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COMMENTS

APPLYING THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 TO ONGOING FEDERAL PROJECTS

by Burk E. Bishop

One of the more significant additions to the federal court dockets is the environmental suit. A federal judge recently gave judicial recognition to the fact that "[e]cology looms as the issue of the decade."¹ This concern with the environment is reflected in all of our national institutions. It has been said "that no man [can run] for national office without declaring himself to be an environmentalist . . ."² Political concern is reflected in an impressive array of new environmental statutes, on both the federal and state level.³ The executive branch has voiced its concern for the preservation and restoration of the ecosystem.⁴ The courts are faced with "the beginning of what promises to be a flood of new litigation,"⁵ primarily under the National Environmental Policy Act of 1969 (NEPA).⁶ It is some of this litigation that will be discussed in this Comment.

I. AN ILLUSTRATIVE CASE

It is advisable to put the various problems into the perspective of an actual case. *Sierra Club v. Froehlke*⁷ is presently pending in the Southern District of Texas, and is a fairly representative example of the problems to be examined.

The plaintiffs⁸ joined in opposition to the Trinity River Navigation Project and, more particularly, the Wallisville Dam which is currently under construction near the mouth of the Trinity. They claimed that the project as a whole will destroy bottom land and trees, drive various species of fish and wildlife from their natural habitats, and foster industrialization along the canal which will in turn "reduce the free-flowing Trinity River to a series of placid pools with stagnant and polluted water."⁹ The Wallisville Dam, according to

¹ *Camp May County Chapter, Inc. v. Macchia*, 329 F. Supp. 504, 506 (D.N.J. 1971).

² Kitzmiller, *Federal Legislation: What's Happening on Capitol Hill*, in ENVIRONMENTAL LAW 61 (C. Hassett ed. 1971).

³ In addition to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970), see such federal laws as the Water Quality Improvement Act of 1970, tit. I, 84 Stat. 91 (codified in scattered sections of 33, 42 U.S.C.), and such state laws as the Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, MICH. STAT. ANN. §§ 691.1201-1207 (1970). For a more complete discussion of the federal laws involved in the environmental area, see text accompanying notes 17-50 *infra*.

⁴ Environmental Message, reprinted in ENV. REP.: FED. LAWS 21:0321 (1971).

⁵ *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

⁶ 42 U.S.C. §§ 4321-47 (1970).

⁷ Civil No. 71-H-983 (S.D. Tex. 1971).

⁸ The plaintiffs include several conservation organizations from the Houston area, a commercial fishermen's organization, and landowners along the lower Trinity. The obvious reason for the joinder of such a diverse group is to insure standing to sue. The recent Supreme Court decision in *Sierra Club v. Morton*, 92 S. Ct. 1361 (1972), while denying the standing of the Sierra Club to challenge the Mineral King Mountain resort complex, laid out fairly clear criteria for standing in environmental suits. For additional discussion of the law of standing in the environmental context, see J. BRECHER & M. NESTLE, ENVIRONMENTAL LAW HANDBOOK 102-07 (1971); Sive, *Availability of Injunctive and Declarative Relief in Private Suits*, in ENVIRONMENTAL LAW 21, 24-30 (C. Hassett ed. 1971).

⁹ Plaintiff's Complaint at 7, *Sierra Club v. Froehlke*, Civil No. 71-H-983 (S.D. Tex.

the plaintiffs, will destroy nursery grounds for various species of fish, render the area less useful for hunting and fishing, and generally reduce the area to a polluted lake.¹⁰ The plaintiffs alleged violations of both the procedural requirements of the NEPA and the substantive duties which they contend the Act creates.¹¹

The original defendants were the Secretary of the Army, the Chief of Engineers, and the District Engineer. The Trinity River Authority of Texas intervened as a defendant to protect its interest in the project. The Authority's answer revealed that the Trinity River Project and the Wallisville Dam are separate and distinct projects. The dam was authorized by Congress in 1962 and the Navigation Project in 1965. The Authority noted that construction of the dam began in 1968 and is now approximately one-half complete, while other elements of the Wallisville system have been completed. However, the Trinity Project is still in the early stages of planning. An environmental impact statement as required by the NEPA was filed regarding the dam, despite the Authority's contention that the Act is not applicable. The Authority also cited the economic, social, and environmental benefits of both the dam and the Navigation Project.¹²

This case is illustrative of the two major issues with which this Comment will deal. First, should the provisions of the Act be applied to projects which were begun before its passage? The Wallisville Dam was authorized in 1962, and construction on it is now half complete. The Trinity River Navigation Project was authorized in 1965, but little money has yet been spent and little planning accomplished. Should the Act be applied to one or both of these projects; and, if applied to both, should it be to the same extent or with recognition of the respective stages of completion? Second, if the provisions of the Act are applied, what issues are reviewable by the court? May the court examine only compliance with the procedural requirements of the Act, or can the plaintiffs challenge the adequacy of the environmental statement and the agency decision to proceed despite harmful environmental consequences? The resolution of each of these issues is dependent upon the answer to the other. Since the court's latitude in reviewing agency action under the Act helps define the issue of retroactive application of the Act, the scope of review will be discussed first.

II. THE SCOPE OF REVIEW

A. *Classifying Environmental Insults*

One can scarcely deny that our environment is in trouble. One author states that the gist of the ecological problem is the pursuit of a goal of infinite growth on a finite planet.¹³ Others state that the ultimate solution to environ-

1971). Opposition to the Trinity River Project is not new, nor has it been based exclusively on environmental concerns. See Drew, *Dam Outrage: The Story of the Army Engineers*, ATLANTIC, Apr. 1970, at 53.

¹⁰ Plaintiff's Complaint, *supra* note 9, at 7-8.

¹¹ See section III *infra*.

¹² Motion of the Trinity River Authority To Intervene as a Defendant, *Sierra Club v. Froehlke*, Civil No. 71-H-983 (S.D. Tex. 1971).

¹³ TIME, Feb. 2, 1970, at 63.

mental decay can only be found in population control. The estimates range from inconvenience to catastrophe, but there is no doubt that the problem does exist, and that it deserves some place on the ladder of national priorities.

The threats to the environment generally fall into four main classes. The first class consists of degradable water pollutants and solid wastes. These are the most easily recognized, and the least difficult to solve from a technical standpoint. The second class, non-persistent air pollutants, is similarly susceptible to technical solutions, although these pollutants often present more difficult problems. The third class, persistent toxic pollutants, such as DDT, is less vulnerable to our present technology, and such pollutants may have only speculative effects. The final class of pollutants includes all those activities which do not themselves introduce pollutants, but nevertheless cause major environmental changes. A dam and power plant, for example, result in irreversible changes in land use, alter wildlife distribution, and produce waste heat which must be dissipated into the biosphere. This last class is the most difficult with which to cope, since it involves problems which do not become evident until many years have passed, and demands solutions entailing serious social sacrifices.¹⁴

B. *The Place of the NEPA in the Scheme of Environmental Improvement*

To interpret the NEPA intelligently, its place in the present scheme of regulation must be identified and the class of environmental insults to which it was addressed isolated. The conceptual organization of the Act is threefold; it includes a declaration of a national policy of environmental preservation, a procedure by which federal agencies are to report their observance of these goals in decision-making, and the institutionalization of environmental concerns in the Council on Environmental Quality.¹⁵

The significant portion of the Act as far as environmental litigation is concerned is section 102(C).¹⁶ That section requires an impact statement to

¹⁴Rathjens, *National Environmental Policy: Goals and Priorities*, in ENVIRONMENTAL CONTROL: PRIORITIES, POLICIES, AND THE LAW 11, 22 (F. Grad ed. 1971). See also S. BLOOM, HEAT—A GROWING WATER POLLUTION PROBLEM 1-3 (Environmental Law Reporter Monograph No. 4, 1970); John, *Thermal Pollution: A Potential Threat to Our Aquatic Environment*, 1 ENVIRONMENTAL AFFAIRS 287 (1971).

