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LEGISLATIVE NOTES

SUBSTANCE AND PROCEDURE
IN THE CONSTRUCTION OF THE
NATIONAL ENVIRONMENTAL POLICY ACT

In 1969 Congress enacted the National Environmental Policy Act (NEPA or Act) in an effort to deal with the many environmental problems facing the United States. In the three years that the Act has been in force, a large number of suits has been filed by environmental organizations seeking to enforce the standards enunciated in NEPA. The courts hearing these cases generally agree that NEPA imposes only procedural duties on administrative agencies. This implies that the courts will merely determine whether the agency in question has complied with the procedural requirements contained in Section 102 of the Act. This further implies that the courts will not review this same agency's final decision to undertake, or not to undertake, a given project even if the project may have a severe environmental impact.

In an attempt to determine whether this approach fulfills the

2 For the legislative history of the Act, see 115 Cong. Rec. 19008-13 (1969) (Senate passage); id. at 26569-91 (House passage); id. at 29046-65; id. at 29066-89 (Senate comparison of environmental quality measures); id. at 39701-04 (Conference Report); id. at 40415-27 (Senate agreement to Conference Report); id. at 40923-28 (House agreement to Conference Report); H.R. Rep. No. 91-378, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-765, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969).
3 For the purposes of this article, the term "procedural" will be used to denote the duties imposed upon the agencies by NEPA § 102. 42 U.S.C. § 4332 (1970). The term " substantive" will be used in the context of the argument that NEPA should require agencies actually to incorporate and apply the information accumulated in the impact statements in the decision-making process.
4 See, e.g., Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971), in which the court said that once the precepts of NEPA have been followed, a good faith judgment by the administering agency as to the consequences leaves the court no further role to play.
6 See, e.g., Committee For Nuclear Responsibility v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).
7 See, e.g., Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971); but see Environmental Defense Fund v. Corps of Engineers, 4 E.R.C. 1721, 1726 (8th Cir. 1972).
policies stated in the Act, this article examines the recent trends facilitating judicial review of an agency's actions, discusses the developing judicial construction of NEPA, and seeks to determine whether the courts' refusal to give substantive meaning to NEPA has undermined the Act.

I. TERMS OF THE ACT

The purposes of NEPA, as stated in Section 2 of the Act, are (1) to "declare a national policy" encouraging "productive and enjoyable harmony between man and his environment"; (2) to promote efforts to prevent damage to the environment; (3) to educate man about natural resources; and (4) to establish the Council on Environmental Quality (CEQ). In an attempt to ensure that these goals are realized, Congress in the remainder of the Act developed a two-fold scheme. The first part of this scheme entailed the establishment of broad policies of environmental protection, and the second involved the creation of procedural duties which must be satisfied by federal agencies in order to insure that those agencies are accounting for environmental concerns.

The policies established by Congress in Section 101 are very broad. The Act itself states, 

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . in a manner calculated to foster and . . . maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Furthermore, the federal government has the "continuing responsibility . . . to improve and coordinate Federal plans, functions, programs, and resources." so that the nation "may" accomplish the goals listed in Section 101.

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9 Id. § 4331.
10 Id. § 4332.
11 Id. § 4331.
12 Id. § 4331(a).
13 Those goals are to:
   (1) fulfill the responsibilities for each generation as trustee of the environment for succeeding generations:
The extent to which federal agencies must adopt these policies is not clear. Section 103 required all federal agencies to review "their present statutory authority, administrative regulations, and current policies and procedures" to determine "whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes" of NEPA. That section further required that all federal agencies "shall propose to the President not later than July 1, 1971" those measures needed "to bring their authority and policies into conformity with the intent, purposes, and procedures . . . in this [Act]." This apparently strong directive may be weakened considerably by Section 105, however, which claims that the "policies and goals set forth in this [Act] are supplementary to those set forth in existing authorizations of Federal agencies."

Realizing that a mere statement of policy coupled with a few vague directives would not necessarily insure environmental protection, Congress included in Section 102 of NEPA several "action forcing" procedures. The purpose behind these procedures was explained in a report written by the Senate Committee on Interior and Insular Affairs which argued,

[I]f goals and principles are to be effective, they must be capable of being applied in action. [The Act] thus incorporates certain "action forcing" provisions and procedures which are designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment.

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(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. §§ 4331(b)(1)–(6).
14 Id. § 4333.
15 Id.
16 Id. § 4335.
18 42 U.S.C. § 4332(2)(C) (1970). The "action forcing" procedures are embodied in the Act's requirements that agencies prepare environmental impact statements.
In general, NEPA requires that, "to the fullest extent possible," all federal agencies must follow certain duties listed in Section 102. These duties include (1) the duty to use 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", (2) the duty to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking", and (3) the duty to prepare impact statements under certain conditions.

