SOME SUGGESTIONS FOR FUTURE PLAINTIFFS ON EXTENDING THE SCOPE OF THE NATIONAL ENVIRONMENTAL POLICY ACT

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I. INTRODUCTION: A PLAINTIFF'S VIEWPOINT OF THE LITIGATION CLIMATE

If the National Environmental Policy Act of 1969 (NEPA) is ever to be applied to "the fullest extent possible," plaintiffs in future lawsuits brought under its provisions must present new and more comprehensive arguments. While hundreds of judicial decisions interpreting NEPA have been reported, and although near unanimity in reviewing courts on some NEPA questions has developed, most major questions arising under the statute remain unresolved. The pleading, proof, and argument of future litigants will be crucial in directing the course of future interpretation. This Article will make suggestions for future lawsuits designed to expand the scope and effectiveness of that statute. It will be argued that environmental plaintiffs should aim at forcing federal agencies to begin using an improved NEPA method of environmental analysis earlier, on a wider scale, in more regulatory areas, for different purposes, and with more citizen involvement and more probing judicial review than is now the case.

A. The Government vs. The Citizen

These suggestions assume the viewpoint of the typical plaintiff in the typical environmental lawsuit: even though his financial ox is not being gored, that plaintiff is an advocate for environmental quality as he sees it in the circumstances at issue. Without NEPA, he is legally powerless. Such a plaintiff's advocacy is usually undiluted by consideration of "balance" as that word is now used by some industry and agency apologists, to whom "balanced" appears to mean that while the goal of environmental protection may be worthwhile in the abstract, it is outweighed by "practical" considerations whenever a concrete proposal to promote the goal is put forward. Such waffling may be discounted coming from leaders of industry because their main job is to make money, and

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2 Strangely, the great concern for balance did not become apparent until real gains in environmental protection began to be felt. Now, one cannot read a newspaper or legal periodical without tripping over oil company presidents or bureaucrats claiming in print that they have always favored clean air or the great outdoors or that sort of thing, but, in this case, it costs too much, or it is going too far too fast, or it exacerbates the energy crisis, or whatever.
properly so. Those same arguments set ill in the mouths of government officials sworn to uphold the law.

In essence, NEPA requires that federal agencies consider the consequences of their actions before acting, that they give weight to environmental factors in their decisional equation, and that they reduce the results of their deliberations to a writing called the environmental impact statement (EIS). Congress, when considering passage of NEPA, recognized that a prime contributor to the nation's environmental problems was the government itself. In spite of this congressional recognition, in the five-plus years that NEPA has been in effect, it has become clear to the environmentalist observer that many federal agencies are incapable of, or unwilling to undertake even the first of the three required steps. Dissemination of impact statements or "negative declarations" is now routine because of decisions in repeated litigation condemning agency nonfeasance, but evidence abounds that paper production does not necessarily indicate either informed analysis or compliance with NEPA's goals and policies.

It has been argued that if overburdened administrative agencies actually had to do the research, investigation, and thinking required by NEPA, they would be able to accomplish nothing else. Some commentators have even implied that administrators' ingrained hostility to NEPA (or, indeed, to anything new) is a sufficient justification for permitting their convenience to override the procedures as well as the substance of the Act. Such arguments answer themselves unless it is accepted that public servants may disobey the law with impunity. The arguments for administrative convenience as a reason for diluting or avoiding the law rest on several fictional presumptions: that agencies are expert in environmental balancing; that they decide fairly on the evidence presented; that they represent and exercise their discretion in favor of the public interest; that their actions are regular; and that only a very few administrators are less than completely honest and honorable men. No

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Many of the questions discussed herein and others are explored at length in Fred Anderson's two fine works on NEPA, F. Anderson, NEPA in the Courts (1973) [hereinafter cited as Anderson, NEPA], and Anderson, The National Environmental Policy Act, in, FEDERAL ENVIRONMENTAL LAW 238-419 (1974) [hereinafter cited as Anderson]. The author acknowledges his debt to Mr. Anderson, whose exhaustive work and provocative ideas greatly assisted the preparation of this Article.

* A negative declaration is a written statement of the reasons why an agency did not prepare an impact statement on the project at issue. See, e.g., Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).


responsible commentator can contend any longer that many federal agencies have not been unduly sympathetic to the interests they are supposed to regulate. "Industry-orientation" aside, it can no longer be pretended that these fictional presumptions represent reality. If it were not evident before Watergate, it is now inescapable that all the public concern, all the evidence, and all the reasoned argument in the world may be outweighed in some administrative decision-making by one phone call from a Peter Flanigan or John Mitchell. Sizable campaign contributions and other less-than-subtle forms of influence peddling cannot be defended as exceptions, for wherever such minor league corruption has been looked for it has been found, and the guilty contributor has not been the Audubon Society. In many cases, therefore, environmental plaintiffs must regard the agency as well as the applicant for its favor as an enemy, and in these cases courts offer the only forum in which a fair hearing is possible.

**B. The Citizen vs. The Government: The Record to Date**

Judicial review of agency NEPA decisions may take place at any one or more of seven levels. The bottom level is comprised of administrative law doctrines that determine whether the court will hear the citizen’s challenge at all. These doctrines include standing, laches, exhaustion of remedies, sovereign immunity, and similar barriers to resolution of the merits. Although an inordinate number of early NEPA suits were aborted because of such technicalities, this aspect of administrative law has developed so rapidly under the deluge of environmental litigation that motions to dismiss on these nonmeritorious grounds are now seldom granted, except when courts prefer to avoid or postpone the more substantial questions.

The next level includes a series of questions involving the applicability of

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8. *Cf. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966): The theory that the Commission can always effectively represent the listener interests . . . is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. Id. at 1003-04.*

9. *See generally, W. RODGERS, CORPORATE COUNTRY (1973). This is a pre-Watergate analysis of the subtle but pervasive use of money and corporate power in governmental processes.*

10. *Without pretending an exhaustive survey, it may fairly be stated as a general proposition that most of these doctrines are anachronistic, confusing, and inconsistent, and that their influence on the law has waned as the amount of environmental litigation has grown. The doctrine of sovereign immunity, a hoary, ill-conceived judicial notion, has been largely swallowed by exceptions recognized in the cases. See, e.g., National Helium Corp. v. Morton, 455 F.2d 650, 654-55 (10th Cir. 1971) (National Helium I), The doctrine, however, continues to be used. See, e.g., Sierra Club v. Hickel, 467 F.2d 1048 (9th Cir. 1972), cert. denied, 411 U.S. 920 (1973) (doctrine cited to buttress questionable conclusion that land transfer was unreviewable). But see National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973). The doctrine of standing, another unnecessary anachronism, received what should prove to be a death blow in so far as it applies to environmental litigation in Sierra Club v. Morton, 405 U.S. 727 (1972) (Mineral King I), and United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (SCRAP I), but keeps popping up in the unlikeliest places. See, e.g., NRDC v. EPA, 481 F.2d 116 (10th Cir. 1973). The defense of laches usually receives short shrift from courts that recognize that plaintiff’s lack of diligence cannot logically serve to excuse an agency’s failure to perform its legal duty. See, e.g., Minnesota PIRG v. Butz, 498 F.2d 1314, 1324 (8th Cir. 1974) (“PIRG” stands for Public Interest Research Group). Other doctrines, such as exhaustion of administrative remedies, threaten a longer life and require more thoughtful preparation for litigation. See generally Coggins, PREPARING AN ENVIRONMENTAL LAWSUIT, Part II: DOCTRINAL BARRIERS AND PRETRIAL PREPARATION, 58 IOWA L. REV. 487, 507-13 (1973).*
NEPA. The question whether the disputed action is sufficiently "federal" to trigger the Act has been litigated often, and the guideline emerging is that federal involvement need only be more than minimal to qualify. Whether the action is "major" is usually conceded by an agency whenever a group of people are upset enough to sue. "Retroactivity," likewise, is seldom a problem any longer. Many decisions of the Environmental Protection Agency, and a few emergency actions of other agencies have been judicially exempted from NEPA, but, for the most part, courts have ordered all agencies to comply. Whether the action will have a "significant effect" on the environment is the primary unresolved issue at this level. Many look skeptically at agency findings that the effect will not be significant, reviewing courts regarding it as a legal issue on which an agency determination carries little weight. A sizable minority, however, are inclined to accept agency negative declarations if supported in the record and not patently arbitrary or capricious.

At the third level are grouped a few peripheral questions about EIS preparation procedures and other NEPA requisites. Even if no impact statement is required, are other duties imposed by NEPA? At what point in the administrative process is statement preparation appropriate or mandatory? Was the draft properly circulated for comment and the final EIS reviewed by the Council on Environmental Quality (CEQ)? If several agencies are involved in a project, which has the responsibility for EIS preparation? May a federal agency delegate any part of its responsibility for statement preparation to the public or private applicant for its funds or favor? The first four questions pose little interpretational problem, but the question of delegation arises frequently,
and the opinions in the circuits are irreconcilable. The leading Greene County\textsuperscript{24} decision, recently and emphatically reaffirmed by the Second Circuit,\textsuperscript{28} forbade delegation because of the danger that statements prepared by private applicants would reflect their self-serving assumptions. Other courts have been less discerning.\textsuperscript{28}

Only at the fourth level of review, when the reviewing court decides whether the preparation and contents of a final EIS are adequate, are more substantial NEPA questions confronted. The main question will be whether the statement is sufficiently "detailed."\textsuperscript{27} Subsidiary questions at this level will be whether the agency used the proper internal talent to conduct sufficient research and study;\textsuperscript{28} whether it considered and answered opponents' objections;\textsuperscript{29} whether it consulted with and considered the opinions of outside agencies and experts;\textsuperscript{30} whether the EIS discusses every adverse impact;\textsuperscript{31} whether its scope is sufficiently broad;\textsuperscript{32} whether all alternatives received enough consideration;\textsuperscript{33} and whether it prejudged the issues too blatantly.\textsuperscript{34} For many courts, review ends at this point.

