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MIAMI-LOS ANGELES AND NEPA: THE USE OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AS AN ANTICOMPETITIVE WEAPON

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I. INTRODUCTION

THE NATIONAL Policy Act of 1969 (NEPA) is viewed, in part, as a measure which "establishes a national policy requiring all federal agencies to give full consideration to environmental effects in planning and carrying out their programs." Accordingly, as one might anticipate, NEPA often squares off environmentalists and citizens groups on one side, and the agency on the other. The names of leading NEPA cases demonstrates this fact: *United States v. Students Challenging Regulatory Agency Procedures,* Environmental Defense Fund v. Department of Transportation,* Save Our Ten Acres v. Kreger [Acting Administrator, General Services Administration],* and Virginians for Dulles v. Volpe [Secretary of Transportation].

There are few proceedings where members of regulated industry have attempted to forestall competition by challenging the adequacy of an agency finding under NEPA in order to delay a final decision.

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4 No. 76-1105 (D.C. Cir. May 19, 1976).
5 472 F.2d 463 (5th Cir. 1973).
In a recent major Civil Aeronautics Board (CAB) certification proceeding—Miami-Los Angeles Competitive Nonstop case (Miami-Los Angeles)—National Airlines, the incumbent carrier, challenged the agency on precisely that basis. At the eleventh hour, National asserted that the CAB had failed to consider adequately the environmental impact of authorizing a second, competitive carrier on the Miami-Los Angeles route.

The purpose of this article is two-fold: (a) to examine National's use of NEPA as a weapon to delay and attempt to prevent competitive service in its lucrative monopoly market and (b) to review the CAB's response to NEPA before, during and after Miami-Los Angeles.

In the recent "deregulation" or regulatory reform debate, one of the main criticisms of the CAB, by both the "deregulators" and the industry, has been the problem of procedural delay. In large measure, this delay stems from the common agency (and particularly CAB) fear of reversal by an appellate court. Since, as a general rule, courts are barred from reviewing the substance of an agency decision, appellate review tends to focus on procedure. Accordingly, the CAB tends to spend excessive time and energy on procedural matters. NEPA, as discussed below, fits basically into the procedural mold.

II. NEPA'S REQUIREMENTS AS THEY APPLY TO THE CAB

Section 102(2)(c), of NEPA requires that:

all agencies of the Federal Government shall . . . include in . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . The environmental impact of the proposed action.  

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* CAB Docket No. 24,694, CAB Order No. 76-3-93, 2 Av. L. Rep. 22,202 (Mar. 15, 1976) [hereinafter cited to CAB Order No. 76-3-93].
* Chronologically, before means prior to the CAB's delegation of the environmental portions of Miami-Los Angeles to the Director of the Bureau of Operating Rights.
* Essentially, factual findings that are supported by "substantial evidence" or are not "arbitrary, capricious or an abuse of discretion" will not be reviewed. See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES ch. 29 (1976).
The focus here is on the threshold issue of whether a CAB action in a route proceeding (particularly Miami-Los Angeles) is a major Federal action significantly affecting the quality of the environment. Case law has established both (1) the standard for agency determinations of whether an impact statement must be prepared and (2) the Courts' role in reviewing that determination. Finally, the CAB's role in reviewing environmental impact in route cases is limited to ascertaining the cumulative and absolute impact of the proposed service.

In the cases discussed below, it is evident that NEPA is not a substantive restraint upon agency action. Congress did not say that if a Federally funded highway will destroy a park the road may not be built. Instead, NEPA requires the agency to examine and set forth the consequences of its action and to insure that the agency has considered less environmentally harmful alternatives.

In all kinds of areas, however, NEPA has been used for delay. Often all resort to NEPA gains is delay. At times delay can be fatal, for example, funds are no longer available, or a new administrator takes office.

A. Criteria for Determining Whether or Not to Prepare an Impact Statement

Perhaps the issue for the 1970's is the environment and whether we can improve it or at least prevent further harm. The difficulty for administrative agencies is that NEPA appears "opaque" and "woefully ambiguous." This view is compounded by the fact that economic regulatory agencies were often ill-prepared to understand, let alone rule on environmental issues. Section 102, however, sets some outside limits:

Congress obviously did not intend impact statements to be prepared

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13 The requirements of an environment impact statement have been treated in detail in R. Anderson, NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act ch. 4 (1973).


each time an agency proposes a trivial action, nor did it intend to excuse all but the largest and most important actions from compliance.\textsuperscript{17}

Thus, "major federal action" and "significantly affecting" are quantitative standards. The result of this language is that courts have been subjective in their determinations. Decisions do not delineate specific guidelines which would permit an agency to distinguish readily between "major" and "minor" actions and "significant" and "insignificant" effects. Each case must be determined on its individual facts.

Some cases, however, have set forth general guidelines. "Major" and "significant" are considered limiting words:

The phrase 'major federal action' was clearly intended by Congress to be a \textit{limiting phrase}, designed to assure that \textit{not every action} of the Federal Government was subject to the rigors of NEPA.\textsuperscript{18}

Similarly, Congress could have required an impact statement for every major federal action. But by adding "significantly"

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Courts have been divided in deciding whether "major" and "significantly" constitute two separate tests. In \textit{Hanly v. Mitchell (Hanly I)},\textsuperscript{19} the Court agreed with the government's contention that "major federal action"

refers to the cost of the project, the amount of planning that preceded it, the time required to complete it, but does not refer to the impact of the project on the environment. We agree with Defendants that the two concepts are different and that the responsible federal agency has the authority to make its own threshold determinations as to each in deciding an impact is necessary.\textsuperscript{21}

\begin{itemize}
\item\textsuperscript{17} \textsc{Anderson, supra} note 13, at 56.
\item\textsuperscript{18} \textsc{Wilkey, Agency Functions in Light of Environmental Problems,} 26 \textsc{Ad. L. Rev.} 143, 149 (1974). \textit{See} \textsc{Julis v. Cedar Rapids,} 349 F. Supp. 88 (N.D. Iowa 1972); \textsc{Natural Resources Defense Council, Inc. v. Grant,} 341 F. Supp. 356 (E.D.N.C. 1972).
\item\textsuperscript{19} \textsc{Hanly v. Kleindienst,} 471 F.2d 823, 830 (2d Cir. 1972), \textit{cert. denied,} 411 U.S. 969 (1973).
\item\textsuperscript{20} 460 F.2d 640 (2d Cir.), \textit{cert. denied,} 409 U.S. 990 (1972).
\item\textsuperscript{21} \textsc{Id.} at 644.
\end{itemize}
Hanly I cites Citizens for Reid State Park v. Laird,22 as support for the two test theory. That case, however, sets forth the one test view:

NEPA . . . require[s] all federal agencies to incorporate as an integral part of their planning process consideration of the environmental consequences of any proposed action, and wherever such consideration indicates that the action may significantly affect the quality of the human environment to prepare and file a detailed impact statement.23

Citizens for Reid State Park never directly confronts the one versus two test issue. In addition, the court relied heavily on the Department of Defense procedural compliance guideline that defined “major federal action significantly affecting the quality of the human environment” as any decision that would “either affect the environment on a large geographic scale or have a serious environmental effect in a more restricted geographic area.”24 The better view is that any federal action which significantly affects the human environment requires an agency to prepare an environmental impact statement. “[I]t makes little sense to find a project minor when its affects are significant.”25

In Hanly I, the Second Circuit remanded the decision of the General Services Administration that the construction of a jail in lower Manhattan was not a major federal action significantly affecting the quality of the human environment. In Hanly II, the court reviewed the redetermination of the agency affirming its previous decision not to prepare an impact statement.26 In Hanly II, the court was persuaded that because Congress did not precisely define the terms, an agency is vested with broad discretion in deciding whether a major federal action will “significantly affect the quality of the human environment.” The court found that the agency is normally required to review the federal action in light of two standards:

23 Id. at 788.
24 Id. at 787 n.5.
25 Anderson, supra note 13, at 90. For a detailed discussion of Citizens for Reid State Park, see id. 89-96.
(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and

(2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or use in the affected area. Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change.\(^7\)

A highway in an area already honeycombed with roads, for example, would have far less impact than a street through a roadless public park.\(^8\) The intent of the language “significantly affecting the environment” was intended to create a criterion of proximate-ness; “The results must be somewhat direct and visible.”\(^9\) Finally, the court in Hanly II, found that before an agency reaches its preliminary or threshold decision, the public must be notified of the proposed major federal action and be given an opportunity to submit relevant facts and comments. The court further found, however, that there was no need for a formal hearing.\(^10\)

The courts are also divided as to whether, when reviewing a threshold decision, a court must use the arbitrary and capricious standard of the Administrative Procedure Act,\(^11\) or the “standard of reasonableness” test. The Hanly II court found that the threshold NEPA decision presented a mixed question of law and fact. The question of defining “significantly” is one of law. Whether the proposed action will significantly affect the environment is a question of fact. With respect to questions of law, a court normally determines such questions de novo.\(^12\) With respect to the factual issue, Hanley II held that a court should determine whether the findings are “‘arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law’ or ‘without observance of procedure required by law.’”\(^13\)

\(^7\) 471 F.2d at 830-31.


\(^9\) Wilkey, supra note 18, at 149.

\(^10\) 471 F.2d at 836.


\(^12\) Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1970); see 4 K. Davis, Administrative Law Treatise § 29.01 (1958).

\(^13\) 471 F.2d at 828.
As opposed to Hanly II's arbitrary and capricious standard, the Tenth and Fifth Circuits have adopted the superficially more exacting "standard of reasonableness." In Wyoming Outdoor Coordinating Counsel v. Butz, the court stated:

We are persuaded that the general reference to discretion in [the Administrative Procedure Act] . . . does not apply here to the agency's determination under NEPA. Under the specific terms of NEPA we feel that the proper standard . . . is whether the negative determination was reasonable in light of the mandatory requirements and high standards set by the staff so as to be "in accordace with law."34

The Fifth Circuit, in Save our Acres v. Kreger,35 stated:

This decision should have been court-measured under a more relaxed rule of reasonableness . . . the spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review. Every such decision pretermits all consideration of that which Congress has directed to be considered "to the fullest extent possible." The primary decision to give or to bypass the consideration required by the Act must be subject to inspection under a more searching standard.

