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THE RELATIONSHIP BETWEEN SUBSTANTIVE AND PROCEDURAL REVIEW UNDER NEPA: A CASE STUDY OF *SCRAP v. U.S.*

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Judicial interpretation of the National Environmental Policy Act of 1969 (NEPA)[1] has established vastly different standards of review for the requirements, procedural and substantive, which NEPA imposes on federal agencies. Because of these differing standards of review, courts have exercised more latitude in reviewing procedural compliance with NEPA, and have often found agency compliance lacking. Because some fault may almost always be found with agency procedural compliance, and because procedural violations provide a solid and objective basis upon which to grant injunctive relief against agency action, courts are inclined to decide NEPA cases on procedural grounds even when substantive grounds for the decision are available. This judicial tendency has been accentuated by an apparent interface between NEPA's substantive and procedural requirements. The interface first became evident in the definitive judicial gloss[2] given to NEPA in *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*,[3] where the court held that NEPA requires a "full good faith consideration" and balancing of environmental factors in federal agency decision-making.[4] The opinion of the three judge court in *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*,[5] upon remand from the Supreme Court,[6] is illustrative of the judicial treatment likely to be afforded in this gray area of NEPA rights. This article will attempt first to delineate more clearly the interrelationships of substantive and procedural rights under NEPA, and subsequently, to probe the judicial psyche in applying NEPA to environmentally objectionable federal conduct through an analysis of the *SCRAP* opinion.

I. Standards of Judicial Review for Procedural Rights Under NEPA

NEPA requires all federal administrative agencies to consider the environmental impacts of proposed projects in their decision-making processes. Section 101 expresses the environmental policy adopted by Congress.[7] Section 102 specifies the action-forcing procedures designed to effectuate that policy.[8] To date, the vast majority of courts interpreting NEPA have focused on Section 102(2)(C)'s requirement that an environmental impact statement (EIS) be prepared in connection with all "major Federal actions significantly affecting the quality of the human environment."[9] Resort to litigation has been constantly necessary to clarify the dimensions and applicability of this phrase. As other more subtle aspects of the impact statement requirement have emerged, they have also received thorough judicial treatment. This extensive judicial enforcement of NEPA was by no means a foregone conclusion when the statute was enacted, since NEPA does not expressly provide for judicial review of agency compliance with its provisions. Courts have recognized a presumption of reviewability of agency action,[10] however, and have stepped forward to become NEPA's primary enforcement mechanism.[11]

To meet the duties imposed under Section 102(2)(C), federal agencies must first decide, in connection with each action they take, whether an EIS is required at all. The answer to this threshold question hinges on the application of the phrase "major Federal actions significantly affecting the quality of the human environment."[12] If the agency decides that NEPA demands filing of an EIS for a given project, the question of when the EIS should be prepared must be determined next. For example, will an EIS have to be prepared before any major planning begins, or will the agency be able to postpone EIS preparation until implementation is at hand? Once the timing issue is resolved, the agency must determine the proper content of the EIS. Must an EIS re-evaluate the basic merits of the overall agency program, or will it suffice for the statement merely to discuss the localized impact of implementation of a specific segment of the overall program? Finally, the agency must give good faith objective consideration to the EIS at every stage of the decision-making process. It is submitted that this final "procedural" requirement merges into a gray area between substantive review and procedural review.

The District of Columbia Circuit Court's landmark decision in

Calvert Cliffs[13] established the framework within which NEPA's procedural duties have been judicially enforced. Because NEPA expressly calls for implementation of its procedural provisions "to the fullest extent possible,"[14] the court viewed NEPA as setting "a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."[15] The court's probing review of agency procedural compliance with Section 102(2)(C) was premised on procedural requirements which "are not highly flexible" but rather "establish a strict standard of compliance."[16] The demand for strict procedural compliance which characterized the *Calvert Cliffs* opinion, has set the tenor for subsequent judicial review under NEPA's impact statement requirement.

In line with the active judicial role outlined in *Calvert Cliffs*, courts have carefully scrutinized agency compliance with NEPA. Courts have generally treated the initial question of whether an EIS must be prepared in connection with a particular federal action as presenting a question of law rather than fact. Thus, they have conducted virtually *de novo* review of the relevant facts to decide this issue.[17] Most courts keep the threshold low when determining which projects require impact statements.[18] If there is any doubt in a particular situation whether an EIS is necessary, the long-range effects of single projects or the cumulative impact of a number of smaller related projects will be taken into account. Considering such cumulative or long-range effects facilitates a finding that NEPA applies and that an EIS must be prepared.[19] According to one commentator: " 'major' now means almost any action anyone cares enough to challenge in the courts, and 'significantly' means discernibly, not insignificantly, or perhaps 'at all.' "[20]

To facilitate judicial review of this threshold issue, courts have often required agencies to prepare a documentation supporting their decision that an EIS is not required for the project at issue (the so-called negative EIS). In making this negative determination, agencies are required to review the same factors that would be studied in an EIS, although treatment need not be as detailed.[21] Additionally, the public must be given notice that this threshold determination is being made and a chance to submit data on the proposed project. When appropriate, a public hearing may even be necessary at this stage.[22]

