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NEPA PRE-EMPTION LEGISLATION: DECISIONMAKING ALTERNATIVE FOR CRUCIAL FEDERAL PROJECTS

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For the greater part of American history the government and citizenry of the United States paid little heed to the disruption and deterioration of the natural environment. Thoughtlessly clinging to the concept of the "frontier," the Ultimate West of inexhaustible freedom, space and natural resources,[1] they viewed the world as a never-empty cornucopia to be enjoyed without the burdens of stewardship for future generations.[2] The immediate and exclusive appropriation of natural resources conferred great financial gain upon the taker, thus encouraging increased exploitation of "common resources."[3] The Industrial Revolution, in turn, created countless tangible benefits as the products of its new technology, yet left as its by-product an unprecedented disruption of the natural environment.[4]

In the 1960's, government and citizens alike realized that the frontier perspective and industrialization had synthesized to pro-

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[1] F. Turner, The Significance of the Frontier in American History (1960) (academic reprint).

[2] One obvious example is the "slash and burn" agriculture practiced by the American settlers.

[3] Hardin describes this economic phenomenon as the "problem of the commons." Briefly stated, the problem of the commons is that the co-owner of a natural resource (a forest, for example) acquires personal economic gain by his immediate consumption of the entire resource before his fellow owners (including future generations) begin to deplete the whole. In the case of the forest, the logger who clears the lumber stands to realize an enormous profit, while his fellows who delay their operations will not share in the economic value of the forest. Consequently, the forester has a financial incentive to consume everyone's share and a disincentive to forego consumption or conserve. For a more thorough discussion of the problem of the commons, see Hardin, *The Tragedy of the Commons*, 163 SCIENCE 1245 (1968).

[4] The relationship between technological advances and environmental disruption has been described in B. COMMONER, THE CLOSING CIRCLE 141-42 (Bantam ed. 1972).

duce a threat to the environment of emergency proportions. The National Environmental Policy Act of 1969 (NEPA)[5] was enacted in an attempt to remedy this deficiency.[6] NEPA requires all federal agencies which recommend major projects having a significant impact upon the human environment to consider the environmental consequences of their actions.[7] NEPA enforcement is accomplished through the courts.

Although NEPA was a needed response to the environmental crisis, the suitability of its prescribed procedures to all environmental disputes can be questioned. The magnitude of the environmental problem spotlights critical deficiencies in the litigation method of policing environmental controversies and often proves the courts unsatisfactory vehicles for NEPA enforcement. A mechanism which would remove environmental decisionmaking from the courts is needed where vital and large-scale federal projects are at issue.

This article recommends pre-emption legislation as the best method for resolving major environmental controversies. Pre-emption legislation is action by Congress which determines environmental disputes without resort to judicial review. Its advantages include enormous savings of time and expense, increased expertise in environmental decisionmaking, and continued public input in major federal policymaking.

I. NEPA's Mandate

In the words of its sponsor, Senator Henry Jackson, NEPA was designed to establish "a national strategy for the management of the human environment."[8] As the Senator astutely observed, "[w]hat we should be doing is setting up institutions and procedures designed to anticipate environmental problems."[9] NEPA's preamble,

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

[6] Realizing that many of the activities causing substantial destruction of the environment are major federal projects which frequently have interstate or even national effects, Congress decided that the first target for environmental reform would be the federal agencies. At the same time, however, Congress hoped that the states might choose to emulate this federal reform. This hope has proven to be well-founded, as many states have adopted their own NEPA-type legislation. *See* Comment, *Emerging State Programs to Protect the Environment: "Little NEPA's" and Beyond,* 5 ENV. AFF. 567 (1976); *cf.* Hagman, *NEPA's Progeny Inhabit The States—Were the Genes Defective?* 7 URB. L. ANN. 3 (1974).

[7] 42 U.S.C. § 4332(2)(C) (1970).

[8] *Hearings on S. 1075, & S. 1752 Before the U.S. Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 24 (1969).

[9] *Id.* at 27.

the congressional declaration of the national environmental policy, reflects these goals.

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that *it is the continuing policy of the Federal Government*, . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[10]

NEPA's most significant provision, Section 102(2)(C), directs every agency of the Federal Government to "include in *every* recommendation or report on . . . major federal actions significantly affecting the quality of the human environment, a detailed statement . . . on—(i) *the environmental impact of the proposed action.*"[11] This provision mandated the now familiar "environmental impact statement" or EIS as an integral part of agency planning. Indeed, it requires an EIS for every major federal action.[12] In order to encourage federal agencies to "utilize a systematic, interdisciplinary approach"[13] to environmental decisionmaking, Congress required that specific information be included in these impact statements.

The EIS must be a detailed discussion of the environmental impacts of the proposed action, including its unavoidable adverse consequences and its irreversible commitments of natural resources.[14] The agency preparing a particular EIS must investigate the relationship between the short-term use of natural resources and the long-range environmental quality of the project area.[15] In addition, NEPA requires that the statement provide significant information concerning possible alternative courses of action.[16] Strict adherence to these procedures was intended to ensure that environmental variables would take their appropriate position amongst economic and technical variables in the agency decisionmaking process.[17]

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[10] 42 U.S.C. § 4331(a) (1970) (emphasis added).
[11] *Id.* at 4332(2)(C) (emphasis added).
[12] *Id.*
[13] *Id.* § 4332(2)(A).
[14] *Id.* § 4332(2)(C)(v).
[15] *Id.* § 4332(2)(C)(iv).
[16] *Id.* § 4332(2)(C)(iii).
[17] *Id.* § 4332(2)(B).

