmental consequences that might result from a particular allocation of federal funds. The Court failed to seize this opportunity to effectuate the purposes of the Act and impose the proper remedy of requiring the preparation of an EIS at the appropriations stage of federal action. The Act, the legislative history, and the relevant cases all indicate that an EIS should accompany a request for appropriations.

NEPA states that an EIS must accompany all proposals for legislation and major federal actions significantly affecting the quality of the environment. Appropriations requests that have the effect of reducing the funds with which an agency such as the National Wildlife Refuge System is to operate, clearly produce a significant effect upon the environment. An EIS would measure these environmental consequences and provide for their consideration during the appropriations stage, the

155. *See* notes 99 and 139 *supra* and accompanying text.

time when the decision maker "has an open mind and is more likely to be receptive to such considerations."[156]

The legislative history of the Act constantly emphasizes that if NEPA is to be successful, it must be fully integrated into the early decision making process of an agency. The *Andrus* decision, however, separates the appropriations process from the requirements of the Act. Inasmuch as all Congressmen are aware of the power of the purse, it is unimaginable that the drafters of NEPA intended to create such a loophole in its applicability.

The *Andrus* decision is representative of a new struggle for environmentalists. The enthusiasm of Earth Day has been institutionalized in legislation, regulations, and litigation. That original wave of enthusiasm has given way, however, to an era of hard fought, case by case, tradeoffs. The *Andrus* decision represents just such a tradeoff. The new authoritativeness that President Carter desired for the CEQ guidelines has been achieved. The frustration felt by environmental groups in observing judicial disregard of the CEQ will become a thing of the past.

Andrus also means that federal agencies which have neglected to prepare an EIS for appropriations requests now have the authority of the Supreme Court in support of that disregard. The long range, and more important, detriment that the decision represents is the lost opportunity to effectively influence decision makers with environmental considerations at the appropriations stage.

Michael J. Munns

156. Kleppe v. Sierra Club, 427 U.S. 390, 418 (1976) (Marshall, J., dissenting). *See also* F. ANDERSEN, *supra* note 75, where the author states that early application of the Act would be more effective to protect the environment. "By having the agencies comply late in the process, the courts have arguably imposed unrealistic requirements for adequate and comprehensive consideration of environmental values." *Id.* at 291-92.