North Dakota Law Review

Volume 50 | Number 3 Article 5

1973

Highways, Environmental Legislation, and Judicial Review: The Changing Notion of Necessity

Thomas L. Hamlin

Follow this and additional works at: https://commons.und.edu/ndlr

Recommended Citation

Hamlin, Thomas L. (1973) "Highways, Environmental Legislation, and Judicial Review: The Changing Notion of Necessity," *North Dakota Law Review*: Vol. 50 : No. 3 , Article 5.
Available at: https://commons.und.edu/ndlr/vol50/iss3/5

This Note is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

HIGHWAYS, ENVIRONMENTAL LEGISLATION, AND JUDICIAL REVIEW: THE CHANGING NOTION OF NECESSITY

I. INTRODUCTION

Highway construction has increased during the last two decades in order to placate multicar Americans who, with their increasing affluence, have demanded low density suburban living away from their urban jobs[1] and coast to coast travel during leisure periods. Along with this rapid expansion, however, has come serious threats to the environment in the form of air pollution and the destruction of irreplaceable natural resources.[2]

Regrettably, highway planners have not been zealous in their efforts to minimize these problems.[3] To be sure, these planners

1. Aurbach, *Environmental Policy and Urban Transportation* (*Urban Freeway Manifesto Revisited* 4 URB. LAW 713, 733 (1972).

> [T]he American way of life has assumed the multi-car family living on a large lot, provided with the necessary highways and other public services, and mandated by zoning and subdivision controls.

Id.

As this note was being put into final form, the United States was experiencing an acute fuel shortage. At this point it is premature to attempt to determine the precise effect that this shortage will have on highway construction since the extent of the fuel problem is not yet fully known. It seems likely, however, that highway construction will not continue at a rapid pace as in the past.

But it is foreseeable that those highways which will be constructed will be built along short, and direct routes in order to conserve fuel. Thus, those environmental amenities which stand in the way could very well be sacrificed in the name of fuel conservation.

2. Note, *Eminent Domain and the Environment,* 56 CORNELL L. REV. 651 n. 3 *citing* MCHARG, DESIGN WITH NATURE 31 (1969).

> In highway design, the problem is reduced to the simplest and most commonplace terms: traffic, volume, design speed, capacity, pavements, structures, horizontal and vertical alignment. These considerations are married to a thoroughly spurious cost benefit formula and the consequence of this institutionalized myopia are seen in the scars upon the land and in the cities.
>
> Who are as arrogant as unmoved by public values and concerns as highway commissions and engineers? . . . Give us your beautiful rivers and valleys and we will destroy them: Jones Falls in Baltimore, the Schuylkill River in Philadelphia, Rock Creek in Washington, the best beauty of Staten Island, the Stony Brook-Milestone Valley near Princeton.

Id.

3. *Id.*

> If one seeks a single example of an assertion of simple-minded single purpose, the analytical rather than the synthetic view and indifference to natural processes—indeed an anti-ecological view—then the highway and its creators leap

must first ascertain whether the proposed highway is needed, and whether the land in question is needed for the project before any land can be condemned.[4] However, this determination of the necessity of the taking does not specifically include an assessment of environmental consequences. Recently, in an attempt to curb environmental abuse, the federal government and a few states have enacted statutes requiring that environmental effects be taken into account in the planning and construction of highways and other projects which are potentially harmful to the environment.[5]

These environmental statutes, as well as increased environmental concern on the part of the courts, have inserted a new element into the necessity equation. Now the question of necessity must also include a determination of whether the taking is environmentally sound. This note will trace the changes which these statutes have made in the legislative determination of necessity, and will describe the role of the courts in implementing this new standard.

II. BACKGROUND — THE COMMON LAW NECESSITY RULE

Eminent domain is defined "as the power of the sovereign to take property for public use without the owner's consent upon making just compensation."[6] This power flows from the state's position as sovereign.[7]

Most courts have held that absent a specific statutory or constitutional authorization, a determination concerning the necessity of a particular exercise of eminent domain power is a matter to be left to legislative discretion.[8] The fair and just resolution of this question could be facilitated by resort to judicial processes.

> to mind. There are other aspirants who vie to deface shrines and desecrate sacred cows, but surely it is the highway commissioner and engineer who most passionately embrace insensitivity and philistinism as a way of life and profession.

Id.

4. GUY, STATE HIGHWAY CONDEMNATION PROCEDURES 47 (1971).
5. The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2) (1970) provides that a "detailed statement" shall be included "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . . ." Provisions similar to this also appear in many state statutes, *see e.g.*, CAL. PUB. RES. CODE § 21102 (West Supp. 1973).
6. 1 NICHOLS, THE LAW OF EMINENT DOMAIN § 1.11, at 1-9 (3rd ed. 1973).
7. *Id.* § 1.13[4], at 1-19.
8. *Id.* § 4.11. at 4-138. Specifically the proscribed questions are as follows:
   (1) Whether there is necessity for the taking,
   (2) Whether there is any need for resorting to eminent domain in effecting such acquisition,
   (3) Whether the time is a fitting one,
   (4) Whether there is a need for the property to the extent sought to be acquired,
   (5) Whether there is a need for the particular tract sought to be acquired (and, correlatively, whether another tract would not better serve the purposes of the condemnor),
   (6) Whether there is any need for the particular estate sought to be condemned,
   (7) Whether the mode of acquisition with respect to the instrumentalities employed, such as a state officer, an individual, or a corporation, is proper insofar as the exercise of the legislative discretion is concerned.

Id. § 4.11, at 4-147—4-142 (footnotes omitted).

