1973


Clay G. Small

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

Recommended Citation
https://scholar.smu.edu/jalc/vol39/iss4/7

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THE NATIONAL ENVIRONMENTAL POLICY ACT:
WHAT STANDARD OF JUDICIAL REVIEW?

Congress has responded to the concern of Americans with the deterioration of their environment by passing the National Environmental Policy Act. NEPA is the manifestation of the federal government's recognition of itself as a major pollutor and its attempts to rectify the situation. NEPA requirements have been diffused throughout federal projects from airports to dredging permits; each agency has the primary responsibility to administer NEPA's provisions under the general supervision of the Environmental Protection Agency. Due to the Act's inherent ambiguities and inconsistent application by the various agencies, administrative decisions pursuant to NEPA have come under challenge in the courts by various environmentally concerned groups. The courts have responded with unpredictable decisions that have substantially limited the Act's effectiveness. NEPA, potentially the most powerful tool to correct a waning environment, has been stymied by judicial confusion regarding both the degree of review NEPA mandates and the standard by which this review is to proceed.

I. THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS OF NEPA

The substantive and procedural aspects of NEPA are set forth in sections 101 and 102 respectively. The substantive aspects of

---

Federal restrictions on the federal government are not a new concept with NEPA. In 1959, there was a proposal for the coordination of the executive branch and the national goals of conservation. See Proposal Resources and Conservation Act, S. 2549, 86th Cong., 2d Sess. (1960).
4 Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).
NEPA manifest the Act’s ultimate goal, to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” Accordingly, the federal government must coordinate its plans and functions to assure that the nation enjoys a healthful, productive environment and that succeeding generations will also have an environmentally acceptable existence. The Act’s procedural requisites, on the other hand, comprise the steps agencies must follow to be deemed in compliance with the Act’s goals. In theory, if these steps are faithfully executed, the Act’s substantive goals will also be served. Not only have the Act’s procedural steps at times not been met, however, but it has become apparent that even when these steps are complied with, the substantive goals may not be met.19

The major thrust of NEPA’s procedural requirements are found in section 102 (2)(c) in which the requisite procedural steps of an environmental impact statement are spelled out.20 The impact statement must include the following: the environmental impact of the proposed action,21 environmental effects that will be unavoidable if the proposed action is implemented,22 alternatives to the proposed action,23 the relation between short-term use of the environment and long-term productivity,24 irreversible commitments of resources the proposal will bring25 and results of consultation with a federal agency possessing either jurisdiction or expertise con-

---

10 See Environmental Defense Fund, Inc. v. Corps of Engineers United States Army, 470 F.2d 289 (8th Cir. 1972).
cerning the proposed action. The statement must also be written in laymen’s terms, striking a balance between a report written to be understandable by non-technically oriented individuals, yet scientifically grounded so that experts in the field will be alerted to potential environmental problems. An environmental impact statement must be filed for every major federal action. What constitutes a major federal action is measured from the perspective of cumulative impact.

The procedural requisites are jurisdictive; courts will demand they be met and will not read resilience into them. A failure to meet any one of the requisites will result in a judicial finding that the impact statement is insufficient. An insufficient impact statement shows on its face lack of agency compliance with NEPA and will be overturned when appropriately challenged in court.

Another important subsection of NEPA, 101(c) provides:

The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Since each person has a right to a “healthful environment” and

---


19 See Guidelines for the Federal Agencies Under the National Environmental Policy Act 1500.6 (1973), BNA ENVIR. REP. FED. LAWS, 71:0301: “The statutory clause major Federal actions significantly affecting the quality of the human environment is to be construed by the agencies with a view to the overall cumulative impact of the action proposed, related federal actions and projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared.” Also, there has been considerable litigation concerning whether the Act applies retroactively to major federal actions commenced before the Act’s passage. See Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970). Contra, Named Individual Members of San Antonio Conservation Society v. Texas Highway Dep’t, 446 F.2d 1013 (5th Cir. 1971).