A close examination of Hanly II reveals that its "arbitrary and capricious standard" is no less exacting than the "standard of reasonableness" test. The court's definition of "significantly"36 and its requirement for public participation suggests that the Hanly II court closely examined the agency's threshold determination.37

Finally, in determining that the agencies have the authority to make the threshold NEPA determination whether to prepare a statement, the courts have held that the agency must make a rational determination. The agency must "affirmatively develop a reviewable environmental record" and cannot limit itself to prefuntory conclusions.38

34 484 F.2d 1244, 1249 (10th Cir. 1973).
35 472 F.2d 463, 467 (5th Cir. 1973).
36 Text at note 27 supra.
37 See Anderson, supra note 2.
B. The CAB and the NEPA Threshold Determination

The Board's duty to consider the environmental issues predates NEPA. In Palisades Citizens Association, Inc. v. CAB, the court held "that questions relating to environmental impact of proposed services upon persons and property lying below the routes are substantial and clearly relevant to the Board's certification inquiry." The court labeled as "folly" the idea that consideration of the environment was not a proper issue for the CAB.

The difficulties faced by economic (as opposed to safety) regulatory agencies, such as the CAB, in analyzing environmental issues, aside from the lack of technical expertise, are further compounded in licensing proceedings. Usually, such agencies have the power to issue broad licenses. On the other hand, curtailment or restriction of the licensee's operations is statutorily limited. Finally, the activities of a licensee which may have an environmental impact are often controlled in agencies other than the licensing agency.

These problems are illustrated in First National Bank of Homestead v. Watson. There, the incumbent bank sought to enjoin the Comptroller of Currency from approving an application to organize a second bank in its area of operation. The incumbent bank contended that the Comptroller's action was illegal since the Comptroller had failed to comply with NEPA. The court found that while licensing of the bank was a major federal action, here it did not significantly affect the quality of the human environment.

The incumbent bank argues that a serious ecological crisis threatened the area, and that any action which would increase development, such as another bank lending funds, would adversely affect the environment. In finding that the Comptroller had complied with NEPA, the court noted that the incumbent bank or the agency could only speculate as to the environmental laws and the rising consciousness of ecological problems in the area. Thus, the court found that here "the Federal action will possibly allow others

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39 420 F.2d 188 (D.C. Cir. 1969).
40 Id. at 191.
41 363 F. Supp. 466 (D.D.C. 1973). This is one of the few cases where an incumbent licensee attempted to interpose NEPA against an aspirant applicant.
to set into motion projects which possibly will affect the local environment."^{32}

CAB consideration of environmental issues is likewise affected by lack of authority to curtail licenses and the control of other agencies. Indeed, the CAB should have followed the First National Bank case. First, the CAB may issue a broad license (certificate). However, it is statutorily barred from limiting certain crucial aspects of the applicant's authority. In authorizing scheduled air transportation, the CAB is limited by Section 401(e)(4) of the Federal Aviation Act of 1958 which states:

No term, condition or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require.\(^4^3\)

These are the very factors which will determine the environmental impact of the proposed operations. Secondly, other agencies such as the Federal Aviation Administration (FAA), the Department of Transportation (DOT), and the Environmental Protection Agency (EPA) are vested with strong powers to examine and prevent adverse environmental impact resulting from the operation of aircraft by CAB-authorized carriers.\(^4^4\)

Therefore, on the one hand, the CAB is powerless to regulate the two most important phases of air carrier operations as they affect the environment—schedules (i.e., frequency) and equipment. Thus, it can only speculate as to the environmental impact of licensing a carrier. On the other hand, other agencies, particularly the FAA and the EPA, are specifically empowered to regulate the environmental aspects of air carrier operations. Several recent cases and FAA/EPA proceedings have illustrated this situation.

In Virginians for Dulles v. Volpe, a number of citizens and environmental groups sought to enjoin the FAA from allowing stretch

\(^{32}\) Id. at 473.


Boeing 727-200 aircraft to utilize Washington National Airport. The court outlined a number of the elements of air transportation at Washington National which effect the environment.

1. Noise abatement operational rules.
2. FAA high density rule limiting operations per hour.
4. Flight range restrictions.
5. Equipment restrictions.

All of these factors are essentially outside CAB control. Instead, the FAA and the airport owner (at Washington also the FAA) either impose environmental rules or work out voluntary restraints with the air carriers. The CAB could certificate 50 new routes to Washington; however, with FAA restrictions on capacity, the CAB's action would have zero effect on the environment.

The limited environmental impact of CAB action is further illustrated in *Illinois ex. rel. Scott v. Butterfield*. Plaintiffs sought declaratory and injunctive relief against FAA and CAB actions which had allegedly resulted in uncontrolled increases in aircraft operations, noise, and air pollution at O'Hare International Airport in violation of, *inter alia*, NEPA. The FAA and CAB moved to dismiss. The laundry list of FAA "action" where the FAA had allegedly failed in its duty under NEPA was quite extensive. The agency was accused, for example, of permitting unlimited growth in daily operations, improving electronic aids to increase capacity, funding and approving new runway and taxiway constructions, improving flight paths and failing to promulgate restrictive operational regulations. The CAB, on the other hand, was accused of failing to prepare an impact statement as required by NEPA for its "action" in establishing a policy for developing O'Hare as a central airport for national and international commerce. The CAB had moved to dismiss claiming that there were no facts showing CAB adoption of such a policy.

The court replied that since this was a motion to dismiss, the truth of Plaintiff's pleading would be assumed. The court refused

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"4" Short range flights are "less noisy" than long range flights, see note 171 infra.
"4" 344 F. Supp. at 576.
to dismiss the suit; however, it found that the validity of Plaintiff's claim would rest on the failure of the CAB to evaluate further increases in aircraft operations resulting from newly certificated flights. The court's perception that the basic control of environmental effect of aircraft operations rests with the FAA is well founded in statutory law. The FAA has pervasive control over aircraft operations through its authority to control the navigable airspace. In addition, the FAA administers the Airport and Airway Development Act of 1972 through which new airports are developed and older ones improved. These actions, as noted above, have a direct impact on the environment. Moreover, the Noise Control Act of 1972 requires that the FAA, after consulting with EPA, shall provide,

for the control and abatement of aircraft noise and sonic boom including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certification authorized by this title.

The CAB's actions have far less impact on the environment. Aside from the fact that it is barred from controlling schedules or aircraft, individual CAB proceedings involve only a limited number of flights from a limited number of points. Miami-Los Angeles involved additional service at only two points, with a maximum of three daily landing and take-off cycles (LTO's) at each point.

The CAB cannot impose aircraft or schedule restrictions nor does any one case usually involve massive increases in LTO's. Furthermore, other agencies, especially the FAA and EPA are directly responsible for the environmental impact of aircraft operations and airport construction. Accordingly, a strong argument could be made on this basis alone that the CAB's actions cannot have a significant

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46 Counsel for State of Illinois has informed the author that no further proceedings have occurred at this time.


51 See text following note 86 infra.
impact on the environmental effect of aircraft operations. The air carriers and airport owners must conduct their operations in compliance with, at least, FAA and EPA environmental controls. The CAB's position was, however, that in spite of the intense involvement of other agencies, it "is highly sensitive to NEPA and its requirements and objectives and it intends to adhere scrupulously to NEPA's mandates and policies."

Rather than follow the First National Bank precedent, in Miami-Los Angeles the CAB heeded the monopolist's request and determined to examine in detail the environmental impact of competition in that market. In fact, in Miami-Los Angeles the use of NEPA was most dramatic in that the actual environmental impact was marginal at worst.

III. BACKGROUND TO MIAMI-LOS ANGELES AND NATIONAL RAISES NEPA AS AN ISSUE

A. Origin of the Miami-Los Angeles Case

The history of Miami-Los Angeles can be traced as far back as 1951. The significance and value of the route increased as the Southeastern and Southwestern areas grew in economic importance. In 1949, for example, 11.2 passengers traveled between Miami and Los Angeles daily. In 1974, 622.9 passengers per day traveled between the two points. Accordingly, Pan American World Airways and every trunk carrier (except United Air Lines) vigorously prosecuted their applications to be authorized as National's competition between Miami and Los Angeles.

In 1951, the CAB denied a number of applications, including one by National, for single carrier through service authority between the West Coast and the Southeast. Instead, the Board authorized

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55 CAB, Notice of Proposed Rule Making, Preparation of Environmental Impact Statements, 39 Fed. Reg. 18,288, 18,289 (1974). A notable exception is in foreign air carriers proceedings, "for the same route right or rights described in a duly executed air transport agreement with the United States need not duplicate the earlier compliance by the Department of State with the National Environmental Policy Act incident to the execution of such agreement."


57 Southern Service to the W. Coast, 12 C.A.B. 518, 574 (1951).

58 CAB Order 76-3-93, at 7 (Mar. 15, 1976).

59 Southern Service to the W. Coast, 12 C.A.B. 518 (1951).
an interchange. Ten years later, the CAB authorized National to operate nonstop between Miami and Los Angeles.

In 1969, the CAB found that National’s service was deficient and that competition was required. Northeast Airlines, undisputably the weakest trunk carrier, was granted Miami-Los Angeles authority for route strengthening purposes. Subsequently, it was suggested that Northeast merely wanted the route as a bargaining chip in merger negotiations. On September 18, 1969, the CAB affirmed the award “[a]fter Northeast categorically advised the Board that the carrier did not contemplate any merger. . . .” Six days later, Northeast announced it was negotiating a merger with Northwest Airlines.

