1973

The Adequacy of Environmental Impact Statements and the Development of State Law

Cooper H. Wayman
Diana C. Dutton
Cassandra Dunn

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
https://scholar.smu.edu/smulr/vol27/iss4/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THE ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENTS
AND THE DEVELOPMENT OF STATE LAW

by

Cooper H. Wayman,* Diana C. Dutton** and Cassandra Dunn***

THE National Environmental Policy Act of 1969 (NEPA) has thrust major responsibilities and sensitivities upon industry, government, and the general public. The obvious practical intent of NEPA as culled from the legislative history was to instill in each federal agency an awareness of concern for preservation of the environment. Although the Act is still in its infancy, its protectorate-type mandate should have been invoked hundreds of years ago. There is nothing novel about pollution.

* B.S., Rutgers University; M.S., University of Pittsburgh; Ph.D., Michigan State University; J.D., University of Denver. Assistant to the Regional Administrator, Environmental Protection Agency, Region VIII, Denver, Colorado. The authors wish to acknowledge the assistance and research provided by Mr. Elliott S. Garsek, Editor-in-Chief of the Journal of Air Law and Commerce, Southern Methodist University, Dallas, Texas.

** B.A., Georgetown University; J.D., University of Texas. Assistant Regional Counsel, Environmental Protection Agency, Region VI, Dallas, Texas.

*** J.D., Humphreys College of Law. Regional Counsel, Region IX, San Francisco, California.

3 Pollution was recognized as early as 1388:

Also, for that so much dung and other filth of the garbage and entrails as well of beasts killed, as of other corruptions, be cast and put in ditches, rivers and other waters, and also many other places within, about, and nigh unto divers cities, boroughs, and towns of the realm, and the suburbs of them, that the air there is greatly corrupt and infect, and many maladies and other intolerable diseases do daily happen, as well to the inhabitants and those that are conversant in the said cities, boroughs, towns and suburbs, as to others repairing and traveling thither, to the great annoyance, damage, and peril of the inhabitants dwellers, repairers, and travellers aforesaid: it is accorded and assented, that proclamation be made as well in the city of London, as in other cities, boroughs, and towns, throughout the realm, where it shall be needful, as well within franchises as without, that all they which have cast and laid such annoyances, dung, garbages, entrails and other ordure in ditches, rivers, waters, and other places aforesaid, shall cause them utterly to be removed, avoided, and carried away betwixt this and the feast of Saint Michael next ensuing after the end of this present parliament, every one upon pain to lose and to forfeit to our lord the King twenty pounds; and that the mayors and bailiffs of every such city, borough, and town, and also the bailiffs of franchises shall compel the same to be done upon like pain. And if any feel himself grieved, that this be not perfected in manner aforesaid, and will thereupon complain to the chancellor after the said feast of Saint Michael, he shall have a writ to cause him of whom he will so complain to come into the chancery, there to shew why the said penalty should not be levied of him. And moreover proclamation shall be made, as well in the said city of London, as in other cities, boroughs, and towns as aforesaid, that none of what condition soever he be, cause to be cast or thrown from henceforth any such annoyance, garbage, dung, entrails, nor any other ordure into the ditches, rivers, waters, and other places aforesaid; and if any so do, he shall be called by writ before the chancellor, at his suit that will complain; and if he be found guilty, he shall be punished according to the discretion of the chancellor.

No one really knows what NEPA stands for. It is basically a policy act to guide the agency decision-making process. It has been colored with many connotations. Various legal commentators have embellished the Act with some perceptive comments. "In form, the National Environmental Policy Act is a statute; in spirit a constitution . . . ."4 "In sum, it does not seem farfetched to suggest that the National Environmental Policy Act could well become our Environmental Bill of Rights."5

NEPA is believed one of the best governmental self-regulating devices to become law, but it is still in the judicial "laboratory" state with its awkward-looking bumps becoming a succinct tool with a very sharp cutting edge. With all due deference to the keenness with which our Congressmen have envisaged NEPA, attorneys, administrative agencies, and the judiciary have shared some formidable headaches. One area that is anything but resolved involves the adequacy of an impact statement. Agencies are left with a very wide discretion as to the necessity of preparing an environmental impact statement (EIS) and how detailed the statement must be. This Article attempts to evaluate the present status of what elements compromise an EIS; how definitive it must be; whether or not it is necessary at all; whether or not NEPA is a substantive mandate or merely procedural; how NEPA should be considered in segments of projects and multi-agency projects; and the spin-off of NEPA into state laws.

I. ELEMENTS OF AN EIS

The preparation of an EIS is a highly technical process involving the evaluation of a policy together with its environmental impact. Impractical in terms of a cost-benefit analysis, the most elegant approach to the EIS problem was recently promulgated.6 Other technical and practical guides in the preparation of an EIS are available.7

Drafting a proper impact statement involves much more than filling in the blanks of a government form. NEPA statements can and do vary, from relatively short and simple analyses of the environmental effects of smaller projects to complex multi-volume works for projects of multi-billion dollar dimensions. In Sierra Club v. Froehlke8 the district court reviewed four major areas that must always be considered when drafting an EIS. First, as to detail, "[t]he statement should gather into one place the discussion of environmental impacts and alternatives so that it serves as a comprehen-

---

sive document upon which responsible agency officials and others might rely in making the required balance between environmental and non-environmental factors." An impact statement should be "sufficiently detailed so that, if challenged, the courts will not be left to guess as to what is involved and whether the requirements of NEPA have been met." Second, as to objectivity, the statement must, at a minimum, reflect a good faith effort to comply with provisions of NEPA. This will automatically preclude consciously slanted or biased impact statements with attempts at intentional misrepresentation. Third, an impact statement must be written in language understandable to non-technical minds and at the same time contain enough scientific reasoning to alert specialists to particulars within the field of their expertise. Finally, the statement must discuss the alternatives to the proposed policy in order "to ensure that each agency decision-maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance." Although agencies are to consider alternatives to the fullest extent possible, the search for appropriate alternatives need not be exhaustive, speculative, or remote. Rather, an agency only needs to consider those alternatives that are reasonably available always keeping in mind that the discussions and considerations of alternatives cannot be merely superficial but must be thoroughly explored.

An additional element that must be included in an EIS is a discussion of the effect that a project will have on the cost-benefit ratio (B/C ratio). Since the purpose of an impact statement is to advise Congress of all environmental consequences of a proposed action, it should contain a section

---

10 359 F. Supp. at 1342; see Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).
14 Calvert Cliffs’ Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971).
16 Id. at 834.
that initially explains how the benefits and costs are calculated and then details which items are included as a benefit or cost and the valuation of each. The exact value of the B/C ratio, with respect to the proceedings brought under NEPA, is important only to ascertain whether the environmental factors have been properly and adequately considered. The value of the B/C ratio to the courts, therefore, is not as a basis for the disposition of an action brought under NEPA, but merely as an aid to the court in its task of determining whether all factors have been taken into account, after which the court may rule on whether the agency's decision to proceed was arbitrary and capricious. To calculate the B/C ratio under NEPA, the agency proposing the action must take account of "the total effect of the action not only upon the environment, but also upon local and state governments and any other groups that might be adversely affected. Failure to quantify each environmental effect will not, in itself, render an EIS deficient, because it is recognized that such values cannot be calculated. An EIS, however, must note that there is a deficiency present to comply with NEPA. Thus, summing up, it is apparent that the B/C ratio analysis required by NEPA is to aid the courts in determining whether all benefits and costs of projects have been considered, but is not, in itself, a determining factor of compliance with the NEPA.

Any number of omissions or agency miscalculations can taint a final impact statement. Examples include the failure to follow agency regulations in preparing the statement; regarding the substance of the statement itself, the failure to set forth all known environmental impacts or unavoidable adverse effects; the failure to mention and explore all alternatives and the environmental impacts of these alternatives, whether or not under agency control; the failure to discuss irreversible and irreplaceable commitments of resources; and the failure to discuss future plans emanating from the proposed action. Additionally, it might be fatal to fail to consult all appropriate agencies specified by NEPA, to fail to include responsible

---

26 Greene County Planning Bd. v. FPC, 455 F.2d 412, 423-24 (2d Cir.), cert. denied, 409 U.S. 849 (1972).
27 Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 788 (D.C.
comments in the report,\textsuperscript{28} or to fail to show that these comments accompanied the proposal through the agency review process.\textsuperscript{29} Failure to include an agency comment post-dating the final statement has been noted\textsuperscript{30} and the failure to circulate subsequent addendum to the final statement has been declared improper.\textsuperscript{31} All of these matters have received attention by courts in deciding whether the agency has produced a "detailed statement"\textsuperscript{32} or whether it has failed in some respect.\textsuperscript{33}

The District of Columbia Circuit Court of Appeals shed some light on some of these pitfalls in \textit{Committee for Nuclear Responsibility, Inc. v. Seaborg}\textsuperscript{34} when it admonished the Atomic Energy Commission to include the full range of responsible opinion in the comments received concerning the environmental impact of an underground nuclear explosion on Amchitka Island in the Aleutians:

When, as here, the issue of procedure relates to the sufficiency of the presentation in the statement, the court is not to rule on the relative merits of competing scientific opinion. Its function is only to assure that the statement sets forth the opposing scientific views, and does not take the arbitrary and impermissible approach of completely omitting from the statement, and hence from the focus that the statement was intended to provide for the deciding officials, any reference whatever to the existence of responsible scientific opinions concerning possible adverse environmental effects. Only \textit{responsible} opposing views need be included and hence there is room for discretion on the part of the officials preparing the statement; but there is no room for an assumption that their determination is conclusive. The agency need not set forth at full length views with which it disagrees, all that is required is a meaningful reference that identifies the problem at hand for the responsible official. The agency, of course, is not foreclosed from noting in the statement that it accepts certain contentions or rejects others.\textsuperscript{35}

Another opinion by the same circuit court dealt at length with another of the pitfalls: the degree to which the statement must consider alternatives

\textsuperscript{30}Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971).
\textsuperscript{34}463 F.2d 783 (D.C. Cir. 1971).
\textsuperscript{35}Id. at 787.
to the proposed action. In Natural Resources Defense Council, Inc. v. Morton\(^{38}\) the court referred to the EIS as “the environmental source material for . . . the making of relevant decisions”\(^{37}\) which should include an evaluation of the proposal and its alternatives:

A sound construction of NEPA . . . requires a presentation of the environmental risks incident to reasonable alternative courses of action. The agency may limit its discussion of environmental impact to a brief statement, when that is the case, that the alternative course involves no effect on the environment, or that their effect, briefly described, is simply not significant. A rule of reason is implicit in this aspect of the law as it is in the requirement that the agency provide a statement concerning those opposing views that are responsible.\(^{38}\)

The rationale for this construction is that “[t]he impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest.”\(^{39}\) Therefore, only the demonstrably speculative, presently unfeasible, or unreasonably remote alternatives can be given short shrift or excluded altogether.\(^{40}\)

Due to the generality of NEPA, it is not surprising that the courts have had numerous occasions to interpret it, especially section 102. “The lack of specificity in NEPA's environmental mandate has cast upon courts the responsibility for formulating more precise definitions of NEPA's requirements and for determining the legislation's effect on administrative authority and conduct.”\(^{41}\) Accordingly, it is not possible to predict definitely what a court will require an impact statement to include to be acceptable on judicial review. If, however, each of the factors discussed in the previous pages are considered when preparing an EIS, and each of the five specified elements of section 102(2)(C)\(^{42}\) are included, the EIS should withstand review in every circuit, regardless of whether the court has adopted the more lenient procedural review or the rigors of a substantive review.

