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Case Notes

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ENVIRONMENT—ENVIRONMENTAL IMPACT STATEMENT—An Airport Construction Project is Not Subject to the National Environmental Policy Act Until Federal Funds Are Allocated. *Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972).

The Department of Transportation granted a tentative allocation of federal funds to the Massachusetts Port Authority (Massport) for the development of an outer taxiway at Boston's Logan Airport. The construction threatened the surrounding area with increased noise and also threatened to disrupt the city's long-planned waterfront park.[1] Since no environmental impact statement had been filed pursuant to the National Environmental Policy Act,[2] the

[1] Boston v. Volpe, 464 F.2d 254, 256 (1st Cir. 1972). Boston is concerned with Massport's construction plans in view of its threats of noise and future harbor filling disrupting the continued viability of the city's plans to rehabilitate an adjacent area, Jeffries Point, where the city has long planned to construct a waterfront park for the deteriorated community.

[2] National Environmental Policy Act of 1969, § 102(2)(c), 42 U.S.C. § 4332(2)(c) (1970) provides:

> The Congress authorizes and directs that, to the fullest extent possible: . . .
> (2) all agencies of the Federal Government shall—
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided

city of Boston sought to enjoin the project,[3] which allegedly threatened to irreparably damage the environment, contending that the tentative allocation of funds raised federal question jurisdiction under the NEPA.[4] The trial court denied the city's motion for a preliminary injunction. *Held, affirmed*: An airport project is not "federalized" until federal funds are allocated. Until then, a project is not subject to the provisions, requirements or policies of the NEPA. *Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972).

Before a project is "federalized" there is no duty to file an environmental impact statement. Although the impact statement is a precondition to the expenditure of federal funds, failure to file the statement will not preclude state-funded construction because the NEPA is not yet applicable. The First Circuit, noting that environmental policies will be undermined if a state project is allowed to damage the environment,[5] cautioned that when a state authority expecting federal aid commences construction prior to final federal approval, it proceeds at its own risk: "[T]he options of the federal agency become increasingly limited to bald approval or rejection with no opportunity for modification."[6] Consequently, a state will jeopardize its chances of obtaining future federal funds for a specific project if it is not sensitive to its environmental obligations.

Although the First Circuit would not enjoin construction pending the filing of an environmental impact statement, Massport was warned that their requests for federal funds may be denied if the environment is damaged by the pre-federally funded construction.[7]

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by section 552 of Title 5 (United States Code) and shall accompany the proposal through the existing agency review processes . . .

[3] A suit for temporary injunction is the common judicial relief used to require federal agencies to fulfill the mandate of the NEPA and submit environmental impact statements. *See* Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971) (property acquisition for interstate highway enjoined pending preparation of NEPA Section 102 environmental impact statement); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) (timber cutting and road construction enjoined pending preparation of NEPA Section 102 statement); Environmental Defense Fund, Inc. v. Corps of Eng. of U.S. Army, 325 F. Supp. 749 (E.D. Ark. 1971) (Gilham Dam project enjoined pending preparation of proper NEPA Section 102 statement); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971) (highrise housing project enjoined for failure to prepare NEPA Section 102 statement).

[4] 42 U.S.C. § 4321 et seq. (1970).

[5] Boston v. Volpe, 464 F.2d 254, 259-60 (1st Cir. 1972).

[6] *Id.* at 260.

[7] *Id.*

In addition, the court indicated that "with minor exceptions, federal aid cannot be awarded for costs incurred prior to the execution of the grant agreement."[8] As a result, the longer Massport delays filing the impact statement and continues construction, the less federal funding it can expect to receive.

The city of Boston argued that the project became "federalized" when a tentative allocation of federal funds was made and therefore construction must stop until a satisfactory environmental impact statement has been issued.[9] The city urged that a tentative allocation of funds for an airport project is analagous to a tentative allocation of federal funds for a highway project, and since a highway becomes subject to the NEPA prior to the expenditure of federal funds,[10] the same result should be reached when no federal funds have been expended on an airport project. The First Circuit, however, rejected this argument, reasoning that while federal-aid highway planning is carried out in a "system" of discrete stages, each requiring federal approval, the federal-aid scheme for airports contemplates a single decision whether to fund the project.[11] A highway system, therefore, is "federalized" upon receiving "location approval," even though this is prior to the actual allocation of federal funds, because approval of the design, plans and construction will still be required.[12]

The First Circuit reasoned that since only one decision is made in the airport-aid situation, the decision to allocate must be determinative of when an airport project becomes subject to the NEPA requirement of an environmental impact statement. As a result,

[8] *Id.* at n.8.