¹⁵Reilly, *The National Environmental Policy Act and the Federal Highway Program: Merging Administrative Traffic*, 20 CATH. U.L. REV. 26 (1970).

¹⁶42 U.S.C. § 4332c (1970). Pertinent provisions are as follows:

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach . . . in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environ-

be submitted to the Council on Environmental Quality for every report on legislation or "other major federal action significantly affecting the quality of human environment." The statement must set out all possible effects of the project on the environment and the possible alternatives to the project. The lack (or insufficiency) of the impact statement is at the heart of virtually every case decided under the NEPA.

Other Statutes Concerning Environmental Quality. There are a great many environmental statutes on the books. Many of the statutes are technical and regulatory, having been directed at class one pollutants. Examples of such statutes are the recent Clean Water Restoration Act of 1966¹⁷ and the Water Quality Improvement Act of 1970.¹⁸ This latter law, along with the Rivers and Harbors Act¹⁹ and the statutes implementing the International Convention for the Prevention of Pollution of the Sea by Oil,²⁰ are specifically directed to the much publicized problem of oil spills. The Federal Water Pollution Control Act²¹ is the general source of water pollution standards. The Refuse Act of 1899²² prohibits the discharge of refuse into navigable waters without a permit, and has recently been revived as a tool of environmental litigation.²³ Ordinary garbage is the subject of the Solid Waste Disposal Act.²⁴ These statutes are narrower than the NEPA. They attempt to remove pollutants which have no social value, rather than to dictate a balancing between social cost and social benefit.

There are also a number of statutes which approach the problem of water quality and use in a more general manner. For example, the Delaware River Basin Compact²⁵ and the Hudson River Basin Compact Act²⁶ prescribe both water quality and the allocation of water between commercial use, aesthetic pleasure, and recreational enjoyment. The Federal Watershed Protection and

ment 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 . . . shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes . . .

¹⁷ Pub. L. No. 89-753, title II, § 211(a), 80 Stat. 1252-54, as amended, 33 U.S.C. § 1151-75 (1970).

¹⁸ 84 Stat. 91, amending Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-75 (1970).

¹⁹ 33 U.S.C. §§ 401-65 (1970); see *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952).

²⁰ 33 U.S.C. §§ 1001-15 (1970). See also the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970), which applies to wells outside navigable waters, and the Oil Pollution Act of 1934, ch. 316, §§ 1-5, 7, 8, 43 Stat. 604-06, as amended, 33 U.S.C. § 1161 (1970), which prescribes penalties for the negligent discharge of oil.

²¹ 33 U.S.C. §§ 1151-75 (1970).

²² 33 U.S.C. § 407a (1970).

²³ See, e.g., *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970); see Note, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HASTINGS L.J. 782 (1971).

²⁴ Pub. L. No. 89-272, as amended by the Resource Recovery Act of 1970, 42 U.S.C. §§ 1857a-1857l, 3251-54, 3256-59 (1970).

²⁵ Pub. L. No. 87-328, 75 Stat. 688 (1961).

²⁶ Pub. L. No. 89-605, § 1 (Sept. 26, 1966).

Flood Prevention Act²⁷ also expands treatment of water usage. The Water Resources Research Act of 1964²⁸ and the Water Resources Planning Act²⁹ are similarly designed to involve the federal government beyond the simple removal of pollutants. These laws mandate a balancing approach much like that of the NEPA.

There are also a number of statutes addressed more or less specifically to non-persistent air pollutants. The Air Quality Act of 1967,³⁰ as amended by the Clean Air Amendments of 1970,³¹ establishes standards and provides for a limited enforcement procedure. The National Emissions Standards Act³² empowers the Department of Health, Education and Welfare to establish criteria for automobile exhaust emissions.³³ Noise pollution has been recognized in an amendment to the Federal Aviation Act which requires the Federal Aviation Agency to prescribe rules for the control of aircraft noise and sonic booms,³⁴ and is the subject of the recent Noise Pollution and Abatement Act of 1970.³⁵ These statutes are also technical and fairly narrow. They attempt to minimize environmental harm rather than to balance harm with benefit.

At least two statutes are addressed to the particular problems of persistent toxins. The Federal Insecticide, Fungicide, and Rodenticide Act³⁶ requires registration with the Department of Agriculture of all toxins for insect, pest, and fungus control. The Federal Food, Drug, and Cosmetic Act³⁷ proscribes the use of pesticides, unless their safety factor is within limits established by HEW.

Several statutes regulate the more general issue of man's overall relationship to the environment, and, thus, begin to deal with the particular problems of class four pollutants. Statutes which require some sort of balancing between economic development and environmental, aesthetic, and recreational considerations include the Federal Power Act,³⁸ the Department of Transportation Act of 1966,³⁹ and the Federal-Aid Highway Act of 1968.⁴⁰ Protection of fish and

²⁷ 16 U.S.C. §§ 1001-07 (1970).

²⁸ 42 U.S.C. §§ 1961-61c (1970).

²⁹ 42 U.S.C. §§ 1962-62d (1970).

³⁰ 42 U.S.C. §§ 1857a-1857l (1970).

³¹ *Id.*; see Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 HASTINGS L.J. 661, 668-74 (1971).

³² 42 U.S.C. § 1857f (1970).

³³ Regulations may be found at 37 Fed. Reg. 5634 (1972).

³⁴ 49 U.S.C. § 1431(a) (1970). FAA rules on noise abatement may be found at 14 C.F.R. pt. 36 (1972). The Department of Transportation is also directed to study and promulgate rules on noise abatement by the Transportation Act of 1966, 49 U.S.C. § 1653(a) (1971).

³⁵ 42 U.S.C. §§ 1858-1858a (1970).

³⁶ 7 U.S.C. §§ 135-135k (1970).

³⁷ 21 U.S.C. §§ 301-92 (1970).

³⁸ 16 U.S.C. §§ 791-825 (1970). Section 10(a) of the Act, 16 U.S.C. § 803(a) (1970), requires the Federal Power Commission to consider public benefit, including recreation, in granting licenses for hydroelectric plants.

³⁹ 49 U.S.C. §§ 1651-59 (1970).

⁴⁰ 23 U.S.C. §§ 101-141 (1970). These last two statutes all provide for scenic, historical, and recreation planning in highway construction. Section 138 of the Federal-Aid Highway Act (§ 4(f) of the Department of Transportation Act) requires that before park land can be used for highway construction, the responsible agency must make a determination that (1) no feasible and prudent alternative to the use of park land exists; and (2) that all possible planning to minimize harm to park land has been done. This finding is occasionally referred to as the § 138 or § 4(f) statement. See Gray, *Environmental Requirements of Highway and Historic Preservation Legislation*, 20 CATH. U.L. REV. 45 (1970).

wildlife is contemplated by the Fish and Wildlife Coordination Act,⁴¹ the Migratory Bird Act,⁴² the Anadromous Fish Act of 1965,⁴³ and the Endangered Species Act.⁴⁴ The general question of the allocation of land use between commercial productivity and conservational or recreational activity is regulated by the Wilderness Act of 1964,⁴⁵ the Classification and Multiple Use Act of 1964,⁴⁶ and the Taylor Grazing Act of 1934.⁴⁷ The Environmental Quality Improvement Act of 1970⁴⁸ and the Environmental Education Act⁴⁹ reflect a desire for further recognition and understanding of environmental problems. The Airport and Airway Development Act of 1970⁵⁰ requires a general analysis of ecological factors in airport construction in a fashion similar to the NEPA. In fact, all of these statutes are conceptually similar to the NEPA. They are concerned with a balance of the need for a particular resource on one hand and the resultant ecological decay on the other. Rather than minimum standards being set, which presupposes a socially acceptable level of environmental harm, the decision must be justified by the now familiar balancing procedure.