As one might expect, in the subsequent Northwest-Northeast Merger case, the CAB decided to exclude Miami-Los Angeles from the routes to be transferred to Northwest. That was too bitter a pill for Northwest to swallow; the carrier backed out of the merger. Then, Delta and Northeast entered into a merger agreement. The CAB approved that agreement—again without the Miami-Los Angeles route. Delta, however, accepted the decision, for the moment.

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60 The Board authorized, inter alia, a National-Delta-American interchange. Miami was thusly connected to the West. 12 C.A.B. at 549.

61 Southern Transcontinental Service Case, 33 C.A.B. 701 (1961). There, Eastern Air Lines, an applicant for the route, attempted to thwart National’s case by raising an issue the CAB found unrelated to National’s application. Eastern had requested the CAB to find National unfit. The FCC had found National’s General Counsel and two Directors guilty of corruption. WKAT, Inc., 29 F.C.C. 216, 218 (1960). The CAB held:

Where, as here, we have an established and certificated air carrier with many years of operating experience and no indication of improper dealings with the Board or the public, we are unable to make a finding that National Airlines is not fit, willing or able within the meaning of the Act to properly and effectively operate the Florida-California route being awarded to it.


62 Southern Tier Competition Nonstop Investigation, CAB Order No. 69-7-135, at 12-13 (July 24, 1969).

63 Id. at 17-18.

64 LOWENFELD, supra note 44, at I-203.

65 CAB Order No. 70-12-162/163, at 5 (Dec. 31, 1970).

66 LOWENFELD, supra note 44, at I-203.

67 CAB Order No. 70-12-162/163, at 7 (Dec. 31, 1970).

68 CAB Order No. 72-5-73/74, at 26-29 (May 19, 1972).

69 Delta later argued that if the CAB found a need for reinstating competitive
Competitive service, such as it was,\textsuperscript{70} ceased in July 1972, when Northeast ceased to operate as an independent carrier. On August 23, 1972, the Board instituted the \textit{Miami-Los Angeles Competitive Nonstop Investigation}.

No environmental findings were contained in the instituting Order. Subpart J of the CAB's Organizational Regulations,\textsuperscript{72} promulgated by the CAB in 1970, required that in any proceedings which might result in a major Federal action:

\begin{quote}
The Order . . . instituting the proceeding, including the indication of the possible environmental consequences or the contemplated action, will be published in the Federal Register . . . .\textsuperscript{73}
\end{quote}

Accordingly, the CAB either failed to comply with its regulations or determined that the case would not result in a major federal action significantly affecting the quality of the human environment. Most likely, the Board did not believe that replacement of Northeast on the Miami-Los Angeles route was a major Federal action significantly affecting the environment.

B. Traditional Advocacy Tools in Miami-Los Angeles

In most route proceedings incumbents and aspirant carriers' cases are usually framed by a standard set of arguments. Incumbents argue the adequacy of existing service and the threat of diversion. Aspirants, on the other hand, argue inadequacy of existing service, traffic growth and stimulation, and the importance of competition.\textsuperscript{74} Among themselves, aspirants argue beyond and behind services, strengthening weak carriers, identity, past innovative service, and superiority of proposed service. All carriers, of course, attack each other's interpretation of the facts and each other's service proposals. Up until presentation of briefs to Administrative Law Judge William H. Dapper, \textit{Miami-Los Angeles} was, in this sense, a routine or typical proceeding.

\begin{itemize}
\item substitute service in the Miami-Los Angeles market, Delta, as a matter of law, must be authorized to serve it. The CAB did not agree. CAB Order No. 76-3-93, at 11-12 (Mar. 15, 1976).
\item Northeast was never an effective competitor in the market.
\item CAB Order No. 72-8-95 (Aug. 23, 1972).
\item 14 C.F.R. § 399.110(b) (1975).
\item See \textit{Lowenfeld}, supra note 44, at I-23 to 25.
\end{itemize}
National argued that its service was adequate to meet the public convenience and necessity, i.e., its load factors were low. Furthermore, National asserted that a second nonstop competitor would divert a substantial amount of traffic resulting in lower load factors. These projected load factors were, it said, unreasonable and well below the CAB's standard established in the Domestic Passenger Fare Investigation, Phase 6B (load factor) (DFFI 6B). Finally, National claimed that it intended to increase its service from two to three DC-10 daily round trips.

The aspirants maintained that National had acted as a true monopolist; it had neglected the market. National's load factor argument was countered in three ways. First, the carriers noted that National's breakeven load factor was 32 percent, over 10 points below its current load factor. Therefore, to permit National to operate without competition at a 55 percent load factor would be unconscionable. Second, the CAB in DFFI 6B adopted industry rather than "market or carrier load factor standards . . . ." Finally, the carriers argued that the CAB has consistently refused to review the adequacy of an incumbent's service by reference to proposed schedules.

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77 CAB Order No. 71-4-54 (April 9, 1971). There, the CAB held that for ratemaking purposes it would establish a 55 percent load factor standard for trunkline carriers. In February, May, August and November, 1972, National averaged a 42.3% load factor on the Miami-Los Angeles Segment. Miami-Los Angeles, CAB Docket No. 24,694 (June 13, 1973) (initial decision of Administrative Law Judge).


79 Brief for Pan American, at 9, Miami-Los Angeles, CAB Docket No. 24,694 (June 13, 1973) (initial decision of Administrative Law Judge).

80 As Western points out, however, National would have the Board look at the feasibility of competition in the light of the schedules that National contends it will operate in the market during the forecast year and then determine if there is still room for competition. The difficulty with National's approach is that competition would rarely be certificated in a market regardless of the size because the incumbent carrier could almost always tailor its service proposal for the forecast year in such a manner as to insure that
Each of the nine aspirants argued that its competitive service proposal would most benefit the public convenience and necessity. Of the nine, Pan American World Airways submitted strong arguments on each of the traditional factors:

1. **Beyond-Segment Benefits**: Pan American claimed outstanding beyond and behind segment benefits. It forecast 163,100 annual beyond-segment passengers or 223 passengers per day.¹¹

2. **Traffic Diversion**: Pan American argued that under the growth offset theory, it would divert only ½ of 1 percent of National's annual revenues or $2,083,000.¹²

3. **Route Strengthening**: Although it had previously been denied any routes within the contiguous 48 states, Pan American presented an appealing argument that it should receive the Miami-Los Angeles for route strengthening purposes.¹³ Between 1969 and 1972, Pan American had lost almost $166 million,¹⁴ its international routes were the subject of vigorous competition from both United States and foreign scheduled and supplemental carriers; and it said that its costs abroad were higher than those incurred by domestic carriers. Therefore, Pan American concluded that access to a long-haul domestic route was necessary to strengthen its route and improve its dismal profit picture.

4. **Identity**: Pan American also could claim a well-established identity in both cities.¹⁵ It had begun service to Miami in the late 1920's and to Los Angeles in the early 1940's.¹⁶

5. **Superiority of Service Proposal**: Finally, Pan American offered a strong service proposal. It would operate the largest number of

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¹¹ Brief for Pan American, supra note 78, at 22-32.

¹² The growth offset method contrasts the incumbent's traffic in the forecast year against a selected past year.

¹³ Brief for Pan American, supra note 78, at 56-60.


¹⁵ Brief for Pan American, supra note 78, at 53-55.

seats—633,640—with two daytime B-747 roundtrips and one night coach B-707.

C. National Injects NEPA Into the Miami-Los Angeles Case

Some seven months after institution of the proceeding, and after the record had been closed, National argued in its brief to Judge Dapper that the CAB had failed to comply with NEPA. National also maintained that certification of a second Miami-Los Angeles nonstop carrier would be a major federal action significantly affecting the quality of the human environment, and accordingly, any such CAB action would be invalid without the preparation of an environmental impact statement. Furthermore, National said that the record was inadequate to support an impact statement. Accordingly, National asserted, the case had to be remanded and the record reopened for environmental evidence.

National raised the following adverse impacts of reinstating competitive service: increased fuel consumption, increased air and noise pollution and increased congestion at airports.

On June 13, 1973, Judge Dapper issued his Initial Decision. He found that Pan American should be authorized to provide Miami-Los Angeles nonstop competitive service. The Judge selected Pan American for essentially the traditional reasons asserted by the carrier.

Judge Dapper did not receive National's eleventh hour environmental argument warmly. He noted that:

National has had a full opportunity to present evidence with respect to the environmental issue. The carrier, however, offered no evidence dealing with this matter. National's tardy enthusiasm for environmental matters has, of course, effectively deprived all the other parties of any opportunity to comment on brief with respect to National's contentions.

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88 Id. at 55.
89 Id. at 50-54.
90 Pursuant to 14 C.F.R. § 302.27 (1976) an Initial Decision becomes final within 30 days unless a party files a Petition for Discretionary Review within 21 days or the CAB orders review on its own initiative within the 30-day period.
92 Id. at 97, n.129.
The Judge responded to National's specific environmental concerns as follows:

(1) **Fuel**—with the anticipated energy crisis, the air transportation system requires a total plan, not a case-by-case *ad hoc* program.\(^{39}\) Furthermore, Pan American already owns and operates the aircraft to be used in Miami-Los Angeles service.\(^{44}\) Therefore, it will probably consume the fuel in other markets anyway. In addition, the amount at issue is very small in comparison with Pan American's overall fuel consumption. Accordingly, the positive benefits to the public of competitive service far outweigh any adverse effects of increased fuel consumption.

(2) **Noise and Air Pollution and Congestion**—Contrasted against total operations at Los Angeles and Miami, the Judge found that "it is clear that any such increases would be *de minimis*."\(^{58}\) He noted that at Miami, Pan American's operations would amount to slightly more than one-half of one percent of 1971 operations, and less than one half of one percent of fiscal 1971 operations at Los Angeles.\(^{66}\) Finally, the Judge noted that the communities involved had not complained about any potential adverse ecological consequences of granting competing authority.\(^{67}\)

Six days after the issuance of the Initial Decision, the CAB exercised its discretion to review the Judge's Decision.\(^{68}\) Briefs to the CAB were due thirty (30) days later. In its brief National reiterated its argument that "if competition was to be authorized, the record should be reopened to provide the environmental impact statement required by National Environmental Policy Act."\(^{69}\)

Like the Judge, the CAB had a visceral reaction that three round-trips per day between Miami and Los Angeles could not "significantly affect the quality of the human environment." Unlike the Judge, however, the CAB was troubled that it did not have any

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\(^{39}\) See CAB Order No. 73-5-123 (May 25, 1973), authorizing capacity discussions.