The fifth level is a rudimentary form of review of the "merits," or so-called substantive review. Courts conducting this review have declared that, pursuant to section 706 of the Administrative Procedure Act (APA)\textsuperscript{35} as construed in Overton Park,\textsuperscript{36} they will look beyond procedural paperwork to the project or license itself to determine if it is "arbitrary and capricious." Unfortunately, with but few exceptions, courts that have reached this level have merely recited that the agency action at issue was neither arbitrary nor capricious, without offering any enlightenment as to what measuring device was used.\textsuperscript{37}

At the sixth level, courts will undertake the full judicial review mandated by the APA, as interpreted in other areas, and evaluate the disputed project or license in terms of the agency's discretion under law, as that discretion has been

\[\text{\textsuperscript{24} Greene County Planning Bd. v. FPC, 455 F.2d 412, 420 (2d Cir.), cert. denied, 409 U.S. 849 (1972).}\]
\[\text{\textsuperscript{25} Conservation Soc'y v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974) (Route 7 Corridor).}\]
\[\text{\textsuperscript{26} See, e.g., Citizens Environmental Council v. Volpe, 484 F.2d 87 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974) (Switzer By-Pass). Perhaps the worst of this genre is Life of the Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974), in which the court approved an EIS prepared by a private consulting firm with a financial stake in the outcome.}\]
\[\text{\textsuperscript{28} Lathan v. Volpe, 350 F. Supp. 262, 265 (W.D. Wash. 1972).}\]
\[\text{\textsuperscript{29} Id.}\]
\[\text{\textsuperscript{30} On the question whether the agency should "defer" to those opinions, compare the district court opinion in Sierra Club v. Froehlke, 359 F. Supp. 1289, 1348-49 (S.D. Tex. 1973) (Wallsville Dam), with the appellate opinion in the same case, Sierra Club v. Callaway, 499 F.2d 982, 993 (5th Cir. 1974).}\]
\[\text{\textsuperscript{31} E.g., Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378, 386-88 (2d Cir. 1975).}\]
\[\text{\textsuperscript{32} See section III.C. infra.}\]
\[\text{\textsuperscript{33} See, e.g., NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (Offshore Oil Leases).}\]
\[\text{\textsuperscript{34} This test, if such it is, is not very stringent. Its usual expression in the cases is: "The test of compliance with \textsection{} 102, then, is one of good faith objectivity rather than subjective impartiality." EDF v. Corps of Engineers, 470 F.2d 289, 296 (8th Cir. 1972) (Gillham Dam II).}\]
\[\text{\textsuperscript{35} Administrative Procedure Act \textsection{} 706, 5 U.S.C. \textsection{} 706 (1970) [hereinafter cited APA].}\]
\[\text{\textsuperscript{36} Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-16 (1971).}\]
\[\text{\textsuperscript{37} See section III.B. infra.}\]
bounded by the substantive policies of NEPA section 101.\textsuperscript{38} One day the courts may go all the way to a seventh level that accords environmental values pre-eminence and enjoin permanently projects that are not demonstrated to be "beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."\textsuperscript{39}

C. The Citizen vs. The Government: Future Prospects

Recent events seem to indicate a political and judicial climate that is unpropitious for any attempt to expand the scope and clout of NEPA through litigation. Many impact statements have been compiled only under compulsion, and then not very well. Congress has exempted several particular classes of decisions from the Act altogether,\textsuperscript{40} but it has resisted attacks on the Act's basic integrity. The energy crisis has the corporate establishment howling for freedom from all environmental responsibilities, and the Administration is falling into line. A few courts also seem to have succumbed to this creeping neo-anti-environmentalism; judges in several recent cases have evinced by narrow readings a hostility to the spirit and letter of NEPA.\textsuperscript{41}

Despite this recent atmosphere, hostility to NEPA in the judiciary and elsewhere is neither static nor widespread, and future plaintiffs must press the attack against agency lawlessness.\textsuperscript{42} No new ideas will be accepted by the decision-makers until forcefully presented and argued, perhaps many times. A host of early restrictive interpretations of NEPA have been overruled or ignored in other courts because aggressive plaintiffs persisted in pointing out that the earlier opinions were wrong in reason and law. It is wrong to assume that courts will emasculate NEPA because of the energy crisis or other crises advanced by the industry-agency complex as reasons to avoid or destroy requirements for environmental protection. The suggestions made herein, therefore, assume that environmental concern will weather the current propaganda storm

\textsuperscript{38} NEPA § 101(b), 42 U.S.C. § 4331(b) (1970).
\textsuperscript{39} Id. § 101(b)(3), 42 U.S.C. § 4331(b)(3) (1970).
\textsuperscript{40} The AEC succeeded in obtaining an exemption for issuance of interim operating licenses, Act of June 2, 1972, Pub. L. No. 92-307, 86 Stat. 191, which was never used in the year allowed, and former Vice-President Agnew's tie-breaking vote exempted the Trans-Alaska Pipeline. See also Federal Water Pollution Control Act Amendments of 1972 § 511(c), 33 U.S.C. § 1371(c) (Supp. III, 1973).
\textsuperscript{42} Plaintiffs, however, should remember that litigation under NEPA and other relevant statutes, if successful, only delays a particular harmful project until the agency makes some showing that it has followed the necessary procedures. See, e.g., Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972) (Scenic Hudson II); EDF v. Corps of Engineers, 392 F.2d 1123 (5th Cir. 1974) (Tennessee-Tombigbee II); EDF v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark.), aff'd, 470 F.2d 289 (8th Cir. 1972). Even the Calvert Cliffs' nuclear generating facility is now on line. Only the political process can veto a project, and, as David Brower, former Executive Director of the Sierra Club, has noted, even in that arena there are no ultimate victories, only successful counterattacks that protect a part of the environment only until the next attack. No matter how many successes one has defending a wilderness tract, for instance, it is lost forever with just one defeat.
and that the courts will interpret the statute without being unduly influenced by predictions of impending catastrophe.

The proposals that follow can be grouped into three main categories: required procedures; necessary relief; and new administrative worlds to conquer. Under the heading of procedure are included three interrelated arguments: first, that earlier public participation and earlier availability of judicial remedies are necessary for the proper implementation of the law; secondly, that NEPA in some circumstances demands a public hearing even when not otherwise required by another statute; and thirdly, that all agencies should be required to prepare a series of "layered" or "programmatic" environmental impact statements when a project is a part of some larger program. It will be argued, with respect to theories for and forms of relief, that other sections of NEPA besides section 102(2)(C) may create claims for relief, that substantive review must be expanded to become a reality, and that remand to the Congress may well be required in appropriate circumstances. The Article will conclude with a discussion of some potentially innovative uses of NEPA.

II. IMPROVING AGENCY PROCEDURES REQUIRED BY NEPA

A. The Courts Should Force the Federal Agencies to Allow Earlier Public Participation and Should Create Remedies to Prevent Damage Caused by Pre-EIS Activities

The interested public should be given notice of the pendency of a project or license and an opportunity to submit its views to the agency and obtain judicial protection at an earlier point in the administrative process for two reasons. If an agency proceeds with planning a project in secret for an appreciable length of time, the project tends to acquire a life and velocity of its own, so that when it is publicly unveiled, the agency has already developed an emotional commitment to it that cannot be overridden by evidence of its worthlessness. In such cases, earlier solicitation of public comment might cause the warning flags to go up before the investment of agency emotion and might encourage the kind of objective evaluation that obviates the need for wasteful litigation.43

Secondly, allowing such remedies at an early date provides some measure of security for those in danger of losing their homes to agency-supported projects. In some instances, such as electric power generating plants, the project-promoting entity—public or private—has been allowed to condemn the land and eject the landowners prior to any NEPA evaluation. This problem was illustrated in the Gage44 cases, in which the utility took 90 percent of the land required

43 For example, the Corps of Engineers decided, for reasons best known to them, to build, on an earthquake fault, a dam that would inundate old mercury mines. Perhaps an earlier evaluation prompted by public controversy could have induced the agency to abandon the project. See Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301 (1974) (Douglas, Circuit Justice). Cf. EDF v. Brinegar, 6 ERC 1577 (E.D. Pa. 1974) (Saucon Park).

for a nuclear generating facility from its owners and threatened to condemn the rest long before it had been granted a construction permit from the Atomic Energy Commission. Plaintiffs in two suits alleged to no avail that the utility should be prevented from taking such drastic action prior to the environmental analysis that all parties conceded must eventually be undertaken. The District of Columbia Court of Appeals invoked a dubious hypertechnicality to bar plaintiffs' challenge to the AEC regulations allowing prior taking,\(^48\) while a district court, with respect to the actual taking, said, in effect, "tough luck."\(^48\) In a somewhat similar situation, a district court held that since the agency was only planning and preparing (including the purchase of land), no "federal action" had yet occurred.\(^47\) On appeal, the circuit court characterized the lower court opinion on that point as too narrow but did not reverse on this ground.\(^48\) In *Procetta v. Dent,*\(^49\) the court similarly refused to enjoin a project to be funded by an Economic Development Administration (EDA) loan because construction was then proceeding independently of the EDA.

Such situations are unfair. Many opinions have recited that NEPA must be complied with as early as possible,\(^50\) but few courts have required NEPA compliance at a point early enough to afford the landowner some protection. Several cases have enjoined condemnation for lack of NEPA and other compliance,\(^51\) but never in the "pre-NEPA" stage, *i.e.* before agency processes formally commence. In effect, the state agency or utility is allowed to speculate in real estate to the detriment of people on the land, and the landowner is forcibly deprived of his property. This property interest is fundamental and should be accorded some weight in the NEPA evaluation. Furthermore, NEPA demands that an evaluation be made of the alternatives of doing nothing or doing it differently before a project proceeds to the irrevocable.\(^52\) The landowner's interest is ignored, and the requirement of evaluating alternatives is circumvented to a large extent if homeowners are evicted while the utility or highway agency is allowed to proceed untrammeled in the "pre-NEPA" stage. Without judicial protection, presumably innocent parties are allowed to suffer truly irreparable harm before environmental and other values are considered at all, a result that cannot be reconciled with any conceivable purpose or goal of NEPA.

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\(^{48}\) Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973).
\(^{52}\) 484 F.2d 1146, 1148 (2d Cir. 1973).
An egregious illustration of this problem recently occurred when a court held that the Tennessee Valley Authority (TVA) could condemn private land for an “inventory of sites” for future unspecified power plant construction. The TVA need not prepare an impact statement, said the court, because a mere “change in title” can have no significant environmental effect.\textsuperscript{58} Other courts have seen NEPA as operating only against federal agencies,\textsuperscript{54} thus allowing their partners free rein to circumvent the statute. One of these courts regretted the effects of its holding but felt powerless to change the result.\textsuperscript{55}

There is precedent as well as good reason for deciding otherwise. Even under current interpretations, a state agency cannot escape federal requirements by “withdrawing” from the partnership through the device of switching funds on the state’s books.\textsuperscript{56} It does not strain analogy to suggest that when a project eventually will require federal funds or approval, the partnership (or federal involvement) begins as soon as the project is announced or preliminary activities begin. Federal inaction in other related areas is coming under increasing judicial scrutiny.\textsuperscript{57} Agencies are frequently ordered to amend their regulations to reflect the terms and spirit of NEPA.\textsuperscript{88} It is “beyond cavil” that federal courts have the power (and, arguably, the duty) to enjoin state, local, or private entities when there is federal participation in NEPA violations.\textsuperscript{89}

In the case of proposed nuclear generating facilities, it is fatuous to pretend that there is no federal involvement merely because the power company has not yet submitted a formal application to the AEC. The landowner’s fundamental rights would be protected and NEPA’s goals better promoted if the courts were to hold that condemnation in any such case must be postponed until the federal agency has conducted the required NEPA investigation and review and has decided to issue the license or make the grant.

In Silva v. Romney,\textsuperscript{60} the case most clearly in point, a private developer was enjoined from tree clearance on his own property because it was in furtherance of a “major federal action” for which HUD had not yet complied with NEPA. The Silva court strongly urged agencies to promulgate “pre-partnership” regulations:

\begin{itemize}
  \item See, e.g., City of Romulus v. County of Wayne, 392 F. Supp. 578 (E.D. Mich. 1975) (only federal defendant enjoined).
  \item Bidderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974) (Fire Island I) (dictum).
  \item 473 F.2d 287 (1st Cir. 1973).
\end{itemize}
We are convinced that there exists a void which can sensibly be filled only by "status quo" regulations which guide the government, aid applicants and the general public . . . .

. . . .

If a pre-partnership regulatory scheme is in the government's interest, it is equally in the interest of the developer.

