

9-1-1985

## NEPA Requirements for Private Projects

David J. Hayes

James A. Hourihan

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

David J. Hayes and James A. Hourihan, *NEPA Requirements for Private Projects*, 13 B.C. Envtl. Aff. L. Rev. 61 (1985), <http://lawdigitalcommons.bc.edu/ealr/vol13/iss1/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# NEPA REQUIREMENTS FOR PRIVATE PROJECTS

*David J. Hayes\**  
*James A. Hourihan\**

## I. INTRODUCTION

When Congress enacted the National Environmental Policy Act ("NEPA")<sup>1</sup> in 1969, it required that all major federal actions that might have an impact on the environment be preceded by a thorough review and analysis of potential environmental impacts.<sup>2</sup> Because Congress limited NEPA to cases involving "major federal actions," Congress anticipated that the statute would apply to projects undertaken by the federal government that might have an impact on the environment.<sup>3</sup> In the legislative history of the Act, for example, Congress emphasized that all federal agencies must complete an environmental analysis before going forward with their programs.<sup>4</sup>

Although Congress anticipated that NEPA would apply to federally-financed projects, the broad language of the statute has extended NEPA's reach to privately-financed projects.<sup>5</sup> Despite the fact that private projects do not appear to qualify as "major federal actions" that require environmental analysis under NEPA, the proj-

---

\* Copyright © 1985 by David J. Hayes and James A. Hourihan. Messrs. Hourihan and Hayes are partners in the Washington, D.C. law firm of Hogan & Hartson. They have represented a number of clients in environmental matters. Most recently, they have represented a major coal slurry venture in NEPA litigation.

<sup>1</sup> 42 U.S.C. § 4331.

<sup>2</sup> NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

<sup>3</sup> See generally H. Rep. No. 91-378, 91st Cong., 1st Sess. (1969), reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2751.

<sup>4</sup> See Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969), reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2767, 2770-71.

<sup>5</sup> See, e.g., *Scientists' Inst. for Pub. Information, Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973) ("NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. In each of these instances, the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party — private or governmental — to take action.")

ects often must obtain some federal approvals before they can go forward.<sup>6</sup> To illustrate, major pipeline projects often must obtain federal right-of-way permits prior to construction.<sup>7</sup>

Increasingly, courts have characterized the granting of permits for privately-funded projects as "major federal actions" that trigger NEPA requirements.<sup>8</sup> Thus, for example, the granting of federal permits for rights-of-way, leasing arrangements, water discharges, and dredging operations may constitute sufficient "federal action" to trigger NEPA's EIS requirements for privately-funded projects.<sup>9</sup> In addition, loan guarantees or direct federal assistance may sufficiently "federalize" private projects so as to initiate NEPA obligations.<sup>10</sup> As a result, corporations that undertake large development projects increasingly become enmeshed in disputes arising under NEPA.

Unfortunately, because NEPA's regulations and early case law were developed under the assumption that NEPA applied to large federal projects financed by the taxpaying public, the regulations and court interpretations often provide a poor "fit" for private corporate projects. To illustrate, NEPA's requirement that federal decisionmakers complete a full evaluation of all possible alternatives in an EIS so that a federal decisionmaker can choose to take a different action<sup>11</sup> may not apply with equal force to a private corporate decision to pursue a specific project. Once a private company has decided to undertake a large project involving the transportation of coal in a slurry pipeline, for example, evaluation of alternative transportation modes (*e.g.*, increased railroad transportation of coal) is of little relevance to the company that has made an economic commitment to implementing coal slurry technology. Under such circumstances, it is not reasonable to allow a federal official who is reviewing a right-of-way request to insist that the company abandon its coal

---

<sup>6</sup> See, *e.g.*, *Dalsis v. Hill*, 424 F. Supp. 784 (W.D.N.Y. 1976) (approval of renewal project); *Conservation Council of N.C. v. Costanzo*, 398 F. Supp. 653 (E.D.N.C. 1975) (wetlands permit).

<sup>7</sup> In a case in which the authors participated, for example, a proposed 1,400-mile coal slurry pipeline was required to obtain a right-of-way permit to cross approximately 40 miles of federal lands. (A coal slurry pipeline involves the pulverization of coal into small particles, mixing the particles with water in a slurry mixture, and pumping the slurry through an underground pipeline. Once delivered, the water is removed from the slurry and the coal is ready for use.)

<sup>8</sup> See generally Mandelker, *NEPA Law and Litigation* § 8:16 (1984).

<sup>9</sup> See generally *Sierra Club v. Morton*, 514 F.2d 856, 870-72 (D.C. Cir. 1975), *rev'd on other grounds*, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

<sup>10</sup> See, *e.g.*, *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Or. 1970) (funding for power transmission line qualifies as major federal action).

<sup>11</sup> NEPA § 102(2)(D), 42 U.S.C. § 4332(2)(E).

slurry project because the federal official would prefer increased railroad transportation of coal.<sup>12</sup>

Similarly, while NEPA properly requires that federal officials include a cost-benefit analysis in an EIS so that federal officials can evaluate the cost impacts of taxpayer-financed projects,<sup>13</sup> it makes no sense for private companies that have committed the private financial resources to a project to justify the economics of a proposed venture that they have already agreed to underwrite. If a consortium of companies is willing to finance the proposed \$2 billion ETSI coal slurry project,<sup>14</sup> for example, a federal official who is reviewing a right-of-way request should not have the authority to insist that the companies demonstrate in an EIS that the money will be well spent before granting a right-of-way permit.