[9] *Id.* at 258. After the environmental impact statement has been issued, it must be filed with the Council on Environmental Quality, 42 U.S.C. §§ 4341-47 (1970). The Council on Environmental Quality has established guidelines for federal agencies in compliance with the mandate of the NEPA. These guidelines require an agency to assess its major action's potential environmental impact, establish and explore alternatives that will minimize any adverse impact, and establish methods for identifying actions requiring environmental impact statements; BNA Environmental Rptr.—Federal Laws, 71:0301, at paragraphs 1, 2, and 3(a). These guidelines have pervasive value in courts for determining the standards to which an agency must adhere. *See* Udall v. Tallman, 380 U.S. 1 (1965); Unemployment Comm'n v. Aragon, 329 U.S. 143 (1946).

[10] La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971) (a case with a similar fact situation as the facts under consideration here; however, the injunction sought and *granted* concerned the continuation of a highway project).

[11] 464 F.2d at 258-59.

[12] *Id.* at 259.

analogies drawn to the federal-aid highway practice were held not controlling.

This distinction ignores the policy of the NEPA. The common issue in both the highway-aid and airport-aid situations focuses upon the enforcement of a procedural requirement of the NEPA—the filing of an environmental impact statement. The federal statutes cannot protect the environment as intended unless they are applied "*prior* to the time that the deleterious effects to the environment have taken place."[13] The highway-aid cases have recognized:

> the protections that Congress has sought to establish would be futile gestures were a state able to ignore the spirit (and letter) of the various acts and regulations until it actually receives funds.[14]

The First Circuit in *Boston v. Volpe*, citing *La Raza Unida v. Volpe*[15] as a typical highway-aid case, implicitly rejected this argument by distinguishing highway cases as subject to earlier federalization. The real significance of the highway decisions is the recognition that the purpose of the environmental acts necessitates early federal intervention. The federal district court in *La Raza* specifically rejected the contention that federal funding is the sole criteria determining whether a highway project is subject to the NEPA, not because a highway project is a "system" and therefore "federalized" when agency approval is first required as the First Circuit held, but rather because if funding were the sole criteria, a state could ignore the purpose of the act by damaging the environment first and seeking federal-aid later.

In *Boston v. Volpe* the city sought to prevent environmental destruction. The *La Raza* "result oriented approach" should be applicable to all state projects whether highway or airport because this approach furthers the congressional intent to protect the environment. The destructive effect on the environment during these initial stages is often as great as for the completed project. Indeed, the initial effects may be irreparable even without completion of the project.[16] If this approach is utilized, when a local government requests federal funding it will assume a responsibility to protect the environment; this responsibility should not be avoided merely

[13] La Raza Unida v. Volpe, 337 F. Supp. 221, 231 (N.D. Cal. 1971).

[14] *Id.*

[15] 337 F. Supp. 221 (N.D. Cal. 1971).

[16] *See* note 1 *supra.*

because state funds are being used prior to final federal-fund allocation.

Massport's involvement with the federal agencies is clear; three steps had occurred: (i) the airport, although fully empowered to raise and spend funds, "requested" a federal grant;[17] (ii) the federal agency made a "tentative allocation" of funds;[18] and (iii) the airport submitted a formal application for approval.[19] Since Massport chose to involve itself with the federal agency early in the project's construction rather than to sustain the financial burden involved with the construction of an outer taxiway for Logan Airport with purely state funds, the airport project was at a juncture and ripe for the application of the environmental policy requirements.