II. AGENCY DECISION ON PREPARATION OF EIS VERSUS NEGATIVE DECLARATION

A recurring question for the courts is whether or not an administrative or quasi-regulatory agency must prepare an EIS at all. In the alternative an agency may make a discretionary determination to file a so-called “negative declaration.” This section will explore some of the decisions that bear

\(^{36}\) 458 F.2d 827 (D.C. Cir. 1972).
\(^{37}\) Id. at 833.
\(^{38}\) Id. at 834.
\(^{39}\) Id. at 835.
\(^{40}\) Id. at 834-38.
\(^{41}\) Note, Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline, 81 YALE L.J. 1592 (1972).
upon this question and some guidelines that influence the agency decision-making process.

NEPA requires all agencies of the federal government to "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 officials . . ." concerning the environmental aspects and effects of the action and proposing feasible alternatives to the action.43 "There is no doubt that the Act contemplates some agency action which does not require this impact statement," provided the action is not a major federal action or has so little effect on the environment as to be insignificant.44 However, as former Council on Environmental Quality (CEQ) Chairman Train has observe, "You cannot define how significant is significant, or how big is major, or how substantial is substantial. These are qualitative, subjective terms that do not lend themselves to legal definition."45 Nevertheless, the CEQ has attempted to list criteria for the definition of "actions."46 These CEQ Guidelines, first issued in 1971 and revised in 1973, for agencies to follow in implementing NEPA, although not having the force of law, do have persuasive value.47 For this reason, the CEQ makes no attempt at furnishing enforcement methods, nor does it categorically mandate that agencies follow a specific procedure; rather, it couches its directives in terms of what an agency should consider. The CEQ has recognized that federal agencies have vastly differing functions and programs.48 Therefore, federal agencies whose programs are generally carried out by state and local governments, e.g., HUD, will require entirely different and more sophisticated regulations than will agencies that have direct program implementations. Accordingly, the procedures promulgated by different agencies show a wide range of variation in approaching implementation,49 both from the perspective of agency attitude and the care and preparation of their procedures.50 EPA regulations have encouraged both press releases and public participation.

43 Id.
49 Compare GSA Procedures, 36 Fed. Reg. 23,702 (1971), which take a rather exclusionary approach, with HEW Procedures, 36 Fed. Reg. 23,676 (1971), which encourage a more positive and energetic role for HEW.
50 Indicative of agency attitude is the statement of purpose in promulgating regulations. It is interesting to note how the agency views its duties and how it perceives the objectives and the results of complying procedurally with NEPA. Other indicators of agency attitude may be found in the degree to which the public is encouraged to partake in environmental analysis. See, e.g., Forest Service Guidelines § 8413.22, 38 Fed. Reg. 31,930 (1973), where it was established that draft environmental statements are to be the basis for encouraging public action; HEW Procedures, 36 Fed. Reg. 23,676 (1971), where it was established that the agency should encourage press releases on environmental matters.
using the draft environmental statements. Furthermore, courts have sought to ensure that NEPA mandates are fully complied with, and thus, have laid down some of their own minimum requirements for agency procedures.

The decision to prepare and file an EIS depends upon the determination of two autonomous criteria: whether a major federal action is present, and whether this action will significantly affect the environment. These two concepts are distinct, and "the responsible federal agency has the authority to make its own threshold determination as to each in deciding whether an impact statement is necessary." The following discussion deals with three areas of interpretation of each of these two elements considered in turn. First, the CEQ Guidelines are outlined; second, the agency regulations are discussed, giving special consideration to those adopted by the EPA delimiting what is considered to fall into each category; and finally, the judicial gloss on the elements is examined.

A. Major Federal Action

CEQ Guidelines. The CEQ Guidelines require each administrative agency to adopt its own regulations designed to determine when a major federal action is being undertaken. According to the CEQ, the statutory clause "major federal action significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the specific action proposed being presently considered and of further actions contemplated. Even if an action is localized in its nature, a statement must be prepared if there is a potential that it will significantly affect the environment. According to these guidelines, all proposed actions whose environmental impact is likely to be highly controversial must be accompanied by an impact statement.

The CEQ goes on to point out that in considering what elements will constitute a major action, agencies should bear in mind that their decision concerning the necessity of submitting an impact statement for a project or complex of projects should reflect not merely the individual effect of the action, but also the cumulative effect that may make it environmentally undesirable. This may occur, for example, when one or more agencies contribute to a project resources that are individually minor but collectively major. When one decision involving a limited amount of money is a precedent for action in further projects or represents a decision in principle about a future major course of action, or when a group of federal agencies individually makes decisions about partial aspects of a federal action, the lead agency in such projects must prepare an EIS if it is reasonable to anticipate a cumulative impact on the environment from federal action.

54 Lead agency refers to the federal agency that has primary authority for committing the federal government to a course of action with significant environmental impact.
EPA Regulations. Due to the variety of federal actions, agencies have approached the determination of which are major in a number of ways. Some agencies with extremely broad functions have deferred to the general inclusiveness of the CEQ Guidelines, while other agencies with equally broad functions have gone one step further and have made the decision to resolve all doubts in favor of discussion of impact. Agencies with narrower functions, however, have recognized that procedural regulations more readily lend themselves to particularization. The Forest Service, for example, has taken the position that the responsible official must use good judgment in determining when an impact statement is necessary and has provided seven specific categories of possible economic effects, as well as a sample listing of ecological situations that may be affected. HEW has gone even further than the Forest Service, requiring that the determination of whether to file an EIS be based not solely on the dollar and physical size of the project but also on the potential effect on the environment of the community. HEW regulations list many points of comparison between the proposed project and its ecological effect. This approach is also taken by the Department of Transportation and the Federal Highway Administration.

The EPA regulations on the subject of major federal action on their face include all agency actions and actions of other parties directly or indirectly supported by the agency unless expressly exempted. The major exemptions are regulatory activities, normal personnel actions, legislative proposals originating in another agency, legislative proposals not relating to or affecting the matters within EPA's primary areas of responsibility, and contracts for consulting services and administrative procurement. Of these, only the latter two raise additional problems. A contract for consulting services could involve activities having an environmental impact if, for example, a contractor utilizes a particular process for performing. However, since the exemption only applies to the actual decision to employ the contractor, it could not be extended to exempt utilization of the process. Administrative procurement could also conceivably have environmental effect, for example, in purchasing supplies not subject to recycling.

Judicial Interpretation. Courts have recognized the necessity for agency expertise in deciding whether an action is major and whether it significantly

---

As necessary, the CEQ has established that it will assist in resolving conflicts concerning lead agency determination. See also Humphreys, NEPA and Multi-Agency Actions—Is the "Lead Agency" Concept Valid?, 6 NAT. RES. L. 257 (1973).

62 Personnel actions may have an environmental impact if they result in a substantial expansion of the work force at a federal facility, thus increasing traffic, waste and population density. This increment, however, would involve a separate, identifiable
affects the quality of the human environment, and they will generally overturn an agency decision only if it is arbitrary, capricious, or an abuse of agency discretion. But in Scherr v. Volpe\textsuperscript{64} the court rejected this view on the basis that NEPA is a flat command to federal agencies. Thus, while an agency must have the first opportunity to decide what is expected of it, "when its failure is then challenged, it is the court which must construe the statutory standards . . . and, having construed them, then apply them to the particular project . . . ."\textsuperscript{65}

The courts have addressed the major federal action requirement in private injunction suits. In the area of administrative grants, numerous federally supported activities have been subjected to the impact statement requirement. A large blanket grant, even when only a relatively small portion is used for a project with a potential environmental impact, may be found to fall under the mandate. In Ely v. Velde,\textsuperscript{66} because a small portion of a law enforcement assistance grant was allocated by the state to prison construction in an historic area, the court required preparation of an EIS as a prerequisite to receiving the whole grant. Impact statement requirements cannot be avoided by submerging a specific project within a much larger, ill-defined governmental act such as a huge block grant, nor can an assessment of the total environmental impact be avoided by subdividing a project into numerous small parts no one of which is a major federal action. As a result, in Named Individual Members of San Antonio Conservation Society v. Texas Highway Department\textsuperscript{67} the court held that each segment of a highway project must be viewed as an integrated part of the whole, and that the cost of the entire project is the relevant figure from which to decide the major federal action issue.