In addition to subjecting private projects to NEPA requirements that often do not apply well to privately-financed projects, the application of NEPA to such projects opens private parties to abusive legal attacks. Using the cause of action provided by NEPA and the Administrative Procedure Act, economic competitors increasingly are using NEPA as a means to delay or scuttle projects that would erode their competitive position.<sup>15</sup> In a recent case, for example, a railroad that is heavily dependent upon coal transportation based a suit against a proposed coal slurry pipeline on NEPA, despite the fact that the railroad clearly was more interested in the economic impact that the private project would have on the railroad's revenues than on any environmental impacts.<sup>16</sup>

This article addresses the distortions created by application of NEPA requirements to privately-financed projects. Based on an analysis of NEPA's intended purpose, it proposes that EISs prepared for private projects be more limited in scope than those prepared for public projects. In particular, the article argues in favor of tailoring EISs to the special characteristics of private projects and dispensing with a cost-benefit analysis or extensive evaluation

---

<sup>12</sup> For example, a joint venture known as ETSI (Energy Transportation Systems Inc.) proposed to build the world's largest coal slurry pipeline from Wyoming to utilities in the mid-South. The privately-funded venture was based on the application of technology that had been developed by the Bechtel Corporation. Nonetheless, the EIS prepared for the ETSI project included a number of "alternatives" that ETSI would not have accepted including, for example, the "no action" alternative that would have abandoned coal slurry technology in favor of total reliance on railroad transportation of coal.

<sup>13</sup> NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B).

<sup>14</sup> See *supra* notes 8 & 13.

<sup>15</sup> See *infra* note 48.

<sup>16</sup> See *infra* notes 50 & 64.

of alternative actions. In addition, the article proposes that courts strictly apply standing requirements to insure that the judicial process is not abused by economic competitors who rely on NEPA to bring suits that are based on economic and not environmental concerns.

## II. THE SCOPE OF ENVIRONMENTAL IMPACT STATEMENTS PREPARED FOR PRIVATE PROJECTS

NEPA requires that federal authorities prepare "detailed" EISs for all major federal projects that may have an impact on the environment.<sup>17</sup> The scope of the analysis that must be included in an EIS is wide-ranging, including an analysis of direct and indirect environmental effects,<sup>18</sup> potential mitigation measures,<sup>19</sup> an analysis of alternative actions and their environmental impacts,<sup>20</sup> and an evaluation of the environmental "costs" of proposed actions.<sup>21</sup> Two aspects of EISs that raise special difficulty as applied to private projects are the analysis of alternatives and the cost-benefit analysis. As explained below, neither type of analysis should be applied strictly in EISs prepared for private projects.

### A. Cost-Benefit Analysis

NEPA does not require that an EIS include a formal cost-benefit analysis. Similarly, the regulations promulgated by the Council of Environmental Quality ("CEQ") do not require that such an analysis be included in an EIS. Instead, NEPA directs all agencies of the federal government 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."<sup>22</sup> The purpose of the provision is to insure that environmental factors are given sufficient consideration in relation to the other factors.<sup>23</sup> It does not demand, however, that a discussion of these other factors be included in the EIS. The relevant NEPA regulation states that an EIS is not required to contain a formal cost/benefit analysis:

---

<sup>17</sup> NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

<sup>18</sup> See 40 C.F.R. § 1508.8(a) (direct effects); 40 C.F.R. § 1508.8(b) (indirect effects).

<sup>19</sup> NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.14(f), 1502.16(h).

<sup>20</sup> NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(E)(iii).

<sup>21</sup> NEPA § 102(2)(B), 42 U.S.C. § 102(2)(B).

<sup>22</sup> NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B).

<sup>23</sup> *Robinson v. Knebel*, 550 F.2d 422, 426 (8th Cir. 1977).

For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations.<sup>24</sup>

Both NEPA and the CEQ regulations anticipate, however, that the EIS include some attempt to “weigh” the relative environmental impacts of proposed projects.<sup>25</sup> Several courts have interpreted this nebulous statutory guidance to require that an EIS include a formal cost-benefit analysis assessing the relative environmental and economic costs and benefits of a project.<sup>26</sup>

Recently, courts have begun to question the often-assumed “requirement” that an environmental impact statement include a cost-benefit analysis.<sup>27</sup> While an EIS obviously must inform a decision-maker of the potential environmental ramifications of a proposed project, this obligation can be satisfied without an attempt to complete an economic analysis of the proposed project.<sup>28</sup> As the Supreme Court recently reaffirmed, NEPA does not require that an EIS cover every aspect of a proposed action, but only its effects on the *physical* environment:

The theme of § 102 is sounded by the adjective “environmental”: NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word “environmental” out of its context and give it the broadest possible definition, the words “adverse environmental effects” might embrace virtually any consequence of a governmental action that some one thought “adverse.” But we think the context of the statute shows that Congress was talking about the physical environment — the world around us, so to speak . . . . Thus, although NEPA states

---

<sup>24</sup> 40 C.F.R. § 1502.23 (1984).