The NEPA's Role in the Statutory Scheme. It seems that the NEPA was directed basically at class four pollutants. Like the statutes already mentioned, it essentially requires a balancing of environmental effects against social and economic benefits. The technical problems of classes one, two, and to a certain extent, three, can and should be solved by technical statutes. Few would dispute the proposition that a federal project should be designed and built to produce as little water and air pollution as possible; the major issue under the NEPA is whether the project should be constructed at all. Activities which introduce new substances into the biosphere can be adequately regulated without impact statements. The NEPA is directed at those activities which, while they may not introduce pollutants into the biosphere, do produce profound effects on the environment.

The NEPA should be interpreted with the particular problems of class four environmental insults in mind. It should be recognized that a fairly delicate balancing of economic benefit as opposed to environmental detriment is involved, and that in many cases the threat to the ecology will be distant and not easily recognized. The Act will not condone an insult to the environment on a mere showing that a certain project will produce a socially desirable benefit. The solution to the problems presented by class four pollutants must necessarily entail social and economic sacrifices at some point.

C. Judicial Review Under the NEPA

The Reviewable Issues. The traditional role of the courts in reviewing the de-

⁴¹ 16 U.S.C. §§ 661-65 (1970).

⁴² 16 U.S.C. §§ 715-715r (1970).

⁴³ 16 U.S.C. §§ 757a-757f (1970).

⁴⁴ 16 U.S.C. § 668aa (1970).

⁴⁵ 16 U.S.C. §§ 1131-36 (1970).

⁴⁶ 43 U.S.C. §§ 1411-18 (1970).

⁴⁷ 43 U.S.C. §§ 315-315r (1970).

⁴⁸ 42 U.S.C. §§ 4371-74 (1970).

⁴⁹ 20 U.S.C. §§ 1531-36 (1970).

⁵⁰ 49 U.S.C. §§ 1701-03, 1711-27 (1970).

isions of administrative agencies is narrow, and this appears to be true under the NEPA despite the insistence of some commentators that a broader scope of review is necessary. At least three issues seem to be reviewable in various degrees:

- (1) Agency discretion not to comply with the Act;
- (2) Compliance with the procedural requirements of the Act; and,
- (3) "Substantive" review of the sufficiency of the statement and the propriety of the decision.

The question of an agency's discretion not to comply with the NEPA has been raised in three contexts. In some cases, agencies have declined to conform to the Act on the strength of their determination that the action was not "major" or the environmental effects not significant. Some courts have allowed such decisions to stand,⁵¹ while others have emphatically denied the existence of any agency discretion to make such determinations.⁵² Other cases have considered agency discretion to defer to the expertise of other agencies, the apparent requirements of other statutes, or environmental studies previously accomplished. Opinions have ranged from a condemnation of one agency's "abdication,"⁵³ to the acceptance of any carefully done environmental study as complying with the NEPA.⁵⁴ The mandates of seemingly conflicting statutes have been held to be both an excuse for noncompliance with the NEPA⁵⁵ and to be secondary to the NEPA.⁵⁶ A third area in which the question has been raised is the timing of the statement. The argument that an impact statement would be premature or otherwise ill-timed has been accepted by some courts⁵⁷ and rejected by others.⁵⁸

Because of the divergence in the cases, it is difficult to state any firm rule

⁵¹ *Echo Park Residents Comm. v. Romney*, 3 Env. Rep. Cas. 1255 (C.D. Cal. 1971), held that the determination that an impact statement was not required for an apartment complex could be overturned only if arbitrary and capricious. *Davis v. Morton*, 335 F. Supp. 1258 (D.N.M. 1971), specifically approved a determination that a sale of Indian leases was not a "major" project. *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972), gave similar approval to a determination that the environmental effects of a practice amphibious assault would not be significant.

⁵² *Scherr v. Volpe*, 336 F. Supp. 882 (W.D. Wis. 1971); *accord*, *Businessmen v. D.C. City Council*, 339 F. Supp. 793 (D.D.C. 1972); *Natural Resources Defense Council v. Grant*, 3 Env. Rep. Cas. 1883 (E.D.N.C. 1972).

⁵³ *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), struck down AEC rules which removed from the balancing process any environmental factor as to which another responsible agency had certified that its own standards had been met.

⁵⁴ *Bucklein v. Volpe*, 2 Env. Rep. Cas. 1082 (N.D. Cal. 1970); *accord*, *Sierra Club v. Hardin*, 2 Env. Rep. Cas. 1385 (D. Alas. 1971).

⁵⁵ *Cohen v. Price Comm'n*, 337 F. Supp. 1236 (S.D.N.Y. 1972), excused noncompliance with the NEPA because of the necessity for expeditious action under the Economic Stabilization Act, Pub. L. No. 91-379, 84 Stat. 799 (1971). A statement under the Federal-Aid Highway Act was accepted in conjunction with an incomplete § 102 statement in *Citizens To Preserve Foster Park v. Volpe*, 3 Env. Rep. Cas. 1031 (N.D. Ind. 1971).

⁵⁶ *See Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971), holding the Omnibus Crime Control and Safe Streets Act, 42 U.S.C. §§ 3701-81 (1970), inferior to the NEPA. *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971), upheld the NEPA against the Federal Water Pollution Control Act, and *Harrisburg Coalition v. Volpe*, 330 F. Supp. 918 (M.D. Pa. 1971), refused to accept a statement under the Federal-Aid Highway Act in satisfaction of the NEPA.

⁵⁷ *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233 (10th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3556 (U.S. May 23, 1972) (No. 1133); *Port of New York Authority v. United States*, 451 F.2d 783 (2d Cir. 1971).

⁵⁸ *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

outlining agency discretion not to submit an impact statement. It would seem almost axiomatic that an agency must have some measure of discretion to define "major" actions and "significant" effects, but since the determination of these facts cannot be divorced from their legal consequences,⁵⁹ it is submitted that any such discretion should be carefully scrutinized. When it appears that environmental effects have been considered critically, particularly those of projects begun before passage of the Act, there seems to be nothing to gain from requiring a second environmental study. This same observation would apply to studies made under other statutes, but only to the extent that such studies are as broad as those mandated by the NEPA.

Procedure and Substance. The cases tend to support the following two principles of judicial review:

(1) The courts have authority to determine whether or not the agency has fully and in good faith observed the procedural requirements of the NEPA; and,

(2) The courts have no authority to make a factual determination as to the ultimate issue of whether a project should be undertaken or not.

These two issues may be conveniently denominated "procedural" and "substantive" review, and the generalization made that the courts can engage fully in the former but are severely restricted in the latter. One should be wary of such an overstatement, however, as procedural review involves a great deal of substantive examination. Many courts which have emphatically denied their own authority to engage in substantive review have nevertheless unhesitatingly disagreed with findings of fact inherent in procedural compliance.