Congress left important questions unanswered, however. It is unclear how exhaustive an environmental impact analysis must be in order to comply with the procedural requirements of NEPA.[18] More importantly, NEPA fails to state how the environmental consequences revealed in the EIS must affect the decisionmaking process. The substantive sufficiency of an EIS will depend on the agency's balancing of environmental and other variables. This substantive decision will, in turn, determine whether the agency will proceed with the proposed action. Because of congressional silence, judicial review has attained critical significance in determining the requirements of substantive sufficiency.

II. Substantive Judicial Review

EIS litigation has been voluminous.[19] Although a large number of cases have determined which classes of agency decisions constitute major federal actions subject to §102(2)(C)[20] and what procedures an agency must follow when preparing a final impact statement,[21] few decisions have discussed the substantive sufficiency of an EIS. The general test of EIS adequacy is a two-pronged standard: one, whether all of the §102(2)(C) procedures have been met; and two, whether the substantive decision was properly within the discretion of the agency.[22] The courts' application of this two-pronged test has demanded strict compliance with the procedural rules of §102(2)(C).[23] The courts recognize that NEPA is an environmental

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[18] *See* Friedman, *The Operational Impact of NEPA and Related Environmental Laws, Regulations and Orders on Mineral Operations,* 19 Rocky Mt. Min. L. Inst. 47 (1974).

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

[20] Comment, *Evolving Judicial Standards under the National Environmental Policy Act and the Challenge of the Alaska Pipeline,* 81 Yale L.J. 1592, 1597 (1972). (Hereinafter cited as *Judicial Standards*).

[21] *See* cases cited in Lynch, *Complying with NEPA: The Tortuous Path To An Adequate Environmental Impact Statement,* 14 Ariz. L. Rev. 717 (1972).

[22] Cases which have utilized the two-pronged approach include National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974); Concerned About Trident v. Schlesinger, 400 F. Supp. 154 (D.D.C. 1975); Essex County Preservation Ass'n v. Campbell, 399 F. Supp. 208 (D. Mass. 1975); Conservation Soc. of Southern Vermont v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973); Cape Henry Bird Club v. Laird, 359 F. Supp. 401 (D. Va. 1973), *aff'd,* 484 F.2d 453 (4th Cir. 1973).

[23] National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973); Concerned About Trident v. Schlesinger, 400 F. Supp. 154 (D.D.C. 1975); Conservation Soc. of Southern Vermont v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973); Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (D. Va. 1973). Courts which have not explicitly adopted the two-pronged test also require strict procedural compliance, and this appears to be the general view. *See, e.g.,* National Wildlife Federation v. Morton, 393 F. Supp. 1286, 1296 (D.D.C. 1975), holding that procedural duties must be fulfilled to the "fullest extent possible," a high standard which

"full disclosure law,"[24] and they insist that the agency take a "hard look"[25] at the environmental impact of the proposed project.

On the other hand, the substantive contents of an EIS are tested by a far less rigorous standard. One court has held that NEPA creates no judicially enforceable duties,[26] but most courts have determined that the Act establishes sufficiently definite standards to permit meaningful, though limited, judicial review of the substantive environmental decisions of federal agencies.[27]

The courts weigh several factors in determining the substantive adequacy of a given EIS, including the purpose underlying the impact statement requirement,[28] the practicability and reasonableness of including additional data,[29] the extent of compliance with the procedural requirements of § 102(2)(C),[30] the immediacy or remoteness of the threatened environmental harm,[31] the cost-benefit analysis actually conducted by the decisionmaking agency,[32] objective good faith,[33] and the existence of undiscussed possibilities for mitigation of harm.[34] Substantive compliance, however, is not subjected to strict review. Generally, an agency's decision will be overturned only if it is "arbitrary, capricious, an abuse of discretion, or contrary to law."[35] This lenient standard has been expressly adopted in a number of cases,[36] followed by implication in a few others,[37] and

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will be vigorously enforced by the courts. *But see* Westside Property Owners v. Schlesinger, 415 F. Supp. 1298 (D. Ariz. 1976), where only "reasonable compliance" was required.

[24] Sierra Club v. Froehlke, 359 F. Supp. 1289, 1338 (D. Tex. 1973).

[25] Movement Against Destruction v. Trainor, 400 F. Supp. 533 (D. Md. 1975). This decision explained that an agency need not accumulate the sum total of scientific knowledge about the environmental impact of the proposed project. *Id.* at 522.

[26] Bucklein v. Volpe, 1 E.L.R. 20043, 2 Envt'l Rep. Cases 1082 (N.D. Cal. 1970).

[27] *E.g.*, Boone v. Tollatoba Creek Drainage Dist., 379 F. Supp. 1239 (D. Mass. 1974).

[28] Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975).