\(^{58}\) *Id.* at 99.

\(^{66}\) *Id.* at 99-100.

\(^{67}\) *Id.* at 99 n.132a.

\(^{68}\) CAB Order No. 73-6-78 (June 19, 1973).

\(^{69}\) Brief for National Airlines, Inc. at 37, Miami-Los Angeles, CAB Order No. 76-3-93 (Mar. 15, 1976).
evidence in the record to justify its reaction. The CAB could not find any basis to change the Judge's environmental conclusion. On September 27, 1973, however, the CAB decided "to give the fullest consideration to the environmental questions raised by National." While finding the Judge's Statement sufficient, the CAB instructed the Director of the Bureau of Operating Rights (BOR) to prepare a statement regarding the environment.

While the Board does not necessarily believe that further procedures in this case are necessarily required under the judicial decision interpreting NEPA, we are nonetheless desirous of complying with the spirit as well as the letter of the statute.

Over 14 months later the Director issued a Final Statement of Environmental Assessment. Finally, on March 15, 1976, some two years and nine months after Judge Dapper issued his Initial Decision, the CAB granted the Miami-Los Angeles authority to Western Air Lines. The decision was split—Chairman Robson and Vice Chairman O'Melia would have granted Pan American permissive authority for three years in addition to Western's full authorization. Why it took the CAB so long to decide this case, at least the environmental phase, is discussed below. However, certain conclusions can be drawn as to the effective use of the environmental issue and the short-term value of that maneuver to National.

D. Impact of NEPA on the Proceeding

One clear result of NEPA in Miami-Los Angeles was delay. The second, arguable result is that Pan American did not receive the award. That is not to say that Pan American's proposal was environmentally inferior. Instead, during the interval between June 13, 1973 and March 15, 1976, circumstances changed and the

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100 The CAB was accustomed to analyzing cases in terms of load factors, growth offset, yields, etc. Environmental terms, even those relating to aircraft such as NEF, EPNdB, Adjusted Aircraft Emission Rates, were completely foreign to the CAB.


102 Miami-Los Angeles was also unique in that the BOR was not a party to the case below. Apparently, since the CAB had determined that competitive service was required, BOR had determined that its participation in carrier selection was not required.

103 CAB Order No. 73-9-102, at 3 (Sept. 27, 1973).

104 CAB Order No. 76-3-93 (Mar. 15, 1976).

105 Separate Statement of Chairman Robson and Vice Chairman O'Melia.
CAB relied in part on those changed circumstances to deny the award of Pan American. Finally, it became clear that National received short-term financial benefits from the delay in implementing competition.\footnote{106}

The effort to give environmental questions the “fullest consideration” delayed the proceeding 14 months. Primarily, this delay resulted from the inexperience of both the carriers and the CAB. Prior to 1971, the CAB had never issued a detailed environmental assessment. In addition, the BOR and the carriers were simultaneously coping with the environment assessment in the far more complex \textit{Transatlantic Route Proceeding, (Transatlantic)}\footnote{107} and in several less complex cases.\footnote{108}

It is clear that the delay resulted in Pan American’s failure to win at the CAB level. Examination of the CAB decision, however, reveals that three of the four major factors relied upon the CAB to select Western over Pan American materialized more than six months after the Judge’s decision.\footnote{109} These four factors were: (1) focus of the CAB on the Miami-Los Angeles segment; (2) route strengthening; (3) the traffic downturn during 1974 because of the energy crisis; and (4) Pan American’s reduction in service.

\footnote{106} The author acknowledges the counter-argument that the delay could have resulted from factors apart from preparation of the Environmental Assessment. It could be argued that other factors really caused the 33-month delay and if the CAB wanted to expedite the case, it could have. Only the CAB can authoritatively settle the argument. It is the author’s position, however, that NEPA delayed the proceeding long enough to permit circumstances to change sufficiently to result in further delay and to result in the CAB arriving at a different conclusion than the Judge.


\footnote{108} American-Frontier Route Exchange Agreement, CAB Order No. 75-8-94 (Aug. 18, 1975); American-Airwest Route Exchange Agreement, CAB Order No. 75-8-93 (Aug. 18, 1975); American-Pan Am. Route Exchange Agreement, CAB Orders No. 75-6-152, 75-6-153 & 75-6-154 (April 18, 1975).

\footnote{109} This discussion assume that the criteria contained in CAB Order No. 73-9-83 (Sept. 21, 1973) were those which influenced the CAB members. Opinions are not written by the members or their assistants. Instead, the Orders are written by the CAB’s permanent staff. Therefore, decision making and opinion are, to this degree, separated. \textit{See} LOWENFELD, \textit{supra} note 44, at I-151.
(1) **Route Delay**—One significant justification for selection of Western rather than Pan American was the CAB's concern that the competing carrier focus its attention on the Miami-Los Angeles segment. The CAB noted that Pan American proposed "to use the Miami-Los Angeles segment... as a transcontinental bridge, linking points as far as 10,000 miles apart." Thus, the CAB believed that on-route delays and operational disruptions over the long route would compromise service over the local segment. Accordingly, the CAB found Western's proposed service more attractive with turn-around and through service to only a single beyond point.

(2) **Route Strengthening**—While the Board's concern for the Miami-Los Angeles segment is at least superficially not related to delay, its position on route strengthening appears to result from changed circumstances. Pan American in 1976 was substantially different from Pan American in 1973. While still not a healthy, highly profitable carrier, it had effected many economy moves in the intervening years. A month after its decision in *Miami-Los Angeles*, the CAB noted that these economy moves have "produced an impressive and encouraging turnaround in Pan American's financial picture." On the other hand, the award to Western was "consistent with the Board's historic policy favoring award to smaller carriers on route-strengthening grounds..."
Thus, as to the route-strengthening issue, the passage of time disabled Pan American.

(3) The 1974 Economic Crisis—Another and the third major decisional factor—the fuel crisis and downturn in traffic—did not arise until after the Judge's decision. The CAB found that "traffic did not reach the predicted level in CY 1974."15 The three daily roundtrips and 633,640 annual seats offered by Pan American were found to be based on a "more sanguine forecast of the growth of the Miami-Los Angeles market."16 Thus, the CAB held that Pan American's 300,000 additional seats were not warranted.

(4) Pan American's Reduction in Service—The final major basis for not awarding the route to Pan American clearly occurred subsequent to the Judge's decision. On January 30, 1975, nineteen months after the Judge's decision, the CAB approved a joint application by Pan American and Trans World Airlines to temporarily restructure their route systems.17 The CAB, in that proceeding, accepted Pan American's arguments that extraordinary relief was required to "help alleviate the carrier's current financial difficulties attributable to overcapacity in international markets, skyrocketing fuel costs and a significant decline in international traffic."18

More significant than its suspensions in the Atlantic, however, was Pan American's drastic reduction of services in the Caribbean. On April 2, 1975, the CAB permitted Pan American to unilaterally suspend service at the United States Virgin Islands, Martinique, Guadaloupe, Merida (Mexico), and between New York and San Juan.19 Moreover, on July 1, 1975, the CAB approved the Ameri-

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15 CAB Order No. 76-3-93, at 6 (Mar. 15, 1976). While traffic between 1972 and 1973 grew by about seven percent, traffic growth dipped to about three percent during 1974.
16 Id. at 18-19. Western offered two daily nonstop DC-10 trips with 342,000 annual seats.
17 CAB Order No. 75-1-133 (Jan. 30, 1975). The agreement resulted in certain mutual suspensions and exemptions resulting in less operations for Pan American in the Atlantic and more in the Pacific.
18 Id. at 3.
19 CAB Order No. 75-4-16 (April 2, 1975).
MIAMI-LOS ANGELES AND NEPA

Pan American agreed to suspend service at Bermuda, Barbados and Santo Domingo. In addition, Pan American was authorized to suspend service at several other Caribbean points. The CAB concluded that:

many circumstances have changed since the close of the economic hearing in 1973, including substantial alterations in Pan American's route structure and service patterns. These changes fatally undermine Pan American's asserted ability to flow enough traffic over the Miami-Los Angeles segment to support its proposed level of service. The heart of the matter is that, since the close of the hearings, Pan American has been in the process of giving up certain of its existing service obligations as part of a worldwide retrenchment program designed to restore financial health to the financially ailing carrier. Pan American's retrenchment has resulted in the total elimination or significant reduction in service in markets that were to have produced essential contributory traffic for its Miami-Los Angeles operations.

It should be remembered these reductions and alterations were largely accomplished at the urging of the Department of Transportation and the CAB. Thus, at least in part, as a reward for heeding the CAB's call to retrench its services, Pan American was denied a route which it claimed was "superb for [its] system."