Nevertheless, once the legislature has made its decision, the landowner has no constitutional right to question the necessity of this determination before a judicial body.[9] The reason is that the court is powerless to challenge a legislative enactment unless it violates a constitutional provision.[10] Nearly all those constitutions that do refer to the state's eminent domain power provide only that the state must make just compensation when it takes land for public use without the owner's consent.[11] No state has a constitutional provision requiring that land be taken only for necessary projects.[12] Though the court may consider the project unwise, or the site ill chosen, it may not substitute its judgment for that of the legislature.[13]

The court, however, is not totally precluded from intervening. Where the legislature has abused its discretion by taking land without considering whether the land is needed, the court may hold the taking to be unlawful.[14] The court may also act if it finds that the legislature has acted in bad faith.[15] Thus, the question of whether a public necessity exists at all is ultimately a judicial one.[16] But even though the courts have this power, they have rarely exercised it.[17] Furthermore, the party alleging arbitrariness on the part of the state has a heavy burden of proof.[18]

III. JUDICIAL REVIEW OF THE FEDERAL EXERCISE OF EMINENT DOMAIN POWER

When the federal government builds a highway, vast amounts of land must be condemned.[19] To ensure that federal agencies take environmental factors into account when assessing the need

---

9. *Id.* § 4.11[1], at 4-155. "It does not . . . follow merely because such questions are often open to a doubt, and because evidence and argument might be of assistance in coming to a decision, that they are necessarily judicial and should be passed upon by the courts. *Id.*

10. *Id.* § 4.11[1]. at 4-156. In a few states, constitutional provisions have been enacted to provide for judicial determination of the questions of necessity. *Id.* § 4.11[4], at 4-201. Many states have statutes which vest the courts with such power. *Id.* § 4.11[4], at 4-202.

The judicial test for necessity is a liberal one. The state need not show that the project cannot be constructed at all if the land in question is not taken; the state must prove only that the land is reasonably suitable and useful for the improvement. *Id.* § 4.11[4], at 4-203. In applying this test, however, the courts have not been eager to place restrictive limits on the power of the condemnor. *Id.* § 4.11[4], at 4-203 n. 22 *quoting* Latchis v. State Highway Board, 120 Vt. 120, 134 A.2d 191, 194 (1957).

11. *Id.* § 1.3, at 1-78—1-79.

12. *Id.*

13. *Id.* § 4.11[1], at 4-156.

14. *Id.* § 4.11[2], at 4-157.

15. *Id.*

16. *Id.* "In every case, therefore, it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity." *Id.* (footnote omitted).

17. *Id.* § 4.11[2], at 4-163.

18. *Id.* § 4.11[2], at 4-165.

19. Pursuant to 23 U.S.C. § 108 (1970), the states may condemn land for the interstate highway system, even though the federal government pays most of the costs. It has been posited that juries will award smaller verdicts to landowners when the state is the taker. Vogel, *Observations on the Trial of Eminent Domain Cases*, 16 PRAC. LAW., 40, 47 (Oct. 1970).

for these projects, Congress has enacted the National Environmental Policy Act[20] and has added specific provisions to the Federal Aid Highway Act[21] and Department of Transportation Act.[22] But in mandating that these agencies make decisions apprised of all environmental consequences, Congress left unclear the role of the courts.[23] Are the courts simply to determine whether all procedural requirements have been met, or can they look closer at the basis for the agency's decision? Also, what is the ultimate standard of review that courts may use?

A. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969[24] (NEPA) is divided into two major chapters. The first subchapter sets out national environmental goals and policies and includes directives with which federal agencies must comply in their decisionmaking process.[25] The second subchapter creates the Council on Environmental Quality.[26]

Unfortunately, the language of the statute concerning agency responsibilities is less than precise. For example section 4332 (2) (B) of the Act directs federal agencies to:

> identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.[27]

In applying these imperspicuous provisions, courts have struggled with the question of how far they may go in reviewing agency action under NEPA's requirements. This question can be divided into two parts: first, is the court to be concerned only with procedural compliance or may it also determine whether the agency has complied with the substantive policy elements of the act?; and second, once the kind of review has been determined, what is the ultimate standard of review that a court must use?

A dispute concerning the power of courts to review substantive agency decisions on the merits has developed among the circuits.[28] The Tenth Circuit has ruled that no substantive review of agency

20. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970).
21. Federal Aid Highway Act of 1968, 23 U.S.C. § 138 (1970).
22. Department of Transportation Act of 1969, 49 U.S.C. § 1653(f) (1970).
23. Judicial review is not specifically mentioned in any of the above acts.
24. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970).
25. *Id.* §§ 4331-4335.
26. *Id.* §§ 4341-4347.
27. *Id.* § 4332(2)(B).
28. The illustrative cases in this section do not deal specifically with highway construction. However, it is apparent that building a highway is a "major federal action sig-

decisions is possible under NEPA;[29] the Second, Eighth, and District of Columbia Circuits, on the other hand, have sanctioned such review.[30] In *National Helium Corporation v. Morton*,[31] the United States Court of Appeals for the Tenth Circuit held that the Secretary of the Interior must comply with NEPA in cancelling a helium conservation contract because that action has environmental consequences.[32] In assessing the requirements of NEPA, the court observed that they are procedural only and do not control agency decisionmaking.[33] Furthermore, the court felt that NEPA's purpose, which is to make the agency aware of environmental consequences, would be carried out through strict adherence to the prescribed statutory procedures.[34]

In *Environmental Defense Fund v. Corps of Engineers*,[35] the United States District Court for the Eastern District of Arkansas adopted a similar position concerning judicial inquiry. In granting a temporary injunction to prohibit further construction on the Cossatot River Dam until the Corps had compiled an adequate impact statement, the court was careful to point out that NEPA does not create substantive rights in addition to its procedural requirements.[36] The court rejected the plaintiff's claim that NEPA created a substantive right to a "safe, healthful, productive, and esthetically and culturally pleasing surroundings."[37] However, the court made it clear that a mere mechanical compliance was not enough and did not hesitate to undertake a searching inquiry into the facts to determine whether NEPA's procedural requirements had been met. For example, the court found the agency's environmental

---

nificantly affecting the quality of the human environment" under § 4332(2)(C) of the National Environmental Policy Act of 1969. Indeed, one commentator has stated that "highway cases predominate amongst the reported judicial decisions construing NEPA". Note, *Litigation, the Freeway Revolt*: *Keith v. Volpe*, 2 ECOLOGY L. Q. 761 (1972). Thus, the principles set out would clearly apply to highway cases.