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g.,* Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 593 (9th Cir. 1981); Izaak Walton League of America v. Marsh, 655 F.2d 346, 377 (D.C. Cir. 1981), *cert. denied sub nom.* Atchison, Topeka & Santa Fe Ry. Co. v. Marsh, 454 U.S. 1092 (1981). Most such cases rely on Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), which states that “NEPA mandates a rather finely tuned and ‘systemic’ balancing analysis.” *Id.* at 1113. Typically, courts speak of weighing the environmental costs of a project against its economic and technical benefits. *Izaak Walton League of America*, 655 F.2d at 377.

<sup>27</sup> *See, e.g.,* Save the Niobrara River Ass'n v. Andrus, 483 F. Supp. 844, 857 (D. Neb. 1979) (NEPA “does not require economic benefits and costs to be included in an environmental statement”).

<sup>28</sup> *Id.*; *see also* Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974) (EIS can serve its intended purposes without a formal and mathematically expressed cost-benefit analysis).

its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment.<sup>29</sup>

The recent *Metropolitan Edison*<sup>30</sup> decision may quell the debate about the necessity of completing a cost-benefit analysis in an EIS. Whatever the ultimate resolution of this issue insofar as it relates to federally-initiated projects, however, it is clear that a cost-benefit or related economic analysis has no place in an EIS prepared for a private project. Simply put, a public official reviewing a request for federal permit approvals should not have the authority to require a private party to demonstrate the economic desirability of a project. The private party is risking private funds on the project; he should have to justify the economics of his proposal to his bankers, not to federal officials.

Several courts agree, and have recognized that the special character of a privately-funded project makes it peculiarly inappropriate for completion of a cost-benefit analysis in an EIS. In *Bucks County Board of Commissioners v. Interstate Energy Co.*,<sup>31</sup> for example, the "private" nature of a pipeline construction project was decisive in the court's ruling that no cost-benefit analysis was required. The court elaborated:

This case does not involve a publicly funded project. The pipeline represents a private investment . . . . Plaintiffs have cited no case, and I have found none, requiring a cost-benefit analysis where a privately funded project is involved. As noted above, environmental amenities were given "appropriate consideration" in the decisionmaking process. Pursuant to § 102(2)(B) (42 U.S.C. § 4332(2)(B)), the EIS isolated, identified, and evaluated, among other factors, the probable environmental impacts of the project on the natural, man-made, human and economic resources of the area. NEPA requires no more.<sup>32</sup>

---

<sup>29</sup> *Metropolitan Edison Co. v. People Against Nuclear Energy*, 51 U.S.L.W. 4371, 4373 (U.S. April 19, 1983) (No. 81-2399) (emphasis in original).

<sup>30</sup> *Id.*

<sup>31</sup> 403 F. Supp. 805 (E.D. Pa. 1975).

<sup>32</sup> *Id.* at 817. See also *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1046-47 (1st Cir. 1982) (agency's role in reviewing a privately-funded project is merely to determine whether the project is *environmentally* acceptable). In the coal slurry pipeline litigation, the District Court recently applied the Court's ruling in *Metropolitan Edison* to limit a competitor's discovery into the "economic viability" of the proposed project. See *generally* *Missouri v. Andrews*, No. CV82-L-442 (D. Neb. Nov. 3, 1983) (Memorandum and Order). Another District Court recently reached a similar result:

The FEIS' treatment of the economic impacts of the South Bronx project goes well beyond the requirements of NEPA. In the wake of the Supreme Court's decision in *Metropolitan Edison*, *supra*, which limited the impacts with which an agency must

Other cases involving private projects simply have not discussed whether an informal cost-benefit analysis must be included in EISs prepared for such projects.<sup>33</sup> However, in one case, *Sierra Club v. Sigler*,<sup>34</sup> which involved the United States Army Corps of Engineers' approval for the planned private construction of a deepwater port, the court ruled that NEPA "mandates at least a broad, informal cost-benefit analysis."<sup>35</sup> In *Sigler*, the court failed to take note of the distinction between public and private projects, and therefore it should be limited to its unique facts. As a general matter, NEPA should not be stretched so far as to demand that private parties provide an economic justification for their proposed projects.

Thus, as a general matter, EIS's should not stray from an analysis of *environmental* impacts into an analysis of the economics of a proposed project. This principle should be applied especially strictly in privately-funded projects. In such cases, the commitment of funds to a project cannot be second-guessed by federal officials under the auspices of NEPA. To do so would convert an EIS study of potential environmental impacts into an intrusion into the economic underpinnings of a proposed private venture.

### B. Analysis of Alternatives

NEPA explicitly requires that an EIS include some discussion of alternatives to proposed actions, as well as their potential environmental impacts.<sup>36</sup> In the case of a federally-initiated project, the required evaluation of alternatives provides a federal decisionmaker with an opportunity to require government actors to undertake an alternative course of conduct.<sup>37</sup>

---

be concerned under NEPA to those which will occur in the physical environment, and in light of other case law holding that judicial review of the economic aspects of an EIS should be especially deferential, this Court finds that plaintiff has raised no issues as to the adequacy of the FEIS with respect to its analysis of the economic impacts of the South Bronx project.