Most of the procedural requirements of the Act have been held subject to more-or-less plenary judicial review. The court can insure that all environmental impacts and adverse effects which may be known to the agency or disclosed by responsible outside groups are reflected in the statement, as dictated by section 102(C)(i) and (ii).⁶⁰ The court can also require that all possible alternatives be reflected and discussed in the statement.⁶¹ Agency failure to circulate the statement for comments may be freely considered,⁶² and the requirement that the statement accompany the proposal through the agency review process can be rigidly enforced.⁶³

The major substantive issue within this procedural review has been whether all the relevant factors were considered by the agency. This "relevant factor test" emanates from *Udall v. Federal Power Comm'n*,⁶⁴ in which the Supreme Court of the United States held that factors such as the recreational value of a wild river and fish migration must be considered in determining whether a dam was in the "public interest."⁶⁵ *Calvert Cliffs' Coordinating*

⁵⁹ See text accompanying note 71 *infra*.

⁶⁰ See, e.g., *Environmental Defense Fund v. Corps of Eng'rs (Gillham)*, 325 F. Supp. 749 (E.D. Ark. 1971), *injunction dissolved*, 342 F. Supp. 1211 (E.D. Ark. 1972).

⁶¹ *Id.*

⁶² See, e.g., *Natural Resources Defense Council v. Morton*, 337 F. Supp. 170, 172 (D.D.C. 1972).

⁶³ See, e.g., *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

⁶⁴ 387 U.S. 428 (1967).

⁶⁵ Section 7(b) of the Federal Power Act, 16 U.S.C. § 800(b) (1971), required the

*Committee v. United States Atomic Energy Comm'n*⁶⁶ noted that each environmental factor must be individually considered. Other cases have established requirements that the impact statement reflect the "full range of responsible opinion"⁶⁷ and "all known possible environmental consequences."⁶⁸ The courts have not been hesitant in pointing out additional factors to be considered.⁶⁹ All alternatives, even those beyond the authority of the particular agency, must likewise be enumerated.⁷⁰ Once all the relevant factors and alternatives have been considered by the agency, the requirements of the Act are satisfied, even if such factors are ultimately ignored by the decision-makers.⁷¹ To date, the easiest technique for assuring procedural compliance has been to include in the impact statement the depositions of the plaintiff's expert witnesses, thus insuring that the very factors which will be brought to the court's attention are considered in the statement.⁷²

The courts have uniformly recognized that judicial review of the ultimate decision is narrow. Some courts have concluded that an agency decision can be set aside only if the balance of cost and benefit is arbitrary and capricious, or not supported by substantial evidence.⁷³ Other courts have denied that the power of substantive review exists at all.⁷⁴ The contention that the NEPA creates any sort of substantive right to a clean environment has also been uniformly rejected.⁷⁵

FPC to determine that a license to construct a private power plant would be in the "public interest." Justice Douglas, writing for the Court, added a number of relevant factors, but denied that he was expressing any opinion on the merits of the decision. 387 U.S. at 450. Justice Harlan, dissenting, accused the Court of ignoring the substantial evidence rule and substituting its judgment for that of the FPC. *Id.* at 454. In *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Court rejected the substantial evidence test and adopted an "arbitrary and capricious" standard for review of a determination under the Federal-Aid Highway Act that no feasible and prudent alternative to the use of park land for highway construction existed. Despite the standard, the Court noted that an agency decision would be subjected to a "probing, in-depth review." *Id.* at 415. The lead from the Supreme Court is thus something less than clear.

⁶⁶ 449 F.2d 1109 (D.C. Cir. 1971).

⁶⁷ *Committee for Nuclear Responsibility v. Seaborg*, 3 Env. Rep. Cas. 1126 (D.C. Cir. 1971).

⁶⁸ *Environmental Defense Fund v. Corps of Eng'rs (Gillham)*, 325 F. Supp. 749 (E.D. Ark. 1971), *injunction dissolved*, 342 F. Supp. 1211 (E.D. Ark. 1972).

⁶⁹ *See, e.g., id.* at 757-58.

⁷⁰ *Natural Resources Defense Council v. Morton*, 337 F. Supp. 170 (D.D.C. 1972); *Environmental Defense Fund v. Corps of Eng'rs (Gillham)*, 325 F. Supp. 749 (E.D. Ark. 1971), *injunction dissolved*, 342 F. Supp. 1211 (E.D. Ark. 1972).

⁷¹ *See, e.g.,* the decision dissolving the *Gillham* injunction, 342 F. Supp. 1211 (E.D. Ark. 1972). *See also* *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 2453 (1972), involving the "public interest" provision of the Federal Power Act. The Second Circuit in 1965 had reversed the decision of the FPC to construct the Storm King nuclear power plant and remanded for consideration of additional relevant factors. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The FPC recited its consideration of each factor and alternative mentioned in the remand, and was victorious in the subsequent action despite accusations that it was "rubber stamping" the remand. Virtually no changes were made in the plans between the 1965 remand and the 1971 decision. The court declined to apply the NEPA, noting that its earlier order had required the same sort of balancing procedure now necessary under the Act. 453 F.2d at 481.

⁷² *Conservation Council v. Froehlke*, 340 F. Supp. 222 (M.D.N.C.), *aff'd*, 4 Env. Rep. Cas. 1045 (4th Cir. 1972).

⁷³ *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

⁷⁴ *United States v. 247.37 Acres*, 3 Env. Rep. Cas. 1098 (S.D. Ohio 1971).

⁷⁵ *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233 (10th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3556 (U.S. May 23, 1972) (No. 1133); *McQueary v. Laird*, 449 F.2d 608

Several cases have intimated that a different standard of review may apply to ongoing projects. *Environmental Defense Fund v. Corps of Engineers (Gillham)*⁷⁶ said that "defendants may approach the problem of the ongoing project differently from a new project, but the procedural result should be essentially the same in both cases."⁷⁷ The court was willing to waive extensive hearings and accept "any reasonable approach" which included the detailed impact statement. It should be noted, however, that this requirement approximates what the Act would require under any circumstances. *Morningside-Lennox Park Association v. Volpe*⁷⁸ echoed this willingness to accept a different approach to ongoing projects "so long as the 'detailed statement' requirement and other requirements of Section 102 are met."⁷⁹ Since both cases exact full procedural compliance, and the scope of substantive review is narrow under any circumstances, it is submitted that neither of these cases offers much comfort to those responsible for ongoing projects.

The real objective which most environmental suits seek is a redistribution of decision-making authority between the agencies and the courts. One author notes that "[t]he true environmental challenge is the question whether we will maintain the existing system of administrative regulatory agency monopolization over implementation of the public interest, a system so dominant that most lawyers and legislators accept it as obvious and inevitable."⁸⁰ When the Act was first passed, some commentators thought that such a reallocation had been accomplished.⁸¹ Later authors have recognized that no such compulsion exists, and have challenged the effectiveness of the Act.⁸² Serious criticism of the present decision-making system and recommendations for change continue to be made, although not without some rebuttal from those who fear uncontrolled expansion of judicial control over the environment.

The Case for a Broader Scope of Review. The attack on the status quo comes from two directions. Many writers ascribe a presumption of bad faith to any agency action.⁸³ A well-known conservationist lawyer notes that while in the 1930's and 1940's the agencies were considered the liberal forum for the protection of personal rights, now liberals look to the courts to free them from administrative agencies.⁸⁴ The same author notes that in the few years of environmental litigation, "the courts have been the main protector of the environment and the main spokesman for the public interest. The main enemies have

(10th Cir. 1971); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972).