29. National Helium Corporation v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).

30. Environmental Defense Fund. Inc. v. Corps of Eng'rs., U.S. Army, 470 F.2d 289, 298 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972); Scenic Hudson Preserve Conf. v. Federal Power Com'n., 453 F.2d 463, 468-69 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

31. National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

32. *Id.* at 656.

> The Secretary in the instant case proposes to take an action which has environmental consequences, namely rapid depletion of the helium resources of the country. Whether the Secretary's proposed action has significant long range consequences, or whether the environmental effects are insignificant in relationship to the countervailing government interests, are decisions which are left to the Secretary. The important thing is that he must consider the problem.

Id.

33. *Id.* at 656. "The decisions are . . . clear that the mandates of the NEPA pertain to procedures and do not undertake to control decision making within the departments." *Id.* (footnote omitted).

34. *Id.*

35. Environmental Defense Fund, Inc. v. Corps of Eng'rs. of United States Army, 325 F. Supp. 749 (E.D. Ark. 1971), *vacated*, 342 F. Supp. 1211 (E.D. Ark. 1972), *aff'd on other grounds*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972).

36. *Id.* at 755.

37. *Id.*

impact statement to be inadequate, essentially because it did not contain all known possible environmental consequences of the proposed agency action.[38] The court was adamant about ensuring that the record be complete. "Then, if the decision makers choose to ignore such factors, they will be doing so with their eyes wide open."[39]

On rehearing, the district court vacated the injunction and dismissed the action because it found that the Corps' new environmental impact statement met the disclosure requirements of NEPA.[40] On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's ruling that the environmental impact statement was sufficient.[41] However, the court of appeals disagreed with the district court's assessment that the defendant's need only comply with the procedural requirements of NEPA.[42] After surveying the legislative history of NEPA, the court asserted that the purpose of the procedural requirements is to guarantee that its policies will be implemented by the agency.[43] Recognizing the agency responsibility to put into effect the substantive requirements of NEPA, the court stated:

> [W]e believe that courts have an obligation to review substantive agency decisions on the merits. Whether we look to common law or the Administrative Procedure Act, absent "legislative guidance as to reviewability, an administrative determination affecting legal rights is reviewable unless some special reason appears for not reviewing."[44]

The court noted that important legal rights had been affected, and that no special reasons had been asserted for not reviewing the decision of the agency.[45] Furthermore, substantive judicial re-

38. *Id.* at 757-758. The court listed ten reasons for the insufficiency of the impact statement. Among the most significant in terms of demonstrating the thoroughness of the court's demands were the following:

> (3) The statements did not set forth all of the environmental impacts (which would result from the construction of the embankment), which are known to the defendants by their own investigations or which have been brought to their attention by others.
>
> (4) The statements do not adequately set forth the adverse environmental effects which can not [sic] be avoided should the dam be built as planned.
>
> (5) The statements do not adequately explore the alternatives to the proposed action.
>
> (6) The statements do not adequately bring to the reader's attention all "irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

Id. at 758.

39. *Id.* at 759.

40. Environmental Defense Fund, Inc. v. Corps of Eng'rs. of United States Army, 342 F. Supp. 1211 (E.D. Ark. 1972) *aff'd on other grounds,,* 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1972).

41. Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army, 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1972).

42. *Id.* at 297.

43. *Id.*

44. *Id.* at 298.

45. *Id.* at 298-99.

view, the court felt, would implement NEPA's purposes.[46]

In establishing a standard of review, the court adopted the test outlined by the United States Supreme Court in *Citizens to Preserve Overton Park v. Volpe.*[47] Although *Overton Park* dealt specifically with provisions of the Federal-Aid Highway Act[48] and the Department of Transportation Act,[49] the Court formulated general guidelines that could be used in measuring agency compliance with any Congressional enactment.[50] First, the court must ascertain whether the agency exceeded its scope of authority.[51] Next, it must determine whether the final decision was an abuse of discretion.[52] Where NEPA is applicable, the court must first decide whether the agency's decision resulted from a good faith consideration of environmental factors.[53] Taking into account NEPA's policy considerations, the court must then determine whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[54] By using this test, the court in *Environmental Defense Fund* seemed to indicate that the agencies cannot meet NEPA's requirements by merely disclosing the likely harm; they must also make a substantial effort to minimize the damage to the environment.[55]

Despite NEPA's silence as to judicial review, some courts have not been reluctant to oversee agency decisions which are subject to its guidelines. Though the caveat is almost always offered that "[t]he court is not empowered to substitute its judgment for that of the agency,"[56] there is a distinct trend among the circuits to encroach as much as possible on the agency's decisionmaking power.[57] Indeed, these cases seem to indicate that in certain circumstances the court can become, in effect, the final decisionmaker. In those instances where the agency has clearly abused its discretion, it appears that a court may step in to set aside the decision.[58]

---

46. *Id.* at 298.
47. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). For a discussion of this case see text accompanying notes 78-98 *infra.*
48. 23 U.S.C. § 138 (1970).
49. 49 U.S.C. § 1653(f) (1970).
50. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-17 (1971).
51. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1972).
52. *Id.*
53. *Id.*
54. *Id. quoting* Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).
55. This interpretation of NEPA was subsequently asserted in clear and unequivocal language in Sierra Club v. Froehlke 5 ERC 1033, 1065-66 (S.D. Tex. 1973).
56. *See e.g.,* Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1972) *quoting* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).
57. *See* note 30 *supra.*
58. *See* Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army, 470 F.2d 289, 301 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1972). Clearly, the courts do

At first glance, the Court of Appeals for the Eighth Circuit seems to have demonstrated a pronounced judicial activism in subjecting agency decisions that fall within NEPA's coverage to substantive judicial review. However, a comparison with the traditional test used by courts concerning the necessity of the legislative exercise of eminent domain power reveals that the Eighth Circuit position is well-founded.

