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JUDICIAL RECOGNITION OF THE SUBSTANTIVE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

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I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)[1] established by congressional action a national policy for the management and preservation of the quality of the environment. Section 101(a) of the Act declares that:

> [I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.[2]

In order to implement this policy for the achievement of comprehensive environmental goals, the Act imposes on the federal government

> the continuing responsibility . . . to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

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[1] 42 U.S.C. §§ 4321 et seq. (1970). It is noted that this article deals specifically with §§ 101 and 102 of NEPA, the subtleties contained therein, and their interpretation and application by the courts. For this reason, and in order to facilitate analysis of these provisions, §§ 101 and 102 are reprinted in full in the Appendix to this article, at p. 702 infra.

[2] 42 U.S.C. § 4331(a) (1970).

> (2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[3]

To insure that this "continuing responsibility" will be actively assumed by all agencies and departments of the federal government, section 102(1) creates affirmative duties which obligate those instrumentalities to conduct their activities in accordance with the goals and policy enunciated in section 101; and section 102(2) provides detailed operating procedures to assure careful evaluation of the environmental impact of agency decisions "significantly affecting the quality of the human environment."[4] These duties are phrased in mandatory language:

> 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* [strictly comply with a detailed series of specific procedural requirements].[5]

Thus Congress has expressly created a duty of compliance with the national policy of preserving and enhancing the environment in both the substantive and procedural provisions of the Act.

The legislative history of NEPA is replete with statements which support the view that Congress intended to impose both substantive

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[3] 42 U.S.C. § 4331(b) (1970).

[4] 42 U.S.C. § 4332 (1970).

[5] 42 U.S.C. § 4332 (1970) (emphasis added). The procedural requirements established by the Act are enumerated in 42 U.S.C. § 4332(A)-(H) (1970). See App. at p. 703 infra. They are further explained in the Guidelines issued by the Council on Environmental Quality on April 23, 1971, and entitled "Statements on Proposed Federal Actions Affecting the Environment." 36 Fed. Reg. 7723 (April 23, 1971).

and procedural duties upon the federal government in the conduct of activities affecting the environment. Senator Jackson, Chairman of the Senate Interior Committee and manager of Senate bill S. 1075, which became NEPA, declared during the floor debate:

> The bill directs that all Federal agencies conduct their activities in accordance with [national goals for the management and preservation of the quality of America's future environment] and provides "action-forcing" procedures to insure that these goals and principles are observed. The bill specifically provides that its provisions are supplemental to the existing mandates and authorizations of all Federal agencies. This constitutes a statutory enlargement of the responsibilities and the concerns of all instrumentalities of the Federal Government.[6]

The Conference Report similarly indicated that

> the intent of the conferees is that all Federal agencies shall comply with the provisions of section 102 "*to the fullest extent possible*", unless, of course, there is found to be a clear conflict between its existing statutory authority and the bill.[7]

While the Act does impose duties upon federal agencies and departments, it does not appear to *create* any express individual right to a healthful environment. The original Senate bill included a provision which recognized "that each person has a *fundamental and inalienable right to a healthful environment.*"[8] However, the bill as enacted contains only the statement that "each person *should enjoy* a healthful environment."[9] This change was ostensibly adopted "because of doubt on the part of the House conferees with respect to the legal scope of the original Senate provision."[10] Notwithstanding this change in language, persuasive arguments have been offered that

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[6] 115 Cong. Rec. 19,009 (1969) (remarks of Senator Jackson).

[7] Cong. Rep. No. 765, 91st Cong., 1st Sess. 10 (1969). A mechanism to remedy problems of "clear conflict" is supplied in § 103 of the Act, 42 U.S.C. § 4333 (1970) which provides:

> All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiences or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

[8] S. 1075, 91st Cong., 1st Sess. § 101(c) (1969) (emphasis added).

[9] 42 U.S.C. § 4331(c) (1970) (emphasis added).