The last duty listed—the duty to file an impact statement—generally has been the focus of controversy in the courts. Under Subsection 102(2)(C), a federal agency must prepare "detailed" statements discussing the environmental impact of, and the alternatives to, proposed agency actions whenever those actions are "major Federal actions significantly affecting the quality of the human environment." Two major problems with this requirement are readily apparent: it is unclear (1) under what circumstances must the agency file an impact statement, and (2) if such a statement must be filed, what information must be included in it. The Act provides little assistance in answering these questions.

In attempting to determine when an impact statement must be prepared by a federal agency, several key words in Subsection 102(2)(C) must be examined. Those words include "major,"
“Federal,” “actions,” “significantly,” and “affecting.” None of these words is defined in the Act. The Guidelines for Federal Agencies Under the National Environmental Policy Act (Guidelines), promulgated by the Council on Environmental Quality in 1971, have filled this void somewhat by defining the words “actions” and “significantly,” and by discussing the overall meaning of the phrase “major Federal actions significantly affecting the quality of the human environment.” An important fact to note is that the word “significant” has been defined to include actions with both beneficial and detrimental effects on the environment, even if the agency believes the overall effect of the proposed action will be beneficial.

The answer to the second problem—that of determining what the impact statement must contain and the sufficiency of the discussion therein—lies both in the language of the Act and in the construction afforded to the word “detailed.” Although the Guidelines do not define “detailed,” they do elaborate on the Subsection 102(2)(C) requirements that the impact statement include discussions of environmental impacts of the proposal, unavoidable adverse impacts of the proposal, alternatives to the proposed action, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and irreversible and irretrievable commitments of resources which would follow from the implementation of the proposed action.

30 See Guidelines, supra note 20, §§ 5(a)(i)-(iii). “Actions” include: recommendations or favorable reports relating to legislation; projects and continuing activities directly undertaken by federal agencies, supported through federal funds or involving federal entitlements for use; and policy, regulations and procedure making.
31 See Guidelines, supra note 20, § 5(c). The Guidelines refer the agencies to § 101(b) of NEPA (see note 13 supra) for the broad range of aspects that must be surveyed in an assessment of significant effect.
32 See Guidelines, supra note 20, § 5(b). The clause is to be construed with a view to the overall, cumulative impact of the proposed action, and of further contemplated actions. Actions with “highly controversial” environmental impacts are to be covered by statements in all cases.
33 See Guidelines, supra note 20, § 5(c).
35 See note 85-96 and accompanying text infra.
36 Guidelines, supra note 20, § 6(a)(i) (must include information and technical data adequate to permit a careful assessment of environmental impact by commenting agencies); id. § 6(a)(ii) (include primary and secondary significant consequences).
37 Id. § 6(a)(iii) (include any consequences adverse to the environmental goals of NEPA § 101(b)).
38 Id. § 6(a)(iv) (a rigorous exploration and objective evaluation of alternatives is essential).
39 Id. § 6(a)(v) (assessment of cumulative and long-term effects from the perspective that each generation is the trustee of the environment for succeeding generations is required).
40 Id. § 6(a)(vi) (must identify the extent to which the action curtails the range of beneficial uses of the environment).
Once drafted, these impact statements must be made available to the President, the CEQ, and the public.\(^4\) Furthermore, these statements "shall accompany the proposal through the existing agency review processes."\(^4\) It is not clear whether this last requirement is satisfied by the statement's mere presence alongside the proposal or whether the word "accompany" means more than the mere passing of papers along the bureaucratic decision-making route.\(^4\) The answer to this question hinges to a large degree on how much weight federal agencies must give to the policies outlined in the Act. If the agencies do not have to incorporate the policies of NEPA into their decision-making processes, then formal compliance with the impact statement requirements should be enough to insure that the agency has complied with the terms of NEPA. That is to say, the agency would have to compile a "detailed" statement but it would not have to consider it. If, however, the policies underlying NEPA must be incorporated directly into the decision-making process, then it can be argued that the word "accompany" must mean more than mere physical proximity.