Courts have always been able to determine whether a necessity exists at all for the eminent domain action, but have not been able to judge the wisdom of such an action. The standard used is whether the legislature's exercise is arbitrary and capricious, or made in bad faith.[59] The Eighth Circuit employed that precise test in its review of agency action.[60] The only palpable difference is that in making its determination as to whether the agency's action was arbitrary and capricious, the court examined the agency's compliance with NEPA. To adequately test whether the agency's behavior was capricious, the court could not be satisfied with mere procedural obedience, no matter how detailed. Rather, it had to inquire into whether the agency had made a legitimate attempt "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . ."[61] Thus, the standard for review of the necessity of the legislature's exercise of eminent domain remains the same; the scope of review, however, has been broadened by NEPA's requirement that environmental effects be taken into account in agency decisionmaking.

There may, however, be a significant difference in the plaintiff's burden of proof where compliance with NEPA is in issue. Traditionally, the plaintiff had a heavy burden to show arbitrariness on the part of the legislature.[62] In reference to NEPA, however, the plaintiff need only establish a prima facie case of noncompliance with NEPA.[63] The burden is then shifted to the agency which has the expertise, the time, and the resources to undertake a careful environmental assessment of its action.[64]

---

not have the power to make a final decision. However, through use of their veto power they can have a profound influence on that decision.

59. *See* text accompanying notes 14-15 *supra*.

60. Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army, 470 F.2d 289, 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972). This test is also prescribed in § 706(2)(A) of the Administrative Procedure Act 5 U.S.C. § 706 (1970). The point here, however, is that the court is essentially litigating the issue of whether a necessity for the condemnation exists at all. To condemn the vast amount of land necessary for these projects, the federal agency must, pursuant to NEPA, determine that the need for the project outweighs the environmental cost. The test which the courts apply to examine the agency decision is whether the decision is an arbitrary and capricious one—the precise standard used in the common law necessity test.

61. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970).

62. 1 NICHOLS, THE LAW OF EMINENT DOMAIN § 4.11[2] at 4-165 (3rd ed. 1973).

63. Sierra Club v. Froehlke, 5 ERC 1033, 1062 (S.D. Tex. 1973).

64. *Id.*

B. FEDERAL HIGHWAY LEGISLATION

Federal aid for highway construction was initially designed to encourage states to build their own highways,[65] and to create a national system of highways.[66] As the federal share of the costs of highway construction has increased over the years, so has the degree of federal control over particular projects.[67] This is especially true with regard to route selection.[68] The state highway departments select the routes initially; public hearings are held on each highway project, and then the architectural plans as well as the transcripts of the public hearing are submitted to the Secretary of Transportation for his approval.[69] Before 1966, the Secretary was not required to take environmental factors into account in making his decision.[70] However, in 1966 Congress enacted section 15 of the Federal-Aid Highway Act (FAHA) which was designed to protect "Federal, State, and local government parklands and historic sites."[71] This section required that the Secretary of Transportation not approve programs using such lands for highway projects "unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use."[72]

Shortly after the enactment of Section 15, Congress passed the Department of Transportation Act[73] (DOT), which included a provision to further restrict the Secretary of Transportation's discretion in locating a highway through a park. Section 4(f) of DOT provides that to approve locating a highway through a park, the Secretary must find that no "feasible and prudent" alternative routes exist.[74] Furthermore, once he makes this finding, the Secretary can only go forward with the project if the plans include all possible methods to minimize harm to the park.[75] In a 1968 amendment to the FAHA, Congress adopted the wording of 4(f) and eliminated the nebulous language of Section 15.[76] By this amendment, Congress emphasized the necessity of considering alternate routes.[77]

---

65. Act of July 11, 1916, ch. 241, § 6, 39 Stat. 357-58.
66. Act of Nov. 9, 1921, ch. 119, § 6, 42 Stat. 212, 213.
67. Note, *Favoring Parks Over Highways—A First Step Toward Resolving the Conflict Between Preservation of Environmental Amenities and Expansion of the Highway System*, 57 IOWA L. REV. 834, 836 (1972).
68. *Id.*
69. *Id.*
70. *Id.*
71. Federal Aid Highway Act of 1966, Pub. L. No. 89-575 § 15, 80 Stat. 771.
72. *Id.*
73. Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931-50 (1966).
74. *Id.* § 4(f). (codified at 49 U.S.C. § 1653(f) (1970)).
75. *Id.*
76. Federal Aid Highway Act of 1968, Pub. L. No. 90-495, § 15, 82 Stat. 823-24. (codified at 23 U.S.C. § 138 (1970)).
77. Note, *Favoring Parks Over Highways—A First Step Toward Resolving the Conflict*