[10] Cong. Rep. No. 765, 91st Cong., 1st Sess. 8 (1969).

a constitutional right to a healthful and habitable environment[11] is created by the Fifth and Fourteenth Amendment guarantees against deprivation of life, liberty or property without due process of law; the Ninth Amendment's caveat that "the enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people"; the privileges and immunities clause of the Fourteenth Amendment; and the penumbras of the Bill of Rights.[12] Regardless of the final resolution of this question of individual environmental rights, NEPA does create, at the very least, a right to require compliance by the federal government with all of the Act's operative provisions. This right is one "which citizen groups, functioning as private attorneys general, have standing to protect in the public interest."[13]

The Section 102(2) requirement that all federal agencies prepare and submit to the Council on Environmental Quality a detailed evaluation of the environmental impact of any proposed major action (popularly known as the "impact statement") has generated most of the litigation under NEPA, and has received more favorable judicial treatment in terms of enforcement than any other provision of the Act.[14] However, in the few cases which have considered the issue, courts have thus far demonstrated a reluctance to find more than a statement of congressional policy, or a declaration of *discretionary* duties in the substantive provisions of sections 101 and 102(1).[15]

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[11] See, e.g., Hanks and Hanks, "The Right to a Habitable Environment," in The Rights of Americans 147 (N. Dorsen ed. 1971); Esposito, Air and Water Pollution: What to Do While Waiting for Washington, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 32 (1970); and Platt, Toward Constitutional Recognition of the Environment, 56 A.B.A. J. 1061 (1970).

[12] See Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[13] See Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969, 24 Rutgers L. Rev. 230, 269 (1970), and cases cited therein for a discussion of the standing issues involved in such citizen suits. See also Comment, The Clean Air Amendments of 1970: Better Automotive Ideas from Congress, 12 B.C. Ind. & Com. L. Rev. 571, 612-16 (1971).

[14] See, e.g., Texas Committee v. United States, Civil No. 69-CA-119, 1 E.R.C. 1303 (W.D. Tex. Feb. 5, 1970); The Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970); Sierra Club v. Laird, Civil No. 70-78 (D. Ariz. June 23, 1970).

[15] An extreme example of judicial reluctance to enforce the Act's requirements may be seen in Bucklein v. Volpe,—F. Supp.—, 2 E.R.C. 1082 (N.D. Cal. 1970), in which an attempt to enjoin as a violation of NEPA the disbursal of federal emergency funds for road repair was denied by the court on the following rationale:

> [I]t is highly doubtful that the Environmental Policy Act can serve as the basis for a cause of action. Aside from establishing the Council, the Act is simply a declaration of Congressional policy; as such it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only the general command to federal officials to use all practicable means to enhance the environment. It is unlikely that such a generality could serve or was intended to serve as a source of court-enforcible [*sic*] duties.

2 E.R.C. at 1083.

Two important recent cases illustrative of the broadest limits to which the courts have been willing or able to construe NEPA are *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*[16] and *Calvert Cliffs' Coordinating Committee, Inc., v. AEC.*[17] Both of these cases involved efforts by "public interest" groups to enjoin actions by federal agencies which threatened irreparable injury to environmental values. Both courts held that the procedural requirements of section 102(2) were to be strictly and rigorously followed but they declined to hold that the substantive provisions of sections 101 and 102(1) were to be similarly enforced. This article will show that the courts' refusal to enforce the substantive provisions of NEPA frustrates the legislative intent of the statute and impedes the Act's declared purpose of protecting the environment.

II. Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army

A. *Courts May Enforce only the Procedural Requirements of NEPA*

In *Environmental Defense Fund* an action was brought to enjoin the construction of the Gillham Dam, which was to be built across the Cossatot River in Arkansas as part of the Millwood public works project. At the time the suit was instituted, approximately two-thirds of the project had been completed although work had not yet begun on the dam itself. Opponents of the project contended, *inter alia*,[18] that the "impact statement" prepared by the Corps of Engineers regarding construction of the dam did not set forth a sufficiently detailed examination of the important environmental factors involved. Furthermore, they argued that construction of the dam would violate their substantive rights created by Section 101 of NEPA. In particular, the plaintiffs claimed that construction of the dam and the consequent destruction of the Cossatot as a free flowing stream would violate their rights to "safe, healthful, productive and esthetically and culturally pleasing surroundings,"[19] to "the [attainment of the] widest range of beneficial uses,"[20] and to "an environment which supports diversity and variety of individual choice."[21]

[16] 325 F. Supp. 749, 2 E.R.C. 1260 (E.D. Ark. 1971).

[17] 449 F.2d 1109, 2 E.R.C. 1779 (D.C. Cir. 1971).

[18] Other causes of action alleged by the plaintiffs, based upon the Fifth, Ninth, and Fourteenth Amendments to the Constitution, and upon various federal statutes such as the Fish and Wildlife Coordination Act of 1934, 16 U.S.C. § 662(b) (1970), the Water Supply Act of 1958, 43 U.S.C. § 390(b) (1970), and the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271 et seq. (1970), were dismissed by the court in five memorandum opinions issued in the course of litigation.

[19] 42 U.S.C. § 4331(b)(2) (1970).