Silva is often cited with general approval, but only one other court appears to have agreed with this point, and it did not issue any order to implement the policy.

It should not prove difficult for agencies to develop the rules suggested in Silva. In cooperative state-federal or local-federal projects, such as road building, housing developments and so forth, the enforcement mechanism is fairly simple: the federal agency can merely command its partner to hold off condemnation on pain of federal fund withdrawal. In the case of federal licenses, such as construction permits for atomic reactors, the agency can achieve the same end by announcing in a rulemaking proceeding or otherwise that it will deny any application if the applicant exercises its power of eminent domain before the license is actually issued.

B. Federal Agencies Should be Required to Hold a Public Hearing Even When Not Otherwise Required by Statute

In many instances of administrative decisionmaking, the agency is required by statute to hold a public hearing. These hearings may be any of three types: if an adjudication is required by due process or by section 554 of the Administrative Procedure Act, a trial-type hearing must be held;68 if certain types of rules are under consideration, a rulemaking hearing is necessary;69 and in still other situations, something called a public hearing (of an undetermined nature) is called for by the governing statute.68 When the statute mandates one of these three types of hearings, it is fairly well settled that the EIS or at least a draft must be compiled before the hearing.68 This insures that the interested public may address issues raised by the EIS during the hearing.

The problem for environmentalists arises in the myriad of "informal" administrative contexts (such as dam building and other Corps of Engineers' projects) for which Congress has not specifically provided any type of public hearing in the enabling statute. Without a specific statutory requirement,

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61 Id. at 291. See also Anderson, NEPA, supra note 3, at 70-73; Anderson, supra note 3, at 354-56.
63 APA § 553, 5 U.S.C. § 553 (1970). When all the exceptions are added up, agencies have only to conduct formal rulemaking proceedings for "substantive" rules, and even that requirement may be avoided by a finding of "good cause." Id. § 553(b)(1)(B).
agencies historically have been less than anxious to encourage public participation, except perhaps in press releases issued after the decision is made. If NEPA's purposes are to be considered to any real extent before the project is literally or figuratively set in concrete, some form of public access to the agency is necessary. The publicity resulting from issues focused and aired in a public hearing is the best way to draw political attention to the more ill-conceived projects emanating from Washington. The question, therefore, is whether NEPA requires a public hearing, even when other applicable statutes do not.

NEPA itself is silent on the question. Consequently, some courts have assumed, without much analysis, that NEPA does not add an independent requirement for a hearing. The Council on Environmental Quality (CEQ) has been more discerning. In section 10(e) of its former Guidelines for NEPA Implementation, the CEQ indicated that an agency should hold a hearing when "appropriate." The 1973 version of the Guidelines retains the "whenever appropriate" language and adds four factors for agencies to use in determining whether a hearing is appropriate. It is not entirely clear that the courts will follow this Guideline. Courts nearly always look to CEQ pronouncements for guidance but seem to follow the CEQ position only when it agrees with the result the court wishes to reach. Most courts give at least some weight to the Guidelines' position generally,

deeding them semi-authoritative interpretations from the only agency having designated oversight responsibility for NEPA implementation. A few courts, however, have noted that CEQ is only an advisory body with no statutory rulemaking power and have refused to attach any significance to the Guidelines.

Assuming arguendo that the Guidelines will be followed, when is a public hearing appropriate? The few decisions requiring a hearing do not offer much guidance. Courts in two cases have suggested that hearings are more or less indispensable in fulfilling an agency's duty under section 102(2)(B) to insure

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69 The new and expanded treatment is found in the Revised Guidelines 40 C.F.R. § 1500.7(d) (1974).
70 Agency procedures shall also specifically include provision for public hearings on major actions with environmental impact, whenever appropriate, and for providing the public with relevant information, including information on alternative courses of action. In deciding whether a public hearing is appropriate, an agency should consider: (1) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved; (2) the degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held; (3) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; and (4) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action. Agencies should make any draft environmental statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings.
72 It is at least arguable that the Office of Management and Budget should be forced to assume some oversight responsibility. See Anderson, NEPA, supra note 3, at 11-12; Anderson, supra note 3, at 250-53. And cf. Sierra Club v. Morton, 395 F. Supp. 1187 (D.D.C. 1975) (OMB ordered to develop procedures).
73 Hiram Clarke Civic Club, Inc. v. Lynne, 476 F.2d 421, 425, 426 (5th Cir. 1973). In one ill-considered opinion, the Fifth Circuit rejected one guideline and followed another. Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974) (Wallisville Dam).
that unquantified environmental amenities are given appropriate consideration,78 but those courts did not purport to lay down an across-the-board rule. The district court in the Wallisville Dam case,74 without extended discussion, required hearings to consider both general and specific impact statements. The Fifth Circuit, in reversing, did not mention this point.75 Other courts, construing other statutes in light of NEPA, have ordered upgraded public rehearing of certain matters.76

The revised CEQ Guidelines are themselves deficient. They offer only generalities, seemingly designed to retain the status quo, and in some cases, to narrow the opportunities for public hearing.77 It is significant that CEQ failed to provide any presumption in favor of hearings. Courts should not be so restrictive because the purposes of NEPA include broader citizen participation in the decision-making process.78

If a public hearing is ordered by a court or agency, what type should it be and what elements should it include? On this question too, judicial opinions offer little guidance. Several courts have asserted that such hearings are neither "quasi-judicial" (adjudicative) nor "quasi-legislative" (rulemaking), which leaves only some undefined species of "public discussion,"79 or an ill-defined opportunity to present relevant facts.80 A most extensive consideration of hearing requirements, in the highway context, did not reach any definitive conclusions.81 Some decisions, however, have held that hearings were inadequate. The district court in Keith v. Volpe82 observed that a public hearing must be more than just a forum for expression of concern. Relying in part on NEPA section 102(1), the court held that the hearings were deficient because not enough information was available to the public beforehand, and as a consequence, relevant areas were not considered in depth at the hearing.83 A Ninth Circuit panel reversed,84


We . . . hold that before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major Federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision. We do not suggest that a full-fledged formal hearing must be provided before each such determination is made, although it should be apparent that in many cases such a hearing would be advisable. . . . The necessity for a hearing will depend greatly upon the circumstances surrounding the particular proposed action and upon the likelihood that a hearing will be more effective than other methods in developing relevant information and an understanding of the proposed action. The precise procedural steps to be adopted are better left to the agency . . . .

471 F.2d at 836.


80 Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974).

81 Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974); cf. Massachusetts Air Pollution Comm. v. Brinegar, 499 F.2d 125 (1st Cir. 1974). But see Scenic Rivers Ass'n v. Lynn, 520 F.2d 240 (10th Cir. 1975).

82 See Guideline quoted at note 59 supra.


85 Tierrasanta Community Council v. Richardson, 6 ERC 1065 (S.D. Cal. 1973).


88 Id. at 1353.

89 Keith v. California Highway Comm'n, 6 ERC 1097 (9th Cir. 1973).
two to one, on the question whether hearings were required, but the court en banc reaffirmed\textsuperscript{85} the penetrating, persuasive district court opinion. The Second Circuit’s opinion in the Monroe County\textsuperscript{86} case will be equally useful as precedent. The court disapproved hearings in that case because the agency limited the hearing to giving, not receiving, information.

None of the cases, pro or con, has dealt with specific questions such as notice formalities, the right to counsel, whether and to what extent cross-examination will be allowed, the quantum and nature of background materials to be available or disseminated before the hearing, or the scope of an agency’s power to go outside the hearing “record” to establish a basis for its actions. Such questions will arise only after favorable resolution of the preliminary questions discussed above, of course, and likely will be decided on a case-by-case basis. Environmental plaintiffs should seek to have the hearings structured on the judicial model. Cross-examination is necessary for effective participation because, almost invariably, all of the relevant facts will be known only to agency and applicant. Without cross-examination, these facts will not be revealed until a later commission investigates the resulting catastrophe. In addition, any hearing should provide the public an opportunity to introduce evidence and opinion, to rebut the agency’s position, and to blow off steam. Hearings will accomplish little of value so long as agencies are permitted to talk the hearing to death.\textsuperscript{87} The common ploy of “explaining” a project for hours until the audience gives up and goes home is no substitute for a genuine presentation of all facts and views.

C. The Agency Should be Forced to Prepare a Series of “Layered” Impact Statements From Program to Project Level With Increasing Particularity as the Scope Narrows

Acceptance of the programmatic EIS concept by some courts is perhaps the single most important development in NEPA interpretation since Calvert Cliffs.\textsuperscript{88} Two important decisions in 1973, the Wallisville Dam\textsuperscript{89} and Scientists’ Institute\textsuperscript{90} cases, broke the new ground, and, although many courts have resisted the concept (including the court of appeals in Wallisville), the time for judges to force agencies to consider environmental factors on a far wider scale has clearly arrived.

A programmatic environmental impact statement is simply one that assesses the consequences of an overall agency program instead of a single project within it. The concept of “layered” or “tiered” statements means that when a particular

\textsuperscript{85} 506 F.2d 696 (9th Cir. 1974), cert. denied, 95 S. Ct. 826 (1975).
\textsuperscript{86} Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 701-02 (2d Cir. 1972).
\textsuperscript{87} Cf. EDF v. Brinegar, 6 ERC 1577 (E.D. Pa. 1974) (Saucon Fork).
\textsuperscript{88} Calvert Cliffs’ Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). See generally Anderson, supra note 3, at 335-38; Note, Environmental Law—Project-Program Relationships Used to Define Applicable Scope of Section 102(2)(C) of NEPA, 23 KAN. L. REV. 342 (1975).
\textsuperscript{90} Scientists’ Institute For Pub. Information, Inc. v. AEC, 481 F.2d 1079, 1085, 1092-93 (D.C. Cir. 1973).
project is a component of a larger, overall agency plan or program, the agency should first prepare an impact statement for the entire program or legislative proposal, then another EIS for each major part, and perhaps yet another for each important individual component. One commentator noted, "[t]he later statements would cover increasingly specific programmatic initiatives and impacts, and would refer back to the wider, policy-oriented statements for their treatment of far-ranging alternatives and basic federal policy." In the AEC, for instance, the agency would prepare a statement on its overall energy research program to determine the present status of its various projects, their relation to other non-AEC energy research projects, and the goals the program is intended to accomplish. Thereafter, statements would be prepared for each major subprogram, such as the Liquid Metal Breeder Reactor (LMBR) Pilot development, and finally, if all goes well, on each subsequently licensed reactor. The concept is particularly applicable to state-wide or city-wide highway development, area water resource projects, oil shale recovery, pesticide registration, urban redevelopment, and similar programs in which the project is intended to fit into a larger scheme. It would also "be a useful device for comprehensively evaluating entire programs, old or new." Certainly many existing governmental programs would benefit from recalculation.