Available statistics show that the average route case in 1972 required 288 days from initial decision to CAB decision. Accordingly, other factors being equal, the Miami-Los Angeles deci-

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150 CAB Order No. 75-6-152 (July 1, 1975).
151 CAB Orders No. 75-8-143 (Aug. 8, 1975); 75-6-48 (June 10, 1975). For additional Pan American suspensions, see CAB Orders No. 75-7-97 (July 21, 1975); 75-6-95 (June 20, 1975); 75-4-117 (April 24, 1975); 75-4-19 (April 3, 1975); 74-12-66 (Dec. 18, 1974); 74-12-30 (Dec. 9, 1974); 74-12-29 (Dec. 9, 1974).
152 CAB Order No. 76-3-93, at 26 (Mar. 15, 1976).
153 See CAB Order No. 74-9-62 (Sept. 18, 1974) where the CAB denied Pan American's petition for temporary subsidy. See also CAB Order No. 75-1-133, at 7 (Jan. 30, 1975) where the CAB said: "We view [the Pan American-TWA] agreement as but the first of many self-help programs. . . . The applicants should consider implementing immediately such other cost-saving programs as unilateral suspension. . . ."
sion would have been issued in April or May 1974. One can only speculate, of course, as to what would have happened; but an educated speculation, based on the changed circumstances above is that Pan American would have received the authority.\textsuperscript{126}

One clear result of the environmental delay was a short-term economic gain for National: "the fortuitous profits that National has enjoyed as a result of the absence of effective competition in the market since it was first authorized by the Board in 1969."\textsuperscript{127} National itself estimated that Western would divert between $4.7 and 6.7 million in the first year.\textsuperscript{128} Pan American, according to National, would divert between $8.1 and $10.2 million.\textsuperscript{129} Thus, National's short-term gain was between $9 and $19.6 million.\textsuperscript{130} The long-term gain or loss is not at all clear. Whether Pan American (or any other carrier) would have been a less effective competitor than Western will be, is a matter of speculation beyond the scope of this article. In 1976, however, the CAB concluded that Western would be the most effective competitor.

IV. THE CAB'S REACTION TO NEPA

Part II above concluded that the CAB could have complied with NEPA by following the First National City Bank precedent. The CAB could have noted its lack of control over schedules and equipment and, conversely noted FAA and EPA's control over airport construction, aircraft construction, aircraft navigation, and so on.

\textsuperscript{126} An alternative argument is that the CAB's "route moratorium" established in 1969 was a significant factor in the delay and ultimate award to Western. See Subcomm. on Administrative Practice & Procedure, Senate Comm. on the Judiciary, 94th Cong. 1st Sess., CAB Practices & Procedures 84-87 (1976). Again, however, the delay attributable to the environmental assessment set the stage for further delay. Moreover, the CAB had already determined in 1969 that competition was required on this route. Finally, "the decision to hear city-pair route issues in a formal decision has meant as a practical matter, that new or additional authority will in fact be awarded." CAB Staff Study, The Domestic Route System: Analysis and Policy Recommendations 38 (Oct., 1974).

\textsuperscript{127} CAB Order No. 76-3-93, at 10 (Mar. 15, 1976).

\textsuperscript{128} Brief for National Airlines, supra note 99, at 34.

\textsuperscript{129} Id. National's predicted diversion from all applicants ranged from $4.5 million to $10.2 million.

\textsuperscript{130} This figure is somewhat overstated since National was on strike for three and one-half months. But National received mutual aid payments calculated, in part, on its monopoly position on the route.
Instead, the CAB determined to examine in detail the environmental impact of a relatively small change in operations.

The CAB’s reaction to NEPA can be broken down into three phases: Pre-, Post-, and during the Miami-Los Angeles/Transatlantic Route Proceedings. Prior to these cases, CAB treatment of the environmental issue was usually *pro forma*. During both cases, the CAB’s energies, the demand on the carriers, and the consideration given the environmental issues were, viewed in isolation, excessive. Finally, in the wake of the two proceedings, efforts to comply with NEPA matured to the point where the expenditure of unnecessary resources was minimized.

A. Pre-Miami-Los Angeles/Transatlantic Route Proceedings

As previously noted, irrespective of NEPA, the “public interest” criteria of the CAB contained in Section 102 of the Federal Aviation Act requires consideration of the environmental impact of CAB action. Prior to the enactment of NEPA, there was no formal treatment of environmental issues; instead, these were treated on an *ad hoc* basis. Generally, environmental issues were raised by citizens groups.

In the *Washington/Baltimore Helicopter Service Investigation*, a group of civic associations and property owners urged the CAB to deny applications for authority to conduct helicopter operations within the metropolitan Baltimore and Washington area and the three area airports, or alternatively, to reopen the record for further environmental evidence. The CAB refused to reopen the record and granted a certificate to one of the applicants. The CAB justified its conclusion on three bases. First, a substantial amount of evidence had been adduced, including a comprehensive DOT study. Secondly, while new service might add some noise, and possibly add increased disturbance on the ground, Congress mandated that the CAB develop a well-rounded air transportation system and promote air service. Accordingly,

[w]here as here, a new service will achieve these ends, it is required by the public convenience and necessity despite the fact that some additional noise may be the result. Where there is a showing

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181 See text following note 71 supra.
on the record of unusual noise by an opponent of the service, a
different result might be indicated.\[133\]

Finally, the CAB noted that Congress specifically directed other
agencies to protect the public from the noise and air pollution
created by air operations.

NEPA, of course, requires all agencies to incorporate in their
decision-making a regularized method of considering environmental
impact. Therefore, on June 25, 1970, the CAB adopted PS-41,
implementing NEPA. Curiously, this regulation was incorporated
into the CAB's Policy Statements rather than into its Procedural
Regulations.\[134\] Aside from paraphrasing NEPA, this first set of
procedures was somewhat spartan: if a proceeding might result in
a major Federal action significantly affecting the quality of the
human environment, the CAB order instituting the proceeding
would contain the possible environmental consequences. The order
would, as normally is the case, be published in the Federal Register.
In addition, the CAB was to serve the order on DOT, EPA, other
agencies listed in the Council on Environmental Quality's guide-
lines with special expertise as to the possible environmental impact,
and the affected states' governors.\[135\]

The threshold for "major Federal actions significantly affecting
the quality of the human environment" was found to be

primarily, but not exclusively, those licensing activities which re-
sult in the authorization of air transportation
(i) to an area not previously served by air transportation: or
(ii) to be operated under conditions or with equipment which
might result in changes significantly affecting noise or air pollution
levels.\[136\]

This definition follows the CAB's rationale in the Washington-
Baltimore Helicopter case. Unless the proposed action constituted
new service or significant (unusual) pollution or noise, the thresh-
old question would not be given further consideration. Of course,
what "significant" or unusual" actually meant was left undefined.

133 Id. at 354.
134 Generally, rules, governing this conduct of proceedings are contained in
the CAB's Procedural Regulations. There have been other exceptions, for ex-
ample, 14 C.F.R. § 399.61 (1976) governs the presentations of public and civil
bodies in route proceedings.
135 14 C.F.R. § 399.110(b) (1975).
136 Id.
Finally, in those cases which triggered this threshold test, the record was to include sufficient data to, in effect, prepare an environmental impact statement. Nothing in this CAB rule implementing NEPA gave a true yardstick for determining whether the threshold for preparing an impact statement had been crossed. It was an invitation for anyone to allege that any route proceeding would result in an action which "significantly" affected the environment. The result would be, and was, a rather massive effort to gather facts, the relevance of which would, in large part, be doubtful. That, of course, was precisely what happened in Miami-Los Angeles.

Before Miami-Los Angeles the CAB normally invoked Section 399.110 only in unusual cases. An example was the Northeast Corridor VTOL Investigation. That case did not produce a final environmental assessment or impact statement since the CAB never issued a final decision. A smaller in scope but similar case which resulted in an "environmental assessment" was the Reopened TAG-Wright case. There, an air taxi, Wright Air Lines, Inc., sought a certificate of public convenience and necessity to operate aircraft between the downtown airports at Cleveland and Detroit. Because this was a novel case, the Bureau of Operating Rights (BOR) filed a motion to invoke the Section 399.110 procedures. The CAB reluctantly granted the BOR's motion:

although the situation presented is not precisely the kind contemplated by our Policy Statement implementing [NEPA], we are in the early stages of our consideration of environmental issues and we deem it appropriate in this instance and at this time to move in the direction of a full record for the determination of the question whether our action here "might result in a major Federal action significantly affecting the environment."

In a page and a half, the Administrative Law Judge found that Wright's proposed operation would have no adverse affect on the environment. This conclusion was based on the substitution of 14 daily large turbo-prop operations for 15 daily operations performed with small piston equipment. In addition, the Judge relied heavily

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138 CAB Order No. 71-1-74 (Jan. 15, 1971).
140 CAB Order No. 71-5-9 (May 4, 1971).
on an FAA statement and testimony of the City of Cleveland and the City of Detroit that Wright's proposed operations would not measurably change noise exposure levels or materially affect air pollution at either airport. The Wright case was similar to the Northeast Corridor case in that unusual operations were proposed (in Wright—from a downtown airport, and in Northeast Corridor—unusual equipment from downtown airports).

Two cases where the CAB refused to act were the Petition of the City of Inglewood for Decertification, Inc. and Complaint of the Natural Resources Defense Council, Inc. In the first case, the City of Inglewood sought the decertification of one or more of the carriers authorized to serve Los Angeles International Airport. Inglewood alleged that such action would decrease congestion and therefore be environmentally beneficial. In addition, if operations were decreased, load factors would increase and thus result in more economic operations. The CAB denied Inglewood’s petition. While the CAB acknowledged its duty under NEPA, it held that even assuming it had the power to accomplish all the changes requested by the City, the disruptive consequences of the action would more than outweigh any potential benefits. The CAB also noted that due to a capacity agreement between the various carriers, approximately nineteen departures a day had been eliminated at Los Angeles. Finally, the Board noted that “Inglewood’s primary goals of air and noise pollution abatement are the subject of continuing efforts by other agencies (e.g. The Federal Aviation Administration and the Environmental Protection Agency) ...” Considering the Board’s more limited and “less suited regulatory tools”, employment of the Board’s time as requested by Inglewood would not have been “worthwhile.”