⁷⁶ 325 F. Supp. 749 (E.D. Ark. 1971).

⁷⁷ *Id.* at 756-57.

⁷⁸ 334 F. Supp. 132 (N.D. Ga. 1971).

⁷⁹ *Id.* at 145.

⁸⁰ Sax, *New Directions in the Law*, in ENVIRONMENTAL LAW 1, 2 (C. Hassett ed. 1971).

⁸¹ J. BRECHER & M. NESTLE, *supra* note 8, at 126. Without the benefit of two years of decided cases, these authors interpreted § 101 as compelling the agencies to decide in favor of environmental quality.

⁸² See, e.g., Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 BROOKLYN L. REV. 139 (1970); Note, *NEPA: Full of Sound and Fury . . . ?*, 6 U. RICH. L. REV. 116 (1971).

⁸³ See, e.g., Douglas, *The Public Be Damned*, PLAYBOY, July 1969, at 143. Douglas refers to the Army Corps of Engineers as "public enemy number one" due to their "obsession for building dams, whether needed or not." *Id.*

⁸⁴ Sive, *supra* note 8, at 30.

been the somewhat provincial single-interest administrative agencies."⁸⁵

Other objections are directed at the system rather than at the agencies themselves. One writer points out the imbalance of resources in environmental litigation—the ad hoc conservationist group facing the unlimited resources of the agency (and often interested corporations) is "David facing Goliath" in a suit commenced "in the shadow of the bulldozer"—and opines that this fact alone should necessitate a more flexible review.⁸⁶ Other objections are leveled at the nature of agency determination. It is claimed that cost-benefit analysis ignores the crucial equitable question of who should pay, a decision which should be made through the legal and political processes.⁸⁷

It is generally agreed that the greatest obstacle to the environmentalist is posed by the substantial evidence rule. One author makes the following observation on the operation of the rule:

[T]he number of agency decisions concerning the environment with which the courts will interfere will be few if any. In environmental cases, the calls to be made are so close that it is almost certain that an agency's decisions will be supported by substantial evidence on the record as a whole, yet may result in irreparable harm to the environment. For example, if a numerical value could be assigned to the amount of evidence, *substantial* evidence on the record as a whole could mean a decision supported by as little as 25 or 30 per cent of the evidence.⁸⁸

As an example, the author notes that both sides in the Alaska pipeline controversy are supported by "substantial" evidence. The same point is made in respect to the Mineral King Mountain resort complex attacked in *Sierra Club v. Morton*.⁸⁹ Both sides represent valid claims to the use of land, "each grounded upon values which society seeks to preserve in its environment."⁹⁰ These authors make the very valid point that review of a fairly balanced decision under the substantial evidence rule will inevitably lead to a result in the deciding agency's favor.

The majority of the commentators favor some expansion of the scope of review in environmental cases. A trend toward broader review is noted in the "relevant factor test" of *Udall v. Federal Power Comm'n*.⁹¹ This approach may be justified under existing standards of review by three alternate theories: (1) the categorization approach, which states that the interpretation of unsettled statutory provisions and the application of relatively new and undefined legal standards is a question of law; (2) the analytical approach, which states that an assertion of fact, such as "in the public interest," cannot be separated from its legal consequence, and is thus fully reviewable by the court; and (3)

⁸⁵ *Id.* at 21. See also Sax, *supra* note 80, at 8.

⁸⁶ Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 617-19 (1970).

⁸⁷ J. BRECHER & M. NESTLE, *supra* note 8, at 20-21. Another author has attacked agency expertise, noting that the major issues of environmental law are not questions of technical expertise, but rather broad innovative matters of policy. Sax, *supra* note 80, at 3-8.

⁸⁸ Comment, *Preservation of the Environment Through the Doctrines Governing Judicial Review of Administrative Agencies*, 15 ST. LOUIS U.L.J. 429, 437 (1971).

⁸⁹ 92 S. Ct. 1361 (1972).

⁹⁰ Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 U.C.L.A.L. REV. 1070, 1084 (1970).

⁹¹ *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1966).

the practical approach, which favors deferral to whichever tribunal is more qualified to deal with the question.⁹² While the suggested methods vary, these authors uniformly feel that a change in the scope of review is essential to the effective solution of the environmental crisis.⁹³

III. RETROACTIVE APPLICATION OF THE ACT

The scope of permissible review having been determined, it is necessary to examine judicial response to the particular issue of application of the Act to projects which were in various stages of planning or construction at its effective date of January 1, 1970. The issue is likely to be around for quite a while, as most major federal projects are in the planning stage for a number of years and are not likely to attract public attention until a fairly advanced stage of development is reached.

A. *The Act Itself and Its Implementing Regulations*

The words of the statute itself shed relatively little light on the issue of retroactive application. Section 101 emphasizes "all practicable means and measures" are to be taken to protect the environment, while the phrase "to the fullest extent possible" modifies (or illuminates) the requirements of section 102. While these phrases have been interpreted to indicate both retroactivity⁹⁴ and nonretroactivity,⁹⁵ neither conclusion can be said to be compelled by the Act. It is evident that the statute is not made expressly retroactive; however, it omits the traditional "grandfather" clause often inserted to insure that retroactive application is not read into a law. The legislative history is equally unenlightening, containing little more than the hope that agencies will not attempt to evade its mandates by a "narrow" construction.⁹⁶

The Guidelines⁹⁷ published by the Council on Environmental Quality approach the retroactivity issue in a somewhat more direct manner. The Guidelines state that the Act is to be applied to "further major federal acts," even though they arise from projects initiated prior to its effective date. The Guidelines accept the fact that reassessment of the basic course of action will not always be possible, but caution that in such cases further incremental major actions should be planned so as to minimize environmental damage and take into account factors not fully evaluated at the outset of the project. The language of the Guidelines indicates that the Council, at least, did not envision full retroactivity.

B. *The Theories of the Cases*

Since the question of retroactive application is not definitely answered by

⁹² Sive, *supra* note 86, at 621-29. See also Comment, *supra* note 88, at 438.

⁹³ For a discussion of the logic on the other side of the fence, see Note, *The Role of the Court in Protecting the Environment—A Jurisprudential Analysis*, 23 S.C.L. REV. 93, 113 (1971).

⁹⁴ See, e.g., *Environmental Defense Fund v. Corps of Eng'rs (Gillham)*, 325 F. Supp. 749 (E.D. Ark. 1971), *injunction dissolved*, 342 F. Supp. 1211 (E.D. Ark. 1972).

⁹⁵ *Pennsylvania Environmental Council v. Bartlett*, 3 Env. Rep. Cas. 1421 (3d Cir. 1971).

⁹⁶ CONF. REP. NO. 765, 91st Cong., 1st Sess. 9-10 (1965).