II. THE COURT'S ROLE

Congressional enactments such as NEPA, even combined with interpretive guidelines promulgated by an agency charged with overseeing the policies of the Act, do not necessarily insure bureaucratic compliance with the letter and spirit of the law.\(^4\) The modern trend toward liberal construction of the standing requirements under the Administrative Procedure Act (APA)\(^4\)

\(^4\) Id.
\(^4\) The Guidelines intimate that the latter should be the case. See Guidelines, supra note 20, § 6(a)(iv) (sufficient analysis of alternatives should accompany the proposed action through the review process in order not to foreclose options with lesser detrimental effects); id. § 10(b) (statements should be furnished to the Council early enough in the review process to permit meaningful consideration of the environmental issues involved). See notes 101–26 and accompanying text infra.
\(^4\) At least two courts have berated the agencies for failing to comply with NEPA. See Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971); Students Challenging Regulatory Agency Procedures v. United States, 346 F. Supp. 189 (D.D.C. 1972). The CEQ has stated that there is data which implies that agencies are not taking sufficient care to define those actions which require impact statements and are not properly preparing those impact statements which are deemed to be required. This situation raises the question "not whether the goals of NEPA are being implemented effectively but whether they are being implemented at all." CEQ THIRD ANNUAL REPORT, supra note 26, at 247. In addition, the General Accounting Office has recently released a report stating that the agency impact statements were inadequate in the following respects: discussion of and support for the identified environmental impacts; treatment of reviewing agencies' comments; and consideration of alternatives and their impacts. 3 ENV. RPTR. 910.
has made it possible for an increasing variety of groups and individuals to challenge agency action for failure to meet NEPA's requirements. Indeed, it has been said that "[c]itizen enforcement of NEPA through court action has been one of the main forces in making the Act's intended reforms a reality."46

The Administrative Procedure Act entitles a “person suffering legal wrong” because of agency action, or “adversely affected or aggrieved” by agency action, “within the meaning of a relevant statute,” to obtain judicial review of that action.47 While a detailed discussion of standing is beyond the scope of this article, it is appropriate to indicate the important cases which have made the current standing requirements as liberal as they are and which suggest future developments in the law of standing under the APA.

In Association of Data Processing Service Organizations v. Camp,48 a case dealing with standing under the APA, the Supreme Court reversed lower court holdings that had denied the plaintiffs standing on the basis of their lack of a “legal interest.”49 The Court advanced, as the test for standing, the requirements that the challenged action cause the plaintiff “injury in fact, economic or otherwise,” and that the interest sought to be protected be “arguably within the zone of interests to be protected or regulated by the statute . . . .”50 Although the Court did not define “injury in fact,” it stated that the injury could be “economic or otherwise” and that the interest sought to be protected could reflect aesthetic, conservational, and recreational values.51

The Data Processing case was a significant advancement of the trend, which the majority opinion noted,52 toward enlargement of the class of people who may protest administrative action.53 While the Court also noted the existence of a drive for enlarging the category of aggrieved “persons” within the meaning of the

46 CEQ THIRD ANNUAL REPORT, supra note 26, at 248.
50 397 U.S. at 152, 153.
52 397 U.S. at 154.
APA, the problem remains as to who or what may be included in the class of aggrieved "persons" under the test of Data Processing.

Decisions in federal courts of appeals have recognized that environmental groups can challenge agency action under the APA. These decisions have encouraged additional suits by environmental groups seeking to assert their organizational interests in protecting the environment. The Supreme Court, however, in Sierra Club v. Morton, has erected an obstacle in the path of this liberalizing trend in environmental law. The Court of Appeals for the Ninth Circuit had denied standing to the Sierra Club, which had sought an injunction to prevent development of a commercial ski resort in the Sequoia National Forest. The Club had filed suit as a membership organization having a "special interest" in national park and forest conservation, and this was rejected as a basis for standing.

The Supreme Court affirmed the denial of standing in a 4-3 decision. The Court stated that although an organization whose members have been injured may represent those members in a judicial proceeding, it is mandatory that the organization, despite its expertise in or longstanding concern with the subject matter in controversy, have more than a mere interest in the problem in order to render it "adversely affected" or "aggrieved" under the APA. Thus, although an environmental group is free to represent its members, it must still allege an injury in fact. Sierra Club reiterated the Data Processing principle that pro-

54 397 U.S. at 154.
55 See, e.g., Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir. 1970), cert. denied, 400 U.S. 949 (1970) (the public interest in environmental resources is a legally protected interest affording environmental groups standing to obtain judicial review of agency action); Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970) (the consumer's interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem).
56 405 U.S. 727 (1972); see Recent Decisions, Allegations of Direct Injury Are Required to Establish Standing in Accordance with the Administrative Procedure Act, 43 U. Miss. L.J. 538 (1972).
57 Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).
58 The court said that the Club had not alleged that they would be affected other than by the actions being personally displeasing or distasteful to them. 433 F.2d at 33.
60 405 U.S. at 739. The Court's opinion cites to various courts that have conferred standing on organizations demonstrating an "organizational interest in the problem" of environmental or consumer protection. Id. at 738-39 & n.14. The Court noted, however, that in "most if not all" of the cases, there was a proper assertion of individualized injury to either one party or to the members of an organization. See also id. at 760 n.1 (Blackmun, J., dissenting).