[29] Environmental Defense Fund v. Tennessee Valley Authority, 492 F.2d 466 (6th Cir. 1974). The "rule of reason" test applies to this question; Concerned About Trident v. Schlesinger, 400 F. Supp. 454 (D.D.C. 1975).

[30] Sierra Club v. Morton, 379 F. Supp. 1254 (D. Colo. 1974).

[31] Basin Land Protection Ass'n v. Kleppe, 417 F. Supp. 46 (D. Wash. 1976).

[32] National Wildlife Federation v. Morton, 393 F. Supp. 1286 (D.D.C. 1975).

[33] Sierra Club v. Morton, 510 F. Supp. 813 (D. Fla. 1975).

[34] Sierra Club v. Froehlke, 359 F. Supp. 1289 (D. Tex. 1973).

[35] Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974).

[36] Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974); Brown v. Callaway, 497 F.2d 1235 (6th Cir. 1974); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir.1973), *cert. denied*, 416 U.S. 961 (1974); Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (D. Va. 1973), *aff'd*, 484 F.2d 453 (4th Cir. 1973); Environmental Defense Fund, Inc. v. Armstrong, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974), *reh.*

employed in conjunction with a requirement of "good faith" in several more.[38]

Since the final decision to go ahead with a major federal action should be legislative rather than judicial, the courts should not be the final arbiter[39] and judicial review should be limited.[40] Given that reviewing courts measure the substantive adequacy of a NEPA statement by so lax a standard, whether there is presently any meaningful substantive review of impact statements is highly questionable. Indeed, a few federal courts have refused to examine EIS substance at all.[41] Where substantive review is so diluted as to be virtually non-existent, and courts are merely ensuring procedural

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denied, 419 U.S. 1041 (1974) (holding also that a "clearly erroneous" test is inappropriate); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); First Nat. Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973); Baxley v. Corps of Engineers of U.S. Army, 411 F. Supp. 1261 (D. Ala. 1976); Arkansas Community Organization for Reform Now v. Brinegar, 398 F. Supp. 685 (D. Ark. 1975), *aff'd*, 531 F.2d 864 (8th Cir. 1976); Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975); Minnesota Public Interest Research Group v. Butz, 401 F. Supp. 1276 (D. Minn. 1975) (also noting that the Forest Service had acted within the scope of its authority).

[37] Westside Property Owners v. Schlesinger, 415 F. Supp. 1208 (D. Ariz. 1976) (the judiciary should ensure that NEPA's required methodology is followed, rather than provide a forum for the expression of substantive disagreements). *See also* Sierra Club v. Froehlke, 534 F.2d 1280 (8th Cir. 1976); Brooks v. Coleman, 518 F.2d 17 (9th Cir. 1975); Daly v. Volpe, 514 F.2d 1106 (9th Cir. 1975) (all using a "not clearly erroneous" test).

[38] National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973) (requiring objective good faith compliance and reasonable discussion of the subject matter); Conservation Soc'y of Southern Vermont v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973) (the substantive decision must be consistent with a good faith weighing of the proposed project's environmental impact); Concerned About Trident v. Schlesinger, 400 F. Supp. 454 (D.D.C. 1975) (requiring full, good faith consideration and a balancing of environmental factors); Duke City Lumber Co. v. Butz, 382 F. Supp. 326 (D.D.C. 1974).

Courts frequently employ "cost-benefit" language in their discussion of the "arbitrary and capricious" test. One interesting formulation appears in Patterson v. Exxon, 415 F. Supp. 1276 (D. Neb. 1976), a burden of proof opinion holding that, in the absence of evidence in the EIS that the actual cost-benefits balance struck by the agency was arbitrary or based on insufficient weight awarded environmental values, a court will examine only NEPA's procedural requirements. *Accord,* Sierra Club v. Morton, 510 F.2d 813 (D. Fla.1975), wherein the court also utilized the standard arbitrary and capricious measure, as well as some "clear disregard of the evidence" language—truly a gatling gun approach. Simpler formulations may be found in Minnesota Public Interest Research Group v. Butz, 401 F. Supp. 1276 (D. Minn. 1975); and Concerned About Trident v. Schlesinger, 400 F. Supp. 424 (D.D.C. 1975).

[39] Patterson v. Exxon, 415 F. Supp. 1276 (D. Neb. 1976).

[40] Concerned About Trident v. Schlesinger, 400 F. Supp. 424 (D.D.C. 1975).

[41] Under this view, a court must determine whether §102(2)(C) procedures have been followed, but cannot rule on the impact statement's substantive adequacy. Columbia Basin Land Protection Ass'n v. Kleppe, 417 F. Supp. 46 (D. Wash. 1976); Upper West Fork River Watershed Ass'n v. Corps of U.S. Army Engineers, 414 F. Supp. 908 (D. W.Va. 1976); Essex County Preservation Ass'n v. Campbell, 399 F. Supp. 208 (D. Mass. 1975); Burleigh v. Calloway, 362 F. Supp. 121 (D. Hawaii 1973).

compliance with NEPA, the national interest might best be served by wholly eliminating the lengthy and expensive delay of substantive sufficiency litigation. Congress should not be timid about expressly curtailing judicial review in this area.