An exhaustive analysis of the many court decisions considering whether the scope of an EIS was proper or whether more than one was necessary would require at least another entire article if not a book. The following short history of the treatment of these related questions by agencies and reviewing courts is, however, necessary for understanding the controversy. Early NEPA cases advanced the common sense proposition that environmental evaluation can not be detailed or comprehensive if it is very limited in scope. Courts in highway cases soon realized the propensity of highway planners to divide proposed corridors into arbitrary little segments, so that the impact and potential alternatives to each segment would appear minimized, and decreed that such statements must cover the corridor between "logical termini," usually towns. Other courts noted that piecemeal approaches are not sensible, that fragmentation is

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Anderson, NEPA, supra note 3, at 290.
Anderson, NEPA, supra note 3, at 177.
\[\text{In Scientists' Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973), the court ordered an EIS for each of the latter two levels.}\]
\[\text{See, e.g., NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (Offshore Oil Leases).}\]
\[\text{See, e.g., Named Individual Members v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971).}\]
\[\text{Jones v. Lynn, 477 F.2d 885, 891 (1st Cir. 1973).}\]
undesirable, and that overall evaluation would be wiser. Contentsions that an EIS should be prepared for a state-wide plan, or a complete corridor, or a city-wide belt plan, however, were rejected. That pattern was broken in the Conservation Society litigation when the court held that an EIS was required for the entire three-state, 280 mile corridor of a proposed super-highway.

Evolution of the concept in other areas, notably water resource projects, has been similar. In Environmental Defense Fund, Inc. v. Armstrong, a suit to enjoin the New Melones Dam, the court flatly stated that no EIS was necessary for the overall water resource plan in that region of California. The same result was reached for different reasons in a case challenging the farm subsidy program. The Wallisville Dam district court opinion, one of the most detailed and discerning NEPA opinions ever written, marked the start of more careful analysis. The court minutely examined both the overall plan for regional water resource development in the Trinity River basin and the place of the Wallisville dam within that plan, and required an EIS for both the overall plan and the individual component. Even though it was reversed on appeal, the district court's opinion has been relied on by other courts while these same courts distinguish the result flowing from the confused and rather shallow opinion of the Fifth Circuit.

The other pioneering case, Scientists' Institute, came down shortly thereafter. Although concerned primarily with whether, not whether, an EIS would be required for a pilot nuclear breeder reactor program, the court assumed that separate statements were required for the overall research effort exemplified in the pilot breeder reactor research and development project, and also for each individual commercial breeder reactor unit subsequently licensed. Since 1973, courts have differed both on whether a programmatic EIS is required, and, if so, whether a programmatic statement by itself satisfies the need for an EIS on particular projects. The Fifth, Ninth, and Tenth Circuits have conceded the validity of the concept but have very narrowly confined its applicability and have refused to apply it in specific cases. The District of Columbia

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101 Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973).
102 Id.
105 356 F. Supp. 131 (N.D. Cal.), aff'd, 487 F.2d 814 (9th Cir. 1973).
106 356 F. Supp. at 139.
107 Kings County Econ. Community Dev. Ass'n v. Hardin, 478 F.2d 478 (9th Cir. 1973).
109 Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974).
111 Scientists' Institute For Publ. Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).
112 Id. at 1085, 1088.
Circuit, on the other hand, has been its primary enforcer in a series of cases of national significance. The differences are in approach and semantics, and the results are irreconcilable.

In the District of Columbia, programmatic statements have been required for the nuclear export program and for the overall operation of the National Wildlife Refuge System in relation to the Department of Interior’s annual budget request. The question whether subsequent impact statements for projects within the programs would be required was not raised in either lawsuit. Two cases in other circuits have answered that question negatively. The Sixth Circuit stated that an EIS on TVA’s overall policy for procurement of strip-mined coal obviated the need for further statements on individual purchase contracts. The Eighth Circuit likewise indicated that an overall statement on the effects of logging operations in the Boundary Waters Canoe Area would suffice without additional statements. In the District of Columbia, on the other hand, program and project statements have been explicitly ordered in cases concerning the entire six-state Northern Great Plains coal development plan, the Bureau of Land Management grazing permit program, and the Upper Mississippi navigation improvement and rehabilitation concept.

In the coal development case, the court of appeals allowed the agencies involved some discretion in defining the extent of their participation in the enormous potential development, but it firmly held that EIS preparation was required for their entire resulting plan, and for each major permit or other component within it. The court noted that just as a series of minor actions cumulatively could amount to a major action, so too could a series of major actions together amount to an even higher level action. In the grazing permit program case, the court scored the agency’s ineptitude in managing and lack of diligence in assessing the resulting impact. It went on to hold that an overall EIS on the program would not of itself suffice. The agency could choose initially the scope of district or local statements, but every major impact had to be assessed.

These two cases involved challenges to the entire program as such, but a third case was a direct attack on only one phase of a program (which the Corps of Engineers denied existed) to restructure the entire system of navigation improvements on the Upper Mississippi. The court found that a 12 foot navigation lock in a nine foot system was senseless standing alone. The Corps’ one-step-
at-a-time position, if allowed to prevail, would insure a lack of overall environmental assessment. The court felt such an assessment should be made before, not after, millions of dollars were committed. Similar in tone was a New Hampshire highway case requiring a more comprehensive statement because the segment at issue, when completed, would “coerce” increased traffic and further highway development in an ecologically sensitive area.

The Fifth Circuit in Wallisville Dam, on the other hand, did not even ask whether the agency was proceeding in furtherance of its overall development plan. Disregarding detailed findings of fact, the court said that the Wallisville Dam component of the Trinity project could exist by itself. The court noted that the future of the Trinity project was in doubt, and since the dam was much nearer completion than the remainder of the project, it refused to tie the dam to the project. Implicit in this holding is a presumption against impact statements of program scope. This narrow approach has been adopted by the Ninth Circuit, which permitted segmentation of a single project into two “phases,” and by the Tenth Circuit in Sierra Club v. Stamm. In the latter case, plaintiff sought to enjoin construction of the Strawberry Aqueduct system, which was but one of six elements in the Bonneville component of six components of the Central Utah Project for overall development of water resources in the area. The court could not say that the Strawberry system was independent of either higher level, so it held they were “not interdependent” and let it go at that. Other decisions have followed suit: a district court has held that consideration of effects could be limited to three blocks of a larger, phased urban renewal project; and the Fifth Circuit later determined that it was not necessary to consider the effect of the inevitable pipeline and other development in an EIS discussing offshore oil leases. Somewhat more defensible is the Ninth Circuit’s holding that excavation for highway fill could take place in a proposed canal site without considering the canal’s impact because other agencies were developing a statement on the canal.

The bewildering semantic gymnastics of the latter decisions cannot disguise their unduly narrow view of the purpose and scope of NEPA. Congress clearly intended that agencies reevaluate overall policies and programs as well as projects in the new light of NEPA. The policies set out in the Act clearly require broad, long-term evaluation of consequences before commitment of

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131 Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974) (Teton Dam). In Cady v. Morton, 8 ERC 1097 (9th Cir. 1975), reported after this Article was written, the Ninth Circuit adopted a more expansive concept.
132 Id. at 791.
134 Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975) (Eastern Gulf Oil Leases).
135 Friends of the Earth v. Coleman, 513 F.2d 295 (9th Cir. 1975).
136 See generally, Note, Environmental Law—Project-Program Relationships Used to Define Applicable Scope of Section 102(2)(C) of NEPA, 23 KAN. L. REV. 342 (1975).
137 See authorities cited in Anderson, supra note 3, at 335.
resources, and courts are commanded to interpret the Act to give effect to those policies. The statute does not demand the impossible, but program statements are not only possible, they may prove to be less administratively inconvenient in the long run. Earlier and wider consideration of a program’s potential impact should lead not only to better overall decision-making, but also to earlier identification of boondoggles, resulting in less controversy, litigation, and delay. Programs and projects surviving early critical review will be sounder and stronger for it. Perhaps more importantly, this system would allow the agency to reexamine and then settle its “first principles” for an entire program, thus avoiding relitigation in each particular case. The layered EIS requirement will also promote the policies of the Act by forcing agencies to begin considering consequences at a higher level and by bringing the public into the decision-making process earlier.

Agency resistance to reevaluation of programs and projects is occasionally irrational but nevertheless understandable. Using new criteria to judge old programs is painful. It complicates bureaucratic routine at the arbitrary behist of the environmentalist gadfly. The behavioral reality of bureaucracy noted by Professor Sax accounts for the unedifying spectacle of an agency first preparing a grandiose, comprehensive program, and, after getting a part of it funded, denying that the part has any relationship to the whole. The administrative rule is simple: if the money is there, do as much as the money permits, and worry about the consequences (and the rest of the program) later. This is the result that NEPA was enacted to prevent, but it will be prevented only if courts force agencies to evaluate the potential consequences of their actions at all levels of decisionmaking.

Admittedly, application of this principle will not work any instant miracles, but there has to be a start somewhere. It seems reasonable to conclude that over the long run—the time span that agencies are least able to cope with—a series of layered statements from program to project level as roughly outlined above would benefit the agencies as well as the environment and would have the effect of achieving NEPA’s goals.

III. Additional Theories of Relief Under NEPA

To date, NEPA litigation has provided only stopgap relief. When procedural error is found, the project will be enjoined pending preparation of an original or amended EIS, but once the statement is prepared, disseminated, and judicially approved (as to form), the project will proceed, irrespective of its

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188 For example, had the Department of the Interior initially prepared a statement on alternatives to off-shore oil tract leasing, the delay stemming from the ensuing litigation might not have occurred. Compare NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (off-shore oil leases) with the myopic, one-sided discussion in Nassikas, Energy, The Environment and the Administrative Process, 26 Admin. L. Rev. 165, 174-77 (1974).
189 Cf. Cramton & Berg, supra note 7, at 527-29.
objective merit. Only when plaintiffs are able to galvanize the political process (or defendants lose heart and voluntarily drop the project) is there hope for the permanent solution favored by plaintiffs. In order to provide some measure of permanent protection against environmentally unsound projects, relief available to plaintiffs in the courts should be expanded. First, courts should give effect to NEPA provisions other than section 102(2)(C). Second, "substantive review" must be taken a step or two further to become a reality. Third, when doubt exists as to the meaning of the Act, a "remand" to the legislature may be the best remedy.

A. Sections 102(1) and 102(2)(A), (B), (D) and (G) Must Be Construed to Give Effect to Their Plain Meaning

NEPA imposes two principal types of duties on federal agencies in addition to the EIS requirement of section 102(2)(C). Other subsections of section 102(2) mandate environmentally oriented procedures and consideration of environmental factors even when the federal action is deemed non-major or not to have a significant environmental effect. Furthermore, section 102(1) read literally could wipe out many of the problems facing environmental plaintiffs.

1. Sections 102(2)(A), (B), (D), (E) and (G): Improving Agency Methodology

Subsections (A), (B), (D), (E), and (G) of section 102(2) are mandatory. The duties they impose on agencies exist under a far wider variety of circumstances than the impact statement requirement because these sections must be considered in most types of federal decisionmaking. Procedurally, there is a clear duty to compile and consider all relevant environmental information: all agencies must use an interdisciplinary approach; develop methods to give weight to "presently unquantified environmental amenities";

139 See note 42 supra.
140 NEPA §§ 102(2)(A), (B), (D), (E), (G), 42 U.S.C. §§ 4332(2)(A), (B), (D), (E), (G) (1970): The Congress authorizes and directs that, to the fullest extent possible:

(2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects.

(Emphasis added.)
and study and describe alternatives.\textsuperscript{141} Substantively, there is a less clear duty to use the information so garnered.\textsuperscript{142} Prospective plaintiffs should realize therefore that a finding that no EIS is required because the action is not major or has no significant environmental effect need not end the ballgame. These other subsections still may apply and may provide grounds for relief if forceful argument leads the court to read the law closely.