tected interests could reflect aesthetic, conservational, and recreational values;61 but the opinion made clear that simply alleging harm to such values was insufficient to confer standing and that to gain standing "the party seeking review must have himself suffered an injury."62

Despite the immediate adverse effects of the Sierra Club decision on those seeking to preserve the wilderness area involved, the case does not appear to have seriously impeded the ease with which environmental groups may gain access to the courts.63 The premise that such a group can represent its members is firmly established, as is the concept that environmental concerns may be legally protected interests. The Sierra Club case seems only to have reaffirmed the requirement that the group seeking standing must allege that it or at least one of its members actually be threatened with harm.64

The heavy burden which enforcement of NEPA has placed on the judiciary results not only from the ease with which plaintiffs may gain standing to sue for such enforcement but also from the broad nature of the review of an agency decision in which the courts will engage. For example, even where the APA indicates that an agency finding may not be reversed unless arbitrary or capricious,65 the Supreme Court has held that the court may inquire as to whether the agency decision was based on a consideration of the relevant factors and whether there was a clear error of judgment.66 Indeed, although "[t]he court is not empowered to substitute its judgment for that of the agency,"67 there must nevertheless be a probing review of the facts.68

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61 405 U.S. at 738.
62 Id.
63 The Court said that the decision in Sierra Club did not bar the Club from amending its complaint in the district court. Id. at 736. The Sierra Club has since done so, 4 E.R.C. 1561 (N.D Cal. 1972).
64 Although in the context of the instant case the requirement may merely present an easily surmountable procedural obstacle, a potential problem remains: who would be entitled to sue when agency action threatens environmental values enjoyed by the public as a whole? For an argument that Sierra Club does not foreclose recognizing the right of any responsible citizen or citizens' group to gain standing in such cases, see CEQ THIRD ANNUAL REPORT, supra note 26, at 251. Justice Blackmun's dissent in Sierra Club argued for an "imaginative expansion" of traditional standing concepts to enable organizations with "probable, sincere, dedicated, and established status" to litigate environmental issues. 405 U.S. at 757–58.
67 Id. at 416.
68 Id. In addition to the broad standard of review enunciated by the Supreme Court, there has been a suggestion that the doctrine holding that environmental decisions by administrative agencies are required to be sustained unless arbitrary or capricious be abolished or substantially eased. REPORT OF THE LEGAL ADVISORY COMMITTEE TO THE PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY (December, 1972). See Joint Hearings on the Operation of the National Environmental Policy Act of 1969 Before the Comm. on Public Works and the Comm. on Interior and Insular Affairs of the United States Senate, 92d Cong., 2d Sess., at 467 (1971) [hereinafter cited as Joint Hearings].
III. JUDICIAL CONSTRUCTION OF NEPA'S REQUIREMENTS

The great volume of litigation challenging agency actions for failure to meet NEPA's requirements, encouraged by the liberalization of standing rules in combination with the probing review engaged in by the courts, has resulted in considerable judicial elaboration on the meaning of NEPA. Most of this judicial review has been undertaken with the policies and goals of the Act in mind, and the courts have clearly indicated that they will construe the statutory language so as to give as full effect as possible to the mandates of the Act. 69 The primary requirement which NEPA imposes on the agencies is that they file an impact statement for "major Federal actions significantly affecting the quality of the human environment." 70 The litigation under NEPA has been to determine under what circumstances an impact statement must be prepared, what information must be contained in such statements, and how detailed that information must be.

Some courts have treated the "major Federal actions significantly affecting the quality of the human environment" clause as a unitary test, not separating the language "major Federal actions" from the language "significantly affecting the quality of the human environment." 71 The implicit assumption behind such treatment must be that satisfaction of one criterion automatically carries with it satisfaction of the second. Other courts, meanwhile, have rejected the argument that merely because a federal action is major, it will necessarily have a significant effect on the environment. In Hanly v. Mitchell, 72 the court said that the terms were separable, and that "major federal action" refers to such criteria as the cost of the project, the amount of planning that preceded it, and the amount of preparation that preceded it, and how detailed that information must be.

69 See, e.g., Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1111 (D.C. Cir. 1971), in which Judge Wright said, "[O]ur duty . . . is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." See also Comment, The National Environmental Policy Act of 1969 Saved from "Crabbed Interpretation," 52 B.U.L. REV. 425 (1972).


71 See Citizens For Reid State Park v. Laird, 336 F. Supp. 783, 789–90 (D. Me. 1972), in which the court, resting primarily on the Navy's showing of nonsignificant environmental effect, concluded that a mock amphibious landing of 900 marines by vehicles and/or helicopters was not a major federal action significantly affecting the environment.

72 460 F.2d 640 (2d Cir. 1972).
and the time required to complete it. The court in *Natural Resources Defense Council v. Grant* followed a similar approach. It construed "significantly affecting the quality of the human environment" to refer to a project that had "an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment," indicating that "the cumulative impact with other projects must be considered."