The stage in the development of a project at which federal action becomes major also has attracted judicial inquiry. The mere funding of preliminary studies or investigations, for example, does not require an impact statement,\textsuperscript{68} except, of course, when the preliminary studies themselves have a physical impact.\textsuperscript{69} Preliminary steps, however, may be deemed major actions even without a physical impact if they represent so substantial a commitment of federal resources that subsequent withdrawal is unlikely. Condemnation proceedings by state and federal agencies for a federally funded project have been found to fall within this category.\textsuperscript{70}

\textsuperscript{64} See Echo Park v. Romney, 3 ENVIR. REP.—CAS. 1255 (C.D. Cal. 1971).\textsuperscript{65} 336 F. Supp. 886 (W.D. Wis. 1971).\textsuperscript{66} Id. at 888. See also Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366 (E.D.N.C. 1972).\textsuperscript{67} 451 F.2d 1130 (4th Cir. 1971).\textsuperscript{68} 446 F.2d 1013 (5th Cir. 1971).\textsuperscript{69} Northeast Area Welfare Rights v. Volpe, 2 ENVIR. REP.—CAS. 1704 (E.D. Wash. 1971). See also City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).\textsuperscript{70} West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) (permit for mineral testing held to be a major federal action). See Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Keith v. Volpe, 4 ENVIR. REP.—CAS. 1562 (C.D. Cal. 1972); United States v. 247.37 Acres of Land, 3 ENVIR. REP.—CAS. 1098 (S.D. Ohio 1971).
The physical dimensions of a federal project have served as a guideline for determining major action in at least two instances, both involving HUD projects. In *Goose Hollow Foothills League v. Romney*\(^7\) the construction of a sixteen-story apartment building was found to constitute a major federal action. The opposite conclusion, however, was reached regarding a sixty-six unit HUD project in *Echo Park v. Romney*,\(^8\) although the basis for this latter decision is not definite because the court treated the necessity of an impact statement as a matter of administrative discretion subject only to limitations against abuse. Since the decision in *Echo Park*, the issue whether a project is a major federal action has been held to present a matter of law for the judiciary to determine independently of agency discretion.\(^9\) Another district court has determined that an expenditure of $9.3 million on a sewage plant is a major federal action.\(^10\)

Additionally, the cancellation of federal contracts has been subjected to NEPA requirements. In *National Helium Corp. v. Morton*\(^11\) helium production contracts were cancelled. This negative action was held to constitute action sufficiently likely to require an impact statement thereby justifying issuing a preliminary injunction. The potential environmental impact was a loss of a natural resource into the atmosphere. Here, the failure of the federal government to continue to take advantage of a natural resource was found to be within the probable purview of the Act.

Finally, permit and licensing activities also have been subjected to NEPA requirements. Even a partial operating license for a nuclear reactor, granted pending NEPA review of an application for a permanent license, has been found to require its own separate impact statement.\(^12\) Federal permit activity of lesser potential dimensions similarly has been subjected to the impact statement mandate. In *Kalur v. Resor*\(^13\) the district court ruled that grants of Refuse Act permits by the Corps of Engineers require the submission of impact statements. The court did not distinguish between permits for small discharges of little overall significance and permits for large discharges, but rather grouped all permit approvals in the major federal action category.

The applicability of NEPA to EPA enforcement activities is a problem indirectly raised by *Kalur*. Both CEQ Guidelines\(^14\) and EPA regulations\(^15\) exempt enforcement activities from the impact statement requirements; but the decision in *Kalur* casts doubt on this area of the law by voiding the Corps’ regulation that attempted to exclude some permits from NEPA coverage.

\(^{72}\) 3 Envr. Rep.—Cas. 1255 (C.D. Cal. 1971).
\(^{74}\) Mountain View Improvement Ass'n v. Fri, Civil No. 10171 (D.N.M., filed June 22, 1973).
\(^{75}\) 455 F.2d 650 (10th Cir. 1971).
B. Significant Environmental Effect

Once the major federal action issue has been affirmatively resolved, the second prong of NEPA statutory language comes into play. A determination of whether there is a "significant environmental effect" is a critical jurisdictional requirement for the application of NEPA's impact statement mandate.

**CEQ Guidelines.** NEPA indicates a broad range of significant effects including those that degrade the quality, curtail the range of beneficial uses, or work to the long-term disadvantage of the environment.\(^80\) Additionally, CEQ Guidelines provide that "[s]ignificant effects can also include actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial."\(^81\) Thus, an impact statement will be required if an action will degrade the environment, curtail the range of beneficial uses, or have both beneficial and detrimental effects. The first factor, the degrading of the environment, obviously is the main thrust of NEPA and self-explanatory; but the other elements bear close scrutiny. Even uses that would generally be considered beneficial for a particular site, *i.e.*, a playground, will require an impact statement if other beneficial uses, such as agriculture, are curtailed. The construction of a playground requires the irreversible commitment of the site to that use, precluding all other uses.\(^82\)

**EPA Regulations.** Agency regulations establish some standards for determining significance of effect. In response to the CEQ model, consideration must be given to both beneficial and adverse effects.\(^83\) Even possible temporary effects, such as damage during construction, are included as significant. Individually small, but cumulatively large or precedent-setting actions are also treated.\(^84\)

Under EPA regulations an initial, thorough study of activities and proposed or recommended agency actions, called an "environmental review," is always required for the purpose of determining whether a significant impact is anticipated and an environmental impact statement required.\(^85\) A significant effect on the quality of the human environment encompasses both adverse and beneficial effects and includes environmental consequences of both a primary and secondary nature; but primary effects should not be given greater consideration than secondary effects.\(^86\) An impact statement should be prepared when the project is likely to be or is highly contro-

---


\(^{81}\) CEQ Guidelines § 1500.6(b), 38 Fed. Reg. 20,551 (1973).


versial, regardless of any measurement of effect. The regulations provide further that, if the environmental assessment indicates no significant impact upon the quality of the human environment by the proposed action, a "negative declaration" to that effect shall be prepared and circulated by the EPA, and an "environmental impact appraisal" supporting the negative declaration and describing the proposed activity and its impact shall be prepared and kept on record by the EPA.

The EPA regulations on impact statements for waste water treatment plants depend upon more easily identifiable criteria. If the construction of a plant will affect a residential area by odor or merely visual presence, it is deemed significant, as is the case when it is planned to be built on public park lands. Similarly, when substantial population displacement or expansion of service to undeveloped areas is involved, the action is treated as significant. On the other hand, if the project is located in an area that is already highly industrial or one in which no new land use is involved, no impact statement is required.

Judicial Interpretation. The basic form of significant effect that has been recognized in case law is the immediate physical impact. But the cumulative impact with other projects must be considered. "Any action that substantially affects, beneficially or detrimentally, the depth or course of streams, plant life, wildlife habitats, fish and wildlife, and the soil and air significantly affects the quality of the human environment."

Almost any construction that meets the major federal action requirement will have a significant effect because substantial land will be involved. The effect of the particular land use has been deemed important by the courts. Population concentration, increased traffic, interference with views, and alterations of neighborhood character all have been found to be significant under NEPA. Destruction of wildlife habitat has also qualified, as have increased noise levels and effects on pedestrian safety. Additionally, increases in parking and transportation needs resulting from federally supported development have also been found significant. And fi-

---

94 Texas Comm. on Natural Resources v. United States, 1 ENVIR. REP.—CAS. 1303 (W.D. Tex.), vacated, 430 F.2d 1315 (1970).
nally, stream channelization by the Corps of Engineers, increasing the surface of a waterway, and changes in water temperature that affect fish production are also the type of physical changes within the NEPA mandate. Effects of major physical actions, not in themselves physical alterations, have also received judicial attention. For example, continual purchases of fuel coal produced by strip mining have been subjected to NEPA review.

An area of less obvious significant environmental effect is the regulatory rate increase approval. In *Cohen v. Price Commission* a rate increase for subway and bus fares in New York City had been approved. Plaintiffs brought suit to enjoin the increase pending a full NEPA review on the theory that fare increases would expand motor vehicle traffic thereby increasing air pollution in the downtown area. A preliminary injunction was denied by the court on evidentiary grounds because plaintiffs had failed to carry the heavy burden of demonstrating the necessary likelihood of success. Since disposal of the case was on a burden of proof ground and not on defendant's counter argument that there was no major federal action or significant effect, the basis of the decision arguably supports the impropriety of the defense under the circumstances in the case. Another rate increase case, involving ICC approval of railroad freight surcharge increases, squarely presented the issue of the effect of rate increases on the environment. In *Scrap v. United States* plaintiffs relied on the theory that increased shipping costs would adversely affect the recycling of used goods, thus rendering an EIS necessary. The ICC contended that since the increase was only temporary it was not a major federal action. Defendants also emphasized in their answer that they had issued a summary statement that concluded that there were no significant effects. The court rejected the ICC argument and found that even a temporary action could be major and have a significant effect as it did in that case because environmentally beneficial recycling was likely to be affected. The Commission's abbreviated finding of no effect was deemed inadequate to satisfy even the barest negative declaration form of review.

Although *Scrap* did not directly involve the effect of transportation rates on air and traffic conditions, *City of New York v. United States* relied on by the court in *Scrap*, did consider the problem. There, the city sought to enjoin ICC approval of a railroad line abandonment taken without compliance with NEPA requirements, alleging increased truck traffic and air pollution as environmental effects. The court remanded to ICC to undertake NEPA evaluation.

---

Although the court in *Hanly v. Mitchell*\(^{102}\) pointed out that major action and significant effect are separate criteria to consider, there has been little judicial experience on negative findings of significant effect once it has been determined that a major federal action is involved. In *Citizens for Reid State Park v. Laird*\(^{103}\) an injunction was sought against a mock military amphibious landing on a state park beach. Potential ecological damage alleged included trampling mosses, uprooting dune grasses by helicopter prop wash, and sewage increase from the nine hundred man maneuver. The court studied the Navy's evaluation of these effects and determined that there were no long-term effects. Since any damage done would remedy itself rather than become permanent, injunction was denied.

Judicial application of the significant effects standard has been sensitive to both immediate and remote physical impacts. The effect of an action on intangibles, such as neighborhood character, has been considered in determining the significant effect criteria to the same degree as the obvious tangibles, such as building a highway over an open field or the erection of an ecologically threatening tall building.\(^{104}\) The most expansive decision taking into account social effects of construction is *Hanly v. Mitchell*,\(^{105}\) where a citizen sued to enjoin construction of a federal prison facility in Foley Square in New York City. The GSA had prepared a brief statement declaring that no adverse effects existed because water, sewage, trash, heat, and transportation could be handled by existing facilities, no relocation would be involved, and existing zoning would not need to be altered or challenged. The Court of Appeals for the Second Circuit did not find these considerations of physical impact to be exhaustively descriptive of environmental effects; therefore, the district court was reversed and the injunction granted. The effect that was found not to have been considered was the change in the “living environment of all the families in [the] area.”\(^{106}\) In addition to physical changes that must be considered in making an environmental appraisal to determine whether an EIS is required, “crime, congestion and even [the] availability of drugs” are deemed to be among the effects that must be studied.\(^{107}\) The social impact of constructing various kinds of facilities, such as hospitals, rehabilitation centers, and police stations, may alter an otherwise negative finding concerning the necessity of submitting an EIS. The required degree of an environmental evaluation is greater than many federal agencies may have imagined necessary because most have viewed the requirements of NEPA as focusing on plants, wildlife, and air, water, and solid waste pollution matters. The definition encompassed by the word “environment” in NEPA refers to more than merely biological and physical problems.

---

\(^{102}\) 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972).