For example, in Hanly I,\textsuperscript{143} the Second Circuit held that construction by the General Services Administration (GSA) of a proposed courthouse annex did not require an EIS. It is at least possible (indeed, very likely) that plaintiffs could have shown that GSA did not use an interdisciplinary approach, did not make integrated use of natural or social sciences or environmental design arts, did not consider or give weight to unquantified amenities such as open space, increased traffic, and the like, did not study or describe alternatives, and did not develop environmental information, much less utilize it.

The same court was far more perceptive the second time around. In Hanly II,\textsuperscript{144} the court first stated that subsections (A), (B), and (D) were not limited to major federal actions and then went on to discuss compliance with each. It held that the agency was within the terms of subsection (A) because it had hired architects, and was within subsection (D) because it had considered alternatives, but that subsection (B)'s requirements were not shown to have been met because a failure to hold hearings resulted in the lack of a reviewable record.\textsuperscript{145} Other decisions have followed suit, notably with respect to the requirement of subsection (B) that appropriate consideration be given unquantified environmental amenities in decisionmaking.

a. \textit{Section 102(2)(A): systematic, interdisciplinary approach.} This section demands a diligent, good-faith research effort "which utilizes effective methods and reflects the current state of the art of relevant scientific discipline."\textsuperscript{146} Since the landmark 1971 Gilliam Dam I\textsuperscript{147} decision, in which the court found the provision violated, subsection (A) has not often been raised or discussed. The Tennessee-Tombigbee II\textsuperscript{148} opinion noted that the section was designed to better governmental programs, but the court nevertheless refused to enjoin a project in need of considerable betterment.\textsuperscript{149} Although two courts have remedied a decision to the agency because the required systematic approach was lacking, neither offers much instruction to future plaintiffs. One court did not

\textsuperscript{141} Id., §§ 102(2)(A), (B), (D), 42 U.S.C. §§ 4332(2)(A), (B), (D) (1970).


\textsuperscript{143} Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972) (Hanly I).

\textsuperscript{144} Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (Hanly II).

\textsuperscript{145} 471 F.2d at 834-35.


\textsuperscript{149} 348 F. Supp. at 927.
explain the reasoning behind its decision, and the other simply inferred a violation because the agency had not consulted other persons or entities.

b. Section 102(2)(B): considering unquantified amenities. This subsection has been, after the basic EIS requirement, the most effective weapon in the NEPA litigator's arsenal, primarily because agencies and their clients have been unwilling or unable to attach comparative significance to aesthetic and other non-monetary values. So long as agencies refuse to give "appropriate consideration" to those values, plaintiffs should investigate, allege, and stress violations of this subsection. Subsection (B) means that the "full cost" of the project must be evaluated by the agency, and most courts will not accept an EIS that looks at just half—the most favorable half—of the picture. The first violation of this subsection was found in Gillham Dam I, but the same opinion introduced a truck-sized loophole. The district court, after discussing the agency's failure to comply with subsection (B), went on to hold that "NEPA does not require the impossible. Nor would it require, in effect, a moratorium on all projects which had environmental impact while awaiting compliance with § 102(2)(B). It would suffice if the statement pointed out this deficiency." The ill-considered jicarilla opinion cited this language to support its conclusion that a decision could be made before the necessary information was compiled. In other cases, the quoted language has been used to excuse admitted failure to quantify, and some cases have merely ducked or obfuscated the issue. These holdings are completely out of tune with those of other courts, which emphasize that NEPA is more than a paper tiger.

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151 Simons v. Grant, 370 F. Supp. 5, 18-19 (S.D. Tex. 1974). In confused accord with Hanly II is First Nat'l Bank v. Watson, 363 F. Supp. 466, 474 n.22 (D.D.C. 1973). In this case, involving a challenge under NEPA to a bank charter application by a rival bank, the court eventually dismissed the complaint, even though it seemed to find various infirmities in the agency's NEPA procedures. The decision is worthless as precedent because the opinion cannot be comprehended by ordinary human reason; the result is explicable only because plaintiff was a rival bank.

155 Jicarilla Apache Tribe v. Morton, 471 F.2d 1275, 1280 n.11 (9th Cir. 1973).
Many other decisions, however, in addition to Hanly II, have afforded relief for demonstrated violations of subsection (B). In Akers II, the court found a violation but did not explain its finding. Simmans v. Grant followed Hanly II in holding that failure to hold hearings violated subsection (B). In Harlem Valley Transportation Association v. Stafford, the Second Circuit remanded a case to the ICC under subsection (B) with an order to provide the decisionmaker with sufficient investigative resources as well as to hold hearings. Other courts have found breaches in conjunction with section 102(1), or because the agency's attempted compliance was mere "bureaucratic politesse."

The most comprehensive discussion of the litigation potential of this subsection is found in the first Wallisville Dam opinion, in which the court devoted fourteen pages to a merciless dissection of the Corps of Engineers "quantifying" abilities in connection with the benefit-cost ratio for a proposed dam. The court of appeals held it error to require the Corps to develop procedures as stringent as those called for by the CEQ Guidelines but did not otherwise disturb the trial court's treatment of this point. Finally, the court in the Wildlife Refuge case ordered the Office of Management and Budget to implement procedures for identifying environmentally significant legislative proposals, but without specific discussion of subsection (B).

c. Section 102(2)(D): alternative uses of available resources. Subsection (D) commands agencies to "study, develop, and describe appropriate alternatives...in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Thus far in the history of NEPA litigation, that command has largely been subsumed under the more general requirement of section 102(2)(C)(iii) to "include...a detailed statement...on...alternatives to the proposed action." Even though subsection (D) is applicable to non-major actions, and even though it is particularly relevant now that the nation has been rudely jolted into the realization that its resources are finite, only one court has found an agency to be in violation of subsection (D) standing alone. All other courts interpreting that subsection have found violations in the context of EIS sufficiency, have used it to buttress other conclusions, or have decided that the agency's treatment was adequate.
Plaintiffs have been urged to use these heretofore obscure provisions before and courts and agencies are devoting increasing attention to them. The ultimate questions arising from them have not yet been asked, however, much less answered. Future plaintiffs' attorneys will be well advised to give them more heed.

2. *Section 102(1): The Unrealized Revolution*

The other section of NEPA now languishing in undeserved obscurity is section 102(1). On its face, it commands a revolution: "The Congress authorizes and directs that, to the fullest extent possible (1) the policies, regulations, and public laws, of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." The policies referred to are, of course, the statements of noble goals found in section 101. Couched as they are in generalities, NEPA's policies may not provide concrete answers to specific questions, but they are certainly far more explicit than the typical congressional directive to an agency, such as: go forth and regulate in the public interest. The potential applications for this section are limitless. Section 102(1) applies to all laws of the United States and thus arguably requires a reinterpretation of all statutes or policies that conflict or interfere with the attainment of NEPA goals.

Unfortunately, only a few courts have read the section in that way and followed or applied it. The first opinion in *Akers v. Resor*, applying section 102(1), reinterpreted the Fish and Wildlife Coordination Act to require submission to Congress of a mitigation plan before the project could proceed. In *Keith v. Volpe*, the district court favorably resolved doubts concerning the meaning of Federal Highway Act provisions on the basis of section 102(1), and the Ninth Circuit's *en banc* affirmation incorporated similar language. In *Gulf Oil v. Morton*, the Ninth Circuit gave section 102(1) its intended

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178 Subsections (E) and (G), which require agencies to consider the long-range character of environmental problems and to use ecological information, have occasionally been cited or discussed briefly but have never become the main basis for decision in any suit. See, e.g., Swain v. Brinegar, 7 ERC 2046 (7th Cir. 1975); EDF v. Froehlke, 473 F.2d 346, 349-50 (8th Cir. 1972) (Cache River); Greene County Planning Bd. v. FPC, 455 F.2d 412, 424 (2d Cir.), cert. denied, 409 U.S. 849 (1972); State Comm. to Stop Sanguine v. Laird, 317 F. Supp. 664, 666-67 (W.D. Wis. 1970).


184 493 F.2d 141 (1973).
meaning in an otherwise non-NEPA case by broadening the powers of the Secretary of Interior to protect the environment under the Outer Continental Shelf Act. The Second Circuit used section 102(1) in Monroe County Conservation Council v. Volpe and again in deciding whether the reorganized Postal Service must comply with NEPA. Another court found the section persuasive in reexamining the old securities laws in light of NEPA. Still other courts have cited the section to buttress their conclusions that violations of more specific sections of NEPA have occurred. When faced with the closely analogous question whether other laws or policies require a weakening or total avoidance of NEPA procedure, courts have usually held that they do not.

Not all courts have been so perceptive. In the first SCRAP decision, Judge Wright initially decided that NEPA provided an independent basis for jurisdiction to review an interim ICC rate approval, even though the Interstate Commerce Act had earlier been interpreted as a bar to interim review. In reversing, a majority of the Supreme Court did not address the basic questions raised by the lower court opinion, and inherent in section 102(1), but instead applied the old interpretation of the Interstate Commerce Act to deny review because of lack of jurisdiction. The Court relied on the shallow conclusion that NEPA was not intended to repeal the older Act. Although undoubtedly true, that conclusion does not take into account section 102(1), which was intended to change all prior law if it conflicted or interfered with NEPA purposes and policies. NEPA section 103 specifies that if agencies upon review of their statutory authority found "inconsistencies" that "prohibit full compliance" with NEPA, they were to have proposed measures to Congress to bring them into conformity. If there were a conflict between NEPA and the other statute, as the Supreme Court impliedly found, the ICC should have requested additional authority from Congress before the SCRAP case arose. The ICC's failure to do so would seem to indicate that its arguments in SCRAP were post hoc rationalizations, but this possibility was likewise not discussed by the majority. Fortunately, SCRAP is likely to be sui generis since it involves a regulatory scheme with few precise analogues. When faced squarely with the question of the meaning of section 102(1), the Court should no longer ignore the plain language.

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184 Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1343 (1970). The holding in Gulf Oil on this point was reaffirmed in Union Oil Co. v. Morton, 7 ERC 1587 (9th Cir. 1975).
185 472 F.2d 693, 700 n.6, 701 (2d Cir. 1972).
186 Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975).
192 412 U.S. at 693-98.
B. Substantive Review Must Be Taken at Least One Step Further to Promote the Basic Goal of NEPA

The second use of section 102(1)—as a bridge between section 101 policies and section 102 action-forcing procedural provisions—leads directly into the area of NEPA interpretation now termed “substantive review.”

As mentioned earlier, of the many levels at which courts may review agency decisions involving NEPA, the highest levels are the various forms of substantive review. This term is shorthand for the idea that a court will review the merits of the project itself, as well as the adequacy of the procedures used by the agency in making its decision. Most courts considering the question before 1973 held that judicial review must be confined to agency procedures because the Act—specifically section 101(c)—did not create a substantive right to a healthful, ecologically sound, or aesthetically pleasing environment. A few opinions contained dicta indicating that limited substantive review should be provided by courts, but the first definite holdings that substantive review was proper did not come until the Eighth Circuit’s Gillham Dam I and Cache River decisions. Although other circuits and districts soon followed suit, at least two circuits (not surprisingly, the Ninth and Tenth) still refuse to look beyond the paperwork, and some other courts remain ambiguous on the question. The Supreme Court has not decided a case raising the question.