21 See note 9 supra.

the "responsibility to contribute" to the betterment and continuation of his environment, it follows that citizens seeking to accomplish these ends must have access to the judicial apparatus to implement their rights. The public participation foreseen by section 101 (c) has not become a working reality for at least two reasons. First, the courts have not consistently held whether only the procedural aspects of NEPA are reviewable or whether the Act's substantive provisions are also subject to judicial review. Secondly, even when substantive review is recognized, the courts have failed to decide upon a standard by which to substantively review agency decisions. The citizen attempting to assert his environmental rights is thereby confronted with the obstacle of judicial confusion at two levels.

II. LEGISLATIVE HISTORY OF THE NEPA AND JUDICIAL REVIEW

NEPA does not include specific review provisions; therefore, the provisions of the Administrative Procedure Act are applicable. Under the APA, a reviewing court may set aside agency action when it is found to be unwarranted by the facts of the situation. The APA entitles anyone suffering an alleged legal wrong resulting from agency action to judicial review of the claimed injurious action. Agency decisions determined to be arbitrary or capricious, or not otherwise in accordance with law, will be overturned by the reviewing court after the facts of the agency decision are subjected to a trial de novo by the reviewing court.

Although at least one court has viewed the NEPA as a mere policy statement with no review of any type allowable, the procedural requirements of NEPA set forth in section 102 are gen-

38 Bucklein v. Volpe, 2 E.R.C. 1082, 1083 (N.D. Cal. 1970): "Aside from establishing the council, the Act is simply a declaration of congressional policy; as such, it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only the general command to federal officials to use all practicable means to enhance the environment. 42 U.S.C. § 4331. It is unlikely that such a generality could serve or was intended to serve as a source of court-enforceable duties."
erally regarded as being reviewable by the courts. Presently, the major issue before the courts is the question of the review of NEPA's substantive provisions. Courts that deny substantive review interpret NEPA as a purely procedural act. These courts reason that if Congress had intended for the courts to make a substantive review, explicit language giving this power would have been set forth in the Act. Since NEPA contains no specific substantive review provisions, the agencies are deemed to be in control of all substantive aspects of the environmental decisions free from judicial review. This reasoning overlooks both the applicable provisions of the APA and NEPA's legislative history. It is not explicit language that subjects administrative decisions to judicial review; on the contrary, clear preclusionary language is necessary to place an administrative decision beyond the scope of judicial review. NEPA contains no preclusionary language. The Supreme

---


32 Originally, the major issue in environmentally related law suits was who had standing to challenge agency action. With the liberalization of judicial requirements, however, standing is no longer a major obstacle in environmentally oriented cases. See Ass'n of Data Processing Service, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965); Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878 (D. D.C. 1971). See generally Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970). The recent liberalization is illustrated by United States v. S.C.R.A.P., ___ U.S. ___, 93 S.Ct. 2405 (1973). The Supreme Court ruled in this case that environmentalists who were attacking an emergency railroad surcharge on the ground that the tariff adversely affected the recycling of glass and paper had standing under the theory that the group had an interest in the environment that would be injured if recycling were discouraged.


35 Brownell v. We Shung, 352 U.S. 180, 185 (1956): ".... Exemptions from
Court has made it clear that when the APA is applicable, the instances when administrative decisions are not subject to judicial review are "a very narrow exception." The question is not the preclusion of judicial review, rather it is the extent of the review. The APA not only subjects agency decisions made in light of NEPA to court review, but NEPA's legislative history as well illustrates the intention of Congress that NEPA be substantively reviewed by the judiciary.

Congress wanted environmental legislation that would be action-based and objective-oriented through public participation. Henry M. Jackson, one of NEPA's co-sponsors in the Senate, interpreted the Act's objectives as being to create active participation in environmental management at all levels of federal action. Total commitment at every level of federal action does not mean every level except the federal courts. The combined House White Paper on—

*A National Policy for the Environment* envisioned the mobilization of the people via the courts:

If America is to create a carefully designed healthful and balanced environment, we must . . . establish judicial procedures so that the individual right to a productive and high quality environment can be assured.