\(^{105}\) 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972).

\(^{106}\) Id. at 646.

\(^{107}\) Id. at 647.
If any elements requisite for the filing of an EIS pursuant to NEPA are not found to exist after making an extensive environmental review, then rather than order the preparation of an impact statement, the agency, according to the EPA regulations, should require the preparation of a negative declaration, a written announcement prepared subsequent to the review which is factually defensible, stating that the agency has decided not to prepare an EIS. The drafters of NEPA intended this Act to be a firm but fluid statement.

As the courts become more willing to involve judicial machinery with the problems of the environment, NEPA, especially through the EIS mandate, will become the significant tool it was intended to be. In light of the direction that courts are taking, no federal project, major or minor, with a significant or insignificant effect, is totally free from the all-encompassing umbrella of NEPA. If an EIS is not determined to be necessary, a similar statement verifying such a negative determination is still prepared—the submission of an environmental impact appraisal supporting the negative declaration. This appraisal actually is an impact evaluation, just as an EIS, but concludes that no environmental impact will result from the action at issue. Therefore, in essence, all projects are subjected to the same intense environmental review and required to submit some statement attesting to the result of that review. When it is determined that the project constitutes a major federal action that will significantly affect the quality of the human environment, then the agency must follow all procedures finally leading up to the submission of a final EIS; when a negative determination results, then the agency must still submit an abbreviated EIS accompanying the filing of a negative declaration.

110 Senator Henry Jackson, co-sponsor of the National Environmental Policy Act, has written, "A national policy for the environment [is] necessary to provide both a conceptual basis and legal sanction for applying to environmental management the methods of systems analysis that have demonstrated their value in universities, private enterprise, and in some areas of government." Jackson, Environmental Policy and the Congress, 11 NAT. RES. J. 403, 407 (1969).
111 The following procedural steps are to be followed in making environmental appraisals in accordance with EPA Interim Regulations, 38 Fed. Reg. 1696 (1973):
1. Proposed and certain ongoing agency actions shall be subjected to continuing environmental review, which will determine whether a significant impact is anticipated from the proposed action. Id. § 6.21.
2. If an environmental review indicates impact will occur, the following action must take place:
   a. Notice of intent, announcing the preparation of a draft impact statement, shall be issued by the "responsible official." Id. § 6.22.
   b. As soon as possible after notice of intent is filed, the draft must be circulated to interested federal and state agencies. Public hearings will be held if warranted. Id. § 6.23.
   c. A final impact statement must be prepared and distributed. Id. § 6.24.
3. If an environmental review indicates no significant impact will occur, the following steps should be taken in accordance with Id. § 6.25:
   a. A negative declaration shall be prepared and circulated in the same manner as the notice of intent.
   b. An environmental impact appraisal shall be on file in the originating office and available for public inspection.
III. IS NEPA A SUBSTANTIVE ACT OR MERELY PROCEDURAL?

Because of a lack of adequate legislative history under NEPA there has been substantial uncertainty as to the reason for imposing compliance on federal agencies. The question is whether NEPA requires the courts to scrutinize an EIS substantively or merely evaluate procedural compliance.

"The primary purpose of the [environmental] impact statement is to compel federal agencies to give serious weight to environmental factors in making [sic] discretionary choices."\(^{112}\) It has been recognized that the role of district courts in reviewing actions of federal agencies under NEPA has not been clearly enunciated, and different standards have been formulated and followed.\(^{118}\) It has also been held that in the ultimate weighing of values, the courts cannot strike the balance but must insist that the appropriate administrative officials use the scales prescribed by Congress (in NEPA) with a scrupulous regard for the importance of the choices presented.\(^{114}\) Another decision has noted that a court, in reviewing an EIS, cannot seek to impose unreasonable extremes or inject itself into the area of discretion of the agencies as to the choice of action to be taken.\(^{115}\) Yet the courts must see that the important legislative purposes to protect the environment are not lost or misdirected in the vast hallways of the federal bureaucracy.\(^{116}\)

While agency action is always subject to judicial review as to the compliance with NEPA specified procedures, substantive review is limited. The form of substantive inquiry was set forth by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*,\(^{117}\) and can be clarified in terms of three stages: (1) the Secretary's decision is entitled to a presumption of regularity, although that presumption is not to shield his action from a thorough, probing, and in-depth review; (2) the reviewing court must then determine whether the Secretary has acted within the scope of his authority—this includes ascertaining: (i) if the actual decision made was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law, (ii) if the decision was based on a consideration of the relevant factors, and (iii) if there has been a clear error of judgment; (3) finally, despite the fact that the inquiry into the facts is to be searching and careful, the ultimate standard of review is narrow, as the Court is not empowered to substitute its judgment for that of the agency. This substantive review, however, is only allowed and not prescribed. There is wide disagreement among the circuit courts as to when, if ever, an inquiry into the substantive determinations of the agency is justified.

\(^{112}\) Monroe County Conservation Council v. Volpe, 4 ENVIR. REP.—CAS. 1886, 1887 (2d Cir. 1972); see Committee for Nuclear Responsibility, Inc. v. Seaborg, 465 F.2d 783, 787 (D.C. Cir. 1971); National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971).


\(^{116}\) Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

\(^{117}\) 401 U.S. 402 (1971).
A. District of Columbia Circuit

An agency decision concerning an environmental impact statement is subject to very limited substantive review and can be set aside only if the balance of cost and benefit is arbitrary and capricious or not supported by substantial evidence. In Calvert Cliffs' Coordinating Comm., Inc. v. AEC the court emphasized this by contrasting a reversal on procedural grounds as opposed to one on substantive grounds.\footnote{118} A Fifth Circuit district court cited another District of Columbia Circuit decision, Committee for Nuclear Responsibility, Inc. v. Seaborg,\footnote{119} for the proposition that a court can determine only whether the agency has complied substantially with the procedural requirements of NEPA.\footnote{120} The Seaborg court, however, while noting that its function in substantively reviewing an agency's impact statement was limited, did not dismiss altogether the possibility of such review.\footnote{121} An example of substantive review can be found in National Resources Defense Council, Inc. v. Morton, where the court reviewed the substance of an EIS in question and found that "the defendants only superficially discussed the alternatives listed in their Final Impact Statement, and they failed to discuss in detail the environmental impacts of the alternatives they listed in the statement."\footnote{122} Therefore, the project was enjoined pending preparation of a proper EIS.

The court has also indicated that it will review the factors discussed in an EIS, recognizing that although agencies are to consider alternatives to the fullest extent possible, the search for appropriate alternatives need not be either exhaustive or speculative and remote. The agency need only consider those alternatives that are "reasonably available," yet always realizing that the discussion and consideration cannot be merely superficial; they must be thorough.\footnote{123}

B. Second Circuit

Hanly v. Mitchell\footnote{124} originally involved only procedural review under section 102(2)(C) because the federal agency involved contended that under the circumstances an impact statement was not required, although ultimately a short impact statement was submitted. The court first discussed the procedural aspects and ruled that an impact statement was required. Then turning to the substantive aspects of the abbreviated EIS that was submitted, the court found it to be insufficient. The Second Circuit issued a preliminary injunction and remanded the case to the federal agency for a proper EIS reflecting a "determination . . . taking account of all relevant

\footnotesize
\begin{itemize}
  \item \footnote{118}{449 F.2d 1109, 1115 (D.C. Cir. 1971).}
  \item \footnote{119}{463 F.2d 783 (D.C. Cir. 1971).}
  \item \footnote{120}{Pizitz v. Volpe, 4 Envr. Rep.—Cas. 1195 (M.D. Ala.), aff'd, 467 F.2d 208 (5th Cir. 1972).}
  \item \footnote{121}{"On the ultimate issue whether a project should be undertaken or not, a matter involving the assessment and weighing of various factors, the court's function is limited." 463 F.2d at 786-87.}
  \item \footnote{122}{458 F.2d 827, 832 (D.C. Cir. 1972).}
  \item \footnote{123}{Id. at 834-38.}
  \item \footnote{124}{460 F.2d 463 (2d Cir. 1971), cert. denied, 409 U.S. 990 (1972).}
\end{itemize}
factors, of whether the proposed (project) significantly affects the quality of the human environment." \(^{126}\) It is therefore apparent from \textit{Hanly} that the Second Circuit is willing to undertake substantive review of an EIS.

In an earlier case, \textit{Scenic Hudson Preservation Conference v. FPC}, \(^{126}\) the Second Circuit construed section 101 of NEPA as requiring the same detailed and exhaustive consideration of environmental factors that had been required when it remanded the same case to the Federal Power Commission five years earlier. \(^{127}\) In the earlier case the court made a detailed substantive review of alternate plans to the project and of the impact of the project on "the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites." \(^{128}\) "The policy statement in Section 101 envisions the very type of full consideration and balancing of various factors which we, by our remand order, [require] the Commission to undertake." \(^{129}\)

The Second Circuit was consistent with this opinion concerning the review of an EIS when, in \textit{Monroe County Conservation Council, Inc. v. Volpe}, \(^{130}\) it enjoined another project pursuant to the filing of a proper impact statement, reasoning that the preparation of a federal aid highway EIS by the Department of Transportation had not adequately discussed alternatives to the project or the project's environmental effects. The statement was not subjected to review by other federal agencies, and it was not reviewed by the Council on Environmental Quality. Therefore, it did not satisfy NEPA. Although it is apparent that the project was enjoined in \textit{Monroe County} due to a failure to follow certain specified procedural steps, substantive review of the EIS was also one of the elements given as a basis for the injunction.