[20] 42 U.S.C. § 4331(b)(3) (1970).

[21] 42 U.S.C. § 4331(b)(4) (1970).

The court rejected this argument, however, and held that the Act merely reflected the result of a compromise by its sponsors which declared a national environmental policy but "[did] not purport to vest in the plaintiffs, or anyone else, a 'right' to the type of environment envisioned therein."[22] Thus, despite a clear admission by the court that construction of the Gillham Dam could defeat a substantive goal of the Act, only the procedural requirements of section 102(2) were found to be judicially enforceable. In reaching this conclusion, the court reasoned as follows:

> In the instant case it is clear that the damming of the Cossatot will reduce "diversity and variety of individual choice." It is apparently plaintiffs' view that upon the basis of such a finding the Court would have the power, and duty, ultimately and finally to prohibit the construction of the dam across the Cossatot. *No reasonable interpretation of the Act would permit this conclusion.* If the Congress had intended to leave it to the courts to determine such matters . . . it certainly would have used explicit language to accomplish such a far-reaching objective. In view of this interpretation of NEPA by the Court, the plaintiffs are relegated to the "procedural" requirements of the Act.[23]

The court then found the original and amended environmental "impact statements" submitted by the Corps of Engineers to be insufficient as a matter of law for failing to comply "to the fullest extent possible" with the detailed procedural requirements of Sections 102(2)(A)-(H) of the Act. Notwithstanding the fact that the overall Millwood project had been authorized by Congress eleven years before the passage of NEPA, and was sixty-three percent completed at the date the action was instituted, construction of the dam was enjoined because (1) the Corps had failed to " 'utilize a systematic, interdisciplinary approach' in evaluating the environmental impact of the dam";[24] (2) "it [did] not appear that methods and procedures [had] been developed in consultation with the Council on Environmental Quality which would permit the defendants to assign values to presently unquantified environmental amenities [and, thereby] take into consideration, in estimating costs and benefits, the 'value' of the Cossatot as a free-flowing stream";[25] (3) all environmental impacts, both positive and negative, which would result from the construction of the dam were not set forth in the "impact statement";

[22] 325 F. Supp. at 755, 2 E.R.C. at 1264.
[23] Id. (emphasis added).
[24] Id. at 757, 2 E.R.C. 1266.
[25] Id.

(4) unavoidable adverse environmental effects were inadequately discussed in the "statements"; (5) alternatives to the proposed action had been inadequately explored; (6) the "statements" did not satisfactorily "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' ";[26] (7) the Corps had not consulted with and obtained the comments of all jurisdictionally concerned federal agencies before submitting the "impact statements"; (8) "the statements [did] not include the 'comments and views' of *all* appropriate 'State and local agencies . . . authorized to develop and enforce environmental standards' ";[27] (9) there was no indication that the statements, comments and views of all the appropriate federal, state and local agencies had accompanied the proposed project through the Corps' existing review process; and (10) it did not appear that the defendants had studied alternatives to the proposal although it "clearly 'involve[d] unresolved conflicts concerning alternative uses of available resources.' "[28]

In ordering strict compliance with the requirements of section 102(2), the court gave a literal interpretation to the phrase "to the fullest extent possible," which prefaces the two major provisions of section 102. The procedural steps outlined above were held to be mandatory, and to impose upon all federal agencies a duty to "objectively evaluate all of their projects, regardless of how much money has already been spent thereon and regardless of the degree of completion of the work."[29] This interpretation of the statutory language is supported by the legislative history. According to the Conference Report accompanying the final version of the Act, each federal agency was required to comply with the directives of Section 102 "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."[30]

B. *Enforcement of the Substantive Provisions of NEPA: Judicial Usurpation of an Agency Function or Judicial Enforcement of Environmental Policy?*

It is undeniable that the court was correct in stating that Congress intended that "[a]t the very least, NEPA is an environmental full disclosure law . . . intended to make [agency] decisionmaking

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[26] Id. at 758, 2 E.R.C. at 1267.

[27] Id. (emphasis added).

[28] Id.

[29] Id. at 752, 2 E.R.C. at 1262.

[30] Cong. Rep. No. 765, 91st Cong., 1st Sess. 10 (1969).