Several courts which require such procedures to be followed if an agency decides not to file an EIS do not conduct a *de novo* review of the agency's threshold determination, but only reverse an agency decision which is found to be arbitrary or capricious.[23] Even though

an agency may escape reversal under this less strict standard, the required record for review ensures that environmental factors will be taken into account by agencies in every case. It may therefore be just as easy to produce an EIS in a given instance as to provide the judicially required detailed record for review.[24]

Once the threshold issue has been answered affirmatively, an agency must determine when, in relation to the overall project planning and implementation process, the EIS must be prepared. The need for preparation of impact statements early in the decision-making process was forcefully explained in *Calvert Cliffs* and has become an accepted principle of NEPA construction.[25] Nevertheless, courts have differed in their implementation of this principle in individual cases. Like the initial question of whether to draft an EIS at all, the timing question is of crucial importance. If EIS preparation is delayed too long, undesirable environmental consequences may become unavoidable for all practical purposes. For this reason, *de novo* judicial review of an agency's decision as to timing of a project's EIS has also been endorsed.

In *Scientists' Institute for Public Information, Inc. (SIPI) v. United States Atomic Energy Commission* the court recognized the problems inherent in the timing issue.[26] In technology development programs, for example, impact statements must be drafted *after* the technical processes have been sufficiently developed to make the information provided therein meaningful. At the same time, such impact statements must be drafted soon enough to provide meaningful input into the decision-making process. Preparation should therefore occur *before* excessive resources have been poured into the developmental program and potentially less damaging alternatives have been foreclosed. Since this determination requires significant expertise, the *SIPI* court placed upon the Atomic Energy Commission (AEC) "the initial and primary responsibility for striking a balance between the competing concerns."[27] While granting some leeway to the AEC on EIS timing, the *SIPI* court nevertheless recognized the need for judicial scrutiny of the agency's timing decision. It emphasized that courts should "require the agenc[ies] to provide a framework for principled decision making," including procedures for regular agency evaluation of whether the proper time for drafting an impact statement has yet arrived.[28] In implementing this principle the *SIPI* court required the AEC to draft a written statement supporting its decision that an EIS was not yet required.[29] The court explained that this statement of reasons would serve two functions:

> It will ensure that the agency has given adequate consideration to the

> problem and that it understood the statutory standard. In addition, it will provide a focal point for judicial review of the agency's decision, giving the court the benefit of the agency's expertise.[30]

By allowing the agency certain leeway in its initial decision and subjecting that decision to *de novo* review after the agency has documented its reasons for not filing an EIS, the *SIPI* court effectively monitored this aspect of agency compliance with NEPA.

Judicial review of the contents of agency impact statements has also been thorough. The contents of each impact statement must provide a complete analysis of the environmental consequences of the project and viable project alternatives.[31] In accordance with the "strict standard of compliance" first imposed by *Calvert Cliffs*, the EIS must meet a standard of "full disclosure" of all matters relevant to informed environmental decision-making. This demanding standard is tempered only by a "rule of reason":

> In reviewing the sufficiency of an agency's compliance with § 102, we do not fathom the phrase 'to the fullest extent possible' to be an absolute term requiring perfection. If perfection were the standard, compliance would necessitate the accumulation of the sum total of scientific knowledge of the environmental elements affected by a proposal. It is unreasonable to impute to the Congress such an edict. . .[However,] the phrase 'to the fullest extent possible' clearly imposes a standard of environmental management requiring nothing less than comprehensive and objective treatment by the responsible agency. . .Thus, an agency's consideration of environmental matters that is merely partial or performed in a superficial manner does not satisfy the requisite standard.[32]

The contents of the EIS provide the reviewing court with insight into the sufficiency of agency compliance with both NEPA's procedural provisions and its substantive thrust. The First Circuit described three perspectives from which a reviewing court must examine the contents of an EIS:

> First, it [the EIS] permits the court *to ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard*. To that end it must 'explicate fully its course of inquiry, its analysis and its reasoning'. . .Second, it serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project. To that end, it 'must be written in language that is understandable to nontechnical minds and yet contain enough scientific reasoning to alert specialists to particular problems within the field of their expertise' . . .It cannot be composed of statements 'too vague, too general and too conclusory'. . . Finally, and perhaps most substan-

> tively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug. A conclusory statement 'unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind' not only fails to crystallize issues, . . .but 'affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives' . . . Moreover, where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be *good faith, reasoned analysis* in response. [emphasis added and citations omitted][33]

Consequently, a final and perhaps distinct procedural requirement that agencies exercise "good faith" in the preparation and utilization of the EIS has emerged. *Calvert Cliffs* explained this duty as follows:

> NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, 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. . .The magnitude of possible benefits and possible costs may lie anywhere on a broad spectrum. Much will depend on the particular magnitudes involved in particular cases. 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 a proper balance. The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.* [emphasis added][34]

The court noted that "the basic purpose of the Act" necessitates judicial review of agency preparation and utilization of the EIS to insure that "individualized consideration and balancing of environmental factors — conducted fully and in good faith" has taken place in each instance.[35] *Calvert Cliffs* left no doubt that where federal agencies have not met this standard courts will reverse and remand for further agency efforts.[36]

Good faith duties thus are required of an agency at two levels in order to comply with Section 102(2)(C).[37] Agencies must prepare the EIS in good faith so that its contents are sufficiently complete and contain the exhaustive analysis demanded by NEPA. And at the final decision stage, when the agency balances environmental costs

against the projected social and economic benefits of the project, that balancing also must be accomplished objectively and in good faith.