C. Fourth Circuit

In \textit{Conservation Council of North Carolina v. Froehlke} \(^{131}\) the Fourth Circuit adopted the position that when a federal court reviews an agency decision to enter into construction of a major project it must consider whether the agency arbitrarily and capriciously violated substantive policies of NEPA as well as whether it complied with the procedural requirements of the Act in reaching its decision. The Fourth Circuit cited a decision by the Eighth Circuit for the proposition that the courts have the authority to inquire into substantive decisions:

The review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits

\(^{125}\) \textit{Id.} at 648.
\(^{128}\) \textit{Id.} at 614.
\(^{129}\) 453 F.2d at 481.
\(^{130}\) 472 F.2d 693 (2d Cir. 1972).
\(^{131}\) 473 F.2d 664 (4th Cir. 1973).
struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors.\textsuperscript{132}

In the Fourth Circuit, then, substantive inquiry is limited to determining "whether there has been a clear error of judgment."\textsuperscript{133}

\textbf{D. Fifth Circuit}

The Fifth Circuit has not allowed substantive review, taking the position that the courts' only duty is to ascertain whether the procedural requirements under NEPA have been met.\textsuperscript{134} Only if a plaintiff raises substantial environmental issues should a court proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects significantly affecting the environmental quality.\textsuperscript{135} If the plaintiff can establish that there was an inadequate evidentiary development before the agency, the district court should supplement the deficient administrative record by taking evidence on the environmental impact of the project. The view of the Fifth Circuit on whether NEPA should be considered a "substantive" or "procedural" Act is thus firmly established: "The mandate of the NEPA on federal agencies is that they comply with the procedural duties imposed by the Act to the fullest extent possible."\textsuperscript{136}

\textbf{E. Seventh Circuit}

"Other than the procedural requirements . . . no judicially enforceable duties are created by . . . the National Environmental Policy Act . . . ."\textsuperscript{137} Thus, the Seventh Circuit has held that the declaration of a national environmental policy and a statement of purpose appearing in this Act is not sufficient to establish substantive rights. It is apparent that an EIS review by this circuit will pertain only to the procedural aspects of NEPA, including the proper filing of an EIS, rather than the substance. This concern of the Seventh Circuit for the specified procedures established in NEPA for filing an EIS rather than its substantive content is focused in \textit{Scherr v. Volpe}.\textsuperscript{138} In \textit{Scherr} the court upheld an injunction against a federal-aid highway project, because the state official's reports that considered the environmental effects of the proposed project were not made public, were not prepared in consultation with federal officials, and were not indicative of the evaluation process required by NEPA. The injunction was granted and affirmed on procedural grounds.

\textsuperscript{132} Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 353 (8th Cir. 1972).

\textsuperscript{133} 473 F.2d at 665.

\textsuperscript{134} Pizitz v. Volpe, 467 F.2d 208 (5th Cir.), aff'd 4 ENVIR. REP.—CAS. 1195 (M.D. Ala. 1972).

\textsuperscript{135} Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973); see Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).

\textsuperscript{136} Atlanta Gas Light Co. v. Federal Power Comm'n, 476 F.2d 142 (5th Cir. 1973).

\textsuperscript{137} Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537, 540 (7th Cir.), cert. denied, 409 U.S. 1047 (1972).

\textsuperscript{138} 466 F.2d 1027 (7th Cir. 1972).
Although the Seventh Circuit has not directly spoken on the point of whether it will allow a substantive review of an EIS, its unquestionable interpretation of NEPA in Scherr as a “procedural” act rather than one creating substantive rights lends support to an argument favoring a procedural rather than substantive review.

F. Eighth Circuit

When an EIS is challenged and brought before the court for review, the court will first determine if the agency reached its decision after a full, good faith consideration of the environmental factors. Under the holding of Environmental Defense Fund, Inc. v. Corps of Engineers, the court must then determine, according to the standards set forth in sections 101(b) and 102(1) of NEPA whether “the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.” In that case the Eighth Circuit emphatically recognized NEPA as a “substantive” Act, stating that “[t]he language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decision-making.” Speaking directly on the point of substantive review, the Eighth Circuit concluded that “courts have an obligation to review substantive agency decisions on the merits . . . . NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.”

This policy of the Eighth Circuit was later elaborated in Environmental Defense Fund, Inc. v. Froehlke, where the court determined that NEPA authorizes federal district courts to consider whether an agency decision to construct a project arbitrarily and capriciously violates the substantive policies of the Act. At the same time, however, the court cautioned that although there is to be a careful search and study of the facts surrounding each particular situation, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

G. Ninth Circuit

The Ninth Circuit in Jicarilla Apache Tribe of Indians v. Morton refused to balance the benefits of a particular project against its adverse effects on the environment, holding instead that the scope of review is very narrowly

---

139 Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 300 (8th Cir. 1972), quoting Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).
140 Id. at 297.
141 Id. at 298-99.
142 473 F.2d 346 (8th Cir. 1972).
143 See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).
limited to whether the necessary procedural requirements have been met.\textsuperscript{144} The court found that considerations of what particular information is required to complete an EIS were beyond its jurisdiction and accordingly limited its review to questions of procedure. Only when the issue "is purely a question of mechanical procedures, requiring no expertise in a particular substantive area," is it proper for review under NEPA.\textsuperscript{145}

**H. Tenth Circuit**

In *McQueary v. Laird*\textsuperscript{146} the Tenth Circuit rejected the contention that NEPA creates any sort of substantive right to a clean environment. It followed this position in *Upper Pecos Association v. Stans*, ruling that "[t]he mandates of the N.E.P.A. pertain to procedure and not to substance, that is, decision-making in a given agency is required to meet certain procedural standards, yet the agency is left in control of the substantive aspects of the decision. The N.E.P.A. creates no substantive rights in citizens to safe healthful, productive and culturally pleasing surroundings."\textsuperscript{147} The Tenth Circuit has thus aligned itself with the Fifth, Seventh and Ninth Circuits in allowing only procedural review in NEPA cases.

**I. Summary**

Generally speaking, the District of Columbia, Second, Fourth and Eighth Circuits permit some substantive review of cases arising under NEPA, while the Fifth, Seventh, Ninth and Tenth Circuits allow only a very limited substantive review if any. Although the circuits vary in their conclusions and interpretations of the role they play in reviewing an agency determination concerning an EIS, it is the consensus of the circuits that NEPA is, at the very least, an "environmental full disclosure law," for agency decision-makers and the general public.\textsuperscript{148} Therefore, although some circuit courts may voice an opinion that there is no substantive review allowed under NEPA, it is possible to argue before all courts that if inadequate consideration is given to alternatives in an EIS or if inaccurate representations are propounded in an EIS they amount not only to a substantive breach but actually a procedural breach of section 102(2)(C) of NEPA. The basis for this position is that section 102 of NEPA impliedly requires that an EIS be complete and accurate; it does not contemplate the submission of misleading reports. Therefore, when misleading reports are submitted, an agency has not even met the procedural requirements of NEPA; and under such circumstances, all courts should accept jurisdiction for a substantive type of review.

\textsuperscript{144} 471 F.2d 1275, 1280 (9th Cir. 1973).
\textsuperscript{145} Id. at 1281. The court cited with approval the District of Columbia Circuit's Decision in Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971). For a discussion of this case, see note 117 supra, and accompanying text.
\textsuperscript{146} 449 F.2d 1109 (10th Cir. 1971).
\textsuperscript{147} 452 F.2d 1233, 1236 (10th Cir. 1971).
There has been substantial concern recently with respect to what type of EIS should be prepared when projects are started in segments. This type of problem is inextricably intertwined with the retroactive nature of NEPA and the impact of multi-agency actions. This section will briefly consider the necessity of preparing an EIS for projects completed after January 1, 1970, but started prior to that date. The problem of NEPA application to projects constructed in segments but commenced after the effective date of the Act will be examined in terms of the relation that each segment bears to the entire project. Lastly, the problems of multi-agency actions and the "lead-agency" concept will be described.

A. Retroactive Application of NEPA

The express words adopted in the Act itself shed relatively little light on the issue of retroactive application. Section 101 provides that "all practicable means and measures" are to be taken to protect the environment, while the phrase "to the fullest extent possible" modifies the requirements of section 102. Although these phrases have been interpreted to indicate both retroactivity and nonretroactivity, neither conclusion is compelled by the provisions of the Act. The statute is not made expressly retroactive, but it omits the traditional "grandfather" clause often inserted to assure that retroactive application is not read into a law. Equally unenlightening is the legislative history that contains little more than expressions of hope that agencies will not attempt to evade its mandates by a narrow construction.

The CEQ Guidelines approach the retroactivity issue in a more direct manner. According to these Guidelines, 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 cautioned that in such cases further incremental major actions should be planned in such a way to minimize environmental damage and take into account factors not fully evaluated at the outset of the project. Accordingly, it is apparent that the language adopted by the CEQ in formulating its guidelines reflects its opinion that NEPA is not fully retroactive.

The question of retroactive application is not definitely answered by the statute itself, the legislative history, or the implementing regulations, it has been the subject of several judicial decisions. *Pennsylvania Environmental Council v. Bartlett* is the leading case in support of nonretroactivity. In that case the court examined NEPA and determined that

---

149 Id. at 755.
153 454 F.2d 613 (3d Cir. 1971).
"[t]here is no evidence of a congressional intention that the Act be applied retroactively to reopen decisions [that] had become final before [the effective] date." The court stated that under the particular circumstances of the case the final federal approval took place prior to the effective date of NEPA, and therefore, the Act was not applicable. Other cases have reached the same conclusion. Accordin...some, the congressional failure to make the Act explicitly retroactive was determinative, particularly in light of the realization that Congress must have been aware of the numerous incomplete projects in progress when NEPA was adopted. One court made retroactive application contingent upon substantial deviation from any plans implemented before NEPA was passed. Others have urged a comparison of the likelihood of a change in plans with the cost of a delay in construction. A recent case directly on point is Greene County Planning Board v. FPC, in which the court, after studying and considering the major trends of judicial interpretations concerning the retroactive application of NEPA, 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." In contrast to these cases, an impressive number of courts have either expressly stated that NEPA is fully retroactive or have applied the Act to projects begun before its effective date by using other theories. One of the most innovative cases interpreting NEPA is Environmental Defense Fund, Inc. v. Corps of Engineers, in which the project at issue was a dam that Congress had authorized to be constructed in 1958. The construction began in 1965 and by the effective date of NEPA, January 1, 1970, nine million dollars of the projected fourteen million dollar cost of the project had already been expended. The court, in deciding that an impact statement must be filed pursuant to NEPA before construction could continue, 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 NEPA." The Act was interpreted 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 completion of the work."
The court stated that the duty to make an environmental assessment was a continuing responsibility to study and improve plans and to determine whether to go forward with, abandon, or restudy the whole project.

Several courts have applied a "balancing of factors" test to projects begun before NEPA became effective in dealing with the issue of retroactivity. The Fourth Circuit in *Arlington Coalition on Transportation v. Volpe*, holding that an impact statement was required for a highway project planned prior to the Act's effective date, noted that "Section 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." Since the construction contracts in *Arlington Coalition* had not yet been let, the court determined that application of NEPA was warranted even without the necessity of considering its retroactivity under the circumstances. Although this case did expressly approve the nonretroactivity theory of *Pennsylvania Environmental Council v. Bartlett*, it ultimately applied NEPA to a project initiated before the Act. Opposed to this, however, is *Environmental Law Fund v. Volpe*, which refused to follow *Bartlett* and at the same time declined application of NEPA to a project similar to that considered in *Arlington Coalition*. The court ruled that NEPA requires an impact statement to be filed for the continuation of a project ongoing before and after January 1, 1970, only if practicable, the four factors of practicability being 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 would be impracticable under the circumstances, and therefore declined to enjoin the project. Likewise, the court in *Jicarilla Apache Tribe of Indians v. Morton* upheld a lower court's refusal to enjoin construction of a power plant, noting that an impact statement will be required for an ongoing project only when it is practicable to reassess the basic course of action.