It is perilous to predict decisions by the Supreme Court in environmental cases, but it may with considerable assurance be prophesied that substantive review is inevitable for a host of reasons. The two most compelling reasons are

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184 See section I.B. supra.


196 See, e.g., EDF v. Corps of Engineers, 325 F. Supp. 749, 755 (E.D. Ark. 1971) (Gillham Dam I). This portion of the court’s opinion has been widely quoted by commentators and in subsequent opinions, but few seem to realize that this point was specifically overridden and disapproved by the Eighth Circuit. EDF v. Corps of Engineers, 470 F.2d 238, 297 (8th Cir. 1972) (Gillham Dam II). See generally Anderson, NEPA, supra note 3, at 258-65.

197 The clearest statement was Judge Wright’s in Calvert Cliffs’ Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971). See Coggins I, supra note 175, at 313-16.

199 EDF v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972) (Gillham Dam II).

200 EDF v. Froehlke, 473 F.2d 346 (8th Cir. 1972) (Cache River).


202 Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974) (Teton Dam); EDF v. Armstrong, 487 F.2d 814, 822 n.13 (9th Cir. 1973) (New Melones II); National Helium Corp. v. Morton, 486 F.2d 995, 1001 (10th Cir. 1973) (National Helium II).

203 Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974) (Wallisville Dam); EDF v. TVA, 371 F. Supp. 1004, 1014 (E.D. Tenn. 1973), aff’d, 492 F.2d 466 (6th Cir. 1974) (Tellico II).

that this review conforms to normal canons of review of other agency actions and that NEPA will be a nullity in the end without it.\footnote{204}

The justifications offered by nonconforming courts for their failure to review the merits border on the nonsensical. The Tenth Circuit, in circular language, essentially stated that it refuses to look beyond procedure because it refuses to look beyond procedure.\footnote{205} The Ninth Circuit attempted to justify its failure to review the merits on the basis of APA section 706,\footnote{206} which mandates the opposite conclusion. In 

\textit{Lathan v. Brinegar},\footnote{207} that court stated:

Subsection (2)(A) refers primarily to substantive decisions committed to the Agency in the first instance. It may be applicable (we do not say that it is) where it is claimed that the Agency, in deciding whether to proceed with a project, has ignored conclusions or considerations stated in an EIS. Such a question is for the Agency, not the courts, to decide. The scope of judicial review in such a case is narrow, if review be available at all. See 5 U.S.C. § 701(a)(2); \textit{Citizens to Preserve Overton Park v. Volpe}, 1971, 401 U.S. 402, 410; \textit{Environmental Defense Fund, Inc. v. Armstrong}, 9 Cir., 1973, 487 F.2d 814, 822, n. 13. We could reverse the agency, if at all, only in a rare case, and only if we found its action arbitrary, capricious, an abuse of discretion, or contrary to law. We could not substitute our judgment for that of the Agency. . . .

On the other hand, subsection (2)(D) provides that we may set aside agency action if we find it to be without observance of procedure required by law. We regard the question whether an EIS complies with the requirements of NEPA as a procedural question, governed by § 706(2)(D). . . .

We stand on § 706(2)(D) because NEPA is essentially a procedural statute. . . . We think that the courts will better perform their necessarily limited role in enforcing NEPA if they apply § 706(2)(D) in reviewing environmental impact.

\footnote{\textit{Coggins I}, supra note 175.}

. . . It is eminently reasonable for the courts to examine agency decisions and their underlying bases in depth, or widen the scope of review, or "guide" the exercise of agency discretion, however one chooses to term it. First, the statute itself requires judicial enforcement of its policies. Second, the twin assumptions that agencies are expert in NEPA balancing and will uphold the public interest exemplified in NEPA are, if not demonstrably false, at least directly contradicted by much evidence of an apparent desire to avoid NEPA procedures. Courts are as much or more "expert" in determining the "public interest"—here the basic longing of all men for a decent physical environment in which to live. Many agencies historically have been concerned more with economic cost-benefit ratios, creation or protection of certain industries than with the spiritual, aesthetic, health or other unquantifiable needs of man. Third, the scope as well as the availability of judicial review in general has been steadily broadened in recent years. The environmental suit is a logical candidate for a furtherance of that trend. Fourth, many "wrong" agency decisions are not correctable by other means. No one in any branch of government can remove pesticide residue from living cells. Public pressure cannot return a channelized stream to its natural state. The victims of the Donora disaster will not rise from the dead, even on executive order. The best of intentions cannot turn lumber in Japan back into Alaskan trees. \textit{Ad infinitum [sic], ad nauseam}, Where the agency decision is likely to have a permanent and degrading effect, closer judicial scrutiny is entirely warranted. Finally, anything less than rigorous review would allow agencies to make a mockery of NEPA. Already the specialization of writing impact statements designed primarily to meet "procedural" paperwork requirements is developing in agencies. NEPA purposes and policies will go unrealized if the courts affirm administrative decisions because the agency followed the proper form. Neither the form nor the language of statements should be the ultimate object of judicial scrutiny. Further environmental degradation is inescapable unless courts are willing to examine underlying factual situations and evaluate consequences in accordance with NEPA policies.

\textit{Id.} at 317-18 (footnotes omitted).

\footnote{National Helium Corp. v. Morton, 486 F.2d 995, 1001 (10th Cir. 1973) (National Helium II); accord, Sierra Club v. Stann, 507 F.2d 788 (10th Cir. 1974) (Strawberry Aqueduct).}

\footnote{APA § 706, 5 U.S.C. § 706 (1970).}

\footnote{506 F.2d 677 (9th Cir. 1974).}

The fatal flaw in that argument is that the subsections of APA section 706 are not mutually exclusive. A court is not forced to choose between examining an action to see if it is arbitrary, etc., or procedurally defective. Instead, as the cited *Overton Park*209 opinion makes clear, a court must reverse and remand if either failure is shown; a decision may be arbitrary even if procedurally flawless, and a reasonable decision may have been made in an improper manner. Such erroneous reasoning cannot prevail much longer.

Perhaps even more important than the question whether courts will conduct a substantive review are the questions of the nature or degree of such review or the level at which it will be conducted. The trend among courts accepting the doctrine appears to be towards a shallow, unexplained application of the “arbitrary and capricious” standard. It should go without saying that there must be a standard of some sort against which an action is to be judged before it can be declared arbitrary, yet very few courts have articulated such a standard. The result has been opinions in which the court has said, without further explanation, that it could not find the decision or project arbitrary.210 Other courts claim to have adopted the concept but have refused to apply it when it seemed inconvenient.211 More anomalous are decisions that, while purporting to consider procedure only, actually discuss and decide the environmental merits of the contested project.212 Other courts concede the validity of the concept of substantive review but have held that it has little or no application to projects approved by Congress, even in cases in which plaintiffs were precluded from introducing evidence showing that Congress also had been misled by errors and omissions in the EIS.213 Incantation of catch phrases about substantive review has, in many cases, avoided a probing, in-depth review.

Only a few courts have noted that the policies of section 101214 provide the

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208 Id. at 692-93.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, programs, functions, and resources so as to achieve - the end that the Nation may-

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
necessary legal standards, or "law to apply," but even these courts generally have failed to interpret the policy provisions in a manner that gives them concrete application to particular projects. The district court in a highway case considered plaintiff's allegation that the project violated section 101(b)(3), but decided that it would not subject the project to strict scrutiny. To prevail plaintiff would have had to show a callous disregard by the agency of its statutory duty. As a consequence, no violation was found. Judge Wright, in yet another SCRAP decision, questioned but did not decide whether the ICC's decision to allow an increase in the transportation rates for recyclable materials violated section 101(b)(6). The district court in the Wallisville Dam case discussed the section in greater depth and noted that the trustee relationship created by section 101(b)(1) imposes high performance standards and onerous duties on federal agencies.

Three courts have gone nearly all the way. In Montgomery v. Ellis,218 the court applied section 101 to enjoin a pending, environmentally damaging channelization project.219 The court in the Locks & Dam 26 case220 noted that if it had to decide the question at that time, "it would have to conclude that the plaintiffs are likely to prove that the environmental injury so outweighs the benefits of the expanded structure as to make the agency's decision to proceed arbitrary and capricious."221 Finally, one court has ruled a project illegal, although without extended reference to NEPA policies. The Buck Hill Falls case222 involved a challenge to a Soil Conservation Service dam project on a famous trout stream. The court did not stop with the standard holding that an EIS was required. It went on to examine the evidence presented and concluded, "[t]he dam project . . . cannot be determined to meet N.E.P.A.'s requirement that it protect the environment."223 To sew up the matter for good, the court concluded as a matter of law that the "benefits to costs ratio is less than 1 to 1,"224 thus making the dam's construction illegal.

These tentative judicial ventures point the way to a better approach. After

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(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id. at 529.
Id. at 622 n.38.
Id. at 409.
Id. at 410.
procedural compliance with EIS requirements results in amassing and analysis of the best information possible, courts should judge the project itself on the basis of that information to determine whether the project contravenes the goals and policies of NEPA liberally construed. Section 102(1), discussed earlier, requires courts as well as agencies to interpret all federal laws and regulations, including NEPA itself, in accordance with the policies of section 101. These policies, found primarily in section 101(b), are both the "law to apply" for purposes of determining whether agency action is reviewable, and the legal standard by which the courts "shall" measure whether the action is "unlawful" within the meaning of APA section 706.

The general pronouncements of section 101 are difficult to interpret in the abstract, but the six stated "ends" of section 101(b) are not as abstruse, meaningless, or hedged as some courts and commentators have assumed. The requirement that the federal government "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations, literally appears to incorporate and magnificently expand the public trust doctrine, now of very limited application. The second end—that agencies are to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings," seems to create a limited environmental "right" vis-a-vis the federal bureaucracy. At a minimum, it seems to require justification for projects whose effects will be less than healthful or aesthetically pleasing by means of "other essential [and not merely convenient] considerations." From the environmental plaintiff's viewpoint, section 101(b)(3) appears especially pertinent; it imposes on the federal government the obligation to use "all practicable means" to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." If this guideline is closely read and literally applied by reviewing courts, some projects (such as channelization of natural streams) will be impossible to justify because they are not necessarily beneficial, involve environmental degradation or risk to safety, and frequently have undesirable consequences.

In the Gilham Dam II case, the court of appeals off-handedly justified the

\[\text{See, e.g., Cramton & Berg, supra note 7, at 512-13, 517-18.}\]
\[\text{NEPA }\text{§ 101(b)(2), 42 U.S.C. }\text{§ 4331(b)(2) (1970) (quoted at note 214 supra).}\]
\[\text{The effectiveness of this section as an environmentalist's tool may be limited slightly by the fact that agencies are to "assure . . . productive . . . surroundings," and by the prefatory requirement that the agencies use "all practicable means, consistent with other essential considerations of national policy" (emphasis added). It is not unlikely that agencies will seek comfort in these qualifications.}\]
\[\text{See note 94 supra.}\]
\[\text{EDF v. Corps of Engineers, 470 F.2d 289, 300-01 (8th Cir. 1972) (Gilham Dam II).}\]
damming of a beautiful, free-flowing river at least partially on the basis of section 101(b)(4), which requires the government to “preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.”