The demands of good faith enable the judiciary to evaluate agency thought processes far more effectively, and on a more subjective basis, than mere review of the adequacy of documents produced by agencies. Agency bad faith has not been defined nor is it clearly definable. The judiciary therefore has great flexibility under this standard to ensure that the spirit and substantive goals of NEPA are carried out. It seems doubtful that an agency can ever be said to have met NEPA's demands of good faith when that agency continues to advance an environmentally harmful course of action in the absence of a compelling social, economic or political justification.[38] It is hardly surprising that an agency may fall short of good faith when its own self-interest hangs in the balance. Such agency transgressions nonetheless supply reviewing courts with opportunities for enjoining agency action on "procedural" grounds.

It appears, therefore, that courts utilize a wide scope of review under Section 102(2)(C). There are significant opportunities for judicial interference to ensure strict compliance with NEPA's objective procedures. Furthermore, the procedural requirement that agencies conduct a good faith consideration and balancing of environmental factors affords a judicial basis for ensuring agency compliance with the substantive goals of NEPA. Curiously, however, when compliance with NEPA's substantive duties is expressly at issue courts have exercised less probing review.

II. Standards of Judicial Review for Substantive Rights Under NEPA

Substantively, NEPA directs federal agencies to choose the least environmentally harmful course of action "consistent with other essential considerations of national policy."[39] To satisfy NEPA's substantive requirements, agencies must make at least two correct choices on the basis of the EIS. First, agencies must choose the alternative course of action with the optimal environmental cost/benefit ratio, weighing potential environmental damage against expected project benefits. Second, agencies must decide whether this cost/benefit ratio warrants proceeding with the proposal at all.[40] Additionally, NEPA may create enforceable duties for agencies to minimize or avoid any environmental harm contingent upon the course of action ultimately chosen.[41]

The leading case on judicial review under NEPA's substantive

rights, *Environmental Defense Fund v. Corps of Engineers, United States Army*,[42] adopted the standards of review suggested by *Calvert Cliffs* and *Citizens to Preserve Overton Park v. Volpe*.[43] Essentially, an agency decision may be reversed on its substantive merits if it is arbitrary and capricious or clearly gave insufficient weight to environmental factors:

> The standard of review to be applied here and in other similar cases is set forth in *Citizens to Preserve Overton Park v. Volpe*. . .The reviewing court must first determine whether the agency acted within the scope of its authority, and next whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In making the latter determination, the court must decide if the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment.
>
> Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§101(b) and 102(1) of the Act, whether 'the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. . .' [citations omitted][44]

Following the lead of the Eighth Circuit, several courts have adopted substantive review under the same standard, which has become known as the "substantial inquiry" test.[45]

The exact wording of the standard for substantive review remains unsettled, yet courts allowing such review agree that it is of limited scope. As in other areas of administrative law, the courts will refrain from substituting their own subjective judgments about the merits of a particular project for those of the agency involved.[46]

Concededly, there is merit in this judicial formulation of the standard of substantive review. The trade-off of environmental costs against other social, economic and political benefits which are essential to the fulfillment of national policy involves many imponderables, and objective factors upon which to base judicial judgments are not readily ascertainable. However, the strength and comparative weight of conflicting national policies may be gauged at least roughly from the tenor of Congressional enactments. On this basis, NEPA stands out as an eloquent and forceful Congressional statement that environmental preservation and enhancement is absolutely essential to the continued well-being of the nation. Therefore, should the occasion arise for judicial review of compliance with NEPA's substantive rights under the arbitrary and capricious stan-

dard, judicial review could be meaningful, even though restrained.

The process of review should not end, however, once a court has decided that an agency has duly complied with the above standard. Because substantive review under NEPA is a relatively uncharted area, different standards of review may ultimately develop for different substantive rights. Particularly if NEPA is construed in the future to require minimization or avoidance of environmental harm in any agency action actually taken, courts may impose a more demanding standard of review.[47] Although determining reasonable requirements for minimization of environmental harm in each case can be difficult, it does not involve reconciliation of conflicting national policies, and stable principles for judicial decision can be developed.