A recent decision in *Scherr v. Volpe* recognized that while NEPA is not to be given retroactive effect as a result of applying the balancing of factors test, NEPA does apply prospectively to certain projects ongoing when the Act became effective. Considering the congressional command that the Act be complied with "to the fullest extent possible," the court ruled that an ongoing project is subject to the requirements of section 102 until it has reached that stage of completion where the cost of abandoning or altering the proposed project clearly outweighs the benefits that could flow from compliance with section 102.

Another theory that has been proposed and accepted by some courts, with modification, in disposing of the retroactivity issue is the "incremental action theory." This theory originated in the Guidelines adopted by the

---

168 458 F.2d 1323, 1332 (4th Cir. 1972).
164 454 F.2d 613 (3d Cir. 1971); see note 150 supra, and accompanying text.
166 471 F.2d 1275 (9th Cir. 1973).
167 466 F.2d 1027 (7th Cir. 1972).
CEQ which provide that NEPA is to apply to "further major Federal acts," even if the basic project was initiated before the Act became effective. According to the Guidelines, 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 enhance and restore environmental quality as well as to avoid or minimize adverse environmental consequences." In Environmental Defense Fund, Inc. v. Corps of Engineers the district court cited the Guidelines with approval, noting that the actual extension of the dam was an incremental action. Yet, it is evident that the court did not absolutely accept the incremental theory, because it required the consideration of an alternative of no dam at all, while under the incremental theory only alternative ways to complete the project must be considered, and not the prospect of abandoning the project completely.

It is clear that this issue of retroactive application of NEPA is far from settled and likely to persist, since most major federal projects are in the planning stage for a number of years and are not likely to attract public attention and potential injunctive actions until a fairly advanced stage of development is reached.

B. Piecemeal Projects

Since the express words of NEPA and the regulations for implementing the Act do little to clarify its application to projects constructed in segments, it is necessary to rely directly upon interpretations of NEPA requirements adopted by various courts. In Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept. a highway project was divided into three segments. The two end segments culminated at the boundaries of a public park. The defendant in this case argued that no EIS should be required for these two segments because they did not take any parkland. The court was stern in its decision:

The frustrating effect such piecemeal administrative approvals would have . . . is plain for any man to see. Patently, the construction of these two 'end segments' to the very border, if not into, the Parklands, will make destruction of further parkland inevitable, or, at least, will severely limit the number of 'feasible and prudent' alternatives to avoiding the Park. The Secretary's approach to his . . . responsibilities thus makes a joke of the 'feasible and prudent alternatives' standard, and we not only decline to give such an approach our imprimatur, we specifically declare it unlawful.

Committee to Stop Route 7 v. Volpe emphasized the coercive and frustrating effect of avoiding preparation of an EIS by splitting a project into

---

169 Id.
171 446 F.2d 1013 (5th Cir. 1971).
172 Id. at 1023.
segments. The court concluded that if an impact statement is prepared with respect to only a small segment of a proposed highway project, NEPA's requirements of adequate consideration of alternatives cannot be complied with properly. With respect to a proposed highway, consideration of alternatives has two dimensions: an initial choice between building the highway or relying on existing routes or alternative means of transportation, and a subsequent choice among various alternative routes and designs. When consideration of the environmental impact is only concentrated on a small segment of a proposed route, adequate consideration of either of these choices becomes impossible, because alternatives to not building an expressway cannot be brought into focus when consideration is given to just one segment. Additionally, placement of one segment tends to narrow the range of choices for placement of the remainder of the entire highway, thereby precluding adequate consideration of alternative routes. In other words, since NEPA requires impact statements to reflect agency consideration of all possible alternatives to a federal project, including whether to actually construct or enter into the project at all, the requirement will not be satisfied by the issuance of separate impact statements for each individual segment of the whole project.

Under *Sierra Club v. Froehlke*, if the purposes and effects of a project are predominantly local in nature, then it may be considered a separate segment of a larger project and evaluated accordingly for NEPA purposes; but if the project is essentially part of the larger undertaking, then it must be considered along with the whole project. The court in that case enjoined construction of a dam pending completion and review of an EIS filed for the entire proposed river project. The concerns of the court were essentially those of the Fifth Circuit in *Named Individual Members*.

Not all segmented projects are rightly considered in their entirety, however. In *Citizens v. Brinegar* the court pointed out that always to require approval of an entire freeway system before any action can begin is simply not necessitated by NEPA. This strict requirement ought to be demanded only in situations when an essentially unified project is divided into sections in order to attain approval to proceed with the project without submitting an EIS. In fact, the court required that there be an assertion that the agency involved acted in a clandestine manner to avoid direct statutory mandates.

Another consideration is the status of construction. In *Ecos v. Volpe* the court recognized that economic costs and benefits ought to be weighed in determining whether to consider a project as a whole or in segments. If construction has begun, state and federal highway officials' failures to prepare a final EIS concerning a particular segment will not warrant an injunction halting construction when the costs of abandoning or altering the

---

176 5 ENVIR. REP.—CAS. 1019 (M.D.N.C. 1973).
segment clearly outweigh any benefit that would be gained by halting work pending compliance with NEPA. But if construction has not begun and few rights of way have been acquired, an injunction may be granted halting work pending the preparation of an EIS.

Whatever factors are found determinative, it is clear that the courts will act to prevent the frustration of the purpose and intent of NEPA caused by piecemeal treatment of major projects. NEPA is designed to assure not merely that a major federal action will be taken with minimum damage to the environment. It also requires an agency decision, informed as to all pertinent environmental factors, as to whether or not an action should be taken at all, and this cannot be accomplished without ample consideration of the project in its entirety. When presented with attempts to avoid a true assessment of the environmental impact of a project, the courts have been consistent in penetrating through a facade erected to camouflage the actual environmental consequences.

C. Multi-Agency Actions and the Lead Agency Concept

A problem related to the retroactive application of NEPA and the segmenting of projects is whether a single agency can prepare an EIS on behalf of other agencies also involved in the same project. This problem was first attacked by use of the concept of a lead agency. Neither required nor even mentioned in NEPA, the concept was developed in the 1971 proposed CEQ Guidelines: "The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. ‘Lead agency’ refers to the Federal agency which has primary authority for committing the Federal Government to a course of action with significant environmental impact." Since the CEQ is merely an advisory body without authority to promulgate regulations, it apparently relied heavily on two cases to support its recommendations in the proposed Guidelines. In Upper Pecos Association v. Stans the court held that the National Forest Service was the lead agency on a road development project in the mountains of northern New Mexico. Since the Service filed an EIS, it was not necessary for other involved agencies, including the Economic Development Administration, to file additional impact statements, even though the Administration was responsible for granting the funds for the project. In a similar vein, the court in Natural Resources Defense Council, Inc. v. Morton pointed out that the policy of NEPA required that a large project, such as the leasing of tracts for oil and gas development on the outer continental shelf, be evaluated with re-

---

180 328 F. Supp. 332 (D.N.M.), aff’d, 452 F.2d 1233 (10th Cir. 1971), judgment vacated and case remanded for determination as to mootness, 409 U.S. 1021 (1972).
181 458 F.2d 827 (D.C. Cir. 1972).
gard to its impact on the environment as a unified project rather than as piecemeal agency actions. The court suggested that the agency with broader responsibility for the project undertake the burden of preparing, in consultation with the other agencies involved, the required EIS.

Both *Upper Pecos* and *Natural Resources Defense Council* were decided before *Greene County Planning Board v. FPC*. In the latter case the court refused to allow the Federal Power Commission to circulate as the single EIS for a project involving the construction of a high-voltage transmission line a statement prepared by the Power Authority of the State of New York. The court held that the Commission could comply with its duties under NEPA only by conducting its own evaluation of the project. *Greene County* followed the view of agency responsibility for NEPA compliance earlier enunciated in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*. Without proscribing action in concert between involved agencies, *Calvert Cliffs* imposed on each agency the individual responsibility for evaluating a proposed project from its own perspective.

The allocation of responsibility in *Greene County* and *Calvert Cliffs* seems more in accord with the policy of NEPA, as opposed to the lead agency concept defined in the proposed CEQ Guidelines and adhered to in *Upper Pecos* and *Natural Resources Defense Council*. In light of these new interpretations of federal agency responsibility, the CEQ has revised its Guidelines. The 1973 Guidelines allow the possibility of joint preparation of an EIS or designation of a lead agency to act as supervisor in addition to its individual responsibility in the evaluation process. But under the 1973 Guidelines the burden of supervision no longer carries with it primary responsibility for preparation of the substance of the EIS. Whether the EIS is a joint effort or whether it is supervised by one agency, "the statement should contain an environmental assessment of the full range of Federal actions involved, [and] should reflect the views of all participating agencies . . . ."

Because of the unfavorable judicial attitude toward the lead agency concept, and because of the additional burden imposed on an agency which undertakes to supervise EIS preparation, the more viable alternative is increasingly the joint statement approach suggested in the new CEQ Guidelines. This approach further obviates the problems in selecting the supervisory or lead agency.

V. THE IMPACT OF NEPA ON STATE ENVIRONMENTAL LAWS

NEPA has influenced the states to develop their own laws for the protection of the environment. Federal litigation has had its effect on the final products. The state laws are generally aimed at completing the federal-state regulation of environmental matters and at avoiding confrontations in federal grant programs where a federal-state alliance is created.

---

183 449 F.2d 1109 (D.C. Cir. 1971).
185 *Id.* § 1500.7(b), 38 Fed. Reg. 20,553 (1973).
Three major problems seem to have plagued the states in their development of environmental policy acts. First, there seems to be a lack of enforcement and implementation procedures. Second, there is usually inadequate funding, which, when combined with the near-prohibitive costs of enforcement, render the acts largely ineffective. Finally, there is a lack of trained legal experts devoted to the administration of the laws. On an individual basis, the states find it hard to justify regulation of their own agencies to the extent possible at the federal level.