⁹⁷ Interim Guidelines, 35 Fed. Reg. 7390 (1970); Final Guidelines, 36 Fed. Reg. 1398 (1971).

the statute itself, the legislative history, or the implementing regulations, it has been the subject of a good many conflicting judicial decisions. At least three lines of cases are distinguishable, although it is often difficult to place a particular decision in a particular category. The Act has been held to be both nonretroactive and fully retroactive, while an "incremental action" theory has been used to justify holdings in both categories.⁹⁸

Nonretroactive. Several courts have passed directly on the issue of retroactivity. The leading case in favor of nonretroactivity to date is *Pennsylvania Environmental Council v. Bartlett*.⁹⁹ Pennsylvania approved a plan to improve an existing road in 1967. Notice was given and an opportunity for interested parties to be heard was offered. A location study was made in 1968, with extensive cooperation between the Highway Department and state conservation agencies. The project was approved by the Secretary of Transportation in November 1969. Contracts were awarded prior to January 1, 1970, and construction began soon thereafter.¹⁰⁰ The district court held that the Act would not be applied retroactively to require an impact statement. The court also concluded that the NEPA would not apply at all to federal approval of highway location; to do so "not only would place a staggering burden on the Secretary, but also would cause him to duplicate state investigations and determinations."¹⁰¹

The Third Circuit affirmed the district court's refusal to apply the Act. The court noted that both the Secretary of Interior's approval of the project, and the awarding of contracts, preceded the effective date of the Act. The only remaining federal action following passage of the Act was the inspection of the completed highway. The court observed that "[f]or all practical purposes, therefore, final federal action on the project took place prior to January 1, 1970 . . ."¹⁰² The court examined the NEPA and found that "[t]here is no evidence of a congressional intention that the Act be applied retroactively to reopen decisions which had become final before [the effective] date."¹⁰³ A contrary intent was found in the "fullest extent possible" language of section 102. The court said that this case was not one in which discretionary federal action took place in stages, only part of which were prior to the Act. Because final federal approval (and, consequently, final federal action) were prior to the Act, the Act would not apply.¹⁰⁴

Other cases have expounded on the retroactivity issue. Some have agreed that congressional failure to make the Act explicitly retroactive was determinative, particularly since Congress must have been aware of the large number of incomplete projects in existence when the Act was passed.¹⁰⁵ One

⁹⁸ See notes 131, 132 *infra*, and accompanying text.

⁹⁹ 454 F.2d 613 (3d Cir. 1971).

¹⁰⁰ The facts are set out in the district court opinion, 315 F. Supp. 238 (M.D. Pa. 1970).

¹⁰¹ *Id.* at 249.

¹⁰² 454 F.2d at 624.

¹⁰³ *Id.*

¹⁰⁴ In accord is a recent decision of the same court, *Concerned Citizens of Marlboro, Inc. v. Volpe*, 459 F.2d 332 (3d Cir. 1972).

¹⁰⁵ *Brooks v. Volpe*, 329 F. Supp. 118 (W.D. Wash.), *rev'd and remanded*, 3 Env. Rep. Cas. 1858 (9th Cir. 1972); *Elliot v. Volpe*, 328 F. Supp. 831 (D. Mass. 1971).

court made retroactive application contingent upon substantial deviation from pre-Act plans.¹⁰⁶ Others have urged a comparison of the likelihood of a change in plans with the cost of a delay in construction.¹⁰⁷ The point has been made that an intent on the part of Congress to repudiate former decisions to authorize projects now in the construction phase should not be inferred too readily from the NEPA.¹⁰⁸

The most recent case directly on point is *Green County Planning Board v. Federal Power Comm'n.*¹⁰⁹ The plaintiffs challenged completion of a power line which had been licensed in 1969. Construction was eighty percent complete. The Second Circuit considered both *Gillham*, the leading case for full retroactivity, and *Calvert Cliffs'*, the leading case for the incremental action theory. The court concluded that "we see no basis for applying NEPA retroactively to the licensing of the basic project which became final nearly six months prior to the effective date of the Act."¹¹⁰ The significance of this case is that it was decided after the major judicial trends were fairly well-defined. The Second Circuit expressly rejected the full retroactivity and incremental action theories, and indicated its approval of the nonretroactive interpretation of *Bartlett*.¹¹¹

¹⁰⁶ *San Francisco Tomorrow v. Romney*, 342 F. Supp. 77 (N.D. Cal. 1972).

¹⁰⁷ *Civic Improvement Comm. v. Volpe*, 4 Env. Rep. Cas. 1160 (W.D.N.C.), *aff'd*, 459 F.2d 957 (4th Cir. 1972); *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970).

¹⁰⁸ *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970).

¹⁰⁹ 455 F.2d 412 (2d Cir. 1972), *appeal docketed*, 41 U.S.L.W. 3010 (U.S. June 8, 1972) (No. 71-1597).

¹¹⁰ *Id.* at 424.

¹¹¹ *But see* *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971), *appeal docketed*, 40 U.S.L.W. 3470 (U.S. Mar. 28, 1972) (No. 71-1198), where it was indicated in dictum that the NEPA would be applied only prospectively. The Supreme Court had previously denied certiorari in a related case which resulted in a Fifth Circuit decision that the San Antonio Conservation Society did not have standing to sue for an injunction to stop the project. It is interesting to note the language in the Supreme Court's denial of certiorari. Justice Black dissented on the ground that "approval of the two end segments took place in August 1970, eight months after the effective date of the Act." *San Antonio Conservation Soc'y v. Texas Highway Dep't*, 400 U.S. 968, 969 (1971) (denying certiorari). Justice Douglas, also dissenting, noted that "11 months after the Environmental Policy Act became effective, the gist of the location problem so far as the park is concerned had not been resolved." *Id.* at 976. Justice Douglas accepted the date of "unqualified approval" as determinative. Justice Brennan joined in both dissents. These three justices would appear to be the most concerned with the environment, judging from their dissents, yet none expressed any belief that the Act should be retroactively applied.

Nevertheless, in the suit by the individual members of the conservation society, the Fifth Circuit took the position that the state could not complete the project even if it did so without federal funds. The court said that allowing the state to complete the road with its own money would be "giving approval to the circumvention of an Act of Congress. The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation . . ." 446 F.2d at 1027. Judge Clark, dissenting on this point, said that since no funds had changed hands, this was "more nearly a proposal than a marriage," *id.* at 1029, and contended that the court could not enjoin state construction if the state made an unqualified renouncement of federal funds. In accord with the Fifth Circuit decision is *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), which held that state officials must comply with the NEPA concerning a highway for which the state intended to seek federal funds, even though such funds had not yet been appropriated. An interesting case taking the opposite view is *Gibson v. Ruckelshaus*, 3 Env. Rep. Cas. 1028 (E.D. Tex. 1971), in which a district court stated that it would dissolve an injunction against the condemnation of land for a sewage disposal plant if the city would abandon federal funding. In accord with this view is *Civic Improvement Comm. v. Volpe*, 4 Env. Rep. Cas. 1160 (W.D.N.C.), *aff'd*, 459 F.2d 957 (4th Cir. 1972),

Fully Retroactive. An impressive number of courts have either expressly stated that the NEPA is fully retroactive or have applied the Act to projects begun before its effective date by using other theories.

By far the most innovative case to date under the NEPA is *Environmental Defense Fund v. Corps of Engineers (Gillham)*.¹¹³ Gillham Dam was a part of a larger project for flood control and reservoir construction on Arkansas' Little River. The overall project was authorized by Congress in 1958. Construction began in 1965. As of January 1, 1970, over nine million dollars of the projected fourteen-million-dollar cost of the Gillham complex had been expended. Although construction of the actual dam had not begun, related facilities such as spillways and outlet sluices were complete or substantially complete by 1970. The dam would create a lake on the Cossatot River, and would result in fairly definite flood control and water supply benefits as well as undeniable environmental and recreational costs.