In summary, substantive review under NEPA has thus far provided only a restrained judicial evaluation of the merits of agency action in light of NEPA's policies. However, if an agency chooses a course of action which is offensive to NEPA's substantive goals, the chances are slight that it will have complied with all of NEPA's procedural requirements. Conversely, if an agency observes NEPA's procedural requirements in good faith and maintains a truly open mind during the process, it is likely that the course of action ultimately chosen will be environmentally acceptable. Any other choice would probably be a violation of the arbitrary and capricious standard. And, if an agency observes NEPA's objective procedural requirements while continuing to nurture its preference for an environmentally offensive course of action, it is likely that the agency would be found to have violated the procedural requirement that an EIS be prepared and considered in good faith. Analysis of the *SCRAP*[48] case supports the accuracy of this thesis and brings out a significant interrelationship of procedural and substantive compliance with NEPA.

III. Judicial Treatment of Environmentally Objectionable Conduct Under NEPA: *SCRAP v. U.S.*

SCRAP is only the latest in a series of cases arising from railroad rate changes beginning in 1971.[49] These cases involved efforts by an organization of law students known as Students Challenging Regulatory Agency Procedures (SCRAP) and various other environmental groups to force the Interstate Commerce Commission (ICC) to comply with NEPA in connection with the application of across-the-board freight rate increases to recyclable commodities. Under its statutory authority, the ICC had suspended the proposed rate in-

creases while it investigated their lawfulness, but both the investigation and final ICC decision regarding the rate hikes were completed without preparation or consideration of an impact statement.[50]

Under pressure and threat of suit, the ICC reopened its investigation for the limited purpose of satisfying NEPA.[51] At this late point in the decision-making process, the ICC prepared a draft EIS and circulated it to the designated federal agencies and private organizations for comment.[52] The responses obtained were highly critical. The ICC, however, refused to hold new hearings on the environmental consequences of the proposed rate hikes and proceeded to issue its final EIS. The final EIS acknowledged the comments received at the draft stage, but the Commission's original analysis and conclusions remained unaltered. Because the ICC adhered to its position that approval of a general rate increase did not warrant inquiry into the effect of the entire rate structure on the environment. The final EIS discussed only the marginal impacts of the proposed rate increases.[53] The revised ICC opinion with regard to the rate increase did not respond to the issues raised by the EIS. It merely attached a one-sentence addendum to the original opinion which adopted the EIS in its entirety and discontinued the ICC investigation.[54] In response to an action brought by SCRAP and other plaintiff-intervenors, a three judge court temporarily enjoined the ICC from permitting the railroads to collect the rate increases.[55] The Supreme Court vacated that injunction on the ground that the court did not have jurisdiction to enjoin the ICC in its general rate-making capacity and remanded for further consideration.[56]

The district court read the Supreme Court decision narrowly, noting that it did not entirely preclude review. The Supreme Court had merely prohibited injunctive relief against ICC rate-making, leaving the lower court free to formulate other forms of relief.[57] With this in mind, the *SCRAP* court examined ICC compliance with NEPA prior to considering the proper form of relief.

The *SCRAP* court's first comment on the ICC's procedural compliance with NEPA reflected disapproval of "the combative, defensive and advocatory language and style" of the impact statement.[58] The court found this fault to be "at least evidentiary of the fullness and the fairness of the agency's consideration" of environmental factors in its decision to allow rate increases.[59] Language and style alone would not be enough to invalidate the entire EIS for bad faith, the court said, yet this type of language and style were indicative of bad faith on the ICC's part.[60]

Three specific shortcomings of the ICC impact statement then received particular attention. First, the court examined the ICC's treatment of a substantive environmental issue — the responsiveness of the demand for secondary materials to changes in transportation costs.[61] Instead of making a thorough quantitative economic study of this issue as had been suggested, the ICC's impact statement merely disparaged the methodology of a privately commissioned study which reached conclusions adverse to the agency position. The Commission's argument was that the marginal rate increase would not affect the use of secondary materials. This conclusion was based on general discussion in the EIS of past trends in the use of such materials.[62] The ICC's impact statement failed, however, to note the fact that while demand for recyclable commodities had increased, demand for primary goods had also increased. Hence, the inference that the Commission wished to draw from these trends, namely, that increased rates would not hinder the demand for recyclable materials, was unjustified. The court indicated that more detailed and substantial evidence was necessary to support any inference that the demand for scrap iron and other recyclables would not have increased more if the freight rates had been held down.[63] The ICC's cavalier treatment of this issue not only left the contents of its EIS fatally deficient,[64] but also indicated to the court the ICC's lack of good faith:

> It is difficult for us to understand how the statement can conclude that there is no significant environmental impact without a quantitative study of the responsiveness of the demand for each type of scrap to changes in recyclable transportation costs.[65]

A second deficiency in the content of the ICC's EIS also drew the court's attention. The Commission failed to respond to a Department of Transportation study which established that some secondary materials contributed more railroad revenue over costs than their competing virgin materials.[66] The ICC did not rebut this study with an analysis of its own, nor did it attempt to justify the disparities uncovered by this study. If transportation expenses do affect the demand for recyclable materials, the court concluded that the EIS must set forth justification for existing disparities.[67] Moreover, the ICC should have advanced its own "comprehensive alternative analysis" of the issues. The limited discussion offered by the ICC failed to "present a rigorous analysis of what justifies the specific disparities between primary and secondary rates."[68] Third, the Commission neglected to modify its statement in response to com-

ments suggesting that it consider the effect of rate increases on the long-term development of the recycling industry. More particularly, the EIS did not analyze whether a freeze of rates on recyclables would encourage further development of industrial processes utilizing secondary materials. This third transgression — the ICC's failure to respond to comments elicited on the draft statement — also constituted a fatal deficiency in the EIS.[69]