State laws vary from those prescribing environmental impact review for major actions to those requiring review in only certain limited situations. In Part A the laws of the various states are outlined, together with references where further information is available. In Part B a model state statute is proposed.

### A. Requirements and Proposals for Environmental Impact Statements in the States

<table>
<thead>
<tr>
<th>EIS Requirements and/or Proposals</th>
<th>Contact</th>
</tr>
</thead>
</table>
| **Alabama**                     | Edwin G. Hudspeth  
                                        Policy Studies Division  
                                        Alabama Development Office  
                                        State Office Building  
                                        Montgomery, AL 36104 |
| None                             | Jerry Reinwand  
                                        Special Assistant to  
                                        Commissioner  
                                        Department of Environmental Conservation  
                                        Pouch O  
                                        Juneau, AK 99801 |
| **Alaska**                      | Robert D. Curtis, Chief  
                                        Wildlife Planning and Development Division  
                                        Arizona Game and Fish Department  
                                        2222 W. Greenway Rd.  
                                        Phoenix, AZ 85023 |
| None. However, Department of Environmental Conservation reviews projects which have potential for environmental impact and submits comments to appropriate agencies. | |
| **Arizona**                    | T.B. York, Director  
                                        Arkansas Department of Planning  
                                        Game and Fish Building  
                                        Little Rock, AR 72201 |
| No general requirement. Game and Fish Commission on July 2, 1971, adopted a policy requiring Fish and Game Department to prepare EIS on proposed water-oriented development projects. Conservationists are proposing a state policy act similar to California's. | |
California


John S. Tooker, Director
Office of Planning and Research
1400 Tenth St.
Sacramento, CA 95814

Colorado

No current requirement. Senate Bill 43 (1973), the proposed "Colorado Environmental Policy Act," would require EIS for major public and private actions under the jurisdiction of any unit of state or local government.

David F. Morrissey
Assistant Director
Colorado Legislative Council
46 State Capitol
Denver, CO 80203

Connecticut


George Russell, Director
Education Programs
Department of Environmental Protection
State Office Building
Hartford, CT 06115

Delaware

No general requirement, and none proposed. Under the Delaware Coastal Zone Act, DEL. CODE ANN. tit. 7, §§ 7001-13 (Supp. 1972), applicants for coastal zone permits must submit EIS for proposed manufacturing projects.

John Sherman, Chief
Coastal Zone Management
Delaware State Planning Office
530 S. duPont Highway
Dover, DE 19901

District of Columbia

No current requirement. A proposal to require EIS for major construction projects is under consideration.

Malcom C. Hope, Director
Office of Environmental Planning
Department of Environmental Services
415 12th St., N.W.
Washington, DC 20004

Florida

No requirement. A bill similar to NEPA was introduced in the 1972 session of the legislature, but failed to pass.

James K. Lewis, Director of Staff Committee on Environmental Pollution Control
Florida House of Representatives
217 Holland Building
Tallahassee, FL 32304
Georgia

No general requirement. EIS are required for projects proposed to be undertaken by the Georgia Tollways Authority. The Office of Planning and Research of the Department of Natural Resources currently is investigating the possibility of formulating legislation to require EIS for certain state and local actions.

James T. McIntyre, Jr.,
Director, Office of Planning and Budget
270 Washington St. S.W.
Atlanta, GA 30334

Hawaii

Executive Order dated Aug. 23, 1971. The Governor’s office is drafting legislation to extend the EIS requirement to certain local government actions.

Richard E. Marland, Interim Director
Office of Environmental Quality Control
Office of the Governor
550 Halekauwila St., Room 301
Honolulu, HI 96813

Idaho

None

Glenn W. Nichols, Director
State Planning and Community Affairs Agency
State House
Boise, ID 83707

Illinois

No requirement. Governor Richard B. Ogilvie proposed legislation similar to NEPA in 1972, but it failed to pass.

Michael Schneiderman, Director
Institute for Environmental Quality
309 W. Washington St.
Chicago, IL 60606

Indiana

IND. CODE §§ 13-1-10-1 to -8 (1973).

Oral H. Hert, Acting Technical Secretary
Environmental Management Board
1330 W. Michigan St.
Indianapolis, IN 46206

Iowa

No requirement. There is considerable discussion among state officials and it appears possible that a bill will be introduced in the 1973 session of the legislature.

Peter R. Hamlin
Environmental Coordinator
Office for Planning and Programming
523 E. 12th St.
Des Moines, IA 50319
Kansas

None

John P. Halligan, Director  
Planning Division  
Department of Economic  
Development  
State Office Building  
Topeka, KS 66612

Kentucky

None

Bernard T. Carter  
Executive Assistant  
Department of Natural Resources  
Frankfort, KY 40601

Louisiana

No requirement. Legislation to establish a general EIS requirement was introduced in the 1972 session of the legislature (House Bill 1150), but failed to pass.

Eddie L. Schwertz, Jr.  
Assistant Director  
Office of State Planning  
P.O. Box 44425  
Baton Rouge, LA 70804

Maine

No requirement. There is some interest among conservation groups in introducing a bill in the 1973 session of the legislature.

William R. Adams,  
Commissioner  
Department of Environmental Protection  
Augusta, ME 04330

Maryland

No requirement. A bill was introduced in the last session of the general assembly, but failed to pass.

Vladimir Wahbe  
Secretary of State Planning  
301 W. Preston St.  
Baltimore, MD 21201

Massachusetts


Harley F. Laing, Legal Counsel  
Executive Office of  
Environmental Affairs  
18 Tremont St.  
Boston, MA 02408

Michigan


Mark Mason, Executive  
Secretary  
Advisory Council for  
Environmental Quality  
Office of the Governor  
Lansing, MI 48913
Minnesota

No requirement. Governor Wendell R. Anderson has proposed a bill for a state environmental policy act that would authorize a proposed Environmental Quality Council to require EIS from any state agency or private developer on any project or program that is determined to have a significant environmental effect.

Mississippi

None. A proposal to create a coastal zone management program, including EIS requirements, died in the 1973 session of the legislature.

Missouri

No requirement. Two bills similar to NEPA were introduced in the 1972 session of the general assembly; both died in committee. The state administration has created an Environmental Impact Statement Task Force to evaluate other state policy acts and make recommendations.

Montana


Nebraska

No general requirement, and none proposed. Department of Roads prepares EIS on state-funded highway projects.

Nevada

No general requirement. EIS requirement for utility plant siting was established by NEV. REV. STAT. § 704.870 (1971).
New Hampshire

No requirement. Requiring EIS for major land developments, whether private or public, is one of the priorities of a legislative coalition formed by the state's major conservation organizations (for information on this proposal contact: SPACE, Box 757, Concord, NH 03301).

Raymond P. Gerbi, Jr.
Assistant to the Director of
Comprehensive Planning
Office of the Governor
Concord, NH 03301

New Jersey

No general requirement. Legislation is being prepared in both houses of the legislature. A special EIS requirement applies to a 35-mile extension of the New Jersey Turnpike. The Department of Environmental Protection has prepared guidelines for an environmental assessment procedure and distributed copies to local agencies for their guidance. In addition, the department is suggesting that such assessments be prepared for major industrial construction prior to issuance of necessary air or water pollution permits. Several local jurisdictions require EIS as part of the zoning and subdivision process.

Alfred T. Guido
Special Assistant to Commissioner
Department of Environmental Protection
Trenton, NJ 08625

New Mexico


David W. King
State Planning Officer
State Planning Office
Santa Fe, NM 87501

New York

No general requirement. An administrative regulation (Item 73, Budget Request Manual) requires environmental review and clearance for state-funded capital construction projects. A bill for a state environmental policy act, which included an EIS requirement, passed both houses of the legislature in 1972 (Assembly Bill 9245-A), but was vetoed by Governor Rockefeller, who said that it would duplicate existing requirements, confuse responsibility among state agencies, and increase expenditures at a time of protracted fiscal difficulty.

Terence P. Curran
Director of Environmental Analysis
Department of Environmental Conservation
Albany, NY 12201
North Carolina


North Dakota

No general requirements and none pending. A Special EIS procedure applies to certain waste water treatment facilities.

Ohio

No requirement at present. Governor John J. Gilligan has requested his executive department to institute an EIS program, and the Ohio EPA is attempting to get a similar program enacted into law.

Oklahoma

None

Oregon

No requirement. Legislation supported by Governor Tom McCall is being drafted for introduction in the 1973 session of the Legislative Assembly. A similar proposal died in the 1971 session.

Pennsylvania

None
Puerto Rico


Rhode Island

No requirement. A bill to establish a general EIS requirement was introduced in the 1972 session of the Rhode Island Legislature (H 5179), but was not reported from committee.

South Carolina

No requirement. A bill to require EIS review for major private and public projects was introduced in the 1973 session of the legislature but was not passed.

South Dakota

None

Tennessee

No requirement. Governor Winfield Dunn's administration is considering proposing an act similar to NEPA; no decision has been taken.

Texas


Utah

No requirement. A bill to require EIS for state government projects is pending in the legislature.
Vermont

No requirement similar to that under NEPA. However, under Act 250 of 1970, VT. STAT. ANN. tit. 10 §§ 6045-46 (1970), any project involving change in land use of any significance undergoes scrutiny as to environmental impact.

Virginia

VA. CODE ANN. §§ 10-17.31 to -17.65 (Supp. 1973).

Washington


West Virginia

None

Wisconsin

WIS. STAT. §§ 144.01-.76 (Supp. 1973).

Wyoming

None

Schuyler Jackson
Assistant Secretary
Agency of Environmental Conservation
Montpelier, VT 05602

Robert H. Kirby, Director
Division of State Planning and Community Affairs
1010 James Madison Building
Richmond, VA 23219

Dennis L. Lundblad
Office of Planning and Program Development
Department of Ecology
Olympia, WA 98504

Ira S. Latimer, Director
Department of Natural Resources
Charleston, WV 25305

L.P. Voigt, Secretary
Department of Natural Resources
Box 450
Madison, WI 53701

Vincent J. Horn, Jr.
Administrative Assistant to the Governor
Capitol Building
Cheyenne, WY 82001

B. Suggested State Environmental Policy Act

Damage to the environment has often been an unexpected and unintended consequence of governmental programs. Responding to this problem, the federal government and eleven states have enacted environmental policy acts which call for the preparation of environmental impact statements on actions of public agencies which may have a significant effect on the environment. These environmental impact statements set forth the environ-
mental impact of a proposed project and examine alternatives and mitigation measures that could reduce the adverse effects.