In *Citizens to Preserve Overton Park, Inc. v. Volpe,*[78] the United States Supreme Court held that the final route approval decision by the Secretary of Transportation to authorize a six lane highway through a public park in Memphis, Tennessee, was subject to judicial review[79] pursuant to section 701 of the Administrative Procedure Act.[80] Section 701 precludes judicial review only where review is prohibited by statute, or where "agency action is committed to agency discretion by law."[81] The Court ruled that neither restriction was applicable to the case at bar.[82] The Court found no legislative intent to limit access to the courts.[83] Furthermore, the Court indicated that the final decision could not be left to the unfettered discretion of the agency, since statutory requirements were applicable.[84] In this case, these requirements were sections 4(f) of DOT and 138 of FAHA.[85] For an agency decision to meet the requirement of being "feasible," the Court ruled that the Secretary must demonstrate that sound engineering precludes the construction of the highway along another route.[86] For the decision to be "prudent," the Secretary must comply with the Congressional intent to place paramount importance on the preservation of parklands.[87] This means that parks cannot be sacrificed unless "truly unusual factors" are present, "or the cost of community disruption resulting from alternative routes" is extraordinary.[88]

The Court next elucidated the standard for review. First, the reviewing court must determine whether the Secretary exceeded his statutory authority.[89] To make this determination, the court must define that authority;[90] it must then make a finding of fact that the Secretaray reasonably believed that he has acted within that authority.[91] Second, the court must decide whether the Secretary's final decision was arbitrary or capricious.[92] This calls for a decision as to whether all relevant factors have been considered and whether the Secretary has made a "clear error of judgment."[93]

Between Preservation of Environmental Amenities and Expansion of the Highway System, 57 IOWA L. REV. 834, 839 (1972).

78. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).
79. *Id.* at 410.
80. Administrative Procedure Act, 5 U.S.C. § 701 (1970).
81. *Id.*
82. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1972).
83. *Id.*
84. *Id.* at 410. "Plainly, there is 'law to apply' and thus the exemption for action 'committed to agency discretion' is inapplicable." *Id.*
85. *Id.* at 411. The Court makes reference to § 4(f) of DOT and § 138 of FAHA. As has been pointed out *supra* note 76, § 15 has been codified at 23 U.S.C. § 138 (1970).
86. *Id.* at 411.
87. *Id.* at 411-13.
88. *Id.* at 413. The Court summed up its position by stating that "[i]f the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems." *Id.*
89. *Id.* at 415.
90. *Id.* at 415-16.
91. *Id.* at 416.
92. *Id.*

Finally, it must be determined if the Secretary complied with all the necessary procedural requirements.[94] The Court noted that the Secretary need not produce formal findings.[95] However, it did emphasize that the court must review the Secretary's decision based on a full and complete administrative record.[96]

After establishing that the Secretary's decision was subject to judicial review and presenting the standards for that review, the Court remanded the case to the district court for a plenary review.[97] The full administrative record, the Court noted, had not been presented, and therefore no decision could be made concerning the propriety of the Secretary's decision.[98]

On remand, the District Court for the Western District of Tennessee held that the Secretary had not determined that there was no "feasible and prudent" alternative.[99] In holding its plenary hearing, the court made every effort to comply with the Supreme Court's directive that the inquiry be substantial, thorough, probing and in depth.[100] The court not only granted plaintiff's request for discovery,[101] but also allowed plaintiffs to question directly agency personnel responsible for the decision.[102] The plaintiffs were also allowed to bring in their own experts to provide the court with opinions as to the expertise exercised by the Secretary.[103] Finally, the court permitted the plaintiffs to introduce expert testimony of feasible and prudent alternatives.[104]

Besides finding that the Secretary had not determined that there was no feasible and prudent alternative, the court ruled that the Secretary did not apply the correct legal standard in reaching his decision.[105] His interpretation of the words, "feasible and prudent," differed from the Supreme Court's construction in a number of ways. First, the court noted that the Secretary, in making his determination as to whether the alternative route was

93. *Id.* The Court warned, however, that this standard is a narrow one, and that a court must not substitute its own judgment for that of the agency. *Id.*

94. *Id.* at 417.

95. *Id.* at 417-419.

96. *Id.* at 420. The Court authorized the District Court to use various methods to supplement the administrative record if it were not sufficient to determine whether the Secretary acted within the scope of his authority and if his actions comported with the applicable standard. The district court could either question the administrative officials who made the decision, or allow the Secretary to present formal findings of fact. *Id.*

97. *Id.*

98. *Id.*

99. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 878-879 (W.D. Tenn. 1972). The press release which Secretary Volpe used to make his announcement concerning his decision indicated that "[t]he options of this Administration were few, mainly because the route of the highway had previously been determined." *Id.*

100. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1970).

101. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 877 (W.D. Tenn. 1972).

102. *Id.* This is not allowed as a matter of course.

103. *Id.*

104. *Id.*

105. *Id.* at 879.

a "prudent" one, had merely balanced the detriment to the park against the cost of avoiding the park.[106] This was clearly prohibited by the Supreme Court's ruling in *Overton* that the Secretary shall give paramount weight to the policy of park preservation.[107] Second, the court said that the Secretary had implied in an affidavit that he had not used the correct standard.[108] Finally, nothing in the administrative record indicated that anyone at the Department of Transportation in 1969 had construed the 4(f) standard to be so narrow.[109] After identifying these deficiencies, the court remanded the action to the Secretary of Transportation with orders that he comply with the applicable law.[110]

Subsequently, the Secretary issued a decision stating that "I cannot find . . . that there are no prudent and feasible alternatives to the use of the parkland. . . ."[111] In response to that determination, the defendant petitioned the district court to remand the action once again to the Secretary contending that the Secretary had failed to comply with the statutes.[112] The district court ruled that the Secretary's decision was insufficient and ordered another remand.[113]