Had the court conducted the in-depth review mandated by its chosen standard, Overton Park, and considered that fewer natural streams remain each year, that the dam certainly did not tend to preserve natural aspects, and that its construction would tend to diminish variety of individual choice, it might easily have concluded that the dam would not tend to maintain but would rather destroy a diverse environment.

Excessive concern for the well-being of their corporate clientele appears to have led agencies and the present Administration to forget about the commands of the remaining two provisions of section 101(b). Section 101(b)(5) states that it is the federal government’s responsibility to “achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities.”

One may suppose that the agencies and their clients read only the words “high standards of living” and the skeptic will be excused for wondering where the “sharing” went. No federal efforts are visible toward obeying the subsection 101(b)(6) command to “approach the maximum attainable recycling.”

Before 1973, courts shirked the duty imposed on them by section 102(1) when they refused to consider the underlying substantive environmental issues at all. Since passing this watershed, they have continued to refrain from the logical and inevitable consequences of substantive review. The final hurdle will be passed when courts incorporate the spirit as well as the letter of Overton Park into their review of administrative action under NEPA. NEPA, like the parkland statute considered in that case, is not neutral; it expresses the strong intent of Congress to promote environmental improvement. The courts should translate that intent into the kind of presumption in favor of environmental quality that Mr. Justice Marshall found in the parkland provision in favor of parks and review accordingly. While some courts have tended to demand that agencies accord environmental factors at least a rough equality in their decisionmaking, only a few have gone on to state explicitly that under NEPA environmental considerations are to receive a preferred status.

The district court in the Wallsville Dam case was perceptive when it held that Congress intended, in passing NEPA and like enactments, to assign priority to ecological factors.

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240 Judge Leventhal believes that courts already attach paramount importance to environmental values because they are “especially attentive,” in reviewing environmental decisions. Leventhal, Environmental Decisionmaking and the Role of the Court, 122 U. Pa. L. Rev. 509, 514 (1974). While arguably true within his District of Columbia Circuit, this does not seem to be an accurate generalization. See cases cited in note 41 supra.
The court acknowledged this intent by granting those factors a paramount position in the same way that the Overton Park court had construed the parkland statute.\textsuperscript{241} The Montgomery v. Ellis\textsuperscript{242} court was equally astute in analyzing the legal basis for in-depth substantive review. In addition to adopting the factors and reasons cited in the leading Gillham Dam II\textsuperscript{243} case, the court noted that the scope of review generally has expanded in the wake of Abbott Laboratories.\textsuperscript{244} The court held that section 101 does provide a standard ("law to apply"), and that a review of the merits is not only allowed but is required by APA section 706.\textsuperscript{245} In sum, the court shook off prior timorous judicial obfuscation and saw that the new and wondrous beast labelled "substantive review" is really just the old family dog, judicial review of administrative action, in a new guise.

C. When Doubt Exists, Courts Should Remand the Problem to the Legislature

Courts should in effect remand certain agency decisions affecting environmental quality (and perhaps others) to Congress instead of to the agency. Many lawsuits involve projects in which the sponsoring agency is arguably required by applicable law to obtain specific congressional permission to proceed, either in the form of enabling legislation or appropriations. Decided cases indicate that agencies are frequently reluctant to seek this approval, and courts regularly are called on to enjoin the project pending compliance with law.\textsuperscript{246} The same result should occur whenever the court is in doubt whether an agency decision comports with the goals and purposes of NEPA or whenever the court feels it would be "substituting" its judgment for the agency's by permanently enjoining a project.

Remand in this context obviously does not mean the judicial act of returning the litigation to an inferior body for further contemplation. Instead, the term refers to one of the practical effects of judicial review in public interest cases. When much of the taxpayers' money and important policies are at stake, the party or interest that loses may and frequently does seek reversal or relief in Congress. The judiciary should not remain studiously oblivious to this reality. In many or most of the litigated situations, the real underlying question—the overall desirability of the project—is primarily a political rather than a technical question. For the most part, however, agencies, litigants, and courts have deemed it inappropriate for a political body, the Congress, to decide this political

\textsuperscript{243} EDF v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).
\textsuperscript{244} Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).
\textsuperscript{245} 364 F. Supp. at 529-32.
\textsuperscript{246} See, e.g., Atchison, T. & S.F. Ry. v. Callaway, 382 F. Supp. 610 (D.D.C. 1974) (Locks & Dam 26); cases cited notes 248-51 \textit{infra}. It may be argued that the phenomenon of agencies operating as independent fiefdoms, essentially without accountability, stems first, from the failure of Congress to make difficult choices (instead, Congress delegates broad powers without limiting the allowable administrative discretion by law), and, second, from the failure of the courts to require Congress to itself do the legislating (by allowing the demise of the delegation doctrine). See generally Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 582-86 (1972).
question. Because of their industry orientation, agencies cannot adequately perform this political function. In addition to arguing for the standard forms of relief under NEPA, therefore, litigants should alternatively argue that when substantial doubt as to the meaning or application of an authorizing statute exists, or when NEPA policies arguably bar the project, the court should remand the problem to the legislature by enjoining the project. 247

Recent cases show that the concept has been used widely by the judiciary, albeit erratically and sub silentio. In Parker v. United States, 248 the government was enjoined from allowing timber to be cut from a national forest until Congress could determine whether or not the forest should be designated as a wilderness. In Citizens Committee For Hudson Valley v. Volpe, 249 a landmark pre-NEPA case, construction of an expressway on and adjacent to the Hudson River was halted unless and until Congress agreed that the river should be so altered. The court in the first Akers v. Resor 250 decision sent the question whether the plan to mitigate wildlife habitat damage was adequate back to Congress. The Alaska Pipeline controversy, a political question if there ever was one, has been decided in Congress, where it properly should have been. Once the question has been returned to Congress, NEPA will assist the legislators in making their decision because an EIS must be submitted with proposals for legislation. 251

The means by which such a remand can be accomplished are simple. When a project is challenged by litigation and there are serious questions whether it complies with NEPA policies or other relevant statutes, the court may enjoin the project pending an authoritative decision by Congress one way or the other. This, of course, is what in effect occurred in the Alaska Pipeline case. 252 In a similar holding, the court in Gulf Oil v. Morton 253 initially upheld the Secretary of the Interior's decision against further oil drilling partly on the ground that pending legislation would decide the questions posed in the litigation. In denying rehearing, the court invalidated the Secretary's order because Congress had refused to act in the interim, and the Secretary had abandoned his proposal for additional legislation for the time being. 254 The amusing opinion in the Fort Story case 255 (deeming it regrettable that NEPA was lousing up progress on a needed improvement) faced the contention that unless all delay was avoided, the appropriation would expire and a new authorization would have

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249 425 F.2d 97 (2d Cir. 1970).
251 Sierra Club v. Morton, 8 ERC 1009 (D.D.C. 1975) (NWRS Budget). It should be noted that the duty to submit an EIS with all proposals for legislation has been hotly debated, at best, by most agencies. Anderson, supra note 5 at 273, 331-33. The statute would not seem to permit a draft statement alone to be submitted, but one court has held otherwise, East Tenn. Energy Group v. Seaman, 7 ERC 2144 (D.D.C. 1975).
253 493 F.2d 141 (9th Cir. 1973).
254 Id. at 149-50 (rehearing denied, 1974).
to be sought from Congress. Too bad, said the court: you didn’t comply with the law, so go back to Washington, hat in hand. The most recent decision in the San Antonio Freeway litigation held that since the sponsors had convinced Congress that the federal government should divorce itself entirely from the project, NEPA no longer applied and the road could go forward. Although not all of these decisions have been victories for environmental plaintiffs, each of these courts have realized, explicitly or implicitly, that political decisions should be made by politicians.

On the other hand, some courts and commentators seem to feel that it is bad for Congress to become involved in environmental decisions, even those of such magnitude as the Trans-Alaska Pipeline. In a curious justification for its conclusion that work on a dam could continue even though NEPA compliance was admittedly lacking, the District Court for the Western District of Missouri held that enforcing the law rigorously would lead to further congressional hostility to environmental protection and eventually to repeal or emasculation of NEPA. This might be considered merely an isolated, aberrational outburst, but the same sentiments in differing form have been echoed by a few noted commentators. The former head of the Administrative Conference has long advocated diluted judicial review of NEPA questions because bureaucrats will not comply in any event, and the added inconvenience and delay caused by forcing them into a semblance of compliance will be environmentally and otherwise counterproductive. Judge Wilkey of the District of Columbia Court of Appeals seems, in the context of his article, to cite the possibility of repeal as a reason to avoid stringent enforcement of NEPA:

It is not beyond the realm of possibility that Congress could repeal or drastically amend the Environmental Protection Act, especially if the courts delay or cancel economically important projects. Never forget that every major project has an important constituency. First as to its original need, otherwise it would never have been conceived; and, secondly those who are going to profit by the implementation of the project.

The same theme in stronger terms has been sounded by the Chairman of the Federal Power Commission:

It is unfortunate that Congress has had to settle the NEPA dispute in the TAPS case legislatively rather than relying on the customary and preferable route of judicial review. I fear the action taken by the Congress in the TAPS case may become a precedent for further efforts in this area. Hopefully, such a development will be avoided by a more temperate use of the statute by these [sic] opposing

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266 Named Indiv. Members v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974) (San Antonio Freeway III).
268 Crumpton & Berg, supra note 7.
projects and a more realistic and reasoned interpretation of the statute's language
and intent by the courts.\textsuperscript{260}

All of this is, of course, rather nonsensical as well as circular. Courts exist to
apply general laws to specific situations in a reasonable fashion, and it is ridicu-
ulous to declare that courts must desist from giving a statute meaning because it
may tend to offend Congress. Congress has shown itself quite capable of re-
versing NEPA decisions it believed were politically unsound. Perhaps more
significantly, Congress has for the most part refused to act out its presumed
narrow-minded, anti-environmental role in the face of judicial decisions, such as
\textit{Calvert Cliffs},\textsuperscript{261} that have drawn heavy criticism from regulators and their
clients and cohorts. Congress has rejected the great bulk of proposals to repeal
or emasculate NEPA and has largely accepted the most far-reaching
decisions as eminently proper. Many Congressmen have not forgotten that
NEPA was thought to be necessary precisely because of a prevalent agency atti-
dude of indifference toward environmental protection and improvement.

Whether Congress should decide such issues is not the primary question.
Either party has the option of going forward in the Congress, and the question
is really who should have the burden of doing so. Courts could say to plaintiffs,
since there is doubt, and since we presume the good faith and regularity of
administrative action, you must go to Congress for relief. This is the result
whenever judicial relief is denied. Even apart from questions about the factual
basis for the underlying presumption, the unfairness of this result is apparent.
While agencies deal regularly with Congress, have offices in Washington and
vast resources, and indeed go before Congress every year for their appropri-
tions, plaintiffs typically have no resources and no familiarity with Congress.
They frequently can expect only hostility from their own representatives, who
may have a vested political interest in the challenged porkbarreling. Reason
and fairness dictate that the burden should be placed on the agency and its
client, the only parties capable of going forward with it.