III. Deficiencies in Judicial Resolutions of NEPA Controversies

Even if the courts were to apply a stricter standard in evaluating substantive compliance with NEPA, the propriety of the judiciary as the nation's environmental decisionmaker is questionable. Litigation is costly and time-consuming.[42] In addition, environmental litigation has two characteristics which aggravate the societal cost of employing the judicial model of dispute resolution: complexity and delay. Environmental disputes are inherently difficult cases, usually involving well-researched and technically detailed scientific testimony.[43] Moreover, the interdependency of environmental variables increases the complexity of EIS disputes. Environmental problems have been described as "polycentric" because they require "a complex of decisions, judgment upon each of which depends upon the judgment to be made upon each of the others."[44]

The delay inherent in the litigation process also jeopardizes the validity of environmental decisions. Inflation, shifting demands for natural resources, changes in the populations of flora and fauna, international developments, economic variables, and other factors can make a given EIS obsolete. Clearly, NEPA's goal of intelligently balanced federal planning is frustrated where litigation invalidates an EIS not by rule of law, but by passage of time.[45]

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[42] EIS substantive litigation might involve: (1) petitions for a temporary restraining order or preliminary injunction; (2) detailed discovery, testimony, and trial on the merits; (3) appeals to the appropriate circuit court of appeals; and (4) requests for hearings before the United States Supreme Court. The TAPS litigation involved a case history even more complicated. See Section IV, *infra*.

[43] Mid-Shiawassee County Concerned Citizens v. Train, 408 F. Supp. 650 (D. Mich. 1976), refers to "opposing scientific evidence" and requires the inclusion of all "responsible scientific opinion concerning adverse environmental effects." 408 F. Supp. at 656. As a practical matter, however, private corporations which file impact statements will disclose all available studies and testimonies in the EIS and refute those which are unfavorable to the project; omissions cast the EIS into disrepute and create the opportunity for judicial rejection on the ground of procedural inadequacy. Conversation with Frank Friedman, General Counsel, Atlantic Richfield Corporation.

[44] H. Hart & A. Sacks, The Legal Process 22 (tent. ed. 1958).

[45] The Trans-Alaska Pipeline project is again a case in point. During the course of the lengthy *Wilderness Society* litigation (Section IV, *infra*), the formation of the Organization of Petroleum Exporting Countries (OPEC) and the promulgation of national ambient air quality standards served to increase substantially the price of Alaskan crude, so that the

The present system of judicial review can be justified only if the judiciary is uniquely able to moderate environmental disputes. Yet, the courts frequently lack the requisite expertise to handle complex environmental controversies. At least one judicial opinion has recognized this problem.[46] A California court dismissed a class action brought on behalf of Los Angeles County against 291 alleged polluters, holding that "a court of equity lacks the facilities or competency to undertake the problem of abating air pollution within the Los Angeles Basin."[47] The court stated:

> It is readily apparent that the control of the emission of air pollutants is a highly complex problem. Our industrialized civilization is dependent upon energy derived from the oxidation of fossilized fuels. Many industrial processes involve the release directly or indirectly of volatile substances which can cause discomfort to others. Such unavoidable discomfort is one of the prices one pays for living in an industrialized civilization. The court does not have the facilities to undertake the balancing of the interests of the inhabitants of the Los Angeles Basin against the needs of productive industry in this same area. . . .[48]

In order to deal with this lack of competence, special means of assisting the courts in environmental disputes have been suggested. The National Academy of Sciences recommends that courts appoint public agencies as "masters in chancery" to assist with the technical aspects of environmental litigation.[49] Expert advisors such as economists, engineers, administrators, and community leaders also could aid the courts.[50] Even specialized courts of environmental law have been proposed.[51]

Whether even a speedy and capable judiciary should be making major environmental policy decisions is doubtful. In America's tri-

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present West Coast demand for Prudhoe oil is far smaller than it was in 1970. *See generally* Corrigan, *Now That the Pipeline's Almost Built, Who's Going to Take the Oil?*, NAT'L J. 1762 (Dec. 11, 1976).

[46] Diamond v. General Motors Corp., No. 947429 (Los Angeles, Cal. Super. Ct.), *dismissed,* Aug. 20, 1969, *appeal docketed,* Civ. No. 36600, 2d Dist. Ct. App., Oct. 15, 1969.

[47] *Id.*

[48] *Id.*

[49] J. KRIER & R. STEWARD, ENVIRONMENTAL LAW AND POLICY at IV-137 (tent. rev. ed. 1976), *citing* NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, WASTE MANAGEMENT AND CONTROL 233-34 (1975). Such a solution, valid as it may be in many types of pollution litigation, is obviously precluded in NEPA cases, since those agencies which could best assist the court are the very ones which have prepared the EIS under examination.

[50] KRIER & STEWART, *supra* note 49, at IV-137. Judge Harold Leventhal has made similar suggestions. *See* Leventhal, *Environmental Decision Making and the Courts,* 122 U. PA. L. REV. 509 (1974).