This expression of environmental policy is supported by the Fifth Circuit decision in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*,[20] a case footnoted but not expressly discussed in *Boston v. Volpe*. The Fifth Circuit noted that a state is not forced to seek federal funds or to accept federal participation in a highway project. A state enters into a federal relationship with its "eyes open having more than adequate warning of the controversial nature of the project and of the applicable law."[21] The court stressed the voluntary nature of the state's request for federal participation and concluded that this involvement was sufficient to subject the project to federal statutes even though federal participation had not actually commenced. The Fifth Circuit's reasoning de-emphasized the "funding" issue, concluding that the state could not circumvent the environmental laws by funding the highway project itself. Accordingly, the highway project was a federal project and was subject to the federal laws intended to preserve the environmental quality; the state, as a partner in the project, could not subvert the principle of federal supremacy by a mere change in bookkeeping or by shifting funds from one project to another.[22] The Fifth Circuit did not base its decision upon a concept of "highway location ap-

[17] 14 C.F.R. § 151.21(a).
[18] 14 C.F.R. § 151.21(b).
[19] 14 C.F.R. § 151.21(c).
[20] 446 F.2d 1013 (5th Cir. 1971).
[21] *Id.* at 1028.
[22] *Id.* at 1027.

proval," which was the First Circuit's basis for distinguishing highway cases in *Boston v. Volpe*, nor did the Fifth Circuit look to actual fund allocation; rather the determination was based on voluntary involvement with federal funding and participation. Since the circuits conflict in determining when a project becomes "federalized" and subject to the federal environmental requirements, it is appropriate to examine the congressional intent leading to the adoption of these requirements.

When Congress enacted the NEPA, the primary objective was:

> to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action, and to assist agencies in implementing not only the *letter*, but the *spirit* of the act.[23]

The NEPA, as originally introduced[24] by Senator Jackson, did not provide for the preparation of environmental statements. Although the purpose of the Act was "to establish . . . a national policy to guide Federal activities [that] are involved with, or related to the management of the environment, or [that] have an impact on the quality of the environment,"[25] the statute was not intended simply to be permissive. It was designed to achieve results.[26] After the adequacy of a mere declaration of environmental policy that had no "action-forcing mechanism"[27] was questioned in the Senate

[23] BNA Environmental Rptr.—Federal Laws, 71:0301, para. 1 (1970).

[24] For the legislative history of S. 1075 *see* S. Rep. No. 91-296, 91st Cong., 1st Sess. 8-11 (1969).

[25] S. Rep. No. 91-296, 91st Cong., 1st Sess. 8 (1969).

[26] *Id.* at 9 (emphasis added): A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation. *But, if goals and principles are to be effective, they must be capable of being applied in action.* S. 1075 thus incorporates certain "action-forcing" provisions and procedures which are designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment.

[27] Hearings on S. 1075, S. 237, and S. 1752 before the Senate Interior and Insular Affairs Comm., 91st Cong., 1st Sess. 116 (1969): "It seems to me that a statement of policy by the Congress should at least consider measures to require the Federal agencies, in submitting proposals, to contain within the proposals an evaluation of the effect of these proposals on the state of the environment . . . It would not be enough, it seems to me, when we speak of policy, to think that a mere statement of desirable outcomes would be sufficient to give us the foundation that we need for a vigorous program of what I would call national defense against environmental degradation. We need something that is firm, clear, and operational."

hearings,[28] Senator Jackson expressed misgivings about submitting an act that did not go beyond "lofty declarations."[29] The bill was amended to impose specific requirements upon all federal agencies.[30] Accordingly, the requirement that all agencies submit a statement on the environmenal impact of proposed action was added to assure compliance "to the fullest extent possible"[31] with the Act's directives and policies.

This requirement was also designed to insure that no agency would utilize an excessively narrow construction of its existing statutory authorization to avoid compliance.[32]

The District of Columbia Circuit Court emphasized this congressional intent in *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission*[33] when that court "laid down the law" to federal agencies and swept aside a number of dilatory tactics used by agencies to avoid implementation of the NEPA. The court in *Calvert Cliffs* interpreted the NEPA literally to make "*environmental protection a part of the mandate of every federal agency*"[34] and established the rule that the NEPA is not to be trifled with by federal agencies.[35]

An alternate theory for relief in *Boston v. Volpe* was based on the Airport and Airway Development Act.[36] The AADA, which modifies the NEPA and applies it to airport development projects, mandates that airport projects "provide for the protection and enhancement of the natural resources and quality of environment."[37]

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[28] *Id.*

[29] *Id.*

[30] *Id.* at 117: "You see, the problem we are faced with, if we try to go through all the agencies that are now existing with certain responsibilities pursuant to law in which there is not environmental policy or standard laid out, we could be engaged in a recodification of the Federal statutes for a long, long time. But maybe there is a way out of this through a directive and delegation to the Bureau of the Budget of Authority which they could, in turn, exercise with prudence and discretion in requiring that the environmental policies and standards be adhered to in connection with the responsibilities of the Federal Establishment."