*Gerosa Inc. v. Dole*, 576 F. Supp. 344, 352 (S.D.N.Y. 1983).

<sup>33</sup> *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 17 Env't Rep. Cas. (BNA) 2023 (1st Cir. 1982); *Lake Erie Alliance for Protection of the Coastal Corridor v. Corps of Engineers*, 526 F. Supp. 1063, 1068 (W.D. Pa. 1981), *aff'd mem.*, 707 F.2d 1392 (3d Cir.), *cert. denied*, 104 S.Ct. 277 (1983) (court need insure only that agency considered environmental consequences); *Delaware Water Emergency Group v. Hansler*, 18 Env't Rep. Cas. (BNA) 1208 (E.D. Pa. 1981).

<sup>34</sup> 18 Env't Rep. Cas. (BNA) 1649, 1665 (5th Cir. 1983).

<sup>35</sup> *Id.*

<sup>36</sup> See NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii).

<sup>37</sup> See, e.g., *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).



However, once again, the traditional approach to NEPA compliance presents a poor "fit" in the case of private projects. A corporation that has embarked upon an expensive project often is in no position to change plans in mid-stream and adopt an "alternative" approach involving requirements that may be beyond the corporation's technical competence or economic resources. To illustrate, the backers of a coal slurry pipeline project that have invested heavily in the technology that they intend to apply to the project cannot be expected to abandon the technology in favor of an "alternative" technology that they are unwilling or incapable of applying which has been identified by federal officials. Accordingly, the discussion of "alternatives" in an EIS for a private project should be much less extensive than the discussion that might be included in a public project. Instead, the goal of the EIS should simply be to inform the federal permitting authorities of the ramifications of a proposed private project, thereby enabling the decisionmaker to go forward with full knowledge of potential environmental impacts.<sup>38</sup>

Although courts have not squarely been faced with this issue, the theory is fully consistent with a traditional understanding of the alternatives analysis required by NEPA. Regulations promulgated by CEQ require that an agency conducting an EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."<sup>39</sup> In interpreting this regulation, the CEQ has noted that "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."<sup>40</sup>

The principle that an extended discussion is not necessary if an alternative is not practical or feasible has been elaborated upon in the case law. First, the Court declared in *Vermont Yankee Nuclear Power Corp. v. NRDC*,<sup>41</sup> that "[t]o make an impact statement something more than an exercise in frivolous boilerplate the notion of alternatives must be bounded by some notion of feasibility." The feasibility notion was also applied to a discussion of particular alternatives in *Life of the Land v. Brinegar*,<sup>42</sup> where the plaintiffs chal-

---

<sup>38</sup> For a concurring opinion, see, e.g., *Lake Erie v. Army Corps of Engineers*, 526 F. Supp. at 1069 ("The decision may be a complete blunder as long as it is a knowledgeable one.").

<sup>39</sup> 40 C.F.R. § 1502.14(a) (1984).

<sup>40</sup> 46 Fed. Reg. 18027 (March 23, 1981) (emphasis added).

<sup>41</sup> 435 U.S. 519, 551 (1978).

<sup>42</sup> 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974).

lenged the EIS for an airplane runway. Plaintiffs claimed that the Federal Aviation Administration (FAA) did not present alternatives in their EIS. The court held that discussion of the alternatives was not necessary, because there was "nothing in the record to indicate that alternatives . . . are either reasonable or feasible alternatives in this case."<sup>43</sup>

The typical standard applied to alternatives analysis is that the discussion "need not be exhaustive," but rather provide "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." This standard was originally articulated in *Natural Resources Defense Council v. Morton*,<sup>44</sup> where an EIS conducted by the Department of Interior (DOI) for oil and gas lease sales was challenged on the ground that it did not include sufficient discussion of alternatives. Although the Eighth Circuit affirmed the lower court's ruling that more discussion was necessary for many of the alternatives, it found that the DOI's treatment in the EIS of certain new technologies was sufficient:

We think there is merit to the Government's position insofar as it contends that no additional discussion was requisite for such "alternatives" as the development of oil shale, desulfurization of coal, coal liquefaction and gasification, tar sands and geothermal resources. The Statement sets forth . . . that while these possibilities hold great promise for the future, their impact on the energy supply will not likely be felt until after 1980, and will be dependent upon environmental safeguards and technological [sic] developments . . . . [T]he possibility of the environmental impact of long-term solutions requires no additional discussion at this juncture.<sup>45</sup>

The Court also found that no detailed discussion was required where the environmental effects of the alternatives "cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities."<sup>46</sup>

Applying these traditional principles to the non-traditional case where a project analyzed in an EIS is financed solely by a private

---

<sup>43</sup> *Id.* at 471. See also *Kentucky v. Alexander*, 655 F.2d 714, 719 (6th Cir. 1981) (brief discussion of alternatives to a port site in EIS found sufficient where both EIS and administrative record indicate that they were not feasible).

<sup>44</sup> 458 F.2d at 836. See also *Farmland Preservation Ass'n v. Goldschmidt*, 611 F.2d 233, 239 (8th Cir. 1979); *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977).

<sup>45</sup> *Natural Resources Defense Council*, 458 F.2d at 837.