[51] KRIER & STEWART, *supra* note 49, at IV-136.

parted system of government, such major decisions should be made, at least in theory, by the legislative branch. Important questions of national and international impact are not "reducible to courtroom dialectic and resolution."[52] As one commentator has noted, "it is inappropriate for the judicial institution to make a substantive determination about the use and protection of air. That choice is properly made, if at all, in the representative bodies of government, as the policy choice of those represented."[53]

In sum, the ability of the courts to handle major environmental issues with economy, efficiency, and the proper level of expertise, is in serious question. Faced with the risks which courtroom delay poses, and recognizing that case-by-case environmental determinations could create major public policy which more properly should be decided by the legislature, the courts, perhaps correctly, have confined judicial review to an examination of whether NEPA's procedural requirements have been satisfied, and have declined to review closely the substantive merits of impact statements.

IV. Congressional Intervention

Congress has intervened in at least one major environmental dispute—the Trans-Alaska Pipeline litigation—to wrest decisionmaking power from the courts. Following a review of this controversy, this article will discuss alternative mechanisms for future congressional action.

The extensive history of the Trans-Alaska Pipeline dates from January, 1968, when oil was first discovered at Prudhoe Bay, on Alaska's North Slope.[54] The North Slope field contained ten billion barrels of proven reserves, making it the largest proven field in North America.[55] The Trans-Alaska Pipeline System (TAPS), a consortium of oil companies, proposed that the oil be transported by 48-inch pipe nearly 800 miles to an ice-free port in Southeastern Alaska and thence forwarded by tanker to West Coast markets.[56] After TAPS applied for land use permits authorizing construction

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[52] *Id.* at IV-93, *citing* Sedulus, *How Dull the Advocates,* New Republic 22 (May 25, 1970).

[53] Comment, *The Role of the Judiciary In the Confrontation With The Problems of Environmental Quality,* 17 U.C.L.A. L. Rev. 1070, 1074-75 (1970). (Hereinafter cited as *The Role of The Judiciary*).

[54] *Atlantic-Humble Finds Oil on North Slope,* Alaska Construction and Oil Report, (April, 1968), at 47.

[55] *See Judicial Standards, supra* note 20, at 1609.

[56] Knott, *The Pipeline Story—Or How the Caribou Came to Fame,* BP Shield Int'l 8 (May, 1970).

of the Pipeline of June 10, 1969,[57] the Department of the Interior prepared certain environmental requirements to be incorporated into the permits,[58] lifted the "freeze" on Native-claimed land in Alaska so that rights-of-way could be granted,[59] and prepared to issue a permit for the pipeline's haul road.[60] These permits would have been issued within a year,[61] but NEPA and other litigation delayed issuance until January 23, 1974.[62] Without congressional intervention in late 1973,[63] litigation could have stalled the pipeline project for several additional years.

Early in 1970, two groups of plaintiffs, representing Natives and environmentalists, petitioned the District Court for the District of Columbia for an injunction to prevent issuance of the pipeline approvals. The Natives argued that the project theatened their traditional means of subsistence and that the government's approbation would violate both its fiduciary duties and NEPA.[64] District Judge Hart granted an injunction prohibiting the issuance of a permit for a pipeline haul road over any Native-claimed land.[65] Congress ultimately resolved the Native claims problem by enacting the unprecedented Alaska Native Claims Settlement Act,[66] thereby extinguishing any and all Native claims by payment of $962.5 million and forty million acres of Alaska land.[67]

Although the challenge by the Natives was resolved in late 1971,[68] a lawsuit filed by three conservationist organizations[69] caused more extensive delay. The conservationists charged that the issuance of pipeline authorization permits would violate the width requirements prescribed for oil pipelines by the Mineral Leasing Act of

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[57] The application is included in *Hearings on the Status of the Proposed Trans-Alaska Pipeline Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess., pt. 1, 103-06 (1969).

[58] Federal Task Force on Alaskan Oil Development, Stipulations for the Trans-Alaska Pipeline System, U.S. Dep't of the Interior (Sept., 1969).

[59] P.L.O. 4760, 35 Fed. Reg. 424 (1970).

[60] Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970) (findings of fact).

[61] *Id.* at 423.

[62] The Anchorage Times, "Oil & the Pipeline," January 8, 1977, at A-7, col. 3.

[63] Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651 *et seq.* (Supp. III 1973).

[64] The Anchorage Times, "Oil & the Pipeline," January 8, 1977, at A-4, col. 2-3.

[65] Allakeet v. Hickel, Civil No. 706-70, 1 E.L.R. 65021 (D.D.C. 1970).

[66] Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* (Supp. I 1971).

[67] *Id.* § 1605.

[68] The Settlement Act probably would have been enacted at an earlier time had TAPS otherwise stood ready to proceed.

[69] The Wilderness Society, Friends of the Earth, and Environmental Defense Fund, Inc.

1920[70] and that the project's EIS was substantively inadequate.[71] Judge Hart, noting that the Department of the Interior stood ready to issue the haul road permit,[72] concluded as a matter of law that such action would violate both NEPA and the Mineral Leasing Act. The court accordingly granted the preliminary injunction to prevent irreparable injury to the plaintiffs.[73]

Judge Hart correctly found the EIS to be insufficient. Section 102(2)(C) procedures had not been met, as the Department had neither prepared an EIS concerning the proposed sale to TAPS of gravel to be used in construction, nor addressed environmental aspects in the haul road impact statement.[74] Interpreting the court's ruling as required an EIS dealing with the pipeline project as a whole,[75] the Department commenced work on a more comprehensive impact statement.