[31] U.S. CODE CONG. AND ADMIN. NEWS, 91st Cong., 1st Sess., 2770 (1969).

[32] *Id.*

[33] 449 F.2d 1109 (D.C. Cir. 1971).

[34] *Id.* at 1112 (emphasis added).

[35] *Id.*

[36] 49 U.S.C. §§ 1711--27 (1970).

[37] Airport and Airway Development Act of 1970, § 16(c)(4), 49 U.S.C. § 1716(c)(4) (1970). Although § 1716(c)(1) of the AADA specifically states

While all agencies are charged with the responsibility to implement the NEPA, the AADA charges the Secretary of Transportation with the specific duty to carry out the letter and the spirit of the Act.

The "letter" is the procedural requirements of the AADA. The Secretary of Transportation must consult with the Secretaries of the Interior, Health, Education and Welfare, and Agriculture and, after integrating his view with theirs,[38] reach a final decision concerning the effects of a proposed airport project. If the Secretary determines the project will have an adverse effect on the environment, he cannot grant approval unless he determines that no feasible alternative exists and takes all possible steps to minimize the adverse effects.[39]

The "spirit" of the AADA is the Congressional concern for the environment. Although the NEPA is broad enough to include airport development, Congress felt that the urgency of the environmental problem in the sensitive area of airport development necessitated passage of the AADA. The explicit environmental policy of the AADA combined with the more general policy of the NEPA clearly demonstrates an intense concern of Congress and the nation for the problems and responsibilities of environmental protection and conservation.

The holding in *Boston v. Volpe* that these Acts do not apply to an airport development project until the federal funds are actually received is contrary to this clear manifestation of Congressional intent. Although the logic of the First Circuit is valid, the result cannot be justified as a matter of policy. If the goal of environ-

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that "*all* airport development projects are subject to the approval of the Secretary of Transportation," courts interpret this phrase to refer only to *federally funded* airport development projects. *See* New Windsor v. Ronan, 329 F. Supp. 1286 (S.D.N.Y. 1971); Inglewood v. Los Angeles, 451 F.2d 948 (9th Cir. 1971). No interpretation has been issued by the courts construing when a project takes on the characteristics of being "funded." Since the environmental policy is controlled through funding, the city in *Boston v. Volpe* could have argued that a tentative federal fund allocation, as a result of Massport submitting an application for funds placed an airport project in the category of a federal project subject to the environmental policy of the AADA, because it is just prior to the actual fund allocation that the environmental policy can be most effectively enforced.

[38] 2 U.S. CODE CONG. & ADMIN. NEWS 3047, 3057 (1970).

[39] *Id.* at 3057-58. The same responsibility vested in the Secretary of Transportation in the AADA is comparable to that contained in Section 4(f) of the Department of Transportation Act of 1966.

mental protection is to be realized, the NEPA and the AADA must apply prior to the actual receipt of federal funds.

The First Circuit could have achieved this goal by granting a temporary injunction halting construction until the environmental impact statement was approved in compliance with the procedures of the NEPA. Although the First Circuit recognized that any negative environmental result of the construction would eventually obstruct the airport's chances for federal funding, the court failed to acknowledge that the negative environmental effects might have irreversible consequences.[40] Rather than the indirect threat of loss of federal funding, the direct approach of requiring compliance with the NEPA after federal participation by tentative allocation of funds is more consistent with the clear mandate of the Act. If an environmental policy is to become more than rhetoric, agencies must be directed to participate in active and objective-oriented environmental management before the environment is subjected to irreparable damage.[41]

Elliott Garsek

ENVIRONMENT—FEDERAL AGENCY ACTIONS—Federal Aviation Agency Operations at a Completed Airport Are Not Governed by the Procedures of the National Environmental Policy Act. *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E. D. Vir. 1972).

Citizens living near Washington National Airport brought a class action for injunctive and declaratory relief against the Federal Aviation Agency seeking the elimination of all jet aircraft operations from the airport because of alleged pollution from aircraft emissions and increased aircraft noise. Plaintiffs urged that the FAA's operation of the airport violated provisions of the National Environmental Policy Act.[1] *Held: Complaint dismissed.* The

[40] *See* note 1 *supra.*

[41] Environmental Defense Fund v. Corps of Eng. of U.S. Army, 348 F. Supp. 916, 927 at n.17 (N.D. Miss. 1972).