In the second case, the Natural Resources Defense Council, Inc. (NRDC) sought an investigation of the CAB’s implementation of NEPA. NRDC alleged that the CAB failed to satisfy Section 103 of NEPA, which requires all federal agencies to examine their statutory authority to determine any deficiencies which would pre-

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142 CAB Order No. 72-2-41 (Feb. 11, 1972).
143 CAB Order No. 71-7-140 (July 26, 1971).
144 CAB Order No. 72-2-41 (Feb. 11, 1972).
vent “full compliance with the purposes of” NEPA. NRDC alleged that the CAB failed to consider (1) the conflict between NEPA and Section 401(e)(4) (preventing CAB restrictions on schedules and aircraft), (2) the inconsistency between NEPA and the CAB's mandate under Section 103 of the Federal Aviation Act to promote air transportation, and (3) methods of using its various powers to improve the environmental impact of air commerce. Finally, the NRDC sought revision of the CAB's report to the Council on Environmental Quality; in the report, the CAB stated that its current statutory authority was fully adequate to comply with NEPA and that there was no basis for proposing legislation to correct any insufficient CAB power to comply with Section 103 of NEPA.\textsuperscript{145}

The CAB, “after careful deliberation,” dismissed NRDC's complaint. The CAB found that Section 401(e)(4) was not a “deficiency” preventing it from complying fully with NEPA. The CAB stated that, for example, its action in the Domestic Passenger Fare Investigation, “was designed to discourage excessive schedules and was based in part on . . . environmental considerations . . .”.\textsuperscript{146}

The CAB also found that its actions in areas other than route certification would not “often rise to the NEPA standards . . .”. On the other hand, the CAB noted that in all cases, it encouraged the participation of interested parties to assist in forming a “meaningful record” on “environmental impact.” The CAB concluded that its position on participation of interested parties and its Policy Statement (Section 399.110) would “insure ‘that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations,’” as expressed by Section 102(B) of NEPA.\textsuperscript{147}

B. The Miami-Los Angeles/Transatlantic Route Proceeding

“ Era”\textsuperscript{148}

National's forcing the environmental issue in Miami-Los Angeles had a broader effect than just delaying the CAB's ultimate decision

\textsuperscript{145} Letter from CAB to Council on Environmental Quality (Oct. 2, 1970).

\textsuperscript{146} CAB Order 71-7-140, at 3 (July 26, 1971). \textit{See}, Domestic Passenger-Fare Investigation Phase 6B-Load Factors, CAB Order No. 71-4-54, at 6, 13, 24 (April 9, 1971).

\textsuperscript{147} CAB Order No. 71-7-140, at 5 (July 26, 1971).

\textsuperscript{148} As noted \textit{infra}, these cases were not the only focal point of NEPA at the
in that case. It forced the CAB, and consequently the carriers, to take a look at the CAB’s prior treatment of NEPA.149

Pursuant to the CAB’s instructions, on October 19, 1973, the Director, BOR, directed the parties to the Miami-Los Angeles case to furnish environmental evidence.150 The seven page list attached to the Director’s letter included some 25 major categories of information to be supplied.

The Director’s request could be broken down into three categories: (1) Some of the required information was readily available to the carrier parties through their operations divisions; e.g., “fuel requirements of each type of aircraft which each carrier proposed to use ….”151 (2) Some information was obtainable, but not so readily available, for example, “an analysis of peak and off-peak hours at each day of the week” or “[t]otal frequencies (landings and takeoffs) at the Miami-Los Angeles airports for all air carriers and general aviation operations ….”152 Most of this information was in the hands of the DOT/FAA. Finally, (3) some information just did not exist, or was impossible to obtain without prohibitive expenditures; for example, “total emissions of the various pollutants in an average cruise mode (other than LTO operations) for an average flight path ….”153 Without hanging a “bucket” out at twenty thousand feet or, more seriously, expensive experimentation with a pressure wind tunnel, such data did not exist and could not be obtained. In addition, the information would be useless; even with the latest meteorological forecasting techniques, it would be virtually impossible to measure the incremental or cumulative impact of the relatively minute amount of engine emissions over a two

CAB. The two American route exchange cases were also focal. There, much time and effort were spent in developing data which contributed to the resolution of NEPA.

149 No specific CAB statement can be located that recognizes that Miami-Los Angeles spawned a deeper interest in NEPA. The CAB, in its proposed Part 312 rule making (note 125 supra), pointed to the Remanded Reno-Portland/Seattle Nonstop Service Investigation, CAB Order No. 73-11-75 (Nov. 16, 1973). That Order, however, traces it origin to the Miami-Los Angeles Case. Id. at 3 n.7.


151 Letter from Mr. Caldwell, supra note 150, at 1.

152 Id. at 2.

153 Id. at 1.
thousand, three hundred thirty mile route during the course of a future year.

Actually, considering the lack of expertise, the BOR did an outstanding job in conscientiously working to assemble a sensible assessment of environmental impact. Those information requests which were impossible to comply with were eliminated. Others were modified so that they more specifically related to actual environmental impact. The burden on the carriers, however, was not appreciably lightened. Instead, the impossible was eliminated but the difficult job of measuring actual noise and emissions impact, particularly during the LTO cycle, remained.

With one case brought to a halt by NEPA, the Board was thus confronted with the question of environmental procedures in a number of other on-going cases. Some of the major pending cases at that time involved significant (in economic terms) changes in services at numerous points by many carriers. Nevertheless, the Miami-Los Angeles environmental requests were required in all those cases.

In two of the American route exchange cases (Frontier and Airwest), American engaged outside consultants to prepare the environmental evidence. This case involved relatively simple operational changes—basically switching carriers with minor increases and several decreases in flights. In addition, American naturally desired to expedite these cases. It contracted with R. Dixon Speas Associates (Speas), noted for aviation planning and research, to supply the environmental evidence requested by the BOR. The result in the American-Frontier case after considerable effort and expense, was a bound booklet of one hundred forty-two pages and

154 While many BOR staff members assisted in this effort, the single Bureau Counsel primarily responsible for NEPA compliance was Ivars V. Mellups.

155 Transatlantic Route Proceeding, CAB Docket No. 25908 (Jan. 17, 1975); Capacity Reduction Agreement Case, CAB Order No. 75-7-98 (July 21, 1975); Remanded Reno-Portland/Seattle Nonstop Service Investigation, CAB Order No. 75-11-45 (Nov. 12, 1975); cases cited in note 108 supra.

156 See, e.g., CAB Order No. 73-11-75, at 2-3 (Nov. 16, 1973); Reopened Service to Omaha & Des Moines Case, CAB Order No. 73-11-31, at 2-3 (Nov. 8, 1973).

157 The BOR's request was issued on November 2, 1973, shortly after the BOR's request in Miami-Los Angeles.

158 Two months and $50,000 were spent in each case.
The American effort included a great deal of complex information. It did not supply, of course, information requested which was impossible to supply. The evidence did, however, thoroughly cover the three major areas of environmental impact: fuel consumption, engine emissions at the airport, and noise exposure at the airport. The environmental evidence supplied by American set the essential pattern for the submissions in the *Miami-Los Angeles* and the *Transatlantic Route Proceeding*.

Both fuel consumption and engine emissions were relatively simple to calculate. Fuel consumption was essentially broken down to two phases: LTO cycles and enroute. LTO cycles were broken down into six phases: prior to engine start, start and taxi-out, take-off, climb-out, approach and land, and taxi-in. Once the times for each of these elements were established, the engine manufacturers’ data on fuel flow were applied and a total fuel consumption was obtained. The fuel estimate without the route exchange and with the route exchange were then compared to the total U.S. scheduled industry consumption. The result was that the *American-Frontier Route Exchange* would cause an estimated relative increase of seventy-one hundredths of one percent. American characterized that amount as insignificant in comparison with the total United States scheduled industry consumption.

Engine emissions were calculated in much the same manner, except that emissions for all carriers operating at the airport were calculated. Speas used carrier exhibits and FAA data to determine the over-all pollution level at each airport at issue. They found that pollution would decline slightly because of a favorable change in the types of aircraft to be operated.

On the other hand, calculation of noise exposure was far more complex to calculate and required a great expenditure of energy and money. The first step was to determine actual flight pathways at each airport. To do this, Speas surveyed each airport individually and engaged in detailed conferences with FAA air traffic control personnel. From this detailed field work, American’s consultant determined:

(1) runway use patterns;
(2) conditions influencing runway use (noise abatement procedures, meteorological parameters, applicable ATC rules and regulations, crosswind/tailwind criteria utilized, etc.);
(3) arrival-departure fixes with associated inbound and outbound typical flight paths;
(4) runway limitations (displaced thresholds, length and weight restrictions;
(5) flight track vertical profile limitations;
(6) method of assignment of flights to specific tracks.\textsuperscript{159}

Speas calculated the daily noise exposure with this flight track, plus the individual noise footprint\textsuperscript{160} and aircraft operations data\textsuperscript{161} (adjusted by categorization of operations according to equipment type and take-off weight).\textsuperscript{162} Speas employed the Aircraft Sound Description System (ASDS) to determine the change in noise exposure as a result of the \textit{American-Frontier Exchange}.\textsuperscript{163} The result of this extensive noise research was that at six airports there would be no difference in the noise impact with or without the route exchange. Only at two airports would there be a single increase in exposure. In both cases, Speas concluded that in all cases the amount of the noise change would be too small to be perceived by the human ear.

The larger \textit{Transatlantic Route Proceeding} involved some twenty-eight domestic cities and some thirteen carrier applicants.


\textsuperscript{160} The “noise footprint” is defined as that area on the ground, expressed in acres, exposed to noise levels of 85 dBA or greater on one LTO cycle at maximum gross weight.

\textsuperscript{161} The operations at each airport, by type of aircraft were determined for the past years by reference to FAA from 7230 data and CAB 41T-3 reports, and by use of the Official Airline Guide and local airport records to determine the carrier group and equipment of the small residual of operations.

\textsuperscript{162} \textit{R. Dixon Speas Associates, supra} note 159, at 9-10.

\textsuperscript{163} Speas estimated the distribution of air carrier operations by weight and type using the Official Airline Guide analyzing the distribution of flights by stage length. Longer haul flights normally weigh more because of increased fuel carried thus taking longer periods of time to climb out and therefore exposing more ground to noise than do short haul flights with less fuel on board.