A preliminary version of the Draft Impact Statement, a document to be circulated among public agencies for informed comment,[76] was completed in November, 1970, and published two months later.[77] Alyeska Pipeline Service, the successor in interest to TAPS, called the 200 page document "substantially more detailed than any previously drafted by a federal agency pursuant to NEPA."[78] In the public hearings that followed, a 10,000 page record, representing the testimony and statements of more than 2,500 individuals and organizations, was developed. In response to the criticism voiced by many of the participants in the hearing process, the Department created a special §102 "Statement Task Force" to prepare a final EIS. The Task Force obtained information from the governments of the United States, Canada, and Alaska, and from representatives of private interests, examining land, marine, and alternative Canadian routes. Alyeska simultaneously submitted a 29 volume Project

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[70] 30 U.S.C. §§ 181 *et seq.* (1970). Section 185 provides: "Rights-of-way through the public lands. . .may be granted [to cover] said pipeline and twenty-five feet on each side of the same."

[71] Dominick & Brody, *The Alaska Pipeline: Wilderness Society v. Morton And The Trans-Alaska Pipeline Authorization Act,* 23 AMER. U. L. REV. 337, 341 n. 10 (1973).

[72] Wilderness Society v. Hickel, 325 F. Supp. 422, 432 (D.D.C. 1970).

[73] *Id.* at 424.

[74] *Judicial Standards, supra* note 20, at 1612 n. 92.

[75] *Id.*

[76] 42 U.S.C. § 4332(D)(iv) (1970).

[77] For a detailed historical account of the EIS, see Myers, *Federal Decisionmaking And the Trans-Alaska Pipeline,* 4 ECOLOGY L. Q. 915 (1975).

[78] Brief for Alyeska as Appellee at 24, Wilderness Society v. Morton, 479 F.2d 842 (Hereinafter cited as Alyeska brief).

Description containing specific data. The climax of this unprecedented environmental research effort was the Final EIS, a nine volume compendium[79] covering intricate project essentials as well as numerous alternatives to the Trans-Alaska transportation system.[80]

The Final EIS was published on March 20, 1972, and for 45 days thereafter comments were received from numerous public and private sources. The Department of the Interior studied these massive materials and granted the pipeline permits on May 11, 1972, at the same time publishing a 45 page statement of reasons for approval.[81] Judge Hart reviewed the Final EIS and ruled in an oral opinion[82] that the requirements of NEPA and the Mineral Leasing Act were met. The preliminary injunction was dissolved. However, the Court of Appeals for the District of Columbia ruled that the Mineral Leasing Act width requirements had been violated[83] and enjoined on this ground alone the construction of the pipeline.[84] Unfortunately, the court did not rule on the substantive adequacy of the Final EIS. Although the majority considered the EIS issue to be "remote" and rooted in disputed factual matters,[85] three judges[86] dissented on this question, stating that there was sufficient discussion of each alternative in the impact statement to meet NEPA requirements.[87]

As a consequence of the appellate court's failure to decide the NEPA compliance issue, that issue would have to be relitigated once Congress amended the Mineral Leasing Act to accomodate the Trans-Alaska Pipeline.[88] Judge Wright, writing for the majority, admitted that such a delay might well invalidate the Final EIS: "Should amendment of the [Mineral Leasing] Act take several years, the analysis of environmental, economic, and other costs in

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[79] Three volumes consist of an Analysis of the Economic and Security Aspects of the Trans-Alaska Pipeline, six volumes are properly the Environmental Impact Statement.

[80] Among alternatives discussed were a reduction in energy consumption, increased oil imports, additional domestic oil production in areas other than the North Slope, modification of FPC natural gas pricing, nuclear stimulation of natural gas reservoirs, increased coal production, increased use and development of nuclear energy sources, and development of synthetic fossil fuel sources, of geothermal power, and of other advanced power generation techniques. Myers, *supra* note 77, at 937.

[81] *See* Aleyeska brief, *supra* note 78, at 50-51.

[82] Wilderness Soc'y v. Morton, 4 Envt'l Rep. Cases 1467 (D.D.C. Aug. 15, 1970).

[83] Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973).

[84] *Id.*

[85] *Id.* at 889-90.

[86] Judges Robb and Wilkey joined in Judge McKinnon's concurring opinion.

[87] Wilderness Soc'y v. Morton, 479 F.2d 842, 907 (D.C. Cir. 1973).

[88] Judge Wright, writing for the court, foresaw congressional intervention as to this matter, but was uncertain when it might take place. *See* 479 F. Supp. at 889.

the present Impact Statement may become outdated."[89] Notwithstanding this danger, the United States Supreme Court denied certiorari,[90] thereby foreclosing further review of the decision.

Congress, recognizing the importance of the Alaskan project and wishing to avoid further NEPA litigation, speedily amended the Mineral Leasing Act[91] and simultaneously approved the Trans-Alaska Pipeline Authorization Act.[92] This latter Act authorized the immediate issuance of the pipeline permits and eliminated judicial review of the Final Impact Statement.[93] The judiciary had proven totally ineffective in resolving the Trans-Alaska problem, and congressional intervention was necessary. This judicial failure, compared with the legislative success in this grave problem, recommends the advisability of the legislative decisionmaking approach to other major environmental policy decisions.