[*sic*] more responsive and more responsible."[81] At the same time, it is possible to take issue with the court's conclusion, based on the exception noted in the report, that Congress "may not have intended to alter the then existing decisionmaking responsibilities or to take away any then existing freedom of decisionmaking."[82] Relying on this determination, the court found that it lacked the power and duty to prohibit the construction of the dam across the Cossatot because it could find in the Act no explicit language which would permit such a result. Rather,

> the ultimate decisions must be made not by the judiciary but by the executive and legislative branches of our government. This Court does not intend to substitute its judgment . . . for that of the Congress or those administrative departments of the executive branch which are charged by the Congress with the duty of carrying out its mandate. *The role of the Court is simply to require compliance with the laws enacted by the United States Congress.*[83]

However, an independent reading of the language of section 102 and the legislative history does not lead to such a conclusion. By evaluating only the sufficiency of compliance with the procedural requirements of section 102(2), the court, in effect, makes the agency the final arbiter of administrative compliance with the substantive provision of section 102(1).

While recognizing that its function is to require compliance with the laws enacted by Congress, the court seemed to ignore the fact that section 102 has two major subsections, *both* of which must be followed "to the fullest extent possible." Section 102(1) provides that all federal laws, regulations and policies "shall be interpreted and administered in accordance with the policies set forth in [the Act]."[84] The policies of the Act are those enumerated in Section 101;[85] they are incorporated into the enabling statutes and ongoing operations of every federal agency and department by the requirement that such statutes and regulations "shall" be interpreted in conformity with those policies unless there exists a statutory deficiency which prohibits the fullest possible compliance. That section 102(1) was intended to be given the same weight as section 102(2) is clear from the Conference Report, which states that "the phrase 'to fullest extent possible' applies with respect to those actions which Congress authorizes and directs to be

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[81] 325 F. Supp. at 759, 2 E.R.C. at 1267.

[82] Id.

[83] Id. at 751-52, 2 E.R.C. at 1261. (emphasis added).

[84] 42 U.S.C. § 4332(1) (1970).

[85] See text accompanying note 3 supra.

done under *both* clauses (1) and (2) of section 102."[86] Senator Jackson reinforced this position in the floor debate on the Conference Report when he indicated that section 102 authorizes and directs all "Federal agencies . . . to administer their existing laws, regulations, and policies in conformance with the policies set forth in this act [and to consider] the environmental impact of their actions in decision-making."[87]

Notwithstanding this clear statement in the legislative history of NEPA and in the Act itself, the *Environmental Defense Fund* court reasoned that enforcement of NEPA's substantive provisions would have constituted a substitution of the court's judgment for that of the agency. However, the outcome of the case would have been identical and in accordance with the court's reasoning and view of the proper role of the judiciary if the sufficiency of the Corps of Engineers' compliance with the policies of NEPA as required by Section 102(1) had been reviewed as a matter of law. This would not have constituted a substitution of the court's judgment for that of the agency; rather, it would have been a determination of whether the decision to construct the dam over the Cossatot constituted conformity to the policies of the Act "to the fullest extent possible."

The court should have noted the governing principles established by NEPA in Section 101(b) which declare that the federal government is to conduct its activities in a manner calculated to achieve the goals described therein through the employment of all practical means "consistent with other essential considerations of national policy."[88] The latter qualification must be recognized as a seldom-to-be-applied exception to the national policy requiring avoidance of actions detrimental to the environment. This interpretation is supported by the great concern evidenced by Congress in the hearings and other legislative history preceding the enactment of NEPA, in the language of the Act itself, and in the floor debates regarding the extent of environmental degradation. In the floor debates on S. 1075, Senator Jackson stated:

> The basic principle of the policy is that we must strive, in all that we do, to achieve a standard of excellence in a man's relationship to his physical surroundings. If there are to be departures from the standard, they will be exceptions to the rule and the policy. And as exceptions, they will have to be justified in the light of public scrutiny.[89]

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[86] Cong. Rep. No. 765, 91st Cong., 1st Sess. 9 (1969) (emphasis added).
[87] 115 Cong. Rec. 40,416 (1969) (remarks of Senator Jackson).
[88] 42 U.S.C. § 4331(b) (1970).
[89] 115 Cong. Rec. 19,009 (1969) (remarks of Senator Jackson).

Furthermore, it should be noted that the qualification applies only to other essential considerations of national policy and not merely to "other" considerations. Thus section 101 imposes a substantive duty upon all instrumentalities of the government to decide in favor of preserving or enhancing environmental quality in a given case, unless there is a contravening consideration of *essential* national policy which justifies an environmentally adverse decision.

The determination of what constitutes an "essential consideration of national policy" is a question of law which is properly within the purview of the courts. Therefore, the burden is placed on the particular administrative agency to justify a decision, regulation, policy or proposed action which poses a threat to environmental values protected by the Act, by demonstrating the existence of overriding considerations of essential national policy. These considerations must be fully articulated in order to enable the court to fulfill its interpretive function properly. The agency's failure to meet this burden and to overcome the presumption in favor of the environment created by NEPA must result in the setting aside of the agency action.