---

84 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). The court was referring to 5 U.S.C. § 701(a) (1970) which states that judicial review is permissible " . . . except to the extent that . . . statutes preclude judicial review . . . " or " . . . agency action is committed to agency discretion by law."

85 Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 428 (1954). "The question is not whether statutes preclude review but to what extent statutes preclude review, not whether agency action is by law committed to agency discretion but to what extent it is committed." *See generally JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).


87 115 Cong. Rec. 29087 (1969) (remarks of Senator Jackson): "If an environmental policy is to become more than rhetoric, and if the studies and advice of any high level, advisory group are to be translated into action, each of these agencies must be enabled and directed to participate in active and objective-oriented environmental quality must be made part of every phase of federal action." (emphasis added).

88 Senate Comm. on Interior and Insular Affairs and House Comm. on Sci-
NOTES

It would seem anomalous to direct "objective-oriented environmental management," yet only allocate to the courts review of the Act's procedural shell while skirting review of the objective-oriented goals. The policy goals of NEPA are a matter of balancing opposing economic and social interests, a function the courts perform daily. The technical nature of many environmental problems cannot obfuscate the basic social-economic balancing that has long been, and must continue to be, a function of the judiciary.

Other congressional statements also lend support to substantive review. A dispute arose between the House and the Senate over the proper wording of section 101(b). The Senate bill originally stated that "each person has a fundamental and inalienable right to a healthful environment . . ." The House changed the statute's language to its present form: "each person has a responsibility to contribute to the preservation and enhancement of the environment." The reason for the change was stated to be the uncertainty of the House conferees in respect to the legal scope of the Senate version. The language of the House version can be interpreted as a stronger mandate for the substantive judicial review than the original Senate version. The Ninth Amendment states: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."


Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 298 (8th Cir. 1972): "Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits."

It has been suggested that there is a need for a separate court system specializing in these technical decisions. See Kantrowitz, Proposal For an Institution For Scientific Judgment, 156 SCIENCE 763 (1967).

H.R. Rep. No. 91-765, 91st Cong., 1st Sess. 8 (1969). The Senate made this statement regarding its interpretation of the clauses' meaning: "This subsection asserts congressional recognition of each person's fundamental and inalienable right to a healthful environment. It is apparent that the guarantee of the continued enjoyment of any individual right is dependent upon individual health and safety. It is further apparent that deprivation of an individual's right to a healthful environment will result in the degradation or elimination of all of his rights." S. Rep. 91-296, 91st Cong., 1st Sess. 19 (1969).


H.R. Rep. No. 91-765, 91st Cong., 1st Sess. 8 (1969). "The compromise language was adopted because of doubt on the part of the House conferees with respect to the legal scope of the original Senate provision."
retention by the people of the "fundamental rights" envisioned by the Ninth Amendment would include the innate right of self-preservation in an inhabitable environment. The Senate's wording is therefore a reiteration of an enumerated constitutional right. The actual wording of NEPA, "Congress recognizes that each person should enjoy a healthful environment" and "has a responsibility to contribute to the preservation and enhancement of the environment," is a congressional mandate for public participation toward the national goal of a clean environment. The courts are the necessary forum for the voice of the public participation contemplated by Congress.

A conjunctive reading of sections 101 and 102 of NEPA indicates that the courts are not only permitted a substantive review of agency compiled impact statements, but are directed by the Act to do so. According to section 102, Congress directs that all public laws and regulations of the United States be administered in accordance with the policies of NEPA "to the fullest extent possible." This policy is not limited to section 102 alone, rather it modifies the entire Act. Therefore, the goals set forth in section 101 must be administered to the "fullest extent possible." Full implementation should include meaningful participation by the courts. The courts could not possibly insure full implementation of section 101 policy goals without substantive review of agency decisions.