V. Legislative Remand vs. Pre-Emption Legislation

A. *The "Remand to Congress" and Its Deficiencies*

At the height of the pipeline controversy, one commentator proposed that the litigation concerning the sufficiency of the Final Impact Statement take the form of a "remand to Congress."[94] This approach would have had the court enjoin the issuance of the pipeline permits, remanding to Congress the decision whether to exempt the entire project from NEPA's requirements.[95] The idea of a legislative remand was first suggested by Professor Sax,[96] who believed that public policy should not be made by the courts. He argued that the role of the courts is to ensure that the proper body is allowed to make a particular policy determination.[97] The judiciary in NEPA cases, therefore, need only determine whether Congress or the defendant agency is best suited to approve a particular federal project. This method could be utilized whenever a federal agency cannot

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[89] *Id.*

[90] Wilderness Soc'y v. Morton, 411 U.S. 917 (1973).

[91] Federal Lands Right-of-Way Act of 1973, Pub. L. No. 93-153, 87 Stat. 576 (Nov. 16, 1973), *amending* § 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1970).

[92] 43 U.S.C. §§ 1651 *et seq.* (Supp. I 1971).

[93] *Id.* See text at note 100, *infra.*

[94] *Judicial Standards, supra* note 20, at 1631-32.

[95] *Id.* Senator Dominick later interpreted the court of appeals decision in *Wilderness Society* to be a "legislative remand." *See* Dominick & Brody, *supra* note 71, at 350.

[96] J. Sax, Defending the Environment ch. 8 (1971).

[97] *Id.*

effectively comply with NEPA.[98] Remand would occur only if Congress is found better suited to render the decision.

Nevertheless, the remand approach requires prolonged litigation. An EIS would have to be litigated until the highest available appellate court determined which authority, the agency involved or Congress, is best equipped to authorize the project. In the Trans-Alaska controversy, however, the court of appeals enjoined the agency approval for failure to comply with a statute other than NEPA; that is, the Mineral Leasing Act. Standing alone, this did not constitute a true remand since NEPA litigation would have been reinstituted had Congress merely amended the Leasing Act. If the injunction were subsequently upheld on the basis of an EIS insufficiency, a "remand to Congress" might then have occurred. But, since Congress resolved the NEPA issue before the EIS insufficiency was affirmed, the solution to the pipeline litigation was more properly a pre-emption by, not a remand to, Congress.

The remand approach, while properly placing the power to make major environmental decisions in Congress, unfortunately requires a determination by the court of last resort that the particular case justifies congressional resolution. Consequently, the remand perpetuates those deficiencies of the judicial approach which pose such great obstacles to environmental litigation: expense and delay. On the other hand, the remand approach eliminates the problem of judicial inexpertise and prevents the formulation of major public policy by the courts.

B. The Case for Pre-emption Legislation

Pre-emption legislation, a modfication of the legislative remand, may be the best solution for controversies concerning the environmental impact of crucial federal projects. Pre-emption legislation takes effect prior to judicial action, thus conclusively deciding the matter at hand and foreclosing further judicial intervention.[99] This

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[98] *See Judicial Standards, supra* note 20, at 1639.

[99] One commentator considers the authorization act to be "constitutionally infirm." Comment, *The National Environmental Policy Act of 1969 And The Energy Crisis: The Road to Alaska,* 10 COLUM. J.L. & SOC. PROB. 265, 318 (1974). This view considers the authorization act to be a selective withdrawal of the right of particular environmental groups to litigate certain environmental issues and, hence, a violation of due process and equal protection. *Id.* at 321. Congress' modification of its own statute does not infringe upon any constitutional guarantees. Due process protection is guaranteed by the combination of § 102(2)(C) procedural requirements, while equal protection is assured by the fact that NEPA pre-emption legislation is directed to the Secretary of the Interior who represents every citizen. Dominick

alternative short-circuits those judicial deficiencies perpetuated by the legislative remand. Like the remand, however, it places the problem and its solution in the proper governmental sphere.

The Trans-Alaska Pipeline Authorization Act which resolved the TAPS litigation is a prototype of NEPA pre-emption legislation. This Act prevented further review of the NEPA issue by ordering that:

> The actions. . .which relate to the construction and completion of the pipeline system. . .as described in the Final Environmental Impact Statement of the Department of Interior, shall be taken without further action under the National Environmental Policy Act of 1969; and the actions. . .shall not be subject to judicial review.[100]

This resolution justifiably prevented further hazardous and costly delay of the project, eliminated the problem of judicial inexpertise,[101] and ensured the progress of a vital national undertaking.[102] However, the misfortune of the Authorization Act is that Congress waited so long to wrest from the courts an issue of such national and international importance. Since the Act[103] overruled all that the courts had taken a necessarily long time to decide, much time and expense could have been saved had Congress acted earlier. Pre-emption legislation is most advantageous when it anticipates, rather than responds to, litigation. In the future, Congress should be more willing to undertake a major role in environmental policy-making where large-scale projects substantially affect the national interest. Nonetheless, pre-emption legislation is too cumbersome a process to be used in all cases of federal environmental decision-making. The problem, then, is to delimit those situations in which pre-emption should be employed.