<sup>46</sup> *Id.* at 838.

party,<sup>47</sup> courts should define narrowly the alternatives that must be analyzed in an EIS. As noted above, a large project cannot be uprooted and changed in mid-stream as a practical matter. For example, a coal slurry pipeline cannot have its route changed, after rights-of-way have been purchased. Nor can the developer be forced to apply a technology that its backers do not support.

In such cases, the primary goal of the EIS — as always — is to make a federal decisionmaker aware of the potential environmental implications of a proposed project.<sup>48</sup> The permitting authority may require mitigating measures, but it may not force a private party to change fundamentally the nature of a project. NEPA is designed to improve the informational base of decisionmakers, but not to force the decisionmaker's or applicant's hand. As a result, the discussion of alternatives included in an EIS for a private project need not be extensive, and it should not be used as the basis for attempting to force a private party to change the nature of its proposed project.

### III. STANDING TO CHALLENGE EISS PREPARED FOR PRIVATE PROJECTS

Corporations that undertake large development projects frequently are sued by their competitors who attempt to use NEPA to delay, or, preferably, to kill a project. In such circumstances, it is obvious that the competitor's interest in initiating the suit is motivated by economic and not environmental concerns.<sup>49</sup> Nonetheless, based on early court decisions resulting from suits initiated by environmental groups, some courts have been reluctant to question the motives of plaintiffs in NEPA suits.<sup>50</sup> This judicial approach has begun to change. In a recent decision rendered by the Chief Judge in the District Court of Nebraska, in a case involving a railroad's challenge to a coal slurry pipeline project, the court demanded that

---

<sup>47</sup> No statistical analysis has been completed that compares the relative number of EIS's prepared for public versus private projects, but the vast majority of NEPA cases reported by the courts involved government projects. This fact, combined with the fact that NEPA originally was intended to apply to government projects (*see supra* notes 4 & 5), suggests that a privately-funded project involves a "non-traditional" case.

<sup>48</sup> *See supra* n.37 and accompanying text.

<sup>49</sup> The tendency of competitors to use the courts as a means of injuring competitors has drawn the interest of the Federal Trade Commission, which has initiated an investigation into abuses of the Noerr-Pennington doctrine. *See FTC Scrutinizes Unusual Corners for Predation*, LEGAL TIMES Aug. 26, 1985, at 1, col. 3.

<sup>50</sup> *See, e.g.,* Monarch Chemical Works, Inc. v. Exon, 452 F. Supp. 493, 501 (D. Neb. 1978), *aff'd sub nom.* Monarch Chemical Works, Inc. v. Thone, 604 F.2d 1083 (8th Cir. 1979).

competitors evidence more than a mere economic interest in order to have standing under NEPA.<sup>51</sup>

The discussion that follows reviews the traditional principles of standing, and then discusses their application in NEPA cases involving corporate competitors' challenges to private projects. The section concludes that courts should not tolerate such suits, and should readily dismiss them for lack of standing.

### A. *Traditional Standing Principles*

Before any party has standing to challenge the legality of an administrative action, that party must demonstrate that it has suffered (1) "injury in fact" and (2) that the interest injured is "arguably within the zone of interests to be protected or regulated by the statute. . . ."<sup>52</sup> As one Circuit has summarized:

The present test for standing is twofold: whether the challenged action has caused plaintiff injury in fact and whether that injury was to an interest arguably within the zone of interests to be protected or regulated by the statutes that the agencies were claimed to have violated. *See* *United States v. SCRAP*, 412 U.S. 669, 686 (1973); *Adolphus v. Zebelman*, 486 F.2d 1323, 1325-26 (8th Cir. 1973).<sup>53</sup>

The requirement that plaintiffs demonstrate "injury in fact" is a constitutional limitation on federal jurisdiction. Complainants are thus assured to "have the personal stake and interest that impart the concrete adverseness required by Article III."<sup>54</sup> Without a showing by the plaintiff of injury in fact, a case or controversy does not exist.<sup>55</sup> The constitutional requirement of "injury in fact" cannot be satisfied simply by asserting that the government has acted unlawfully, and that the plaintiff has an interest in the subject matter of the government's actions. The United States Supreme Court has held that "it is the responsibility of the complainant clearly to allege *facts* demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."<sup>56</sup>

---

<sup>51</sup> *See* *Missouri v. Andrews*, No. CV82-L-442 (D. Neb. March 7, 1984) (Memorandum on Standing Issues).

<sup>52</sup> *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 152-153 (1970). *See also* *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

<sup>53</sup> *Coalition for the Env't v. Volpe*, 504 F.2d 156, 165 (8th Cir. 1974).

<sup>54</sup> *Barlow v. Collins*, 397 U.S. at 164.

<sup>55</sup> *See* *Adolphus v. Zebelman*, 486 F.2d 1323, 1325-26 (8th Cir. 1973).

<sup>56</sup> *Warth v. Seldin*, 422 U.S. 490, 518 (1975) (emphasis added).