C. *A Desirable Result for the Wrong Reasons*

The decision in *Environmental Defense Fund,* which required scrupulous compliance with the procedures mandated by section 102(2), and which resulted in the issuance of an injunction prohibiting further work on the Gillham Dam project until an acceptable "impact statement" is submitted, will delay construction of the dam for an indefinite period. It is also possible that the project will never be completed, for the opinion contains several "hints" to the Corps which reflect the court's feeling that the dam probably should not be built, and a veiled hope that the detailed evaluation and reconsideration of environmental factors necessary to meet the court's standards for an adequate "impact statement" will lead the Corps to the same conclusion. This intent is apparent from the court's reference to the abandonment of the project as a viable alternative despite the degree of completion;[40] to the Corps' failure to take into account the value of the Cossatot as a free-flowing stream in estimating the costs and benefits of the project;[41] and to the "[m]ost glaring deficiency in [the discussion of alternatives to the proposed action]: the failure to set forth and fully describe the alternative of leaving the Cossatot alone."[42]

The court found on the merits of the plaintiffs' claim that "the damming of the Cossatot will reduce the diversity and variety of choice of recreational opportunities and will reduce the choice of beneficial

[40] 325 F. Supp. at 756, 2 E.R.C. at 1266.
[41] Id. at 757-58, 2 E.R.C. at 1268.
[42] Id. at 761, 2 E.R.C. at 1269.

uses of the environment in that region."[43] Despite these findings, the court held that "no reasonable interpretation" of NEPA would permit the conclusion that it could "ultimately and finally . . . prohibit the construction of the dam across the Cossatot."[44] However, the court attempted to achieve such a result by imposing upon the Corps so strict a standard of compliance with section 102(2) as to be almost impossible to satisfy. Although such an approach may provide relief for plaintiffs in a given case, the decision will not suffice on balance as an effective method of achieving environmental protection since all cases arising under the Act will not necessarily involve the adequacy of a particular "impact statement." More importantly, reliance only upon the procedural requirements of the Act avoids the real issue, which is whether the policy established by NEPA is to be recognized and enforced as a matter of substantive law. The *Environmental Defense Fund* court should have based its injunction on the Corps' failure to meet its burden of articulating those considerations of essential national policy which would have rebutted the presumption created by NEPA in favor of the environment.

III. Calvert Cliffs' Coordinating Committee, Inc. v. AEC

A. *Flexible Substantive Duties: The Balancing Test*

In *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,[45] the United States Court of Appeals for the District of Columbia was faced with a situation requiring interpretation of NEPA in the context of the issuance of administrative regulations which governed the application of the Act to AEC operations. Plaintiffs challenged both the Commission's approval of a permit to construct a nuclear power facility on Chesapeake Bay, and the agency's newly-issued regulations concerning the implementation of NEPA. In rendering a decision, the court analyzed NEPA in depth; the opinion represents the most extensive interpretation to date of the Act's substantive and procedural requirements.

Unlike the court in *Environmental Defense Fund*, which had concluded that only the procedural requirements of section 102(2) were judicially enforceable, the three judge panel in *Calvert Cliffs'* held that section 101 imposed an explicit substantive duty on federal officials to

> "use all practicable means, consistent with other essential considerations of national policy," to avoid environmental degradation, preserve "historic, cultural, and natural" resources, and promote "the widest range of beneficial uses of

[43] Id. at 760, 2 E.R.C. at 1268.
[44] Id. at 755, 2 E.R.C. at 1264.
[45] 449 F.2d 1109, 2 E.R.C. 1779. (D.C. Cir. 1971).

> the environment without . . . undesirable and unintended consequences."[46]

Although "Congress did not establish environmental protection as an exclusive goal,"[47] the court noted that this duty could be fulfilled by administrative agencies through responsible exercise of discretion, since the Act "may not require particular substantive results in particular problematic instances."[48]

In simplest terms, therefore, according to *Calvert Cliffs'*, NEPA "makes environmental protection a part of the mandate of every Federal agency and department."[49] While the ultimate decision was deemed to remain the prerogative of the particular administrative agency, the Act was held to require that environmental issues be given the same considerations as other issues within the agency's statutory authorization. The kind of "consideration" envisioned by the court was a good faith balancing of environmental factors at every stage of the decision-making process. Specifically,