The court seemed to be offended by the fact that the Corps gave the impression that had no work been done on the project, they "would be approaching the environmental impact statement with a different, more open-minded, attitude."¹¹³ The decision quoted section 9 of the environmental statement, which noted that it was no longer practical to reassess the basic project, thus any restudy would be "almost certain to reaffirm the original decision."¹¹⁴ The court said that it was "not suggesting that the status of the work should not be considered in determining whether to proceed with the project. . . . [But] the degree of the completion of the work should not inhibit the objective and thorough evaluation of the environmental impact of the project as required by the NEPA."¹¹⁵ The Act was read to compel federal agencies "to objectively evaluate all of their projects, regardless of how much money has already been spent thereon and regardless of the degree of completion of the work."¹¹⁶ The duty was described as a "continuing action" to study and improve plans¹¹⁷ and "determining [whether] to go forward with the project, abandon the project, or restudy the whole matter."¹¹⁸

The court justified retroactive application of the Act in several ways. First, it questioned whether application under the circumstances was in fact retroactive: "[H]ere the plaintiffs are not asking the Court to set aside or undo any prior action on the part of the defendants. Rather, they are seeking an application of prevailing, existing law related to anticipated future actions of the defendants."¹¹⁹ The decision then took cognizance of the language of section 101(b), which creates a continuing duty to improve federal plans, and the

which held the NEPA inapplicable to a highway project neither financed nor controlled by the federal government.

¹¹³ 325 F. Supp. 728 (E.D. Ark. 1971), *injunction dissolved*, 342 F. Supp. 1211 (E.D. Ark. 1972).

¹¹⁴ 325 F. Supp. at 745.

¹¹⁵ *Id.* at 745-46.

¹¹⁶ *Id.* at 746.

¹¹⁷ *Id.* In accord with the view that the NEPA applies to all projects upon which substantial action is yet to be taken are *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972), and *Morningside-Lenox Park Ass'n v. Volpe*, 3 Env. Rep. Cas. 1327 (N.D. Ga. 1971).

¹¹⁸ 325 F. Supp. at 743.

¹¹⁹ *Id.* at 757.

¹²⁰ *Id.* at 743.

directive of section 102 that the policy is to be implemented to the fullest extent possible. Thus, the same language which *Bartlett* had found to dictate a pragmatic and flexible approach was held to impose an absolute duty to comply with the procedural requirements of the Act.

The underlying reason for the court's decision is its concept of the purpose of the NEPA: "At the very least, NEPA is an environmental full disclosure law. The Congress, by enacting it, may not have intended to alter the then existing decision-making responsibilities or to take away any then existing freedom of decision-making, but it certainly intended to make such decision-making more responsive and more responsible."¹²⁰ If the NEPA is in fact nothing more than a full disclosure law, the court's theory of full retroactivity is correct. At least one author would agree that, because of the technical complexity of the class of environmental threat to which the NEPA was directed, the impetus should be toward recognizing and classifying the problems rather than assigning relative costs and seeking solutions.¹²¹

Calvert Cliffs' could be cited for either the full retroactivity theory or the incremental action concept. The plaintiffs attacked AEC rules which permitted the issuance of licenses for construction of power plants without an impact statement; the requirements of the NEPA were being imposed only with respect to applications for operating licenses.¹²² The plaintiffs objected particularly to an atomic power plant on Chesapeake Bay. The construction permit had been issued prior to the Act, and under the AEC rules no environmental study would be made until the application for an operating permit was received.

The court struck down the AEC rules, noting that it was clear from the Act that any action taken after its effective date must comply with the procedural requirements. The court acknowledged that the NEPA may not require instant compliance, but "it must at least require that NEPA procedures, once established, be applied to consider prompt alterations in the plans or operations of facilities approved without compliance."¹²³ The phrase "approved without compliance" is not limited to approval after the effective date of the Act. The decision considered the "substantive" duties of section 101(b) to be qualified by the phrase "all practicable means, consistent with other essential considerations," but concluded that section 102 duties "are not inherently flexible. They must be complied with to the fullest extent possible, unless there is a clear conflict of *statutory* authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance."¹²⁴ This interpretation of the Act led the court to conclude that the AEC must consider environmental factors in the prelicensing stage, before an irreversible commitment of resources had restricted the available options. The court made a pro forma denial that requiring an impact statement at this stage was tantamount to retroactive application, since the project would have

¹²⁰ *Id.* at 759.

¹²¹ Rathjens, *supra* note 14, at 38-42.

¹²² 10 C.F.R. app. D, at 246-50 (1970). Rule (4) provided that environmental factors would be considered only in hearings for which notice was published after Mar. 4, 1971.

¹²³ 449 F.2d at 1121, citing *Gillham*.

¹²⁴ *Id.* at 1115.

to pass the test of the NEPA before going into full operation anyway. "All we demand is that the environmental review be as full and fruitful as possible."¹²⁵

The crux of the opinion was contained in two footnotes. The court clarified its holding when it noted that:

[T]he Commission must promptly consider the environmental impact of projects initially approved before January 1, 1970, but not granted an operating license. We hold that the Commission may not wait until construction is entirely completed and consider environmental factors only at the operating license hearings; rather, before environmental damage has been irreparably done by full construction of a facility, the Commission must consider alterations in the plans.¹²⁶

Another footnote distinguished many of the previously discussed cases: "The courts which have held NEPA to be nonretroactive have not faced situations like the one before us here—situations where there are two, distinct stages of federal approval, one occurring before the Act's effective date and one after that date."¹²⁷

This case demonstrates the difficulty one encounters in classifying the cases under the NEPA. The court expressly denied that it was applying the Act retroactively, yet it required an impact statement on a project approved and presumably begun prior to the effective date, basing its decision on the existence of a second "major" increment. *Calvert Cliffs'* may thus be said to support all three theories, although the rather self-serving assertion that application of the Act was not retroactive can be readily dismissed. The actual holding of the case must be said to support the fully retroactive theory, while the particular facts of the case lend support to the incremental action concept.

Several courts have applied a "balancing of factors" test to projects begun before the Act. The Fourth Circuit in *Arlington Coalition v. Volpe*, holding that an impact statement was required for a highway project planned before the Act's effective date, noted that "[s]ection 102(c) is applicable to a project until it has reached the state of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom."¹²⁸ Since construction contracts had not yet been let, the court found that application of the Act was warranted and not retroactive under the circumstances. This case expressly approved the nonretroactivity theory of *Bartlett*, but applied NEPA to a project initiated before the Act. *Environmental Law Fund v. Volpe*,¹²⁹ however, expressly declined to follow *Bartlett* and refused to apply NEPA to a similar project. The latter case interpreted NEPA to require an impact statement on an ongoing project only if "practicable." Four factors of practicability were set out: community participation in planning; state efforts to protect the environment; likely environmental harm; and cost of delay. Balancing these factors, the court concluded that compliance with the Act in this case would be impracticable, and declined to issue

¹²⁵ *Id.* at 1129.

¹²⁶ *Id.* at 1121 n.28.

¹²⁷ *Id.* at 1129 n.43.

¹²⁸ 3 Env. Rep. Cas. 1995, 2001 (4th Cir. 1972).

¹²⁹ 340 F. Supp. 1328 (N.D. Cal. 1972).

an injunction. *Jacarilla Apache Tribe v. Morton*,¹³⁰ which declined to enjoin construction of the Four Corners power plant, noted that an impact statement will be required for an ongoing project only when it is "practicable" to reassess the basic course of action. The common denominator of these cases is that each predicates application of NEPA on the presence or absence of various pragmatic factors rather than upon an examination of the calendar.