The informational requirements of NEPA have caused one court to refer to the Act as an environmental full disclosure law; and in determining what information must be contained in the impact statements, one theme running through many of the opinions is that the impact statement must put a complete record before the agency so that the final decision will be a knowledgeable one. Thus, more than mere mechanical adherence to the statutory informational requirements is necessary. For example, some courts have held that in discussing the environmental impact of a proposed action, the agency must discuss opposing views of the action's potential effects. This requirement has been phrased in terms of a duty to discuss "the full range of responsible opinion," even where the agency finds no merit whatsoever in such opposing opinion.

In addition to the requirement that the impact statement discuss environmental consequences, there is a duty placed on the

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73 Id. at 644.
75 Id. at 367.
77 See, e.g., Committee For Nuclear Responsibility v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); Natural Resources Defense Council v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972); Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971). In *Joint Hearings*, supra note 68, at 21, Dr. Russell Train, Chairman of the CEQ said that "[T]hese decisions make clear that NEPA only requires what should already be implicit in the notion of responsible decision making."
78 Committee For Nuclear Responsibility v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971).

A question of institutional bias arises both in this context and also as to the degree of objectivity required of an impact statement. In Environmental Defense Fund v. Corps of Engineers, 4 E.R.C. 1721, 1724 (8th Cir. 1972) (holding that impact statement for Gillham Dam project adequately satisfied NEPA), the court said that the test of compliance with NEPA was "one of good faith objectivity rather than subjective impartiality." See, e.g., Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Sierra Club v. Froehlke, 345 F. Supp. 440 (W.D. Wis. 1972); Environmental Defense Fund v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark. 1972); Conservation Council of North Carolina v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972).
agency to include discussion of alternatives to the proposed action. At least one court has interpreted this requirement to mean that not only must the agency include all possible approaches to a project, including total abandonment, but it must also include alternatives that are outside of the agency's cognizance or not within its authority to implement. Thus, in *Natural Resources Defense Council v. Morton*, the Department of Interior was required to discuss the elimination of oil import quotas in its impact statement on a proposed sale of oil and gas leases on the Outer Continental Shelf. The broadness of the energy problem which the sale of leases sought to alleviate required that all alternatives be gathered for consideration by the ultimate decision-maker. It has been emphasized, though, that these requirements are subject to a rule of reason.

Once a decision has been made that the scope of an impact statement is adequate, the question remains as to whether the statement is sufficiently "detailed." The cases generally require that the impact statement be in such adequate detail as to enable the decision-maker to make a proper decision. The standard of stringency applied by the courts, however, has varied. The court in *Environmental Defense Fund v. Corps of Engineers*, although requiring that an impact statement be "marked by abundant detail" and supply "explicit findings," found that since the impact statement in question, when perused in its entirety, enabled the reader "to gain a true perspective of what is bad as well as what is good in terms of the environmental consequences . . .," it thus served the intended purpose of the statement requirement.

In addition to detail, the court in *Environmental Defense Fund..."
v. Hardin.\textsuperscript{89} required that the statement include the results of an adequate research program, undertaken as part of the systematic, interdisciplinary approach to environmental problems mandated by NEPA, and that the results of this research be accompanied by adequate documentation.\textsuperscript{90} A searching examination into the sufficiency of the TVA's impact statement in \textit{Environmental Defense Fund v. TVA}\textsuperscript{91} forced the court to conclude that although the draft impact statement\textsuperscript{92} filed was "comprehensive in scope,"\textsuperscript{93} the cost-benefit analysis in the statement "consist[ed] almost entirely of unsupported conclusions," and the thoroughness and merit of the research upon which the conclusions were based were indeterminable.\textsuperscript{94}

If an impact statement is to serve not only as a guide to the initial decision-maker, but also as an effective basis for review by subsequent decision-makers, the stringency of these requirements of detail and documentation must be maintained.\textsuperscript{95} Unsubstantiated decisions merely present obstacles to informed decision-making. An informed decision, produced as a result of a proper balancing of factors, can more easily be reviewed by others and will insure that "presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations..."\textsuperscript{96}

The courts have therefore stringently applied the procedural requirements embodied in Section 102. Up to this point in time, however, the courts have generally interpreted their role of review under NEPA as being limited merely to assuring federal agency compliance with Section 102.\textsuperscript{97} It seems that an agency's final decision will not be reversed on the merits for failure to give

\textsuperscript{89}325 F. Supp. 1401 (D.D.C. 1971). An injunction was sought to prevent the Secretary of Agriculture from undertaking a cooperative federal-state program to control the imported fire ant in the southeastern United States.