[1] 42 U.S.C. § 4321 et seq. (1970). It should be noted at this point that plaintiffs raised two other theories in their complaint that will not be directly discussed: (i) The FAA actions are arbitrary, capricious, and constitute an abuse of discre-

FAA's operation of Washington's National Airport is outside the requirements of the NEPA. The airport had reached a stage of completion making application of the Act to the ongoing operations at Washington National no longer practicable.[2] *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Vir. 1972).

The district court in *Virginians for Dulles* has delineated an exception to the National Environmental Policy Act. This exception is in contradistinction to the strong Congressional mandate in the NEPA that all federal agencies act to preserve and protect the natural environment. Thus, it is apparent that there is a conflict between the Congress' policy of strict agency compliance and the court's allowing exceptions to the Act's requirements.

I. THE *NEPA*, ITS PURPOSE AND MANDATE

The National Environmental Policy Act is an expression of Congress' great concern for the national environment.[3] The purpose of the Act is to ensure that all federal agencies consider values of environmental preservation in their respective spheres of activity.[4] Section 4332 of the NEPA prescribes certain procedural measures that will ensure these values are respected. The Environmental Policy Act, however, does more than compel federal agencies to consider environmental factors in making decisions; it provides a basis for challenging an agency's decision that may be detrimental to the environment.[5]

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tion. The court in *Virginians* refused to review the adequacy of the FAA pollution regulations under the Administrative Procedure Act because this review would constitute an interference with the discretionary function of the FAA. The court did not wish to disturb the agency's role as expert. *See*, Davis, *Unreviewable Administrative Actions*, 15 F.R.D. 411 (1954); Patton v. Administrator of Civil Aeronautics, 112 F. Supp. 817 (D.C. Alaska 1953), *rev'd on other grounds*, 217 F.2d 395 (9th Cir. 1954). *See generally*, Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949); Ferris v. Wilbur, 27 F.2d 262 (4th Cir. 1928). (ii) Plaintiffs also raised constitutional issues. These issues, however, are unrelated to the subject at hand.

[2] Virginians for Dulles v. Volpe, 344 F. Supp. 573, 577 (E.D. Vir. 1972). The court also found that introduction of the Boeing 727-200 "stretch" jet at Washington National was not a new "major federal action" requiring an environmental impact statement under the NEPA.

[3] 42 U.S.C. §§ 4321-4331 (1970).

[4] *Id.* at § 4332.

[5] Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972). *See* Sive, *Some Thoughts of an*

The Supreme Court, in *Citizens to Preserve Overton Park v. Volpe*,[6] stated that the standard by which a court may review an agency's actions is provided by the law pertinent to that agency. Congress has made the NEPA pertinent to "all agencies of the [f]ederal [g]overnment"[7]; the standard applicable to the FAA is provided in section 4332. This section demands that certain procedural functions be followed "to the fullest extent possible." Part (2) (C) of section 4332 provides for the most important of these procedures—the environmental impact statement. The impact statement must be prepared whenever an agency undertakes a "major federal action significantly affecting the quality of the human environment." There must be included in the impact statement a detailed analysis of the impact of the proposed action, the adverse environmental effects of the project and alternatives to the project. The data in the impact statement can then be used by a reviewing court to determine whether the agency has acted arbitrarily *vis-a-vis* the environment.

The District of Columbia Circuit Court, in *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*,[8] offered a comprehensive analysis of the NEPA's effect on agency procedures and projects. The issue in *Calvert Cliffs'* was the application of the NEPA to the hearing procedures the Atomic Energy Commission had promulgated to determine the environmental feasibility of proposed installations. The court found the intent of Congress to be that the Environmental Policy Act should be strictly applied to agency actions:

> Congress did not intend the Act to be a paper tiger. Indeed, the requirement of environmental consideration to the fullest extent possible sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing court.[9]

Environmental Lawyer in the Wilderness of Administrative Law, 70 COLUM. L. REV. 612 (1970); Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971).

[6] 401 U.S. 402 (1971).

[7] 42 U.S.C. § 4332(2) (1970).