III. STANDARDS OF SUBSTANTIVE REVIEW

The judicial review of an agency compiled impact statement

---

47 Cf. President Nixon enunciated the need for this participation. "The task of cleaning up our environment calls for total mobilization by all of us. It involves government at every level; it requires the help of every citizen." Man's Control of the Environment, 87 CONG. QUARTERLY (1970).
48 42 U.S.C. § 4332 (1970). "The Congress authorizes and directs, that to the fullest extent possible: (1) the policies, regulations, and public laws of the United States should be interpreted and administered in accordance with the policies set forth in this chapter." S. REP. No. 296, 91st Cong., 1st Sess. 19 (1969): "To insure that the policies enunciated in section 101 are implemented, section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible . . . ."
should serve two purposes. First, the review should serve as a method of providing information to the public by setting a definite standard against which the public can judge the environmental attributes of a particular project. Confused statements lead to a confused, uninformed public; an uninformed public cannot be the participating public Congress contemplated. As stated in Natural Resources Defense Council v. Morton: "Congress contemplated that the Impact Statement would constitute the environmental source material for the information . . . to enhance enlightenment of—and by—the public."

The second function the standard of review should serve is to allow for a definite measure by which the judiciary may review the decisions of their brethren. An educated judiciary would in turn lead to better agency decisions. This reasoning was followed in Environmental Defense Fund v. Corps of Engineers when the court concluded that the review of agency decisions would eventually improve the quality of the decisions. The threat of a judicial reversal of agency decisions due to their failure to meet NEPA standards will compel the agencies to become more environmentally competent. A better informed public, federal agencies and judiciary will necessarily lead to sounder environmental decisions.

To implement the benefits of sounder environmental decisions, a definite, universal standard of review is necessary. The courts have been unable to reach this standard. To a great extent therefore the policy goals of NEPA have been frustrated. The judicial uncertainty and confusion regarding the applicable standards of review and their application can best be illustrated by analysis of a few actual decisions. These decisions illustrate two important points on which the courts are confused. First, the courts are uncertain regarding what standard to apply. Secondly, once they have decided on a standard, they are uncertain how to apply it. If the courts themselves are confused, it is not difficult to see how this bewilderment could funnel down to the modestly funded plaintiffs attempting to protect their environmental rights.

---

48 See note 38 supra.
The courts have adopted a variety of standards for substantive review. In a leading case, *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*, the District of Columbia Circuit Court denied the propriety of substantive review unless it is shown that the agency decision was "arbitrary" or "clearly gave insufficient weight to environmental value." The circuit court in *Calvert Cliffs' failed, however, to delineate what it meant by the failure to give clear weight to environmental value. Is this standard to be measured by NEPA substantive goals or the more narrow environmental problems of a particular project's setting? The focus of the *Calvert Cliffs' standard is unclear.

A similar standard was set forth by the district court's determination in *Scherr v. Volpe*: "administrative determination is not to be overturned by a court unless it is arbitrary and unreasonable." Whether "arbitrary and unreasonable" is the same as the "arbitrary" or "insufficient weight" standard of *Calvert Cliffs' is open to debate. Both courts failed to substantiate their decisions with clear references to NEPA provisions.

In *Natural Resources Defense Council, Inc. v. Morton*, the D.C. Circuit Court seemingly reconsidered what it regarded as the proper standard. The circuit court stated that it would not "interject itself" into administrative determinations as long as the decisions were in accord with "the end prescribed by Congress." Whether and to what extent this standard is consistent with the standard the same court set forth in *Calvert Cliffs' is not stated with any certainty.

The district court in *Brook v. Volpe* further obfuscates the proper standard of review by first stating that the substantial evidence rule is inapplicable, but that the court should perform a "substantial inquiry" into the agency determination. Does this standard set forth the same concept as previously described stand-

---

55 Id. at 838.
ards or has yet another means of substantive review been developed? The court in *Brook* defines "substantial inquiry" as being tripartite: did the secretary act within his authority; was his choice arbitrary, capricious, "or otherwise not in accordance with law;" and were the proper procedural steps followed. The provision, "or otherwise not in accordance with law," would seem to include section 101 policy goals. Once again, however, the court failed to substantiate its standard with specific NEPA language.