\textsuperscript{163} ASDS was adopted by the FAA as its method for calculating community noise exposure caused by aircraft operations. \textit{FAA Order No. 7040.2 (Aug. 10, 1973).}
Considering the fifty thousand dollar cost for six cities and two carriers, and the finding in the American-Frontier Route Exchange that a change in several flights in any hub airport would result in, at worst, imperceptible changes, the carriers in the Transatlantic case decided that there had to be another way.\textsuperscript{164} This determination was reinforced by an EPA study which showed that even a twenty percent reduction in flights at a hub airport would have a minimal or imperceptible impact on airport noise levels.\textsuperscript{165}

One possible solution was to attempt to employ the expertise already existent at the Department of Transportation (DOT). The DOT had spent a good deal of time and money amassing pollution and noise data. DOT had prepared noise exposure data for the year 1972 and a forecast for the year 1968 for some twenty-three airports, all but two of which were involved in the Transatlantic case.\textsuperscript{166} Counsel for American advised the Bureau of Operating Rights (BOR) that DOT experts could indicate noise evaluation methodology "margin of error." Given that margin of error, DOT experts could indicate the number of increased operations that would be required before a measurable change would occur.

The BOR, however, rejected this proposal. BOR noted that the DOT study was created for evaluating the cost and benefits of retro-fitting older, noisier planes with noise abatement equipment. In addition, the forecast year for the Transatlantic case was 1975, whereas the forecast year for the DOT study was 1978. In addition, DOT told BOR that it would cost upwards of three thousand dollars per airport to modify its study. The BOR firmly indicated that it regarded the responsibility for preparation of environmental evidence to be that of the carrier applicants.\textsuperscript{167} While it appeared that

\textsuperscript{164} One consulting firm, not Speas, quoted a figure over $200,000.00 just to prepare the environmental material. This did not include reproduction, distribution, and the cost of appearing as a witness.


\textsuperscript{166} See DOT letter to Administrative Law Judge Ross I. Newmann (Jan. 25, 1974) and letter from Counsel for American Airlines (Jan. 30, 1974) in CAB Docket No. 25,908.

\textsuperscript{167} Letter of BOR to Administrative Law Judge Ross I. Newmann, March 1, 1974:

It is the Bureau's position that the basic responsibility for accumulating data and preparing environmental forecasts, either independently or through consultants, lies with the carrier applicants. The
the carriers had to begin anew, in fact they had suggested a relatively efficient method of examining noise impact: a threshold screening test.

At the same time the BOR was preparing its letter, counsel for Pan American, on behalf of the carrier applicants in *Miami-Los Angeles*, was working with Bolt Beranek and Newman Inc. (BB&N) to develop a noise screening analysis. On March 14, 1974, BB&N submitted to Pan American a memorandum containing the methodology for such a noise screening analysis.

BB&N’s noise screening analysis was based on Noise Exposure Forecast (NEF) methodology. Like the Aircraft Sound Description System, NEF is one method of measuring the effects of aircraft noise on the ground. Basically, the NEF is an average noise level over a twenty-four hour period expressed as contour lines surrounding a given airport. NEF is essentially a planner’s tool. The area contained between the NEF thirty and forty contour lines, while livable, will not be comfortable for all persons. The area closer to the airport, and wholly contained within the NEF forty contour, is considered unacceptable for any uses except those which can accommodate high levels of noise.

While planners carefully identify NEF as a zone of reasonableness rather than an absolute measurement, the NEF system is valuable because NEPA and other environmental legislation require planners to select among various alternatives. Therefore, some criteria are required. The NEF system does offer a decision-making tool because the methodology reveals changed circumstances. The danger of NEF is that it might be used outside the planning area in an attempt to use it as an absolute standard. Such things as local

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Bureau is prepared to work with the carriers and/or their consultants by coordinating input data and assumptions and to take final responsibility for the environmental statement. We are not technically prepared to develop the multitude of environmental studies which are required. Unless such studies are performed by carriers, jointly or individually, with or without the aid of DOT’s study or other consulting firms, the Bureau will be unable to submit an assessment of the noise impact which may result from the award of new or renewed authority in this case.

168 Bolt, Beranek and Newman are consultants in acoustics and vibrations and were subcontractors to Speas in the two American Route Exchange cases and had done acoustic work for the DOT.

topography and other secondary noise sources, such as highways, can result in blanketing-out of noise within any given NEF contour, thus making the NEF irrelevant to specific local conditions.

The problem for the carriers and the consultants in CAB proceedings was devising a defensible criteria for indicating whether or not there would be a perceivable change as opposed to what the actual change will be. In other words, it was necessary to establish a threshold determination to show whether a discernable change will occur if a carrier's proposed service plan was operated. If such a change is indicated, then it would become necessary to use more precise tools to determine the local effects of that change. If the threshold is not crossed, then no further study would be needed.

In a study prepared for the Presidential Aviation Advisory Commission\(^1\) BB&N developed a mathematical model for determining the area contained in an NEF noise impact contour. Essentially, the model is based on the number of operations at an airport. BB&N's NEF model includes adjustments which weight (1) night time operations, (2) the older, noisier, four-engine, Low Bypass-Ratio aircraft (Boeing 707 and Douglas DC-8), and (3) long-range operations.\(^1\)

In the screening analysis, BB&N's formula was used to compare the area enclosed between the NEF thirty and forty contour before and after implementation of the carrier's proposal. The idea of this comparison was to identify those changes in noise impact so that even a questionable increase would receive detailed analyses. EPA studies showed that an increase of five NEF units would cause complaints and that an increase of two NEF units might cause complaints.\(^1\) BB&N and the carriers believed that detailed analyses should be conducted for any change which might possibly cause


\(^{171}\) BB&N's model computes the relationship between the NEF contour area and the airport operations in the following formula:

\[
\frac{\text{Area of Contour}}{15} = A_N \times \left[10 \log N + 24 - \text{NEF} + C\right]
\]

where \(A\) is a constant related to fleet mix and NEF contour, \(N\) is the effective number of operations, NEF is the contour value and \(C\) is the total of adjustment for day vs. night, 4-engine Low Bypass-Ratio (LBPR) and short vs. long-haul operations.

\(^{172}\) Enactment of Part 312, 40 Fed. Reg. 37,184, 37,185 (1975).
complaints. Accordingly, the screening analysis was designed to include a wide margin of safety, and a single unit of NEF change was selected as the threshold.

On March 8, 1974, seven days after BOR rejected the carrier proposal to use DOT data, counsel for Pan American and American, with representatives of Speas and BB&N, met with BOR counsel and proposed that a noise screening analysis be used in the Transatlantic Route Proceeding. At that time, BOR promised to consider carefully the screening methodology.

Shortly after BB&N delivered its memorandum outlining the screening analysis, the nine carrier applicants in Miami-Los Angeles engaged Speas and BB&N to perform the screening analysis in that proceeding. The cost for this analysis was twenty-three hundred dollars, which included developmental costs for evolving the noise screening analysis. This was a far cry from the fifty thousand dollars which it originally cost to comply with BOR's environmental evidence request. Over a month later, all the carrier parties to the Transatlantic Proceeding (including National) engaged the consultants to perform the noise screening analysis for twenty-nine of the cities at a cost of only twenty-five hundred dollars.¹⁷³

The carrier parties in Miami-Los Angeles submitted the noise screening analysis and other environmental responses by the end of April. The more extensive material in the Transatlantic Route Proceeding was not submitted until the end of May, 1974. The BOR filed its draft statement of environmental assessment in both proceedings on August 2, 1974. The BOR accepted the concept of a noise screening analysis and specifically stated:

[It] is concluded that the BB&N noise exposure screening procedure —supplemented where necessary by more detailed noise analysis— is an acceptable method of determining whether any particular proposal before the Board is significant in terms of adverse noise impact, and whether any further, more detailed noise analysis is required.¹⁷⁴

¹⁷³ Both Speas and BB&N, particularly Dr. Carl Robart at Speas and Andrew Harris at BB&N, worked very hard and in a most professional way to dramatically reduce the cost of their services.

¹⁷⁴ BOR, Draft Statement of Environmental Assessment, Transatlantic Route Proceeding (Aug. 2, 1974). The BOR, apparently, for the first time accepted the BB&N noise screening analysis in its Draft Statement of Environmental Impact in the Capacity Reduction Agreements Case 49-54 (June 27, 1974).
Final statements of environmental assessment in *Miami-Los Angeles* and the *Transatlantic Route Proceedings* were issued December 23, 1974 and October 15, 1974, respectively. In both proceedings, despite some questions by DOT and an outright attack on the BB&N analysis by the town of Suffield, the BOR maintained its acceptance of the screening analysis. The BOR answered Suffield's attack, stating:

The short of the matter is that Suffield's objections are misdirected since it is obvious that the heart of the controversy lies not in the *de minimis* impact of non-stop Transatlantic operations at issue here, but in the question of air service and consequent noise impact at Bradley in general. However, the Board is not here passing judgment upon the acceptability *vel non* of the present environmental circumstances at the airport, but rather upon the question of whether there will be any *further* measurable adverse impact as a result of any action it may take herein.

For this purpose, the noise analysis conducted by Bolt Beranek and Newman, and accepted by the Bureau, is entirely adequate, as we discussed previously . . . in fact, as we noted earlier, the "trigger" requiring further detailed noise analysis is very light, representing perhaps one-half of any noise impact change which anyone would notice. Thus, the screening analysis will precipitate a detailed NEF or Ldn/Leq analysis in any instance where there is the mere *possibility* of a measurable adverse change, as in the case of Minneapolis/St. Paul (Draft, Appendix H).175

The CAB adopted the BOR's final statement of environmental assessment in both cases. In most of the other pending cases the carrier parties employed the BB&N noise screening analysis, which BOR accepted in environmental assessments or environmental negative declarations.

Adoption of the noise screening analysis enabled the carrier and the CAB to deal with the NEPA issues in a simplified manner, both from the point of view if complying with the congressional intent and eliminating a significant procedural impediment which seriously delayed numerous cases. However, both the carriers and the CAB staff believed that compliance with NEPA ought to be regularized and refined. Therefore, the next step was to engage in a rulemaking procedure to accomplish that purpose.