In addition, a showing of "injury in fact" is not, by itself, sufficient to confer standing on a party. The Article III requirement that a case or controversy be present is only satisfied when a plaintiff can demonstrate that the alleged "injury in fact" can be redressed by the statute invoked by plaintiffs. A plaintiff must therefore demonstrate that its alleged injury falls within the "zone of interests" of the statute under which the plaintiff seeks relief.<sup>57</sup>

*B. Requisites of Standing in NEPA Cases — The Need to Establish Environmental Injury-In-Fact*

NEPA protects a "zone of interest" that encompasses the environmental impacts of projects.<sup>58</sup> Since NEPA protects environmental interests, plaintiffs who base their claims on NEPA violations must demonstrate that they have suffered, or are suffering *environmental injury-in-fact* before their claims fall within NEPA's "zone of interests." Accordingly, courts have ruled that when plaintiffs allege purely economic interests, they do not have standing to raise NEPA challenges. It is clear that plaintiffs' economic injuries do not fall within the scope of interests protected by NEPA.<sup>59</sup>

Consistent with this authority, courts have denied standing to plaintiffs who bring NEPA-based actions even though their injury

---

<sup>57</sup> As the Supreme Court recently elaborated in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982): "[T]he requirements of Art. III [of the United States Constitution] are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Id.* at 471. Instead, "Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . .'" *Id.* at 472. *Accord*, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) ("The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 260-61 (1977); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). Otherwise, the exercise of federal jurisdiction 'would be gratuitous and thus inconsistent with the Art. III limitation.' *Simon v. Eastern Kentucky Welfare Rights Org.*, *supra*, at 38.").

<sup>58</sup> *See Benton County Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 450 F. Supp. 884, 890 (W.D. Ark. 1978) ("the purpose of the National Environmental Policy Act is to prevent and eliminate damage to the environment").

<sup>59</sup> *See generally Clinton Community Hospital Corp. v. Southern Maryland Medical Center*, 374 F. Supp. 450, 455 (D. Md. 1974), *aff'd*, 510 F.2d 1037 (4th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975).

is economic and not environmental. For example, in *Churchill Truck Lines, Inc. v. United States*,<sup>60</sup> a trucking company attempted to challenge Interstate Commerce Commission (ICC) trucking rates based on the Commission's failure to prepare an environmental impact statement. The court found that the trucking company lacked standing to raise environmental issues because the company's sole motivation in challenging the Commission's actions was economic:

Petitioners, whose sole motivation in this case was their own economic self-interest and welfare, are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest in proceedings concerning the issuance of operating authority to motor carriers. Petitioners do not allege any environmental injury to themselves. *Their interest in their economic well-being vis-a-vis their competitors is clearly not within the zone of interests to be protected by the National Environmental Policy Act . . . . This Act was not designed to prevent loss of profits but was intended to promote governmental awareness of and action concerning environmental problems.*<sup>61</sup>

Other courts have followed the lead of *Churchill* by denying standing to plaintiffs who have alleged only economic interests in NEPA-based suits. In *United States v. 255.25 Acres of Land*,<sup>62</sup> the court noted that landowners challenging certain condemnation proceedings did not have standing to raise environmental claims:

[T]he landowners here made no allegations of harm to the environment, have alleged no interest in the environment and have made no claim as to being within the zone of interests protected by NEPA; nor do they allege any injury to themselves within the scope of NEPA or the other Acts.<sup>63</sup>

Other courts have agreed that NEPA "simply was not meant to be used as a device whereby plaintiffs with strictly economic interests would be allowed to thwart governmental activity under the guise of environmental interest" merely "by invoking the magic word 'environment' when their injury has factually nothing to do with the environment."<sup>64</sup>

---

<sup>60</sup> 533 F.2d 411 (8th Cir. 1976).

<sup>61</sup> *Id.* at 416 (emphasis added).

<sup>62</sup> 553 F.2d 571 (8th Cir. 1977).

<sup>63</sup> 533 F.2d at 572 n.2. *Accord, Benton County Savings & Loan Ass'n*, 450 F. Supp. at 890 ("plaintiffs' sole motivation in this case is their own economic self interest and welfare").

<sup>64</sup> *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 487-88 (D. Kan. 1978), *aff'd*, 608 F.2d 929 (8th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) ("It is not the Congressional intent that the National Environmental Policy Act protect persons whose sole motivation is their own economic self interest and welfare"); *Cummington Preservation Comm. v. FAA*, 8

Despite this strong and persuasive authority, some courts have been reluctant to dismiss economic competitors in NEPA suits for lack of standing due to their reluctance to ascribe purely economic motives to a plaintiff. Some courts also have indicated that NEPA involves a general "informational" interest in the content of an EIS. As recently explained by the District Court in Nebraska, however, this "interest" does not permit an economically-motivated plaintiff to manufacture the requisite injury-in-fact needed to initiate a NEPA suit:

*Environmental Defense Fund v. March*, 651 F.2d 983, 999, n.20 (5th Cir. 1981), and *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1011 (5th Cir. 1980), do say that a plaintiff can challenge the accuracy of any statements made in an environmental statement, but neither case used this principle to grant standing to someone whose economic interests might be harmed because erroneous information in the impact statement would affect a federal official's decision. In both cases, the plaintiffs already had standing to challenge the cost-benefit analysis used in the statement, and the courts were commenting on the extent to which they could use their standing. Environmental impact statements frequently discuss economic issues, and the [plaintiff's proposed] rule would give standing to many plaintiffs whose interests were purely economic. . . .<sup>65</sup>