The court first stated that Section 4(f) requires the Secretary to find that there are "no feasible and prudent alternatives" to locating a highway through parkland.[114] The court then reasoned that if he does not approve the route through the parkland, he must find that there was a feasible and prudent alternative.[115] In a careful reading of the Secretary's statement, the court concluded that the Secretary's double negative — that he could *not* find that there was *no* feasible alternative — was not synonomous with saying that there was, in fact, a feasible and prudent alternative.[116] Furthermore, the court asserted that the Secretary must designate the alternative[117] to insure that the State defendant received meaningful judicial review.[118]

---

106. *Id.*
107. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411-13 (1972).
108. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 879 (W.D. Tenn. 1972). "In his affidavit, the Secretary does say that, applying the correct standard as laid down in the Supreme Court's decision, he would have concluded that there was no feasible and prudent alternative to the park route, but he does not say that he applied such a standard when he made the decision." *Id.*
109. *Id.*
110. *Id.* at 885.
111. Citizens to Preserve Overton Park, Inc. v. Volpe, 5 ERC 1241, 1242 (W.D. Tenn. 1973).
112. *Id.*
113. *Id.* at 1244.
114. *Id.* at 1243. The Court also noted that 4(f) requires that the proposal to place a highway through a park must include "all possible planning to minimize harm to such park." *Id.*
115. *Id.* at 1244.
116. *Id.* at 1243-44.
117. *Id.* at 1244.
118. *Id.*

C. SUMMARY

NEPA, FAHA, and DOT have been construed by the courts as requiring the administrative agencies to engage in a thorough and exacting review of their decisions in order to put into effect the Congressional policy of environmental preservation. This combination of legislative and judicial action has clearly broadened the scope of review with regard to the necessity of a "taking." Though the ultimate standard of capriciousness is essentially the same as at common law, courts may now assess administrative decisions to ensure that environmental consequences have been taken into account.

For courts to engage in effective judicial review of these decisions, however, they must have a reasonably concrete rule with which to work. Legislative cliches that call for "environmental preservation" will not suffice because it is nearly impossible to apply this generic term to mountains of technical data.

Unlike NEPA's vague standards, sections 4(f) of DOT and 138 of FAHA seem to give the courts a more tangible means of measurement. By engaging in a thorough and exacting review of the type sanctioned in *Overton,* courts can reasonably assure themselves that when the Secretary plans to locate a highway through a park, he has, in fact, no feasible and prudent alternative and has taken the necessary steps to minimize the damage to the park. Furthermore, giving the defendant the burden of justifyfing his harmful activity is consistent with the legislative policy of environmental protection.

The district court, on remand from the Supreme Court in *Overton,* demonstrated that by strictly applying the feasible and prudent alternative test, agency decisions can be made more responsive to the legislative mandate.[119] Although the *Overton* ruling is limited to cases where agencies plan to use parkland for highway construction, it may serve as a guide for subsequent legislative enactments designed to preserve environmental amenities.[120]

IV. JUDICIAL REVIEW OF THE STATE EXERCISE OF EMINENT DOMAIN POWER—MINNESOTA

Highways which are part of the interstate system receive sub-

---

119. Citizens to Preserve Overton Park, Inc. v. Volpe, 5 ERC 1241 (W.D. Tenn. 1973), *enforcing* 335 F. Supp. 873 (1972), *enforcing* 401 U.S. 402 (1972).

120. The Minnesota Environmental Rights Act provides that:

> A "defendant may . . . show, by way of an affirmative defense, that there is *no feasible and prudent alternative* and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction."

MINN. STAT. § 116B.04 (1971) (emphasis added).

stantial federal money and are therefore subject to the federal environmental statutes discussed above. State highways and roads constructed with only state monies are not subject to such legislation. Until recently, state courts had few rules with which to examine the state's exercise of eminent domain power.[121] Now, however, some state courts are applying newly enacted state environmental statutes to control the state's exercise of eminent domain power.[122]

This section will discuss important aspects of the Minnesota Environmental Rights Act,[123] one of the most progressive state statutes of its kind. The discussion will also include comments on a recent Minnesota Supreme Court decision[124] which used that Act to restrict the state's exercise of eminent domain power to build a highway through a marshland.

The Minnesota Environmental Rights Act was enacted to provide the courts with greater power to protect the environment.[125] The Act permits any private individual or group residing within the state to seek "an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment or destruction."[126] Although the act provides for four separate actions,[127] this discussion will focus only on that action most likely to be used to curtail the exercise of eminent domain power: a civil action against "any person for the protection of the air, water, land, or other natural resources located

---

121. *See e.g.*, Seadade Industries, Inc. v. Florida Power and Light Co., 245 So.2d 209 (Fla. 1971); Ragland v. State Dep't. of Transp., 242 So.2d 475 (Fla. Ct. App. 1970); Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 225 A.2d 130 (1966). For a discussion of these cases see Annot. 47 A.L.R.3d 1267 (1973).

122. *See e.g.*, FLA. STAT. ANN. § 403.412 (1973); MICH. COMP. LAWS ANN. §§ 691.1201 et seq. (1973-74); N.Y. ENVIRONMENTAL CONSERVATION LAW §§ 1-0101 et seq. (McKinney 1973).

123. MINN. STAT. §§ 116B.01—.14 (1971).

124. County of Freeborn v. Bryson, 210 N.W.2d 290 (Minn. 1973).

125. Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575, 604 (1972). The statute also provides for cooperation between the courts and agencies. *Id.* at 604-05.

126. MINN. STAT. § 116B.01. This section also sets out Minnesota's policy concerning environmental protection:

> The legislature finds and declares that each person is entitled by right to the protection, preservation and enhancement of air, water, land and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which man and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed.

Id.

127. The authorized actions are the following:

(1) an action to enforce existing environmental quality standards. *See* MINN. STAT. §§ 116B.03(1), (5) (1971).