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175 BOR, Final Statement of Environmental Assessment, Transatlantic Route Proceeding 19 (Oct. 15, 1974).
C. Post-Miami-Los Angeles/Transatlantic Route Proceeding

On May 14, 1974, the CAB proposed a new rule to govern the implementation of NEPA.\textsuperscript{176} Under the proposed rules, the CAB avowed faithfulness to NEPA and recognition of the practical realities of air transportation operations. The CAB proposed to accomplish this goal through the use of a regularized system of considering NEPA issues in many more cases than it had previously. The carriers, while in favor of new rules governing the implementation by the CAB of NEPA, objected to some of the complexities of the proposed rule and the failure of the CAB to include threshold screening analyses. In turn, the carriers proposed both the use of BB&N noise screening analysis and a pollution analysis developed by Speas. In its final rulemaking, the CAB adopted both the carrier's suggested screening tests.

In its explanatory statement, the CAB reiterated the basic premise of its earlier Policy Statement that the relationship between its actions and the environment are essentially "peripheral." Again, the CAB maintained that other agencies have a far more direct control over the environmental effects of air transportation and airports than the CAB, and that these agencies have far greater expertise in those areas. Furthermore, according to the CAB, NEPA is not involved in most of its actions in that most are not "major" and do not "significantly" affect the quality of the human environment. Finally, the CAB notes that it must act "expeditiously or the benefit is lost irrevocably."\textsuperscript{177} The CAB desired to avoid placing itself in a "procedural straight-jacket" which would create undue delay.

On the other hand, the CAB also reiterated its high sensitivity to NEPA and its requirements and objectives and [the CAB] intends to adhere scrupulously to NEPA's mandates and policies. We believe that the greatest public good will flow from our actions if they accommodate the objectives of NEPA and the Federal Aviation Act. To this end, the proposed regulations seek not only to be faithful to NEPA and the protection and enhancement of the environment, but also to the practical realities of air transportation operations to the extent that they are essential to the achieve-


\textsuperscript{177} Id. at 18,289.
ment of the promotional and other objectives to the Federal Aviation Act.\textsuperscript{178}

In its proposal the CAB set forth those actions which it believed would have a potential effect on the environment. Those were (1) certification or foreign air permit proceedings (Section 401 or 402 respectively), (2) (a) agreements affecting air transportation under Section 412, (b) merger or other control proceedings under Section 408, (c) exemption proceedings under Section 101(3) or 416(b), and (d) CAB instituted rate proceedings under Section 1002 of the Act. Those proceedings in the second (2) category would only be considered an action with a potential effect on the environment if they "demonstrably" would result in:

(i) authorization of service to the points not served by air transportation,

(ii) "substantially greater or lesser" service in a market or to a point,

(iii) first, additional or reduced service by helicopter, V/STOL aircraft or supersonic aircraft,

(iv) change or first service to a point where a national park, national historic park, national military park or national monument (except the Statue of Liberty or any national monument located within the city limits) is located, or

(v) "any change in service the environmental impact of which is likely to be highly controversial."\textsuperscript{179} In addition, the CAB would consider the potential NEPA issues in any rulemaking or legislative proposals which might result in service changes similar to those outlined above. Finally, the CAB included the catch-all category of any other action which would require substantial commitment of resources or "trigger" such a commitment which possibly might have a significant effect on the environment.

The proposed rule would require any applicant requesting the CAB to act in any of the above matters to prepare an environmental evaluation to accompany its application. The evaluation would describe the services and traffic impact of the proposal (number of flights, departure times, aircraft types, airport used, and traffic forecast). The evaluation would describe the environment

\textsuperscript{178} Id.

\textsuperscript{179} Id. at 18,292.
at the affected points, the probable impact of the proposed action on the environment and finally, address each of the environmental results that the CAB considers would significantly affect the environment.

The proposed rule contained a list of results from CAB actions that the CAB believed would significantly affect the environment. Those were actions which would significantly increase air pollution or the ambient noise level for a substantial number of people; destroy or significantly derogate from an important recreational area; significantly affect areas of historical, cultural, educational, or scientific significance; have significantly adverse aesthetic or visual effects; or have a detrimental effect on safety. The CAB noted that the list was not all-inclusive. Furthermore, in determining if an action was a major federal action significantly affecting the environment, the Board would consider: environmentally controversial actions, the cumulative effect of actions, actions of mixed environmental effect, secondary or indirect effects, and the effect of the action upon the local environment.\footnote{Id. at 18,293.}

Under the proposal, after the environmental evaluations were filed, the CAB staff would make an initial determination of the environmental impact of the proposed action. Three alternatives would be available: (1) an environmental rejection, (2) an environmental negative determination, and (3) an environmental impact statement. The environmental rejection would be used if the action would not be "major" or that the resulting consequences are inconsequential, frivolous, or "not cognizable under law."\footnote{Id.} The rejection would consist merely of a letter containing the CAB findings.

Where it was found that an environmental rejection was not appropriate, but an environmental impact statement would not be required, an environmental negative declaration would be prepared. The declaration would contain facts and reasons for reaching the negative declaration, a description of the proposed action and a summary of any probable environmental impact. Finally, if the proposed action may reasonably be expected to result in a major federal action significantly affecting the quality of the human en-
vironment, the CAB would notify the parties, public, EPA and CEQ that an environmental impact statement will be prepared.

If a complex or controversial action were contemplated, the environmental impact statement and the environmental negative declaration would both be subjected to the same procedural steps. Essentially, those steps would consist of obtaining further environmental information in the form of an environmental assessment from the parties, and if necessary, a draft declaration with a period for comments, a final declaration placed into the record, a hearing, and adoption by the Administrative Law Judge and eventually the CAB. 82

Nine air carriers joined together to comment on the Board's Proposed Rulemaking. 83 The nine endorsed the essential elements contained in the CAB's proposal. Although, the carriers believed that the proposal would comply with NEPA, they maintained that some changes should be made to improve the efficacy of the rule. Primarily, the carriers urged the CAB to change its rule substantively to permit the use of screening analyses to eliminate environmentally insignificant actions, and to accomplish this by adopting noise and pollutant screening tests to accomplish that task. The carriers suggested that the Board adopt the BB&N noise screening analysis and the Speas pollutant emissions screening procedure.

The BB&N noise screening analysis, of course, was that used in Miami-Los Angeles and the Transatlantic Route Proceeding. Like the noise screening analysis, the purpose of the pollutant screening standard was to determine when a change in flight frequencies at an airport would justify closer examination of its environmental effects. The standard was based on pollutant dispersion analysis technique applied to EPA emissions data. The threshold was set below the relevant units of the National Air Quality Standards determined by the EPA. 84

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82 See chart on page 571.
84 See Comments of the Nine Carriers, Notice of Proposed Rulemaking on Environmental Matters, CAB Docket No. 26,718, at 10, & attachment C at 6-8 (Sept. 5, 1974).
The following is a graphic representation of the proposed NEPA procedures:

IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT, INCLUDING THE PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

NOTICE OF PROPOSED RULE MAKING

Docket 26718

Applications + Environmental Evaluation

Environmental Assessment

Environmental Rejection

Environmental Negative Declaration

Draft End

Filed 45 Days

.14(b)

.13(a)

.13(b)

.13(c)

.14(c)

.14(d)

Comments

Final End

Received into Record

.14(e)

.14(f)

.15

.16(b)

30 Days

.16(d)

15 Days

Hearing

.15

.18

.7(b), .9

.7(c), .12

.13

Initial Determination

.14(b)

Draft EIS

Filed 45 Days

Comments

Final EIS

Received into Record

15 Days

15 Days

Initial Recommended or Final Decision
tion would result in an increase in total pollutant emissions, but
the change in concentration at the airport boundary would be less
than one percent of the air quality primary standards, no further
pollutant emissions analysis would be required. If the threshold
level were exceeded, additional analysis, which took into account
specific local conditions, would be required. The screening standard
has been used in two earlier cases where the CAB staff prepared
negative declarations. 185

Finally, the nine carriers disagreed with the CAB's proposed
timing of environmental evaluation submissions. Rather than have
environmental evaluations filed with an application, they suggested
that it be due with the direct exhibits in a hearing case or thirty
days after the application in a non-hearing case. Essentially the
nine carriers argued that the proposed schedules are not formulated
until the time of direct exhibits.

In its promulgation of the new environmental regulations, the
CAB adopted both the noise and pollutant screening analysis; 186
however, the CAB rejected the carriers' proposed procedural
change. Otherwise, the CAB basically adopted its proposed en-
vironmental regulation. Subsequently, in response to a petition of
the nine carriers requesting modification, the Board relented and
set the time for filing an environmental evaluation within thirty days
of the date of any CAB order setting an application for hearing,
unless otherwise specified in that order. Thus, the Board finally
adopted a set of regulations which regularized its compliance with
NEPA.

CONCLUSION

This article examined National Airlines's use of legislation de-
dsigned for environmental protection to delay competition. That
action, in fact, resulted in an economic benefit for the carrier.
Furthermore, that delay created a situation where the top contender
for the route—Pan American—lost the award.

It is clear that National's maneuver could only be used once.

185 Pan Am. W. Route Transfer, CAB Docket No. 27,104 (July 11, 1975);
Reopened Service to Omaha and Des Moines Case, CAB Order No. 70-7-24
(July 6, 1970).

186 Enactment of Part 312, 40 Fed. Reg. 37,184, 37,185 (1975).
National recognized that fact when it joined with other carriers to produce environmental data in the *Transatlantic Route Proceeding* where National was an applicant for authority. Finally, National's action did have one beneficial aspect: it forced the CAB and the carriers to take a hard look at the CAB's compliance with NEPA, and produce a regularized system of dealing with NEPA issues. While the Board could have relied on the *First National Bank* precedent, the over-compliance in producing its environmental rules should insulate the CAB against judicial review.