\textsuperscript{90}Id. at 1403.

\textsuperscript{91}339 F. Supp. 806 (E.D. Tenn. 1972).

\textsuperscript{92}The final statement was in preparation at the time of trial.

\textsuperscript{93}339 F. Supp. at 809. However, the court noted that the draft statement had not dealt with some objections to the proposed action.

\textsuperscript{94}Id. at 809.

\textsuperscript{95}See also Note, \textit{Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline}, 81 \textit{YALE L.J.} 1592, 1600-01 (1972), deciding that of three general categories of data which could be required in impact statements ("description," "quantification," and "monetization") "quantification" is the required type of data sufficiency. The cases, taken together with the procedural requirements of NEPA, suggest that all three types may be required and that a justiciable standard may only be obtainable on a case by case basis.


\textsuperscript{97}See, e.g., Committee For Nuclear Responsibility v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).
adequate weight to the environmental effects of the proposal in question.\textsuperscript{98}

Two courts have argued that decisions on the merits which arbitrarily or capriciously deal with environmental concerns would be reversed.\textsuperscript{99} This approach, however, does not appear to be grounded in the language of NEPA but rather in the language of Section 706(2)(A) of the APA.\textsuperscript{100} Thus, the real issue is whether or not NEPA allows courts to review decisions which fall short of violating the APA’s standards of arbitrariness and capriciousness. To this date no court has held that NEPA so extends the court’s review powers.

IV. THE ARGUMENT FOR SUBSTANTIVE JUDICIAL REVIEW

If the courts were to give substantive effect to NEPA’s policies, agency decision-making would be reviewed in accordance with the congressional declaration of national environmental policy set forth in Section 101 of the Act. Because the courts, in reviewing cases arising under NEPA, have generally determined only whether the agency has compiled an adequate environmental impact statement as required by Section 102, rather than whether the agency has given adequate weight to the information contained in the statement, NEPA’s policies have not yet been directly implemented by judicial action. Such judicial action has been the objective of many of the suits filed under NEPA. Suits brought by the various environmental associations were filed not merely to insure that federal agencies comply with paperwork requirements, but rather to contest the merits of an agency’s decision that a given project was justified in spite of the severe ecological injuries

\textsuperscript{98} See, e.g., Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).

In the latter case the court actually reviewed a substantive agency decision on its merits. The court of appeals found that the decision of the Corps of Engineers to complete the Gillham Dam project was not arbitrary or capricious. \textit{Id.} at 1728. In arriving at this holding, the court compared the benefits of flood control with the importance of a diversified environment. \textit{Id.}

\textsuperscript{100} \textsuperscript{5} U.S.C. § 706(2)(A) (1970) prescribing that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The court in Environmental Defense Fund v. Corps of Engineers, 4 E.R.C. 1721 (8th Cir. 1972), clearly adopted this standard of review:

The reviewing court must first determine whether the agency acted within the scope of its authority, and next whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

\textit{Id.} at 1728.
it might cause. Nevertheless, the courts generally refuse to examine the agency's decision on the merits.\textsuperscript{101}

As a result, the suits centering on NEPA have merely placed additional administrative burdens on the federal agencies,\textsuperscript{102} but generally have not affected the actual decisions made by these agencies.\textsuperscript{103} The nature of the remedies granted in suits against agencies for failure to comply with NEPA dramatically emphasizes this point. Plaintiffs in these suits typically have sought injunctive remedies. The courts, when finding noncompliance with NEPA, have usually responded by granting preliminary injunctions.\textsuperscript{104} These injunctions are removed,\textsuperscript{105} however, once the

\textsuperscript{101}See notes 97-100 and accompanying text supra. But see Environmental Defense Fund v. Corps of Engineers, 4 E.R.C. 1721 (8th Cir. 1972).

\textsuperscript{102}See, e.g., Cramton & Berg, \textit{Enforcing the National Environmental Policy Act in Federal Agencies}, 18 PRAC. LAW., May, 1972, at 86: "[F]ederal agencies appear to be encountering severe difficulties in complying with NEPA as construed by reviewing courts."

\textsuperscript{103}There are few instances where federal projects have been modified or abandoned when their adverse environmental effects were found to be unacceptable. See, e.g., CEQ \textit{THIRD ANNUAL REPORT}, supra note 26, at 226-27. The CEQ has listed five accomplishments of NEPA: (1) national policies have been brought into line with modern concerns for the quality of life; (2) a systematic way of dealing with complex problems involving several agencies has been provided and more sophisticated decision-making has been fostered; (3) a broad range of federal government activities has been opened to public scrutiny; (4) agency staffs have been supplemented with personnel trained in environmental disciplines and their focus of concerns has been broadened; (5) suits by citizens have enforced the requirements of the Act and agencies have been forced to take their tasks seriously. CEQ \textit{THIRD ANNUAL REPORT}, supra note 26, at 255-56. However, these "accomplishments" deal only with the beneficial effect NEPA has had in orienting the administrative process to environmental matters, as opposed to any beneficial effects on the environment itself by virtue of the agencies' giving weight to environmental values in their decision-making. Cf. Cramton and Berg, \textit{supra} note 102, at 83-86.