This Suggested State Environmental Policy Act was drafted by a workshop at the Second National Symposium on State Environmental Legislation on April 10-12, 1973, in Washington, D.C. It draws heavily on experience gained in administering the National Environmental Policy Act and the California Environmental Quality Act of 1970.

The suggested act follows the approach of the National Environmental Policy Act in being fairly simple, leaving the details to be filled in by administrative guidelines. The workshop delegates believed that individual states would need flexibility in adjusting the many minor details to their individual situations.

In considering a proposed law dealing with environmental impact statements, a state should consider the following important issues. The Suggested State Environmental Policy Act represents the workshop's proposed solution to these issues. Where there were differences of opinion on significant issues, alternative solutions to the problems are shown in brackets.

(1). To which levels of government should the act apply? A state should consider whether it wants to apply the requirement for environmental impact statements only to state level agencies or whether it wishes to apply the requirement to local agencies also. The resolution of this issue is not clear in most of the state statutes adopted to the date of this writing. The California Act applies explicitly to both state and local agencies.

(2). Should the act apply only to public works construction or should it also apply to regulatory activities and approval of private actions? NEPA has always applied to direct government operations and to regulatory and licensing activities. The California Act was amended in 1972 to make clear that it applied to regulatory activities and the granting of discretionary approvals to private activities.

(3). Should the act apply only to major actions or should it apply to all actions which may have a significant effect on the environment? NEPA applies only to major actions. This follows the belief that large activities will be the main ones that have significant effects on the environment and that government will become bogged down if it has to prepare and review too many reports. Limiting the requirement to major actions is a simple way to screen out actions which do not require the preparation of an impact statement. On the other hand, there may be many small projects which may have a large effect on the environment. California provides no size limitation and requires reports on all actions which may have a significant effect on the environment.

(4). Are there activities which should be specifically excluded from the operation of the act? A state may wish to exempt emergency actions because there may not be sufficient time for a governmental agency to evaluate environmental factors before taking action. The suggested act follows the California precedent in exempting ministerial actions. With respect
to these activities it was believed that governmental powers are too narrowly confined to enable the agency to shape the activity to improve the effect on the environment.

The Guidelines implementing NEPA and the California Act both exclude environmentally regulatory actions such as setting standards for air and water pollution control. This exclusion under NEPA is currently the subject of litigation. The requirement for an impact statement was not thought to be necessary for these regulatory actions because the programs were conducted for the express purpose of protecting the environment and because the programs have considered the environmental effects of their activities since their beginnings. Whatever benefits might be gained from the formal preparation of impact statements could be lost as a result of the delays in enforcement. On the other hand, opponents of these exclusions have claimed that these regulatory actions may have adverse effects on the environment that were not considered by the regulatory agency or were not known to the public at the time the actions were taken. The suggested act provides for this exclusion.

(5). Should the environment be defined to include the totality of man's surroundings or should it be limited to physical factors? In order to keep the requirement for impact statements manageable, the suggested act limits the definition of the environment to physical factors. Once a physical effect of an action is identified, social and economic factors can be considered to determine whether that effect is significant and whether an impact statement should be prepared. Environment was not limited to natural factors because most of the country's population lives in urban areas, and man-made surroundings form a large part of the environment which affect these people.

(6). Should environmental effects be weighed against social and economic considerations? The suggested act provides that environmental protection should be given appropriate weight with social and economic considerations in overall public policy. This follows the belief that public policy calls for the balancing of many potentially competing factors and that environmental protection does not require shutting down the economy.

(7). Should the act specifically require public hearings on environmental impact statements? Resolution of this decision was deliberately left to guidelines to allow specific procedures to be established in conformity with individual state practices.

(8). Should the act provide for the charging of fees to applicants or should the cost of protecting the environment be borne by the public as a whole? The suggested act allows for the charging of fees to the sponsors of projects which require governmental approval. Participants in the workshop believed that a project which will affect the environment should bear the costs of analyzing its effects on the environment.

(9). Should the act provide a statute of limitations for legal actions brought under the act? Although the workshop believed that a statute of limitations is necessary to provide certainty after a reasonable period, no
statute of limitations was included in the act. Due to the variation in statutes of limitations among the states, the resolution of this issue is deliberately left to each individual state. This subject was believed to be too complicated and calls for too much variation to allow a proposed solution in this suggested act.

**SUGGESTED STATE ENVIRONMENTAL POLICY ACT**

AN ACT to establish a State Environmental policy.

Section 1. *Short Title*

This Act may be cited as the “[Name of State] Environmental Policy Act.”

Section 2. *Purpose*

The purposes of this Act are: to declare a State policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and stimulate the health and welfare of man; and to enrich the understanding of the ecological systems and natural resources important to the people of the State.

Section 3. *Findings and Declaration of State Environmental Policy*

The Legislature finds and declares as follows:

(a) The maintenance of a quality environment for the people of this State that at all times is healthful and pleasing to the senses and intellect of man now and in the future is a matter of statewide concern.

(b) Every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment.

(c) There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the State, including their enjoyment of the natural resources of the State.

(d) The capacity of the environment is limited, and it is the intent of the Legislature that the government of the State take immediate steps to identify any critical thresholds for the health and safety of the people of the State and take all coordinated actions necessary to prevent such thresholds from being reached.

(e) It is the intent of the Legislature that to the fullest extent possible, the policies, statutes, regulations, and ordinances of the State [and its political subdivisions] should be interpreted and administered in accordance with the policies set forth in this Act.

(f) It is the intent of the Legislature that the protection and enhancement of the environment shall be given appropriate weight with social and with economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decisions on proposed public activities.

(g) It is the intent of the Legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

(h) It is the intent of the Legislature that all agencies which regulate
activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that major consideration is given to preventing environmental damage.

Section 4. Definitions

Unless the context otherwise requires, the definitions in this section shall govern the construction of the following terms as used in this Act:

(a) "Agency" means the Executive and Administrative Departments, Office, Boards, Commissions, and other units of the State Government, and any such bodies created by the State.

[(a) "Agency" means any state agency, board or commission and any local agency, including any city, county, and other political subdivision of the State.]

(b) "Actions" include:

(1) Proposals for legislation.
(2) New and continuing projects or activities directly undertaken by any public agency; or supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more public agencies; or involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use by one or more public agencies;
(3) Policy, regulations, and procedure-making.

(c) "Actions" do not include:

(1) Enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings;
(2) Actions of a ministerial nature, involving no exercise of discretion.
(3) Emergency actions responding to an immediate threat to public health or safety.

[(4) Actions of an environmentally protective regulatory nature.]

(d) "Environment" means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, [existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.]

(e) "Environmental impact statement" means a detailed statement setting forth the matters specified in section 5(b) of this Act. It includes any comments on a draft environmental statement which are received pursuant to section 5(c) of this Act, and the agency's response to such comments, to the extent that they raise issues not adequately resolved in the draft environmental statement.

(f) "Draft environmental impact statement" means a preliminary statement prepared pursuant to section 5(c) of this Act.

Section 5. Environmental Responsibility of Agencies

(a) Agencies shall use all practicable means to realize the policies and goals set forth in this Act, and to the maximum extent possible shall take actions and choose alternatives which, consistent with other essential considerations of state policy, minimize or avoid adverse environmental effects.

(b) All agencies shall prepare, or cause to be prepared by contract, an environmental impact statement on any major action they propose or approve which may have a significant effect on the environment. Such a state-
ment shall include a detailed statement setting forth the following:

(1) a description of the proposed action and its environmental setting;
(2) the environmental impact of the proposed action including short-term and long-term effects;
(3) any adverse environmental effects which cannot be avoided should the proposal be implemented;
(4) alternatives to the proposed action;
(5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;
(6) mitigation measures proposed to minimize the environmental impact; and
(7) the growth-inducing aspects of the proposed action.

Such a statement shall also include copies or a summary of the substantive comments received by the agency pursuant to subsection (c) of this section, and the agency response to such comments. The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized and to suggest alternatives to such an action.

(c) As early as possible in the formulation of a proposal for action that is likely to require the preparation of an environmental impact statement and in all cases prior to preparation of an environmental impact statement, the responsible agency shall prepare or cause to be prepared a draft environmental statement describing in detail the proposed action and reasonable alternatives to the action, and briefly discussing, on the basis of information then available to the agency, the remaining items set forth in the preceding subsection. The purpose of a draft environmental statement is to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in determining the environmental consequences of the proposed action. The draft statement should resemble in form and content the environmental impact statement to be prepared after comments have been received and considered pursuant to section 5(b) of this Act; however, the length and detail of the draft environmental statement will necessarily reflect the preliminary nature of the proposal and the early stage at which it is prepared.

The draft statement shall be circulated for comment among other public agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved and shall be made available for comment by relevant federal agencies and interested members of the public.

(d) The environmental impact statement, prepared pursuant to subsection (b) of this section, together with the comments of public and Federal agencies and members of the public, shall be filed with the [Office of the Governor] and made available to the public at least 30 days prior to taking agency action on the proposal which is the subject of the environmental impact statement.

(e) An agency may charge a fee to an applicant in order to recover the costs incurred in preparing or causing to be prepared an environmental impact statement on the action which the applicant requests from the agency.

(f) When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of subsection (a) of this section have been met and that all feasible action will be taken to minimize or
avoid environmental problems that are revealed in the environmental impact statement process.

Section 6. **Guidelines and Agency Procedures**

(a) After conducting public hearings the [Governor] shall issue Guidelines through regulations implementing the provisions of this Act within [90 days] after the effective date of this Act.

(b) The guidelines issued by the [Governor] shall specifically include:

1. Interpretation of terms used in this act including criteria for determining whether or not a proposed action [may be major or] may have a significant effect on the environment with examples. Social and economic factors may be considered in determining the significance of an environmental effect;

2. On the basis of such criteria, identification of those typical agency actions that are likely to require preparation of environmental impact statements;

3. A list of classes of actions which have been determined not to have a significant effect on the environment and which thus do not require environmental impact statements under this act. In adopting the Guidelines, the [Governor] shall make a finding that each class of actions in this list does not have a significant effect on the environment;

4. The typical associated environmental effects, and methods for assessing such effects, of actions determined to be likely to require preparation of such statements;

5. Procedures for obtaining comments on environmental impact statements, including procedures for providing public notice of agency decisions with respect to preparation of a draft environmental statement, or, in the case of major or controversial actions determined not to involve a significant environmental impact, procedures for announcing the decision that no environmental impact statement will be prepared.