The court caustically disposed of the ICC's declaration that an application for a rate increase was not the proper vehicle for examining the effect of the overall rate structure on the environment:

> [No] consideration of the environmental impact of approving the recyclable rate increases could be full without an analysis of how the underlying rate structure itself affects the environment. It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment, then the increases would at least presumptively aggravate that contribution.[70]

The court suggested that any adverse environmental impact of the underlying rate structure later uncovered by the ICC's revised EIS could be remedied gradually by holding down the rates on recyclables when other increases were granted.[71]

The ICC's obligation to consider the cumulative effect of the rate structure could not be put off or shunted onto the ongoing Commission investigation into the freight rate structure.[72] If the Commission wished to utilize this separate study for consideration of the broader rate structure issues, it could do so. However, a moratorium on rate increases for recyclables would be necessary until this separate inquiry had been completed and NEPA's requirements had been fulfilled.[73]

The *SCRAP* court relied heavily on NEPA's procedural requirement of good faith in reaching its conclusions. On the question of ICC good faith, the court considered whether environmental factors had been discussed in sufficient depth in the EIS and whether the interplay between costs and benefits in the EIS indicated an "individualized consideration and balancing of environmental factors."[74] Thus, even if environmental factors are given in-depth consideration, an EIS may be deficient if it fails to weigh, specifically and in a reasonable manner, environmental factors against the economic and other asserted benefits of the project.

In holding for the plaintiffs, the court relied solely on the ICC's lack of compliance with NEPA's procedures. However, there were strong suggestions that the court disapproved of the ICC action on

substantive grounds as well. NEPA specifically states that federal agencies have a responsibility "to use all practicable means," consistent with other essential considerations of national policy, to ". . .approach the maximum attainable recycling of depletable resources."[75] In light of this substantive goal,[76] the tone of disapproval which permeates the *SCRAP* opinion is more readily understood. The ICC's failure to grant special rates (or at least special consideration for the rates) for recyclable materials seemed inexcusable. The *SCRAP* court hinted that it would probably have to reverse the ICC decision unless the Commission changed its position after revising its EIS to comply with NEPA:

> We do indeed entertain 'substantial doubt' about the consistency of the Commission's allowance of the rate increases with the congressional mandate that the Federal Government 'use all practicable means' to 'approach the maximum attainable recycling of depletable resources' 42 U.S.C. §4331(b)(6). We indeed might well question whether the Commission can allow the recyclable rate increases without clearly giving 'insufficient weight to environmental values.' *See Calvert Cliffs*. . .[77]

This statement transmits a clear warning to the Commission. In essence, the court suggests that unless the ICC changes its substantive position as well as improving its procedural compliance, it will be found in violation of NEPA. The opinion's invocation of the second recognized standard for substantive review under NEPA, that of clearly insufficient weight to environmental values, indicates the seriousness of the Commission's deficiency and the court's likely response to that deficiency should it persist.

The court apparently proceeded on the theory that if it forced the ICC to follow NEPA's procedures in good faith the Commission would make the proper choice. The court hoped that "improving the decisionmaking process will improve the decision."[78] Rather than evaluating the substantive merits of the ICC action at that time, the court remanded and gave the ICC another chance to comply with NEPA's substantive requirements and strict procedural directives.

SCRAP is significant for two reasons. First, by ordering the ICC to analyze the environmental consequences of the underlying rate structure, the court reached the broader, more significant environmental issue implicit in the marginal rate increase. Rate increases are an almost automatic agency function, easily justified by inflation or other changes in the tranportation industry. The underlying rate structure, on the other hand, represents the product of conscious decisions concerning the percentage of total railroad revenues

after costs which should be contributed by shippers of various commodities. Meaningful environmental decision-making can only be conducted by taking these broader issues into consideration. Although the basic rate structure decisions were made long before NEPA's passage, any post-NEPA action premised on such decisions requires that they be re-evaluated through NEPA's procedures in light of NEPA's substantive goals.[79]

Secondly, *SCRAP* is significant because it illustrates use of the liberal standard of procedural review under NEPA as a means of achieving NEPA's substantive ends. The Department of Transportation study indicated that certain primary goods benefit from more advantageous rates than the recyclable commodities with which they compete.[80] Whatever the original justification for these discriminatory rates, the court intimated that they could no longer endure in light of NEPA's clear mandate. However, the *SCRAP* court reviewed the Commission's actions solely on a procedural level, finding that the ICC failed to make a good faith objective balancing of environmental and other factors.[81] Such skillful use of NEPA's procedural review mechanisms to compel thorough reconsideration of the basic premises of agency action and the substantive soundness of environmental decisions is a creative step, reaching beyond those taken in the bulk of NEPA cases. *SCRAP* sets an example to be emulated by other courts.