Factors which indicate the appropriateness of the remand ap-

& Brody, *supra* note 71, at 370. Further, Congress has inherent power to manage the public lands under Art. IV, § 3 of the Constitution.

[100] 43 U.S.C. § 1652(a) (Supp. I 1971).

[101] Judicial inexpertise would have been a relatively minor concern in any relitigation of *Wilderness Society* because both District Judge Hart and the District of Columbia Court of Appeals judges possess great familiarity with environmental disputes.

[102] Congress' findings of fact indicate that the "arbitrary and capricious" test had, in fact, been met by the project's Final Impact Statement:

> The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects end of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

43 U.S.C. §1651(b) (Supp. I 1971).

[103] In conjunction with the amendment of the Mineral Leasing Act.

proach are of limited value in determining the efficacy of the pre-emption approach. One commentator suggests that a legislative remand "has in effect stated that there are situations which may arise from time to time which require an exemption from the stringent requirements of NEPA."[104] This theory would limit remand to problems of "great magnitude"[105] to which Congress had previously devoted a great deal of attention.[106] Another writer lists seven factors to be balanced by a court when considering a remand to Congress: the extent of permissible administrative discretion, the magnitude of the threatened harm to the environment, the size of the project, the degree of sophistication of available project data, the amount of time and money already spent on attempted compliance with NEPA, the number of unsatisfactory prior impact statements, and procedural good faith.[107] Both of these formulations, however, are based on hindsight—the former looking to demonstrated congressional experience in the area, and the latter focusing upon the prior history of the particular project. Such factors, while useful in a remand situation, do not provide the necessary prediction required in a pre-emption decision.

Pre-emption legislation must be able to anticipate problems. A determination that pre-emption is proper should be based upon a prediction that a federal project will best proceed if Congress takes immediate and final action. Early consideration of "looking forward" factors, including project size, administrative discretion, threatened harm to the environment, available information, and anticipated savings of time and money, as well as administrative expertise, urgency of the project, and the extent to which the arbiter will be molding significant public policy, should enable Congress to correctly decide whether pre-emption is warranted.

If a lesson was taught by the TAPS litigation, the nation's legislators learned it well, for Congress wisely adopted a pre-emption approach with regard to the proposed Alaska "Natural Gas" Transportation System. Foreseeing the need for a governmental decision concerning the transportation of North Slope natural gas to domestic markets,[108] Title III of the Authorization Act directed the Interior

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[104] Dominick & Brody, *supra* note 71, at 361.

[105] *Id.* at 362.

[106] *Id.* at 363.

[107] *Judicial Standards*, *supra* note 20, at 1637-38.

[108] DEPARTMENT OF THE INTERIOR, ALASKAN NATURAL GAS TRANSPORTATION SYSTEMS, A REPORT TO THE CONGRESS PURSUANT TO PUBLIC LAW 93-153 (December, 1975), at 1.

Department to investigate the feasibility of natural gas pipeline transportation systems through Alaska and Canada.[109] After reviewing the findings of the requested study,[110] Congress set up a comprehensive mechanism "for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas"[111] and eliminated judicial review of project impact statements.

> The enactment of a joint resolution under section 719f of this title approving the decision of the President *shall be conclusive as to the legal and factual sufficiency of the environmental impact statements* submitted by the President relative to the approved transportation system and *no court shall have jurisdiction to consider questions respecting the sufficiency of such statements* under the National Environmental Policy Act of 1969.[112]

The Prudhoe Bay field holds the largest proven natural gas reserve in North America,[113] and "[t]he magnitude of the physical undertaking and cost of building a gas transportation system from Alaska apparently exceeds any prior U.S. private undertaking."[114] When Congress took action, three routes were under consideration, each with a massive EIS. Pre-emption in this case was, therefore, particularly appropriate.

VI. Conclusion

The National Environmental Policy Act of 1969 was designed to incorporate environmental considerations into the process by which federal agencies recommend and implement major federal projects. Nevertheless, judicial review of environmental impact statements has failed to promote environmental quality in large-scale undertakings. Congress must be prepared to decide major environmental decisions itself where to do so would best serve the interests of economy, efficiency and public policy. NEPA should not be served at the expense of democratic decisionmaking, particularly where strict adherence to the Act would result in needless litigation. Early pre-emption of NEPA review for crucial federal projects should become a standard tool of legislative policymaking.

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[109] 43 U.S.C. § 1651 (Supp. I 1971).

[110] *See Judicial Standards, supra* note 20.

[111] Alaska Natural Gas Transportation Act, 15 U.S.C.A. §§ 719 *et seq.* (Supp. 1976).

[112] *Id.* § 719(c)(3).

[113] El Paso Alaska Company, *et. al.*, Docket No. CP75-96, Federal Power Commission (Initial Decision On Competing Applications For An Alaskan Natural Gas Transportation Project) (Feb. 1, 1977), at 7.

[114] *Id.* at 9.