> NEPA mandates a case-by-case balancing judgment on the part of federal agencies [in which] the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values .... In some cases the benefits will be great enough to justify a certain quantum of environmental costs; in other cases, they will not be so great and the proposed action may have to be abandoned or significantly altered so as to bring the benefits and costs into proper balance. The point of the individualized balancing analysis is to ensure that . . . the optimally beneficial action is finally taken.[50]

The court in *Calvert Cliffs'* held that the procedural duties of section 102(2) must be fulfilled to the fullest extent possible, "a standard which must be rigorously enforced by the reviewing courts."[51] At the same time, the court suggested that the reviewing courts probably could not reverse a substantive decision on the merits under section 101, "unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values . . . ."[52] These conclusions go further

[46] Id. at 1112, 2 E.R.C. at 1780.
[47] Id.
[48] Id.
[49] Id.
[50] Id. at 1123, 2 E.R.C. at 1788.
[51] Id. at 1114, 2 E.R.C. at 1782.
[52] Id. at 1115, 2 E.R.C. at 1783.

than any previous decisions in establishing that NEPA imposes judicially enforceable duties upon all federal agencies to consider the environmental impact of their myriad activities. By requiring compliance "to the fullest extent, unless there is a clear conflict of *statutory* authority,"[53] the court has given judicial force to the expressed intention of Congress that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."[54]

B. *Section 102(1): Judicially Unenforced Duties*

Nevertheless, the court's contrast between the "flexible" substantive duties of section 101(b) and the strictly enforceable "procedural" duties of section 102(2) leaves ambiguous the legal meaning and status of section 102(1). The court commented that the phrase in section 101(b) to "use all practicable means consistent with other essential considerations" connotes a greater flexibility than the phrase in section 102 requiring the fulfillment of the duties enumerated in section 102 "to the fullest extent possible."[55] However, such an interpretation cannot be reconciled with the fact that section 102(1) specifically *requires* that the substantive provisions of section 101 be applied in interpreting and administering the "policies, regulations, and public laws of the United States." Such a complete reading compels a recognition that Congress intended to incorporate the substance and policy requirements of section 101(b) into the requirements of section 102 without the necessity of setting them out repetitiously. In this way, the court failed to note that the phrase "to the fullest extent possible" applies to *both* clauses (1) and (2) of section 102.[56]

While the court makes clear that section 102(2) requires careful consideration of the environmental consequences of agency actions, it is not clear under *Calvert Cliffs'* that any more than this agency evaluation is necessary for compliance with NEPA "to the fullest extent possible." The court did state that the requisite consideration of environmental matters was to be more than a *pro forma* ritual since "it is pointless to 'consider' environmental costs without also seriously considering action to avoid them."[57] The court also held that even substantive decisions could be set aside if it were clearly established that insufficient weight had been given to the environmental factors involved in the case.

Notwithstanding the imposition of a duty on federal agencies to

[53] Id., 2 E.R.C. at 1782.
[54] Cong. Rep. No. 765, 91st Cong., 1st Sess. 10 (1969).
[55] 449 F.2d at 1114, 2 E.R.C. at 1782.
[56] See text at note 36 supra.
[57] 449 F.2d at 1128, 2 E.R.C. at 1792.

consider the environmental impact of their activities, the *Calvert Cliffs'* formula does not permit agency action to be set aside if the procedures mandated by section 102(2) have been complied with, and full consideration and weight have been given to environmental factors.[58] This approach undoubtedly will produce more reasoned and responsible decision-making, but it does not assure that the purposes and goals of NEPA will be furthered. Because the economic and technical benefits of a proposed action are to be weighed against environmental costs, which are often intangible and not readily subject to quantification, this balancing process will be vulnerable to the introduction of subjective and arbitrary factors. The weaknesses and potential for abuse of the benefit-cost method have been well documented,[59] and they indicate that such a method is not presently an effective tool for the protection and preservation of environmental values.

Furthermore, the *Calvert Cliffs'* decision appears to permit, on a case-by-case basis, any *federal agency* action (as distinguished from any essential *national policy* action) in which the benefits compare favorably with environmental costs, provided that the necessary balancing was undertaken at each stage of the decision-making process. The court believed that the end result of this process, when carried out in good faith, should be a strong likelihood that "the most intelligent, optimally beneficial decision will ultimately be made."[60] Whether the various instrumentalities of the federal government will in fact make that "optimally beneficial decision" remains an open question. However, judging from the past records of the regulatory agencies, the outlook is not encouraging. Unless Section 102(1) of NEPA is construed as incorporating the substantive policy and goals of Section 101, thereby requiring federal agencies to rebut a presumption in favor of the environment by clearly articulating considerations of essential national policy which justify environmentally adverse decisions, the Act will fail in its overriding purpose.[61]