Conclusion: The Relationship Between Substantive and Procedural Review Under NEPA

Procedural review under NEPA is much more firmly established than its substantive counterpart.[82] It is made even more attractive because the standards for reviewing agency procedural compliance with NEPA give the reviewing court significantly more latitude than do standards for substantive review. Cases decided on procedural grounds therefore have a better chance of being upheld on appeal. Faced with equally justifiable choices between substantive and procedural review, it is no surprise that most courts opt for procedural review. Reversal on procedural grounds has the added advantage of allowing courts to retain jurisdiction over the matter to oversee agency reconsideration of its choice of action in view of environmental factors. By contrast, a trial court decision that the agency's substantive decision was in error would probably result in the court's permanently enjoining the agency project, ending it until the agency could come up with a new proposal. Overlaps between NEPA's procedural and substantive duties ensure that reviewing

courts will almost always have an option between procedural and substantive review.[83] The *SCRAP* court chose the procedural review option to achieve the same sort of results that would have been attainable under substantive review.

The following hypotheticals help illustrate the importance of the judicial option between procedural and substantive review. If an agency completely ignores an important environmental factor in its decision-making, courts can justifiably find a substantive violation of NEPA because "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[84] Such an agency transgression, however, would probably be rooted in an inadequate impact statement, one which failed to discuss the environmental factors at issue. Thus, under a procedural standard of review the court could find the contents of the EIS lacking and remand to the agency with instructions to reconsider the substantive decision in light of the improved EIS.

Even where the content of an EIS seems technically adequate, and the EIS discusses all the requisite topics in sufficient detail, the interplay of substantive and procedural duties is significant. An agency that intends to take action offensive to NEPA will try in the EIS to present its own position as favorably as possible. The agency may attempt to discredit opposing views and draw conclusions which are of questionable validity in view of the information which the EIS itself contains. In this situation a reviewing court will remand for agency reconsideration in light of the good faith objective balancing consideration which NEPA's procedural duties require. The ICC took this approach and the *SCRAP* court found a violation of NEPA's procedural duty to conduct a "full good faith consideration" and balancing of environmental factors.[85]

Finally, an agency bent on an environmentally harmful course of action could conceivably prepare an EIS which contains adequate discussions of the requisite topics and draws valid conclusions from the data contained therein. The agency may be in compliance with NEPA if the environmental harm caused by the project is justified by other essential considerations of national policy.[86] Absent such justification, however, the court could find that an agency decision to proceed in spite of substantial environmental harm that is both documented in its EIS and given appropriate weight in the EIS cost/benefit analysis constitutes a violation of NEPA's substantive requirements. In these limited circumstances, the judiciary will apply the substantive standards which NEPA imposes. By first enforcing the procedural requirement that EIS contents be detailed

and achieve full disclosure of adverse environmental impacts, courts will prevent the agency from advancing a one-sided position.[87] By then enforcing the procedural requirement that agencies articulate a good faith cost/benefit analysis which is reasonable in light of the data presented in the EIS, courts will force agencies to abandon any environmentally damaging alternatives. Thereafter should an agency decide on a course of action which is unjustifiably damaging to the environment, the courts would have an adequate foundation upon which to enjoin agency action under NEPA's substantive requirements — the last line of defense under NEPA.

FOOTNOTES

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[1] National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et seq.* (1970).

[2] F. Anderson, NEPA IN THE COURTS 247 (1973) [Hereinafter cited as Anderson].

[3] Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C.Cir. 1971) [Hereinafter cited as Calvert Cliffs].

[4] *Id.* at 1112 n. 5 and 1123.

[5] Students Challenging Regulatory Agency Procedures (SCRAP) v. United States, 371 F. Supp. 1291 (D.D.C. 1974). [Hereinafter cited as SCRAP].

[6] United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) [Hereinafter cited as U.S. v. SCRAP].

[7] 42 U.S.C. §4331 (1970).

[8] *Id.* §4332.

[9] *Id.* §4332(2)(C).

[10] K. Davis, 4 ADMINISTRATIVE LAW TREATISE 18, 25 (1958).

[11] Anderson, *supra* n. 2, at 16.

[12] 42 U.S.C. §4332(2)(C) (1970).

[13] *See supra* n. 3.

[14] 42 U.S.C. §4332 (1970).

[15] 449 F.2d 1109, 1114 (D.C.Cir. 1971).

[16] *Id.* at 1112. As an example of judicial application of the standard of strict compliance, courts have been willing to remand for filing of an EIS even when they doubted that an EIS would alter the agency's final decision. In City of New York v. United States, 337 F. Supp. 150 (E.D. N.Y. 1972), the court said:

> To permit an agency to ignore its duties under NEPA with impunity because we have serious doubts that its ultimate decision will be affected by compliance would subvert the very purpose of the Act and encourage further administrative laxity in this area. . .In any event, preservation of the integrity of NEPA necessitates that the Commission be required to follow the steps set forth in §102, even if it now seems likely that those steps will lead it to adhere to the present result. *Id.* at 160.