Incremental Actions. The incremental action theory had its origin in the Council on Environmental Quality Guidelines, which provide generally that the NEPA is to apply to "further major federal acts" even though the basic project was initiated prior to the Act. The Guidelines note that even when it is not possible to reassess the basic course of action, "it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences."¹³¹ The heading of this section is somewhat misleading, as no case has actually accepted the import of the Guidelines without some modifications.

Gillham cited the Guidelines with approval, noting that the actual extension of the dam across the Cossatot River was such an incremental action. However, it is evident that *Gillham* did not in fact accept the incremental theory, as it stated that the most glaring deficiency in the defendant's conduct was the failure to consider the alternative of leaving the Cossatot alone. Under the incremental theory the Corps should have considered the alternatives in completing the project. The possibility of a dry dam or embankments of various designs would have to be evaluated, but not the alternative of no dam at all.

Calvert Cliffs' approaches being a correct application of the theory. The court noted that cases holding the Act to be nonretroactive have not faced situations "where there are two, distinct stages of federal approval, one occurring before the Act's effective date and one after that date."¹³² The "basic" project was the construction of a power plant; the "major incremental action" was the issuance of the operating permit. The court, while striking down many of the AEC's rules, did not enjoin construction of the Calvert Cliffs' plant; it only suggested that the AEC take such action pending an environmental review. The *Calvert Cliffs'* situation is somewhat unique, in that the incremental action—the issuance of an operating license—was not to occur until several years after the granting of the construction license. The court refused to allow the AEC to wait until that date to make the environmental study, fearing that by that time the previous commitment of resources would limit the available options. In this regard, the court departed from a strict application of the incremental theory, but it did so with good reason. When there must necessarily be a second stage in the approval process, involving a second distinct and identifiable federal decision, it would seem that an agency should not be able to evade the purpose of the NEPA by waiting until any change in position is economically impossible. It should be noted, however, that the application of this theory is somewhat narrow. It should only be applied when

¹³⁰ 3 Env. Rep. Cas. 1919 (D. Ariz. 1972).

¹³¹ 36 Fed. Reg. 1398 (1971); see note 97 *supra*, and accompanying text.

¹³² 449 F.2d at 1129 n.43.

there are distinct stages of decision-making. A highway designed before the Act, for example, does not require a second "major" federal decision to be put into operation. Even construction of an integrated phase of a larger project, such as the embankment in *Gillham*, is not a separate and distinct event which would allow application of the incremental theory. The second limiting factor is that environmental consideration extends only to the incremental action and not to the basic project. The alternative of no project at all will not generally be available under this theory. It would seem that in situations to which the theory does apply, there is a great deal of merit in the *Calvert Cliffs'* position—that an agency must make the environmental study while alternatives are still available.

IV. A SUGGESTED JUDICIAL POLICY

At the outset, it should be noted that the NEPA should be interpreted as an agency-regulating statute rather than an environmental full disclosure law.¹³³ The concept of full disclosure can scarcely be applied in the context of environmental protection, where the potential harm is to the public sector, and, even with full knowledge of the facts, the public can prevent the harm only through the agency. Major federal actions normally have a built-in delay period, as the planning and hearing stages usually span several years. However, the concept of a forced delay is particularly inappropriate to ongoing projects, since it seems axiomatic that a project once begun should be either shelved or completed with minimum delay and cost. Few plaintiffs would contend that they were surprised by the commencement of the project, since normally the opposition to the project spans many years. Conservationists themselves are quick to point out that administrative agencies have no monopoly on the expertise required to ferret out and evaluate the effects of their projects. One author notes that the difficulty in evaluating the merits of the typical federal project is not from a lack of material, but rather from an overabundance of technical data.¹³⁴ Because the problems of the environment are so complicated, it is doubtful that the data on any one project could be meaningfully condensed into an easily understood summary. Even if disclosure were the primary purpose of the Act, it is doubtful that it would be that beneficial to the fight for a better environment.

As a law regulating agency decision-making, the NEPA comes face to face with an inescapable fact of life—when a court cannot meaningfully review an agency decision, there is little point in requiring a procedure which will not change that decision. Despite the criticism of conservationists, the engineers in the various agencies are naturally quick to defend their own decisions and the importance of their projects. A member of the staff of the Council on Environmental Quality notes that once highway construction reaches a certain stage, it is highly unlikely that the basic course of action will be reassessed, and therefore concludes that the application of the Act at this stage would be

¹³³ The concept of a disclosure law immediately brings to mind the Securities Act of 1933, 15 U.S.C. §§ 77-78ff (1970).

¹³⁴ Drew, *supra* note 9, at 55. Note the 1350-page impact statement submitted in *Gillham*, 342 F. Supp. at 1212 n.1.

impractical.¹³⁵ An engineer, writing on this subject, reached this conclusion: "In selecting highway alternatives, there is always the temptation to opt for the 'no highway' alternative. While it is always appropriate to consider that possibility, in most cases the environmental costs will be high. Bad transportation is bad for the environment."¹³⁶ This philosophy explains why the road was designed in the first place, and it explains why the decision once made will be justified despite environmental considerations. The attitude that the public will be better served by completion of an in-progress project is natural, understandable, and in many cases justified. Since it appears that the NEPA does nothing to shift the decision-making power from these agencies, it is submitted that to apply the procedural requirements of the Act to a project upon which a final decision has been made is to require futile and useless exertion. Once a project has reached the point where all discretionary action has been completed, the NEPA should not be applied.

This is not to say that projects initiated before the Act are completely immune from its provisions. There is a great practical difference between making a decision and justifying a decision already made. When a major incremental decision must be made, the Act should require that it be made with full consideration of its environmental effects. Because of the vastness of the environmental problems to which the NEPA was addressed, a major effort should be made to identify and classify the consequences of environmental decisions, even though the limited scope of review will preclude judicial control of the decision. It is submitted that of all the cases studied, *Calvert Cliffs'* is the closest to a meaningful and effective application of the Act. When further incremental decisions must be made, the Act should guide the decision-makers. As *Calvert Cliffs'* pointed out, if the further action is inevitable but fairly distant, the environmental study should be made before economic costs become so great that environmental factors must be subordinated. It should be reiterated that this theory applies only to a second, distinct discretionary action, and is primarily concerned with the minimization of the effects of the second decision rather than a reassessment of the entire project.

There is, of course, a great deal of merit in the contentions of those who favor full application of the Act and a shift in the balance of decision-making power. If the latter could be accomplished, then the former might be appropriate. Since the NEPA has not changed the basic structure of the decision-making process, its application should be limited to those instances in which it will be effective, and conservationists must wait for new and broader legislation to satisfy their demands for a more active role in the effort to protect and preserve the environment.¹³⁷

¹³⁵ Reilly, *supra* note 15.

¹³⁶ Koltnow, *Changing Highway Priorities: Construction, Economy, and Environmental Improvement*, 20 CATH. U.L. REV. 119, 130 (1970).

¹³⁷ For a different perspective on the problem and a contrary solution, see 22 HASTINGS L.J. 805 (1971), in which the author concludes that the NEPA will reach its full potential only if applied retroactively; and Note, *Retroactive Application of the NEPA*, 69 MICH. L. REV. 732 (1971), in which it was concluded that the Act was meant to be applied retroactively to some degree, but would deny application when the particular project is beyond the point where useful results can be obtained. Both articles also discuss the question of the constitutionality of retroactive application, which has been assumed in this Comment.