In *Robinson v. Knebel*,<sup>66</sup> the plaintiff was granted standing because at least *some* of the motivation for the suit was based on environmental concerns. The court stated:

[i]ndividuals motivated in part by protection of their own pecuniary interest can challenge administrative action under NEPA provided that their environmental concerns are not so insignificant that they ought to be disregarded altogether.<sup>67</sup>

---

Env't Rep. Cas. (BNA) 1121, 1123 (D. Mass. 1975); *Brooks v. Volpe*, 350 F. Supp. 269, 277 (W.D. Wash. 1972), *supplemented at* 350 F. Supp. 287, *aff'd*, 487 F.2d 1344 (9th Cir. 1973) ("Emotional environmentalism must be tempered with rational realism. Litigants must not be allowed to use NEPA as a tool to destroy federal programs under the guise of interest in the environment.").

<sup>65</sup> See *Missouri v. Andrews*, *supra* note 50, at 10. See also *id.* at 12.

<sup>66</sup> 550 F.2d 422 (8th Cir. 1977).

<sup>67</sup> *Id.* at 425. See also *Monarch Chemical Works, Inc.*, 452 F. Supp. at 501; *Mobil Oil v. FTC*, 430 F. Supp. 855, 863 (S.D.N.Y.), *rev'd on other grounds*, 562 F.2d 170 (2d Cir. 1977); *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971). The Nebraska District Court recently limited the holding of the *Robinson*, *National Helium* and *Monarch Chemical* cases as follows:

In *Robinson*, the plaintiffs owned land and lived within a proposed development area. They were given standing to challenge an environmental impact statement on the proposed development because the development would harm them economically and

The minority of courts that have declined to dismiss suits brought by corporations whose suits were obviously attempts to use NEPA to pursue their economic interests have invited abuse of NEPA, as well as the judicial system. Courts should vigorously apply standing principles to ensure that the judicial system is not clogged with economic dog-fights hidden behind "environmental" disguises. Rather, courts should adopt the reasoning recently applied by Chief Judge Urbom in *Missouri v. Andrews*.<sup>68</sup> In that case, the plaintiff Kansas City Southern Railway's allegedly "environmental" challenge to a coal slurry pipeline project was rejected.<sup>69</sup> In so holding, Judge Urbom refused to allow the plaintiff to convert its claims of potential economic injury into an "environmental" injury. As summarized by the court, such speculative, generalized claims will not satisfy standing requirements:

The sole injury-in-fact which the railroad adequately has pleaded is an economic one: the loss of revenues from transporting coal. This interest is not within the zone of interests protected by NEPA. The railroad argues, however, that the potential diversion of large amounts of Missouri River water to a slurry pipeline would reduce production of irrigated crops and thus reduce KCS's revenues from grain transportation, the con-

---

environmentally (they had alleged the loss of their farmland and hunting land, damages from constant water seepage, and damages from increased traffic and congestion). 550 F.2d at 425. In *National Helium*, several helium manufacturers challenged the government's decision to stop purchasing helium. They were motivated by their own pecuniary interest in selling helium, but the court said that they had also implicated an environmental injury. Helium is produced when natural gas is extracted, and the plaintiffs pointed out that if the government did not buy it, the gas would be vented into the air and wasted, unnecessarily depleting the nation's helium resources. 455 F.2d at 653. The court said this was a sufficient environmental threat to give the plaintiffs standing. In both *Robinson* and *National Helium* the environmental interests of the plaintiffs would have been harmed directly . . . [See also] *Monarch Chemical Works, Inc. v. Exon*, 452 F. Supp. 493, 499 (U.S.D.C. Neb. 1978), *aff'd*, 604 F.2d 1083 (8th Cir. 1979) (although plaintiff would suffer primarily economic harm, it also alleged that it would suffer increased air and noise pollution from construction).

<sup>68</sup> *Missouri v. Andrews*, *supra* note 50, at 9. While these cases can be distinguished, as noted above, their continuing vitality must be questioned in view of the courts' increasing unwillingness to tolerate economically-motivated NEPA suits.

<sup>69</sup> In the *Andrews* case, there was little doubt that the suit was motivated by economics. Indeed, the Kansas City Southern Railway admitted in its Complaint that it relied heavily on coal transportation for a large portion of its revenue and that it was concerned that the coal slurry pipeline would threaten that revenue. Indeed, after the ETSI pipeline project was delayed in 1984, ETSI filed an antitrust case against the Kansas City Southern Railroad and other railroads for concerted actions designed to scuttle the coal slurry project, including initiation of the *Andrews* case. See *ETSI Pipeline Project v. Burlington Northern Inc.*, No. B-84-979 (E.D. Tex.).



tention being that damage to the environment is intertwined with an economic injury to the railroad.

This is not sufficient . . . [T]he railroad's claims of reduced grain transportation revenues are too speculative to constitute an injury-in-fact, and its expressions of a general interest in the "natural, economic and socio-economic environment of the area proposed for the project" are subject to the same problems which led the Supreme Court to deny standing in *Sierra Club v. Morton*.<sup>70</sup>

The same reasoning was applied by the District Court in *Kaiser Cement Corporation v. Stockton Port District*<sup>71</sup> to dismiss suits that domestic cement manufacturers brought to block construction of harbor facilities designed to accept cement imports. In *Kaiser Cement*, the cement manufacturers attempted to base their suits on environmental grounds, despite the obvious economic motivation behind the suits.<sup>72</sup>

Thus, some courts have begun to scrutinize more carefully the standing of economic competitors to bring suits that allege violations of NEPA. In view of the abuses of NEPA and the judicial system presented by such suits, courts should readily dismiss such potential aggrieved competitors for lack of standing under NEPA.