In determining whether or not to grant an injunction the courts, following a traditional approach, have required that the plaintiff show irreparable harm, and probable success on the merits; there must be no adequate remedy at law; and the injuries to the parties must be balanced. The courts usually have required that the plaintiffs merely post bonds of nominal value to comply with the requirements of Federal Rule of Civil Procedure 65(c). See, e.g., West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) ($100.00); Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925 (D.D.C. 1971) ($1.00). But see Natural Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972) ($75,000).

agency has complied with the terms of Section 102. That is to say, the courts will enjoin a federal project *only* so long as (1) an impact statement is required and has not been filed, or (2) an impact statement, if filed, does not comply with the standards previously discussed.\(^{106}\)

If federal agencies are being forced to compile thorough impact statements, they should also be forced to consider the information in these statements while arriving at a final decision. There are two possible means of assuring this result: (1) the courts can construe Section 101 of NEPA to give federal agencies substantive duties to take into account environmental factors in the final decision on whether to undertake a federal project; or (2) the Congress can pass legislation strengthening NEPA by providing for substantive judicial review.

The first approach—a revised judicial construction of NEPA—can be accomplished by treating the policies and goals in Section 101 as legal duties which federal agencies must fulfill. If such an approach is followed, and if a federal agency fails to adopt the policies and goals of Section 101 in a decision, environmental groups could seek judicial review under the APA alleging that the federal agency’s acts were not "in accordance with law."\(^{107}\)

There are several provisions in NEPA which could be used to argue that Section 101 imposes legal duties on federal agencies. Section 102 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] . . . .”\(^{108}\) Certainly the policies outlined in Section 101 are covered in this directive. One could point to the goals listed in Subsection 101(b)\(^{109}\) and argue that these goals are incorporated expressly in the “policies, regulations, and public laws of the United States.” Under such a construction, for example, federal agencies would have the legal duty to “preserve important historic, cultural, and natural aspects of our national heritage . . . .”\(^{110}\)

Section 103\(^{111}\) can also be used to substantiate this view. Under this section all federal agencies were directed to review their current practices and policies to see if they deviated from the

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\(^{106}\) See notes 34–40 and 76–94 and accompanying text *supra*.


\(^{109}\) See note 13 and accompanying text *supra*.


policies outlined in NEPA. If there were any such deviations, the agencies were to propose to the President "such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this [Act]." The courts have thus far rigidly forced federal agencies to adopt the procedures of NEPA. When the words intent and purposes are included in the same phrase as procedures in a conjunctive manner, it seems unreasonable to force agencies to adhere to NEPA's procedures but not to its intent or purposes.

One can also point to the overall scheme of NEPA to argue that Section 101 imposes legal duties on federal agencies. Under Section 102 federal agencies are required to compile exhaustive studies on potential environmental effects. The agencies, after compiling such statements, have readily accessible data which can serve as valuable input to the final decision-making process. Furthermore, the impact statement also facilitates any potential court review of an agency's decision. In this light it makes little sense to force agencies to engage in expensive studies and then not to force them to use these studies while making a final decision.

Finally, the purposes of NEPA, as outlined in Section 2 of the Act seem to indicate that Section 101 should have substantive meaning. One of the purposes of the Act is "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man..." It is hard to see how mere compliance with the procedural requirements of Section 102 will effectuate this purpose. Merely forcing federal agencies to disclose the environmental effects of their acts could have little or no effect on the agencies' efforts to prevent ecological damage. Forcing federal agencies to effectuate certain environmental goals would, however, promote efforts to minimize environmental problems.

There are at least three countervailing arguments to a court's construing the statute so as to provide substantive judicial review under NEPA. First, Section 105 explicitly states that the "pol-