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[58] For a discussion of the benefit-cost method currently employed by federal agencies in evaluating environmental considerations, see Policies, Standards and Procedures in the Formulation, Evaluation, and Review of Plans for Use and Development of Water and Related Land Resources, S. Doc. No. 97, 87th Cong., 2d Sess. (1962). For recently proposed changes in permissible benefit and cost factors including environmental considerations, see the proposed Procedures for Evaluation of Water and Related Land Resource Projects: Findings and Recommendations of the Special Task Force of the United States Water Resources Council, Senate Comm. on Public Works No. 20, 92d Cong., 1st Sess. (1971).

[59] See e.g., Hammond, Convention and Limitation In Benefit-Cost Analysis, 6 Natural Resources J. 195 (1966); Elizabeth B. Drew, "Dam Outrage: The Story of the Army Engineers," Atlantic, No. 225, April, 1970 at 51-62.

[60] 449 F.2d at 1114, 2 E.R.C. at 1782.

[61] For commentary dubious as to the real efficiency of the Act, see Note, The National

IV. *Scenic Hudson Preservation Conference v. FPC:* THE INADEQUACY OF THE *Environmental Defense Fund-Calvert Cliffs'* APPROACH

The recent decision by the Second Circuit in *Scenic Hudson Preservation Conference v. FPC*,[62] finally upholding the decision of the Federal Power Commission to license the construction of a pumped storage project at a site noted for its scenic and recreational values, illustrates the inherent weakness of the *Environmental Defense Fund-Calvert Cliffs'* rationale. Although the case had been originally remanded by the court to the FPC in 1965,[63] prior to the enactment of NEPA, the purpose of the remand was to require that adequate consideration be given to environmental factors in accordance with the Federal Power Act.[64] In the second *Scenic Hudson* case, the court held that "[t]he Commission is now obliged also to consider the environmental factors covered by the National Environmental Policy Act."[65] The court concluded, however, that the Commission had satisfied the requirements of all relevant statutes, including Section 102 of NEPA, and that agency findings were supported by substantial evidence. Regarding compliance with NEPA, the court stated:

> The policy statement in Section 101 envisions the very type of full consideration and balancing of various factors which we, by our remand order, required the Commission to undertake. Like our remand, the Act does not require that a particular decision be reached but only that all factors be fully explored. The eventual decision still remains the duty of the responsible agency.[66]

Thus the majority in *Scenic Hudson* answered in the affirmative the question raised by one observer:[67] whether an administrative decision made after balancing all pertinent considerations, but providing for less than full environmental protection, will be upheld.

Environmental Policy Act: A Sheep in Wolf's Clothing?, 37 Brooklyn L. Rev. 139 (1970); and Note, NEPA: Full of Sound and Fury . . . ? 6 U. Richmond L. Rev. 116 (1971).

[62] 453 F.2d 463, 3 E.R.C. 1232 (2d Cir. 1971).

[63] Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).

[64] Section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a) (1970), limits the issuance of licenses by the Federal Power Commission by requiring:

> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and *for other beneficial public uses, including recreational purposes* . . ." (emphasis added).

[65] 453 F.2d at 467, 3 E.R.C. at 1234.

[66] Id. at 481, 3 E.R.C. at 1245.

[67] Schroeder, Pollution in Perspective: A Survey of the Federal Effort and the Case Approach, 4 Natural Resources Lawyer 381 (1971).

The dissenting judge in *Scenic Hudson* argued for reversal of the Commission's order, without remand, because he felt that the FPC had not complied with the court's original order. The dissent also based its argument for reversal on the grounds of "aesthetics," in order to prevent "impairment by the project of the mountain's scenic grandeur."[68] While such reasoning might be considered a substitution of the court's judgment for that of the agency, it can also be viewed as a call for judicial enforcement of Section 102(1) of NEPA. The dissent argued that the FPC's decision to license construction of the controversial project on Storm King Mountain was inconsistent with the declared goals of the Act. In other words, the decision did not, "to the fullest extent possible," constitute an administration and interpretation of the Federal Power Act in accordance with the environmental policies set forth in NEPA. In this case, a determination of noncompliance with Section 102(1) of NEPA, as a matter of substantive law, would have been a proper exercise of the judicial function.