[8] 449 F.2d 1109 (D.C. Cir. 1971).

[9] *Id.* at 1114. *See* Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Conservation Society of Southern Vermont v. Volpe, 343 F. Supp. 761 (D. Vt. 1972); Environmental Law Fund v. Volpe, 340 F. Supp. 1328 (N.D. Cal. 1972); Environmental Defense Fund v. Tennessee Valley Auth., 339 F. Supp. 806 (E.D. Tenn. 1972); Morningside-Lenox Park Assoc. v. Volpe, 334 F. Supp. 132 (N.D. Ga.

Accordingly, the court compelled the AEC to adapt its hearing process to the procedures of the NEPA.

This strict interpretation is supported by the Congressional history of the Act. The Congressional Conference Committee Report on the National Environmental Policy Act stated:

> [T]he language of Section [4332] is intended to assure that all agencies of the Federal Government shall comply with the directives set out in the said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.[10]

The *Calvert Cliffs'* decision, however, did not find that environmental protection was the exclusive goal of Congress in enacting the NEPA. Instead, the court determined that the Act requires a reordering of priorities; environmental considerations are to be elevated to an equal position with the primary concerns of the agencies.[11] For example, the Atomic Energy Commission is charged with the rapid development of safe sources of atomic power. The Environmental Policy Act will compel the AEC to consider the environmental consequences of its actions in addition to the development of atomic energy.[12] The NEPA, therefore, forces the agencies to engage in a balancing process considering both environmental and non-environmental interests before decisions affecting the environment are made.[13]

When an agency finds that a proposed project may have an adverse environmental impact, the project does not necessarily have to be abandoned or altered. A majority of courts that have considered this issue, including the court in *Calvert Cliffs'*, have interpreted the NEPA to require that agency action will have to be

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1971); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1970); Texas Committee on Natural Resources v. United States, (W.D. Tex.) 1 Envir. Rpts.—Cas. 1303, 1304 (1970).

[10] Conf. Rep. No. 91-765, 91st Cong., 1st Sess., 2 U.S. CODE CONG. & ADMIN. NEWS 2767, 2770 (1969). For the opinion of the Council on Environmental Quality, *see* 26 FED. REG. 7724 (April 23, 1971).

[11] Calvert Cliffs' v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971). *See* 42 U.S.C. § 4335 (1970).

[12] Calvert Cliffs' v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

[13] *Id. See* Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

altered only to the extent practicable under the circumstances.[14] The mandate of the Environmental Policy Act is not that environmental concerns should be controlling, but that these concerns should always be given full and fair consideration in the federal agencies' decision-making process.

II. An Exception to the NEPA

In *Virginians for Dulles v. Volpe*, the district court found that the Federal Aviation Administration's activities at Washington National Airport were not within the ambit of the NEPA, and therefore, the FAA is not required to consider the environmental consequences of its actions. This conclusion is primarily based upon dicta found in *Arlington Coalition v. Volpe*.[15]

Arlington, a Fourth Circuit decision, concerned an "ongoing" project, *i.e.*, a project commenced prior to January 1, 1970, the effective date of the NEPA. Plaintiffs sought to enjoin this "ongoing" highway project because the Department of Transportation had not filed an environmental impact statement. Although the Department of Transportation action was enjoined and compliance with the Environmental Policy Act was required, the court outlined the limits of the Act's application to ongoing projects. Only ongoing projects that can "practicably" be subjected to NEPA requirements were deemed within the Act. In reaching this conclusion, the Fourth Circuit employed a "balancing of interests" test:

> At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be 'possible' to change the project in accordance with Section [4332].[16]

In *Virginians for Dulles*, Washington National Airport was found to be an ongoing federal project and that modification of its operation would prove to be harmful.[17] In particular, the court

[14] Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Environmental Law Fund v. Volpe, 340 F. Supp. 1328 (N.D. Cal. 1972); Elliot v. Volpe, 328 F. Supp. 831 (D. Mass. 1971); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970). Other courts have used a "feasible and prudent" standard. *See, e.g.*, Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972).

[15] 458 F.2d 1323 (4th Cir. 1972).

[16] *Id.* at 1331.