(2) an action to enjoin conduct which materially adversely affects the environment. *Id.*

(3) an action involving intervention into administrative proceedings or judicial review thereof where the conduct at issue is alleged to have caused pollution. *Id.* § 116B.09(1).

(4) an action challenging the adequacy of state environmental quality standards or regulations. *Id.* § 116B.10(1).

within the state whether publicly or privately owned, from pollution, impairment or destruction. . . ."[128]

To maintain an action under the Minnesota Act, the plaintiff must present a prima facie case that defendant's conduct has caused or is likely to cause environmental degradation as defined by the Act.[129] Once the plaintiff has established a prima facie case, the defendant may introduce evidence rebutting plaintiff's claims.[130] This provision places the overall burden of persuasion on the plaintiff.[131] Furthermore, once the plaintiff has met his burden or production, the issue goes to the jury.[132] The plaintiff is not granted a directed verdict if the defendant fails to answer.[133]

In addition to submitting rebuttal evidence, the defendant may claim that no "feasible and prudent" alternative exists for the conduct at issue, and that the conduct reasonably comports with and promotes "the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction."[134] To satisfy the "no feasible and prudent alternative" part of the test, the defendant must show that no technological alternative exists, or, if one does exist, it is simply too costly in light of the benefits expected from the project.[135] Once this test has been met, the defendant must show that the conduct in question will so enhance the public health, safety, and welfare that the destruction of natural resources in order to continue the activity is justified. Economic considerations, however, cannot be the sole justification for the activity.[136] To determine whether the defendant has met his burden, the factfinder must carefully balance the conflicting factors involved. In the case of a highway, the factfinder must weigh the public's interest in convenient transportation against the interest in protecting the public from the pollution and environmental deterioration that such a project would cause.

If the plaintiff receives a favorable verdict, the court must determine the relief to be granted. The Act gives the court a considerable range of choices:

---

128. *Id.* § 116B.03(1). § 116B.02(2) (1971) provides that the term, "person", means any natural person, any state, municipality or other governmental or political subdivision or other public agency or instrumentality, ony public or private corporation, any partnership, firm, association, or other organization, any receiver, trustee, assignee, agent, or other legal representative of any of the foregoing, and any other entity. . . .
129. *Id.* § 116B.04.
130. *Id.*
131. Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575, 598 (1972).
132. *Id.* at 598-599.
133. *Id.*
134. MINN. STAT. § 116B.04 (1971).
135. Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575, 599-600 (1972).
136. MINN. STAT. § 116B.04 (1971).

> The court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction.[137]

In *County of Freeborn v. Bryson,*[138] the petitioners brought an action under the Minnesota Environmental Rights Act alleging that the act prohibited the county from condemning part of a natural wildlife marsh for highway use.[139] Petitioners argued that the proposed condemnation would materially and adversely affect portions of the marsh. The Minnesota Supreme Court observed that the appeal raised three issues of first impression with regard to the Minnesota Environmental Rights Act. They were: (1) whether the parties had standing to bring the action; (2) whether the country's power of eminent domain was circumscribed by the act; and (3) whether the petitioner had established a prima facie case.[140]

The court easily resolved the issue of standing by noting that the petitioner was clearly a "natural person" under section 116B.02(2) of the Act.[141]

In holding that the statute limited the county's exercise of eminent domain power,[142] the court interpreted the Act broadly, but not unreasonably. The court first established that the legislature could modify or withdraw a delegation of the eminent domain power.[143] The court then noted that the Act's sweeping proscription of "any conduct" that may do substantial harm to the environment should not be limited by judicial fiat.[144] Furthermore, the broad policy statement in Section 116B.01 of the Act persuaded the court that the legislature had intended to limit the power of eminent domain, including delegations of that power to a county to condemn land for a public highway.[145]

Before proceeding to the final issue, the court commented briefly concerning the Act's effect on the traditional necessity rule. According to the court, the Act modified the notion that the question of necessity was almost exclusively left to the judgment of the condemnor.[146] Particular exercises of eminent domain power could now be judicially limited to the extent that they did not comport with the Act.[147]

---

137. *Id.* § 116B.07.
138. County of Freeborn v. Bryson, 210 N.W.2d 290 (Minn. 1973).
139. *Id.* at 292.
140. *Id.* at 294.
141. *Id.* at 294-95. *See* note 125 *supra.*
142. *Id.* at 295.
143. *Id.*
144. *Id.* at 296.
145. *Id.*
146. *Id.*
147. *Id.* at 296-297.

Finally, the court noted that the petitioner must prove two elements to establish a prima facie case. First, the petitioner must show: "(1) [a] protectable natural resource, and (2) pollution, impairment or destruction of that resource."[148] From the evidence presented, the court ruled that petitioner had proved both elements and therefore had established a prima facie case.[149]

In reversing the trial court's ruling that petitioner had failed to establish a prima facie case, the Supreme Court remanded the case to the trial court to allow the defendants to present any affirmative defenses that they might have under the Act.[150]

In ruling that the Minnesota Environmental Rights Act permitted judicial review of the environmental necessity of an exercise of eminent domain power, the Minnesota Supreme Court has set a significant precedent. Though other courts have implied that environmental statutes affect the scope of judicial review of the legislature's assessment of the necessity of a taking,[151] the Minnesota Supreme Court was the first to clearly broach the issue.

Bryson is also important because the court clarified the meaning of a prima facie showing of non-compliance with the Act. The plaintiff need only show that the defendant's action will pollute, impair, or destroy a protectable natural resource within the state.[152] By noting that the legislature "[o]bviously . . . intended that there should be a balancing of ecological against technological considerations through the Environmental Rights Act,"[153] the court seemed to indicate that a prima facie showing would only be enough to get the question to the jury. According to the statute, the defendant "may" present either evidence to the contrary, or an affirmative defense to rebut the prima facie showing.[154]

Unfortunately, it may be possible for the defendant to benefit from this provision in a way not intended by the legislature. If the defendant decides to introduce contrary evidence, or establish an affirmative defense, the jury has a somewhat easier task than

148. *Id.* at 297.