Perhaps the most adamantly worded case in favor of substantive review by the judiciary of agency compiled environmental impact statements is set forth in *Environmental Defense Fund v. Corps. of Engineers*. The Circuit Court for the Eighth Circuit stated that it is the obligation of the courts to perform a substantive review. The court then set up the "arbitrary and capricious" standard for itself. Although citing *Calvert Cliffs* as authority for this standard, instead of using the "substantial weight" qualification as in *Calvert Cliffs*, the court in *Environmental Defense Fund* relied on other considerations. In this case, the "arbitrary and capricious" decision "represented a clear error in judgment." Thus, even courts claiming to use the same review standard create variances when the standard is applied.

While the courts in numerous other fields of law have managed to establish specific standards of review, the standards of review used in the environmental field seem purposely vague. None of the criteria thus far described deals with nor correlates to the actual substantive provisions of NEPA. The courts' lack of familiarity and expertise in deciding environmental issues may well be the cause of the confusion. Regardless of this lack of familiarity, however,

---

84 350 F. Supp. at 281 n.55.
86 *Id.* at 298.
the courts should strive to set forth a consistent and workable standard of review.

A standard that could meet the educational necessities of the National Environmental Policy Act was posed in *Natural Resources Council v. Grant.* The standard stated was:

The court's function is to determine whether the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed and that they are substantiated by supportive opinion and data.

The reasonableness requirement serves the same purpose as the "arbitrary and capricious" standard due to the rational basis of both. The "substantiated by supportive opinion and data" criterion would force the agency to compile a convincing public record of the project's environmental effects—this could serve as an educational tool. The data supporting the agencies' conduct in the impact-statement should be laid out in nontechnical laymen's terms. This substantiation could serve as a measure of what will and will not be acceptable agency action pursuant to the policy of the NEPA. The reasonable substantiation standard can provide the necessary precedent to form a consistent yardstick of agency conduct in environmental matters.

IV. CONCLUSION

To effectuate a proper challenge to agency action, concrete findings are needed to compare and contrast past environmental decisions. A plaintiff needs precedent on which to build his case. Precedent is not viable without a clear standard of review. These requisites for effective citizen action do not presently exist. When a plaintiff presents a case that was favorably decided on similar facts, the defense has a ready defense that the standard under which the cited court made its decision varies from the one the trial court has used in the past. To remedy the confusion, two steps can be taken. First, Congress could amend NEPA and add particularized review provisions. Secondly, the Supreme Court, on the proper occasion, could rule on the question of the most appropriate type

---

64 Id. at 1004.
65 See note 18 supra.
and standard of review. Supreme Court adoption of a standard like that set forth in Natural Resources Council v. Grant is preferable.

A definite standard for substantive review is necessary for a combined national effort toward obtaining the most “healthful protective, and aesthetically and culturally pleasing surroundings.” The judiciary is the proper forum in which to seek this protective relief. As Supreme Court Justice Douglas recognized:

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. . . . Where wrongs to individuals are done . . . it is abdication for courts to close their doors.

The failure of the courts or the Congress to formulate a definite standard of review for the impact statements has in effect closed the courts’ doors. In light of the detail and technicality of environmental protection, the absence of a specific standard by which a plaintiff may challenge an agency decision makes his task nearly insurmountable. In the absence of a definite standard by which a plaintiff can measure his attack, “the most important single piece of modern environmental law now on the statute books” is lost in a maze of judicial technicalities and uncertainties.

Clay G. Small

---

68 Justice Douglas has already indicated the need for this action in Sierra Club v. Fed. Power Comm'n, 407 U.S. 926, 933 (1971) (opinion of Douglas, J., dissenting from denial of certiorari). In this case, Justice Douglas pointed out that the failure of the courts to review agency decisions from a broader view than the substantial evidence test will lead, along with other factors, to the eventual demise of NEPA mandates.


66 N.Y. Times, July 17, 1973, at 36 (editorial). The quotation was a segment of a vehement editorial in opposition to the Gravel Amendment that provided for the bypass of judicial review of NEPA with reference to the Alaskan Pipeline.
Current Literature