[17] Virginians for Dulles v. Volpe, 344 F. Supp. 573, 577 (E.D. Vir. 1972).

noted the economic importance of the airport to the city of Washington and the prominence of Washington National in the national scheme of air commerce.[18] The court reasoned that the economic detriment arising from the alternation of an established airport clearly outweighed any possible ecological benefit created by application of the Environmental Policy Act.

The effect of *Virginians for Dulles* is a significant broadening of the exception described in *Arlington. Arlington* dealt with a highway project—*i.e.*, a project, which after its completion, would involve little or no discretionary decision-making in its use. The Federal Aviation Administration's operation of Washington National Airport, on the other hand, involves discretionary decision-making.[19] The exception outlined in *Virginians for Dulles* excludes from NEPA requirements a federal agency's activities at an installation completed or nearly completed prior to the effective date of the Act. The manner in which an agency operates a federal airport, dam or atomic energy plant significantly affects the quality of the human environment; the time at which the project was "completed" will not change this effect. Therefore, a project initiated prior to January 1, 1970, should be within the Environmental Policy Act if discretionary decision-making continues after that date.[20]

Courts reviewing agency actions have found most ongoing federal projects to be "major federal actions" significantly affecting the environment, and consequently, bound by the requirements of the NEPA,[21] particularly when the future exercise of discretion by the agency was involved. For example, in *Environmental Defense Fund v. Tennessee Valley Authority*,[22] the district court compelled the TVA to apply Environmental Policy Act procedures to a dam

[18] *Id.* at 576.

[19] An excellent example of the discretionary decision-making of the FAA at Washington National are the five anti-pollution regulations listed in *Virginians for Dulles*, 344 F. Supp. at 575.

[20] *See* Note, 39 TENN. L. REV. 735 (1972).

[21] Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Calvert Cliffs' Coord. Com. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972); Conservation Society of Southern Vermont v. Volpe, 343 F. Supp. 761 (D. Vt. 1972); Environmental Law Fund v. Volpe, 340 F. Supp. 1328 (N.D. Cal. 1972); Morningside Lenox Park Assoc. v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1970).

[22] 339 F. Supp. 806 (E.D. Tenn. 1972).

project that was initiated in 1966. This project was implemented in stages with a substantial amount of discretionary decision-making occurring after January 1, 1970. Application of the NEPA was held resonable because discretion was involved. The presence of discretion was a strong indication to the court that the uncompleted stages of the project could be altered if important ecological considerations so dictated.

In *Pennsylvania Environmental Council v. Bartlett*,[23] the district court refused to apply the NEPA to a highway project that was complete except for a final inspection. The court's refusal to apply the Act was based largely on the ground that no "discretionary federal administrative action" was to take place after January 1, 1970. Since the project was virtually inalterable by the time the NEPA went into effect, the court could find no reason to apply the Act.[24]

The significance of these decisions is that discretionary agency decision-making after January 1, 1970, is an important, and possibly a conclusive, factor to be considered by the courts in determining whether the Environmental Policy Act should apply to a particular project. The presence of discretion indicates modification of present agency procedures or plans is at least possible. This factor should be given decisive weight by the courts.

III. Conclusion

The National Environmental Policy Act was designed to prevent the agencies of the federal government from engaging in conduct detrimental to the environment. The mandate of the NEPA is both strict and comprehensive: any federal action having a significant effect on the environment must comply with the Act's procedures.

The exception that the courts have placed upon the Congress' mandate is valid. As observed in *Arlington Coalition*, some projects have reached a stage of completion that alternation for environmental or any other purpose would be impossible. In these cases, filing an environmental impact statement would be both wasteful and futile. The exception, however, should be limited to

[23] 315 F. Supp. 238 (M.D. Pa. 1970).

[24] *See* Elliott v. Volpe, 328 F. Supp. 831 (D. Mass. 1971); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970).

situations when no discretion is left with the agency. Moreover, if modification of either the project or of the procedures in operating it is reasonable, the congressional mandate demands that the NEPA apply.

The Federal Aviation Administration's operations at Washington National Airport exhibit a high degree of discretionary decision-making. The character of the anti-pollution regulations at the airport are a product of this discretionary decision-making process. Alternation of these regulations is, therefore, possible. The court in *Virginians for Dulles* should have followed the trend utilized in other areas of "ongoing" federal projects and compelled the Federal Aviation Agency to file an environmental impact statement on its regulations. Only if this is done can the public and the courts reasonably judge the adequancy of the FAA's regulations.

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