### C. Third Party Standing

Generally speaking, a party seeking relief from a federal court "must assert his own legal rights and interests, and cannot rest his claim to relief," or his standing, for that matter, "on the legal rights or interests of third parties."<sup>73</sup> A narrow exception to this rule exists for organizations that can satisfy a three-part standing test set forth by the Court in *Hunt v. Washington State Apple Advertising Commission*.<sup>74</sup> Under that test, where an organization attempts to establish its own standing to bring an action based on its employees' or members' interests, it must first demonstrate that its employees would have standing to sue in their own right; second, that the employees' interests are germane to the organization's purpose; and third, that neither the claims asserted, nor the relief requested,

---

<sup>70</sup> *Missouri v. Andrews*, *supra* note 50, at 8.

<sup>71</sup> See *Kaiser Cement Corp. v. Stockton Port District*, Civ. No. S-81-146 PCW (E.D. Cal. Sept. 15, 1982) (unpublished).

<sup>72</sup> *Id.*

<sup>73</sup> *Valley Forge Christian College*, 454 U.S. at 474 (quoting *Warth v. Seldin*, 422 U.S. at 499).

<sup>74</sup> 432 U.S. 333, 343 (1977).

requires the participation of individual employees in the lawsuit.<sup>75</sup> These requirements are cumulative; an organization's failure to satisfy any one requirement negates the organization's standing to bring a case on behalf of its employees or members.<sup>76</sup>

When competitors attempt to block projects on NEPA grounds, they typically invoke their employees' interests and those of other third parties to establish that the environmental injury-in-fact requirement is satisfied. To illustrate, in the *Andrews* case, the Kansas City Southern Railway asserted that its employees had a strong interest in the environment, and that its employees' interest might be injured by the proposed coal slurry project.<sup>77</sup>

Under the principles set forth above, this ploy should not be permitted as a means of bootstrapping standing obligations. Under the *Hunt* test, the corporate plaintiff's alleged environmental interests are rarely germane to the organization's purpose. An examination of a plaintiff corporation's Articles of Incorporation typically confirms that the company is not dedicated to protecting the environment from potential harm.

Judge Urbom's recent standing decision in *Andrews* applied this doctrine to dismiss the plaintiff's NEPA claims in a suit against a coal slurry pipeline venture. The court explained:

The railroad cannot represent the interests of its employees on these issues. It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review . . . . However, it can do so only if its members otherwise have standing to sue in their own right, the interests the organization seeks to protect are germane to its organizational purposes, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit . . . . It is not clear that the employees of KCS have standing to sue in their own right, because the pleadings do not sufficiently link any adverse environmental harms to them. Moreover, the organizational purpose of Kansas City Southern is to operate a railroad; there is no indication that its official purposes include protecting the environment.<sup>78</sup>

---

<sup>75</sup> 433 U.S. at 343. *Accord*, *National Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1387-92 (10th Cir. 1980); *Familias Unidas v. Briscoe*, 619 F.2d 391, 398 n.7 (5th Cir. 1980); *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 690-91 (8th Cir. 1979).

<sup>76</sup> *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 320-21 (1980) (failure to satisfy third requirement negates plaintiff's standing); *Associated Gen. Contractors*, 611 F.2d at 690-91 (failure to satisfy second and third requirements negates plaintiff's standing).

<sup>77</sup> *See, e.g.*, Complaint ¶ 6, *Kansas City Southern Railway Co. v. Andrews*, No. CV-82-L-443 (D. Neb. Oct. 7, 1982).

<sup>78</sup> *Missouri v. Andrews*, *supra* note 50 at 7 (citations omitted).

Courts should follow the lead of *Andrews* and strictly apply third-party standing requirements in NEPA cases initiated by competitors. As explained above, NEPA's application to privately-funded projects should be more limited than its application to federally-financed projects. Moreover, courts should not permit NEPA to be used as the vehicle for competitors' attempts to scuttle projects on the pretense of their employees' environmental concern, when their true concern is that the project may adversely affect their economic postures.

#### IV. CONCLUSION

As the development of natural resources shifts from federally-financed projects to privately-funded projects, courts increasingly will be faced with NEPA suits that do not fall neatly into traditional analytical frameworks. In such cases, courts must not be reluctant to take a new approach that recognizes the special circumstances presented by private projects. In particular, courts should not require that developers prepare an EIS for private projects that includes the same type of analysis mandated for publicly-funded projects. Neither a cost-benefit analysis nor a full-blown discussion of alternatives is appropriate for private projects. In addition, courts must not construe standing requirements loosely and permit business competitors who are interested in the economic (and not the environmental) impacts of privately-funded projects to prosecute suits under NEPA. To preserve NEPA's goals of protecting environmental and not economic interests, courts must take into consideration the nature of the project when applying NEPA's requirements to it.