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112 Id. (emphasis added).
113 See notes 68–96 and accompanying text supra.
114 See notes 76–96 and accompanying text supra.
115 See notes 95–96 and accompanying text supra.
116 The CEQ has estimated that the costs of studying environmental effects may run as high as $65 million a year when NEPA is fully underway. CEQ Third Annual Report, supra note 26, at 258.
117 42 U.S.C. § 4321 (1970). (The Environmental Protection Agency has said that the objective of NEPA is "to build into the agency decision-making process an appropriate and careful consideration of all environmental aspects of proposed actions." Interim Environmental Protection Agency Regulations on Preparation of Environmental Impact Statements, at § 6.10(a). 3 Env. Rptr. 1136 (Jan. 19. 1973)).
118 Id. § 4321.
icies and goals set forth in this [Act] are *supplementary* to those set forth in existing authorizations of Federal agencies.)*119 Thus the argument would be that, because NEPA’s policies are supplemental to the policies of the agencies’ organic acts, the agencies are not required to consider NEPA’s policies if, in their judgment, those policies interfere with their primary duties. However, even if the word supplementary is construed to mean subordinate or peripheral to the policies and goals of each agency, this construction does not preclude requiring substantive consideration of NEPA’s policies in the agency’s decision-making process. Rather, it only speaks to the weight such values are to be given in agency deliberation. Only if supplementary is construed in the very narrow sense of meaning “exclusive,” *i.e.*, that the values in NEPA are not to be given any weight until the agency judges its own values to be fully satisfied, can it be said that the terms of the Act prohibit courts from enforcing substantive consideration of NEPA’s policies. Moreover, although Section 105 states that the policies and goals of NEPA are to be supplementary to the existing authorizations of federal agencies, it does not state that the *procedures* of NEPA are supplementary. Because the procedural requirements of NEPA are phrased in terms of legal duties and apparently are not supplementary to other agency duties, one could argue that Section 105 therefore indicates that the policies and goals of NEPA are not to be treated as legal duties.120 Nevertheless, the fact that NEPA’s policies are said to be supplementary to, and not exclusive of, the existing authorizations of federal agencies could indicate that Congress did intend that federal agencies were to account for the policies in Section 101.

Second, the language of Section 101 enumerating findings of policy is not nearly as directed and forceful as the language of the procedural requirements in Section 102.121 Since Section 102 was meant to impose legal duties upon agencies,122 this dichotomy could be used to imply that Congress meant that Section 101 was not to impose mandatory obligations on federal agencies.

Finally, the legislative history of the Act apparently indicates

119 *Id.* § 4335 (emphasis added).

120 The legislative history of NEPA, however, indicates that Section 105 requires the agencies to “conduct their activities in accordance with [NEPA] unless to do so would violate their existing statutory authorizations.” 115 *Cong. Rec.* 40418 (1969). Thus Section 105 does not excuse agency compliance with NEPA except in limited circumstances. Section 103 seems to support this view. See text accompanying notes 111–13 supra.

121 For example, Section 101 states that all “practicable” means should be used so that the nation “may” achieve certain goals, while Section 102 states that the agencies “shall” comply with certain procedures “to the fullest extent possible.”

122 *See*, e.g., 115 *Cong. Rec.* 40416 (1969) (Conference Report).
that Section 101 has no substantive impact. Illustratively, one can point to the Senate amendments to Subsection 101(c). The language comprising Subsection 101(c) before it was amended read in part, "The Congress recognizes that each person has a fundamental and inalienable right to a healthful environment . . . ." Subsection 101(c) now reads, "The Congress recognizes that each person should enjoy a healthful environment . . . ." It can be argued that this change indicates that Section 101 was not intended by the Senate to give individuals legal rights against federal agencies for the violation of the duties listed in Subsection 101(b).

If the courts continue to be unwilling to deal with these problems and if they continue to hold that NEPA does not have a substantive impact on the decision-making process, then Congress should rectify the matter by legislative command. To refuse to modify NEPA by legislative action would be to preserve a system which dramatically increases a federal agency's workload but which has little or no substantive impact on the manner in which the agency treats environmental concerns.

V. CONCLUSION

A combination of factors—liberalized standing rules, broad scope of judicial review, and apparent judicial commitment to the underlying policies of NEPA—works to give independent assurance that federal agencies have before them thorough information on the effects which their projects are likely to have on the environment. It seems, however, that the expenditure of so much time and effort should result in something more than mere assurance that environmental effects will be known to the agencies. Until environmental effects must actually be taken into account as a factor to be given weight in agency decision-making, rather than merely described and acknowledged, the ultimate goals of NEPA will remain unachieved.

The present apparatus of judicial review under NEPA and the

123 See, Id.
124 Id.

I opposed this change in conference committee because it is my belief that the language of the Senate passed bill reaffirmed what is already the law of this land. . . . If this is not the law of this land . . . it is my view that some fundamental changes are in order.

APA is well designed to work as an independent check on agency actions. The impact statement required by NEPA is a sound vehicle by which to provide a thorough record for judicial review, so that the courts may more easily determine what factors the agency must have considered in making its decision. What is needed to make this check truly effective is a mandate for the courts to enforce environmental values on the agencies so that action that fails to give sufficient weight to public values of conservation, recreation, natural beauty, and the like can actually be stopped rather than merely being publicized.

—Lloyd A. Fox