One recent case, \textit{Friends of the Earth v. Armstrong},\textsuperscript{262} involved the perfect
opportunity for legislative remand, but the court did not appear to be aware of
that possibility. Waters from the Glen Canyon dam were backing up into
Rainbow Bridge National Monument. Long before, Congress had enacted a
statute specifically stating that backwaters from federal dams absolutely would
not be allowed to encroach upon Rainbow Bridge or any other National Mon-
ument.\textsuperscript{268} In the intervening years, Congress refused to authorize funds for
works to protect Rainbow Bridge from such encroachment. After discussing at
length the need to operate the dam at high capacity, the Tenth Circuit in-
credibly held that the lack of action on subsequent bills had the effect of

(1974).

\textsuperscript{261} \textit{Calvert Cliffs' Coordinating Comm. v. AEC}, 449 F.2d 1109 (D.C. Cir. 1971).

\textsuperscript{262} 485 F.2d 1 (10th Cir. 1973), \textit{cert. denied sub nom. Friends of the Earth v. Stumm}, 414 U.S. 1171

repealing the pre-existing protective statute by implication.\textsuperscript{264} Chief Judge Lewis registered a strong dissent,\textsuperscript{265} but the Supreme Court recently refused to review.\textsuperscript{266} Rather than indulge in unrestrained judicial lawmaking, the court would have been far wiser to hold that an agency desiring to override a statute of the United States must go to Congress to get the law changed.

IV. NEW WORLDS TO CONQUER

The foregoing discussion shows that the scope of NEPA has been expanded considerably by reviewing courts. Programs and policies as well as individual projects must be environmentally evaluated. A closer look at the merits of the project itself is in prospect. Courts have recognized NEPA duties where the contemplated action is not major and have occasionally strengthened effective citizen participation. Many would argue that these developments are the most that could be expected, or are a good deal more than is reasonable. It may be, however, that a new and more important wave of NEPA litigation is just beginning. Because agency compliance appears directed more at the procedural letter than at the substantive spirit of the Act, future plaintiffs should attempt to go deeper into the heart of the administrative process by widening NEPA’s reach and by using it as a sword as well as a shield.

A. The Application of NEPA in “Non-environmental” Federal Regulatory Areas

The great bulk of NEPA litigation has been directed against developmental projects in certain well-defined federally licensed or funded programs such as highways, dams and other water resource projects, atomic power plants, housing and other urban developments, and federal facilities. The typical relief sought is an injunction against the project pending adequate evaluation. An enormous number and variety of federal activities have been little affected by NEPA procedure or substance because they superficially seem unrelated to the physical environment. The statute, of course, does not contain exclusions. Every agency is subject to its dictates, whether or not its mission is environmentally oriented in a narrow sense. The key is not whether the agency action appear environmental, but rather whether the action significantly affects the environment.\textsuperscript{267} Nearly all agencies have given lip service to NEPA implementation in the form of regulations, but it is probably safe to speculate that a great deal of federal agency action that ultimately affects the environment is currently not being accompanied by the environmental analysis demanded by the law. A brief series of examples may illustrate the point more concretely.

The Office of Revenue Sharing in the Treasury Department has never prepared an impact statement, even though it annually dispenses billions of dollars

\begin{thebibliography}{99}
\bibitem{264} 485 F.2d at 7.
\bibitem{265} \textit{Id.} at 13-16 (Lewis, J., dissenting).
\bibitem{266} 414 U.S. 1171 (1974).
\end{thebibliography}
to state and local governments. Use of these funds certainly has significant individual and cumulative effects on environmental quality. ICC rate-making decisions, at least insofar as they perpetuate discrimination against secondary, recyclable materials, indirectly have a great cumulative, negative impact. CAB policies regarding airline operations continue to encourage environmental and economic waste. The SEC’s failure to require corporations to disclose their actual pollution-control expenditures, their liability for pollution fines, or their environmental record in general, protects those corporations from adverse publicity and delays improvement of the nation’s air and water quality. FCC opposition to environmental “counter-commercials,” which challenge the daily oil company propaganda on television, has an indirect but no less real negative effect. State Department adamance against changes in treaties regulating the annual seal harvest significantly affects those denizens of the Pribhilofs, as does the pro-whaling position of the Commerce Department. The FPC is a self-appointed spokesman for energy producing corporations, and the new energy agencies, the Federal Energy Administration and the Energy Research and Development Agency, threaten to assume that same role. The Treasury Department’s recent tax “reform” proposals certainly take no account of environmental factors. Development of new weapons systems surely affects our commitment of financial and physical resources, which, some will argue, have better alternative uses. The Department of Health, Education, and Welfare oversees hundreds of programs, thousands if not millions of actions, and the expenditure of billions of dollars annually, yet it has seen fit to file only eighteen draft and final EISs from 1970 through the first half of 1975.\footnote{CEQ, 5 103 Monitor \#6 at 117 (July, 1975).} It may be questioned whether HEW activities are as insignificant as the agency’s NEPA actions imply.

Such a list could go on and on, but the point is clear—continued agency indifference and intransigence toward the policies of NEPA have created a fertile field for litigants dedicated to an uncompromising environmental ethic. The process of forcibly converting a larger share of the bureaucracy to this view has begun. Some of the situations recounted above have been successfully challenged and other straws are in the wind. The Supreme Court, in its second \textit{SCRAP} decision, agreed that the secondary effects of ICC rate-making required NEPA analysis,\footnote{Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 419 U.S. 822 (1975) (SCRAP II).} and the obdurately anti-NEPA ICC has been ordered to comply in other cases as well.\footnote{Harlem Valley Transp. Ass’n v. Stafford, 500 F.2d 328 (2d Cir. 1974).} The only decision in a revenue sharing case held that NEPA did not apply,\footnote{Carolina Action v. Simon, 389 F. Supp. 1244 (M.D.N.C. 1975).} but the question is close and no appellate court has yet considered it.\footnote{Compare Note, Ely v. Velde: The Application of Federal Environmental Policy to Revenue Sharing Programs, 1972 Duke L.J. 667, with Note, The Application of Federal Environmental Standards to the General Revenue Sharing Program: NEPA and Unrestricted Federal Grants, 60 Va. L. Rev. 114 (1974).} The Securities and Exchange Commission was brought under NEPA’s ambit with respect to some aspects of corporate dis-
closure and was ordered to promulgate more comprehensive regulations.\footnote{278} Loan guarantees,\footnote{274} block grants to localities,\footnote{275} and similar financial transactions have been held to be major federal actions subject to NEPA, as have overall programs, such as those involving grazing permits,\footnote{276} nuclear exports,\footnote{277} and regional coal resource development\footnote{278} and procurement.\footnote{279} Particularly significant is the recent decision holding registration under the Interstate Land Sales Act\footnote{280} subject to NEPA.\footnote{281} HEW has not yet become a target defendant, but it is clear that social and economic considerations are highly relevant in NEPA balancing, so the die is cast for an eventual collision between advocates of environmental quality and spokesmen for the disadvantaged.\footnote{282}

No legal reasons bar the extension of NEPA into these and similar areas. NEPA clearly requires all agencies to comply, and a few courts have begun to enforce it in areas that only indirectly affect the physical environment. Limiting factors no doubt will appear as the scope of litigation widens. Administrative convenience cannot be permitted to turn the act into a paper tiger, but there are a few situations, such as law enforcement activities and similar adjudications, which require some weighing.\footnote{283} Even so, whatever limiting considerations may be found will not detract from the central principle of NEPA.

B. NEPA as a Sword: Compelling Favorable Agency Action

The environmentally negative actions and policies recounted in the preceding section are vulnerable to challenge under NEPA in the courts. An allied question is whether the failure of agencies to take affirmative action within their regulatory area to improve environmental quality is similarly vulnerable.

Such inaction is widespread. Most litigated cases involve attempts to restrain further environmental damage caused at the behest or with the permission of the agency. Very seldom is an agency challenged for taking steps to preserve or improve the quality of life. The Environmental Protection Agency, it is true, is regularly sued when it attempts to enforce the laws entrusted to it;\footnote{284} but it is rare that other agencies are sued for having taken similar action. Since \textit{Zabel v. Tabb},\footnote{285} when the Corps of Engineers was upheld in denying a dredge-and-fill permit because of the ecological harm it would cause, the lawsuits in-

\footnote{275} Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (Ely I).
\footnote{277} Sierra Club v. AEC, 6 ERC 1980 (D.D.C. 1974) (nuclear export program).
\footnote{278} Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975) (Northern Great Plains coal).
\footnote{279} NRDC v. TVA, 502 F.2d 852 (6th Cir. 1974).
\footnote{281} Scenic Rivers Ass'n v. Lynn, 8 ERC 1021 (10th Cir. 1975).
\footnote{283} \textit{In re} Nippon Steel Corporation, which was about to be sued by the FTC, sought to require the agency to prepare an EIS prior to bringing the action. The court attempted to balance a variety of factors before finding the agency action non-significant. Gifford-Hill & Co. v. FTC, 389 F. Supp. 167 (D.D.C. 1974).
\footnote{284} \textit{See}, e.g., Kennecott Copper Co. v. EPA, 462 F.2d 846 (D.C. Cir. 1972).
\footnote{285} 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).
volving similar situations can be counted on one hand.\textsuperscript{286} It is conceivable that the agencies are denying large numbers of applications because of NEPA and that disappointed applicants have uniformly chosen not to sue, but to accept this as a fact would require total suspension of disbelief. It is probably true that agencies now do far less harm than before the advent of NEPA, but there is no persuasive evidence that they have seen fit to act affirmatively to achieve NEPA policies.

Agency inaction is reviewable. The APA clearly requires courts to “compel agency action unlawfully withheld or unreasonably delayed,”\textsuperscript{287} and courts have done so in several environmental cases. Without mentioning NEPA, one court recently forced the Secretary of the Interior to take affirmative steps to protect Redwood National Park and its environs to implement the legislation creating the Park.\textsuperscript{288} Other courts, in dicta, have noted that inaction can rise to the level of an “action” (which might require NEPA procedures),\textsuperscript{289} and others have refused to accept self-imposed agency limitations on the scope of their activity.\textsuperscript{290} Decisions requiring agencies to amend their regulations to comply with NEPA have effectively attacked one type of agency inaction.\textsuperscript{291}

NEPA as interpreted in these cases offers considerable support for future litigation. As NEPA is not neutral, neither is it merely negative. It not only directs agencies to avoid environmental damage, it also commands them to improve the quality of our lives. The situations in which NEPA could be used by plaintiffs as a sword instead of a shield cannot be delineated in the abstract, but future litigants should be alert for the possibility.

The first phase of NEPA litigation got citizens into court and defined EIS requirements and procedures. The second wave, now in progress, has haltingly given substance to the Act and increased the citizen's voice in governmental processes. The coming third wave, it is confidently asserted, will build on the first two and proceed from simply restraining instances of destruction to prodding agency action that actively promotes the quest for environmental quality.

\textsuperscript{286} Cf. Canal Auth. v. Callaway, 489 F.2d 567 (5th Cir. 1974).
\textsuperscript{288} Sierra Club v. Department of Interior, 8 ERC 1013 (N.D. Cal. 1975).
\textsuperscript{289} Biderman v. Morton, 497 F.2d 1141 (2d Cir. 1974) (Fire Island I). \textit{See also} Coalition for the Environment v. Volpe, 6 ERC 1872 (8th Cir. 1974) (Earth City).