[17] Scherr v. Volpe, 466 F.2d 1027, 1032 (7th Cir. 1972), in which the Seventh Circuit held that while the agency must initially determine whether an EIS is required, upon review: "it is the responsibility of the judiciary to construe the statutory standards and thereby decide whether the agency violated the Congressional command."

[18] Anderson, *supra* n. 2, at 75.

[19] *Id.* at 80-81.

[20] Jordan, *Alternatives Under NEPA: Toward an Accommodation,* 3 ECOLOGY L. Q. 705, 707 (1973)[Hereinafter cited as Jordan].

[21] Hanly v. Kleindienst, 471 F.2d 823, 835 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

[22] *Id.* at 836.

[23] Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972); Citizens for Clean Air, Inc. v. Corps of Engineers, United States Army, 349 F. Supp. 696 (S.D. N.Y. 1972).

[24] Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir. 1972). Other courts have utilized this standard of arbitrariness for review of agency threshold decisions in conjunction with the requirement for a detailed record at all stages of agency decision-making. The detailed record allows reviewing courts to ascertain whether there has been a "genuine, not a perfunctory" compliance with NEPA. Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

Of these two standards of judicial review of the threshold decision, *de novo* review seems the better choice. Agencies should not be allowed to avoid preparation of an EIS under a standard allowing them as much leeway at this preliminary level as does the arbitrary and capricious standard. As one commentator noted: "Without a judicial check, the temptation would be to short-circuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary or capricious standard. The past history of agency 'crabbed interpretations' making a 'mockery of the Act' leaves little room for confidence." Anderson, *supra* n. 2, at 104, quoting from Calvert Cliffs, 449 F.2d 1109, 1117 (D.C.Cir. 1971).

[25] Calvert Cliffs, 449 F.2d 1109, 1118 (D.C.Cir. 1971), and cases cited in Anderson, *supra* n. 2, at 180 n. 8.

[26] Scientists' Institute for Public Information, Inc. v. United States Atomic Energy Commission, 481 F.2d 1079 (D.C.Cir. 1973) [Hereinafter cited as SIPI].

[27] *Id.* at 1094.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1095.

[31] 42 U.S.C. §4332(2)(C)(i)-(v)(1970).

[32] Environmental Defense Fund v. Corps of Engineers, United States Army, 348 F. Supp. 916, 927 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974).

[33] Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir. 1973).

[34] 449 F.2d 1109, 1123 (D.C.Cir. 1971).

[35] *Id.* at 1115.

[36] *Id.*

[37] 42 U.S.C.§4332(2)(C) (1970).

[38] 42 U.S.C. §4331(b) (1970) states that to carry out NEPA's policies, agencies must "use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" to achieve the substantive environmental goals which Section 101 sets out.

[39] *Id.*

[40] D'Amato, *The Impact of Impact Statements Upon Agency Responsibility: A Perspective Analysis*, 59 IOWA L. REV. 195, 242 (1973).

[41] NEPA's "nondegradation policy," which is implicit in the wording of Section 101, directs agency decision-making toward preservation and enhancement of environmental quality. Anderson, *supra* n. 2, at 265. Under such a policy agencies must minimize or avoid the environmental harms of their projects. This approach was developed by the Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) [Hereinafter cited as Overton Park], relying on the statutory commands of Section 4(f) of the Department of Transportation Act of 1966, 82 Stat. 824, 49 U.S.C. §1653(f) (1970), and on Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §138 (1970). At least one district court has suggested that this type of minimization effort may be required under NEPA:

> [T]o the extent that it [the lack of substantive review power] would allow the agencies merely to disclose the likely harm without reflecting a substantial effort to prevent or minimize environmental harm, it is not

an accurate position of the role of the courts under NEPA. Sierra Club v. Froehlke, 359 F. Supp. 1289, 1340 (S.D. Tex. 1973), *rev'd on other grounds sub nom.*, Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974).

The court denied existence of judicial power to impose unreasonable extremes of compliance but asserted that courts should insist on agency consideration of methods to mitigate environmental costs if the project appeared to call for such mitigation and none had been undertaken or only a half-hearted attempt had been made in that direction: "NEPA states indirectly, but affirmatively, that under some circumstances federal agencies must mitigate some and possibly all of the environmental impacts arising from a proposed project." Sierra Club v. Froehlke, 359 F. Supp. 1289, 1339 (S.D. Tex. 1973).

In Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351-52 (8th Cir. 1972), the Eighth Circuit found some duty to discuss plans for mitigation of potential adverse consequences on a procedural level as a part of the discussion of alternatives under NEPA Section 102(2)(C)(iii), 42 U.S.C. §4332(2)(C)(iii) (1970). The court found that failure to supply information about possible mitigation in the impact statement deprived the decision-makers of information necessary for an informed decision on whether to proceed with the project immediately or wait for effectuation of the mitigation program. *Id.* at 352. Thus, failure to minimize environmental harm may be either a substantive failure under the reasoning of one court or the result of a procedural deficiency in EIS contents under the reasoning of another court.