It is difficult to understand why the Second Circuit did not directly face the issue raised by Section 102(1). If the court was hesitant to set aside the FPC's decision in the face of an urgent power crisis in the New York City area, the interpretation of NEPA advocated here would not have required such a result. As the court in *Calvert Cliffs'* noted, "Congress did not establish environmental protection as an exclusive goal."[69] In imposing a substantive duty on all federal agencies to protect the environment, Congress also included a limitation with respect to essential considerations of national policy. Thus the burden would have been on the FPC to prove that construction of the project at the particular location in question was required by considerations of an *essential national policy*; in this case the provision of an adequate supply of electric power to meet the demands of New York City. If the agency failed to demonstrate that the environmental costs which would result from the proposed project were outweighed by the essential need for the project at that location, a finding of less than compliance with the policies of the Act "to the fullest extent possible" would have been appropriate. The court would not have been limited to a determination of whether the agency's findings of fact were supported by substantial evidence. Instead, the relevant inquiry would have been the extent of the administrative agency's conformance to the substantive goals of NEPA in the conduct of its activities. This inquiry is a question of law, as is the interpretation of "essential national policy," and under the provisions of the Administra-

[68] 453 F.2d at 491, 3 E.R.C. at 1252.
[69] 449 F.2d at 1112, 2 E.R.C. at 1780.

tive Procedure Act[70] it must be decided by the courts, rather than by the administrative agencies.

The foregoing analysis does not represent a strained construction of NEPA. It merely requires that the language of section 102(1) be accorded the significance which the words connote and which the legislative history indicates Congress intended it to have. The analysis of section 102 in the committee report accompanying S. 1075 evidences the congressional intent:

> The policies and goals set forth in section 101 can be implemented if they are incorporated into the ongoing activities of the Federal Government in carrying out its other responsibilities to the public.
>
> . . .
>
> To remedy present shortcomings in the legislative foundation of existing programs, and to establish action-forcing procedures which will help to insure that the policies enunciated in section 101 are implemented, section 102 authorizes and directs 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. It further establishes a number of operating procedures to be followed by all Federal agencies . . . ."[71]

CONCLUSION

Subparts (1) and (2) of section 102 are conjunctive and were intended to have equal applicability. Section 102(1) incorporates the substantive policy and goals of NEPA into the legislative mandates of all federal agencies, thereby imposing an affirmative duty on these agencies to preserve and protect the environment by avoiding or minimizing adverse environmental consequences to the fullest extent possible in the conduct of their activities. Section 102(2) establishes specific procedures to guide federal officials in carrying out this duty. The courts have demonstrated an increasing willingness to enforce section 102(2) of the statute to the letter, prospectively as well as retroactively.[72] They have shown far greater reluctance to require

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[70] The Administrative Procedure Act provides that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

5 U.S.C. § 706 (1970).

[71] S. Rep. No. 296, 91st Cong., 1st Sess. 19 (1969).

[72] On the retroactive application of NEPA, see Note, Retroactive Laws—Environmental Law—Retroactive Application of the National Environmental Policy Act of

compliance with section 102(1), although the potential import of the section has been noted by some commentators.[78] The basis for this judicial reluctance may be a disinclination to become involved in economic decision-making to any significant degree. Whatever the reason, however, the failure to require compliance with section 102(1) will lead ultimately to frustration of the legislative purpose of NEPA, as the result in *Scenic Hudson* well illustrates.

APPENDIX

Section 101 of the National Environmental Policy Act of 1969 provides:

> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
>
> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

1969, 69 Mich. L. Rev. 732 (1971); and, in addition to the three principal cases discussed in the text, see Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 3 E.R.C. 1327, 1336 (N.D. Ga. 1971); and Nolop v. Volpe, 333 F. Supp. 1364, 3 E.R.C. 1338, 1340 (D.S.D. 1971).

[78] See, e.g., Donovan, The Federal Government and Environmental Control: Administrative Reform On The Executive Level, 12 B.C. Ind. & Com. L. Rev. 541 (1971); Peterson, An Analysis of Title I of the National Environmental Policy Act of 1969, 1 ELR 50035 (1971); and Sive, Some Thoughts Of An Environmental Lawyer In The Wilderness Of Administrative Law, 70 Colum. L. Rev. 612 (1970). The latter author opined that "[s]ection 102 . . . may be the most far-reaching section of the Act. If the words mean what they seem to say, it may profoundly affect the operation of, and the scope of court review of resource determinations made by, all agencies of the Federal Government." Id. at 645.

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

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

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

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. § 4331 (1970).

Section 102 of the National Environmental Policy Act of 1969 provides:

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.

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

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

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

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

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

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

42 U.S.C. § 4332 (1970).