149. *Id.* The court noted that:

> The area contains abundant animal and botanical life along with water, land, timber, soil, and quietude resources. We similarly conclude that the evidence shows that the construction of the highway would materially adversely affect this natural resource. In support of this, we point out the following uncontroverted facts: (1) The highway would divide a natural mash; (2) the entire marsh is an ecological unit; (3) the construction would eliminate some of the area's natural physical assets; (4) the highway would be a relatively high-speed, high-volume roadway which would increase animal fatalities; and (5) the quietness and solitude of the marsh would be disturbed. In addition, there are the uncontroverted opinions of the expert witnesses that the highway would have a significant detrimental effect on the marsh.

Id.

150. *Id.* at 298.

151. *See* text accompanying notes 118-20 *supra*.

152. County of Freeborn v. Bryson. 210 N.W.2d 290, 297 (Minn. 1973).

153. *Id.* at 297.

154. MINN. STAT. § 116B.04 (1971).

if the defendant remains silent. For example, if the defendant assumes the burden of proving that there is no "feasible and prudent alternative" to the conduct in question, the jury has a nearly tangible test with which to work. Furthermore, the burden is on the defendant to justify his environmentally harmful activity. This shifting of the burden to the pollutor is in keeping with the state's policy of environmental preservation. If, on the other hand, the defendant remains silent, the jury is forced to make a decision based only on a vague policy statement.[155] Notwithstanding the psychological effect on the jury of the defendant's failure to introduce evidence, a defendant with a weak case may be wise to say nothing in order to force the jury to fumble about with an unworkable standard. This untoward result could be eliminated by an amendment making it clear that a verdict will be directed for the plaintiff if the defendant does not attempt to rebut the plaintiff's prima facie showing. This would further implement the state's goal of protection of the ecosystem.

V. CONCLUSION

Each of the environmental statutes considered in this discussion has affected the scope of judicial review concerning the necessity of a taking. The National Environmental Policy Act requires that agencies take into account environmental values in making their decision. The weight of authority suggests that these agency decisions should be subjected to substantive judicial review.

In assessing the agency's compliance with NEPA, a court can only set aside a decision if it is arbitrary and capricious, the precise standard used at common law to ascertain the necessity of a taking. But to make a decision as to whether the taking is an arbitrary one, the court must consider the agency's response to environmental harm. Despite the reduced burden of proof on the plaintiff which some courts have alluded to,[156] this approach to the problem of curbing environmental harm caused by eminent domain power does not appear to be a substantially effective one. The statutory prescriptions which agencies are supposed to follow are vague and obscure. Notwithstanding the encouraging policy statement,[157] the Act lacks a clear standard which courts can use to measure agency compliance. Perhaps NEPA's greatest value has been that it has placed an overwhelming burden of paperwork on the shoulders of federal agencies and thereby has discouraged a few of the more ill-conceived agency projects.[158]

---

155. MINN. STAT. § 116B.01 see note 121 *supra*.
156. Sierra Club v. Froehlke, 5 ERC 1033, 1061-62 (S.D. Tex. 1973).
157. National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1970).
158. The wealth and complexity of the information necessary to make an intelligent de-

As construed by the Supreme Court in *Overton Park*, sections 4(f) of DOT and 138 of FAHA provide a more palpable alternative to plaintiffs seeking to prevent the environmental deterioration that accompanies locating highways through parks. By allowing the courts to review thoroughly the agency's decision that there is no "feasible and prudent" alternative to the Secretary's decision to sacrifice a park for highway purposes, the Supreme Court has given reviewing courts a means of strictly controlling agency decisions in this limited area.[159] Although the ultimate standard of review is arbitrariness, the courts, through the strict use of the "feasible and prudent alternative" test, can have a greater impact on agency decisions than through the use of NEPA.

The Minnesota Supreme Court in *Bryson* held that the Minnesota Environmental Rights Act permits courts to consider environmental consequences in state eminent domain actions. Consequently, the traditional "necessity" rule that courts had no review powers unless the state abused its discretion was limited. This approach is to be clearly distinguished from the role of the courts with regard to the NEPA, DOT and FAHA. Under these acts, courts can, in effect, only determine whether a necessity exists at all. Under the Minnesota Act, however, the court may review the environmental aspects of the case, balance the factors involved, and make the final decision. Furthermore, *Bryson* made it clear that the plaintiff's burden of proof was to be a minimal one. Though not without defect,[160] this Minnesota formula provides an effective method which environmentalists may use to protect precious natural resources by showing a lack of necessity for the taking.

THOMAS L. HAMLIN

---

cision are so great that it is only fair to place the burden of proof on an agency which has access to the needed resources. One court has stated that:

> [T]he very nature of the problem in this legal area is so extensive that if the burden were placed wholly upon citizen plaintiffs, the full disclosure requirements of NEPA would never be implemented satisfactorily and environmental protection as contemplated by Congress would be little more than a fiction.

Sierra Club v. Froehlke, 5 ERC 1033, 1062 (S.D. Tex. 1973).

159. As has been pointed out, initial indications are that lower courts have eagerly taken up the Supreme Court mandate. *See* text accompanying notes 99-118 *supra*.

160. A slight change in the statute should be made to ensure that the factfinder is presented with a concrete standard and to protect against abuse. *See* text accompanying notes 154-55 *supra*.

For a discussion of the reasons for increasing the role of the courts in the area of environmental disputes see J. SAX, DEFENDING THE ENVIRONMENT, 108-24 (1970).