[42] Environmental Defense Fund v. Corps of Engineers, United States Army, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973) [Hereinafter cited as EDF v. Corps].

[43] *Id.* at 300, quoting from Calvert Cliffs, 449 F.2d 1109, 1115 (D.C.Cir. 1971), and Overton Park, 401 U.S. 402, 416 (1971). In finding that substantive review under NEPA was proper prior to discussing standards of review, the Eighth Circuit said:

> The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decision making. Section 101(b) of the Act states that agencies have an obligation 'to use all practical [sic] means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources' to preserve and enhance the environment. To this end, §101 sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment. EDF v. Corps, 470 F.2d 289, 297 (8th Cir. 1972).

The court said that NEPA's "unequivocal intent" is to ensure that agencies consider and give effect to the substantive goals of the Act, and:

> Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits. Whether we look to common law or the Administrative Procedure Act, absent 'legislative guidance as to reviewability, an administrative determination affecting legal rights is reviewable unless some special reason appears for not reviewing. . .' Here, important legal rights are affected. NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized. *Id.* at 298-99.

[44] *Id.* at 300.

[45] Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 S.D.L. REV. 279, 291 (1974).

[46] EDF v. Corps, 470 F.2d 289, 300 (8th Cir. 1972), citing Overton Park, 401 U.S. 402, 416 (1971).

[47] For example, courts might place upon federal agencies the burden of proving that they have used "all practicable means" to minimize and avoid environmental harm. 42 U.S.C. §4331(b) (1970).

[48] 371 F. Supp. 1291 (D.C.Cir. 1974).

[49] The most important opinions in this series have been the two previous opinions of the three judge court, 353 F. Supp. 317 (1973) and 346 F. Supp. 189 (1972), and the Supreme Court opinion in U.S. v. SCRAP, 412 U.S. 669 (1973). A Supreme Court memorandum order vacating an injunction and remanding for reconsideration, 414 U.S. 1035 (1973), was the immediate predecessor of the opinion analyzed by this article. The Supreme Court has noted probable jurisdiction of this case, 43 U.S.L.W. 3208 (U.S. October 15, 1974).

[50] 371 F. Supp. 1291 (D.D.C. 1974).

[51] *Id.* at 1294.

[52] 42 U.S.C. §4332(2)(C) (1970).

[53] 371 F. Supp. 1291, 1301-06 (D.D.C. 1974).

[54] *Id.* at 1295.

[55] *Id.*

[56] 412 U.S. 669 (1973).

[57] 371 F. Supp. 1291, 1307-10 (D.D.C. 1974).

[58] *Id.* at 1302.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1302-03.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 1303 n. 34.
[65] *Id.* at 1303.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1304.
[71] *Id.*
[72] *Id.* at 1305.
[73] *Id.*
[74] *Id.* at 1301, quoting Calvert Cliffs, 449 F.2d 1109, 1115 (D.C.Cir. 1971).
[75] 371 F. Supp. 1291, 1299 (D.D.C. 1974).
[76] 42 U.S.C. §4331(b)(6) (1970).
[77] 371 F. Supp. 1291, 1310 (D.D.C. 1974).
[78] Jordan, *supra* n. 20, at 746.
[79] Most of the cases interpreting NEPA have failed to reach the level of decision-making which the *SCRAP* court attained. The bulk of NEPA cases to date have dealt with single projects rather than general agency policies. NEPA cases have dealt with the construction of dams, EDF v. Corps, 470 F.2d 289 (8th Cir. 1972); construction of single buildings, Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); short extensions of highways, Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972); abandonment of small stretches of railroad tracks, Harlem Valley v. Stafford, 500 F.2d 328 (2d Cir. 1974); and construction of single electric transmission lines, Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972). Cases like SCRAP, which deal with the overall policy aspects of agency functioning, are by far the exception rather than the rule.
[80] 371 F. Supp. 1291, 1303 (D.D.C. 1974).
[81] *Id.* at 1299.
[82] Anderson, *supra* n. 2, at 259, where the point was made that NEPA's substantive provisions "suggest that Congress said more about the freedom of agencies to consider and trade off environmental values than the courts have yet fully recognized." Thus, mere *potential* for future development of substantive review contrasts with the already existing "strict standard of compliance" for

NEPA's procedural provisions. Calvert Cliffs, 449 F.2d 1109, 1112 (D.C.Cir. 1971).

[83] F. Anderson, *The National Environmental Policy Act*, in Environmental Law Institute, FEDERAL ENVIRONMENTAL LAW 319 (1974), where Anderson states that "it now appears that the courts may pursue a more subtle, conservative course and find that particular decisional techniques are impermissible under §101 or even under the action-forcing provisions."

[84] 449 F.2d 1109, 1115 (D.C.Cir. 1971).

[85] *Id.* at 1112 n.5 and 1123.

[86] 42 U.S.C. §4331(b)(1970).

[87] FEDERAL ENVIRONMENTAL LAW, *supra* n. 83, at 309: "By imposing exacting standards on the adequacy of the statement, the court makes it difficult — perhaps impossible in this case — to produce a favorable cost-benefit ratio."