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Environmental Law -- Definition of Major Federal Action Under the National Environment Policy Act (NEPA) As Applied to Project Partially Completed at the Date of NEPA's Enactment -- Minnesota Public Interest Research Group v. Butz

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ernment attorney who is delegated substantial responsibility for a particular case may be subject to disqualification in a pending case, if a reasonable number of connecting factors exist between the cases, and the financial attractions in the pending case are sufficiently lucrative, to raise the appearance of impropriety.⁶⁶

ROBERT LLOYD RASKOPF

Environmental Law—Definition of Major Federal Action Under the National Environment Policy Act (NEPA) As Applied to Projects Partially Completed At the Date of NEPA's Enactment—*Minnesota Public Interest Research Group v. Butz*.¹—For twenty years prior to passage of the National Environmental Policy Act (NEPA)² the Department of Agriculture and its subordinate agency, the United States Forest Service, had entered into numerous sales contracts with private lumbering concerns whereby the private companies were permitted to cut an extensive amount of timber³ in part of a Wilderness Area⁴ known as the Boundaries Waters Canoe Area (BWCA).⁵ Subsequent to January 1, 1970, the date NEPA became effective, the Forest Service continued to play an active role in eleven of the pre-NEPA timber sales, although it did not award any new contracts for this area. For example, the Forest Service granted extensions of the land area to be cut under certain timbering contracts and engaged in some administration of logging operations, as by mapping out logging roads. The Forest Service did not file a separate environmental impact statement (EIS) with regard to these lumbering activities because it intended to include an analysis of

⁶⁶ The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.

Motor Mart v. Saab Motors, Inc., 359 F. Supp. 156, 158 (S.D.N.Y. 1973).

¹ 498 F.2d 1314 (8th Cir. 1974) [hereinafter referred to as *MPIRG*].

² 42 U.S.C. §§ 4321-47 (1970). The National Environmental Policy Act was signed into law on New Years Day, 1970. Pub. L. 91-190, 83 Stat. 852 (1970).

³ "In recent years about 45,000 cords of timber on about 3,000 acres of land has been cut in the Portal Zone [area where timbering is permitted] each year." *Minnesota Pub. Interest Research Group v. Butz*, 358 F. Supp. 584, 594 (D. Minn. 1973).

⁴ A Wilderness Area is defined in the Wilderness Act, 16 U.S.C. § 1131(c) (1970), as follows:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions

⁵ The Secretary of Agriculture is authorized to manage the BWCA. 16 U.S.C. § 1133(d)(5) (1970).

those activities in a more inclusive EIS that was to be issued by April 1973 in conjunction with a New Management Plan for the entire BWCA.⁶ On April 24, 1972, however, Minnesota Public Interest Research Group (MPIRG), a non-profit corporation, after failing to persuade the Forest Service to suspend timbering voluntarily pending the formulation of an EIS, filed suit in the United States District Court for the District of Minnesota seeking to enjoin the government defendants and the private companies from logging in the BWCA until they had fully complied with all the requirements of NEPA.⁷

The district court granted the injunction;⁸ it held that the Forest Service's failure to prepare an EIS covering the timbering activities on the eleven sales sites after NEPA's passage was "arbitrary, capricious and unlawful" in light of the clear legislative mandate that an EIS be prepared for all "major Federal actions significantly affecting the quality of the human environment."⁹ On appeal, the United States Court of Appeals for the Eighth Circuit, with three of its judges dissenting, affirmed the lower court injunction pending completion of the EIS and HELD: a federal agency's involvement, in a contract executed prior to NEPA's enactment, which involves a major impact on the environment, constitutes a "major Federal action"¹⁰ which requires the preparation of an EIS. Thus the court concluded that the Forest Service's determination of NEPA's inapplicability to the existing lumbering contracts and its refusal to file an EIS were unreasonable because the Forest Service's

⁶ 358 F. Supp. at 588.

⁷ 498 F.2d at 1318.

⁸ 358 F. Supp. at 630.

⁹ Id. at 624. Section 102(2)(C) of The National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1970), provides in pertinent part:

[A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statements and the comments and views of the . . . agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes

¹⁰ Id.

activities subsequent to 1970 in regard to the timbering sales constituted a "major Federal action significantly affecting the quality of the human environment."¹¹

This note will begin with a discussion of the Eight Circuit's utilization of a test of "reasonableness," as opposed to the less demanding standard of "arbitrariness," to review the Forest Service's threshold determination of NEPA's inapplicability to the timbering sales. Next, the court's determination that NEPA requirements are applicable to projects begun before 1970 where the project has a significant environmental impact, will be analyzed in light of the express statutory mandate that an EIS be prepared for "major Federal actions significantly affecting the quality of the human environment."¹² Finally, the affirmation of the district court's injunction despite the existence of the Forest Service's draft EIS providing for a continuation of timbering in the BWCA will be discussed. It will be submitted that the Eighth Circuit's resolution of the above three issues presented in *MPIRG* accords with the congressional intent in enacting NEPA.

I. STANDARD OF REVIEW

Although it is undisputed that the initial determination of NEPA's applicability to any given action lies with the federal agency undertaking the action,¹³ there is no unanimity among the federal courts as to the proper standard for judicial review of an agency's decision that NEPA is inapplicable.¹⁴ Two views emerge from the cases which have analyzed the weight to be accorded an agency's decision not to prepare an EIS¹⁵ in light of the congressional man-

¹¹ 498 F.2d at 1320, 1323, quoting 42 U.S.C. § 4332(2)(C) (1970). See note 9 supra.

¹² 42 U.S.C. § 4332(2)(C) (1970). See note 9 supra.

¹³ See, e.g., *Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir.), cert. denied sub. nom. *Hanly v. Kleindienst*, 409 U.S. 990 (1972).

¹⁴ The Second Circuit, in *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973), and the Seventh Circuit, in *First Nat'l Bank v. Richardson*, 484 F.2d 1369, 1373 (7th Cir. 1973), have endorsed the "arbitrary" standard. The Tenth Circuit, in *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973), and the Fifth Circuit, in *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973), have applied a "reasonableness" standard which allows for more extensive judicial review. The Fourth Circuit adopted a middle position in *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973), where it upheld an agency's negative determination, stating: "We find no basis for any suggestions that the decision was arbitrary or reached without adequate consideration of environmental factors." *Id.* at 162. Two district court decisions have held that the agency's negative determination is subject to de novo review by the courts. *National Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 366 (E.D.N.C. 1971), and *Scherr v. Volpe*, 336 F. Supp. 886, 888 (W.D. Wis. 1971), aff'd, 466 F.2d 1027 (7th Cir. 1972). "The divergence among the circuits indicates quite clearly that if any uniform standard is adopted, it will have to be at the Supreme Court level." F. France, *Extent of Judicial Review of Administrative Determination of Applicability of NEPA 7* (unpublished paper prepared for delivery at a conference of U.S. Attorneys at Orlando, Fla., Jan. 21-23, 1974; copy on file at the offices of the Boston College Industrial & Commercial Law Review).

¹⁵ See cases cited in note 14 supra. The controversy centers around the proper standard

date that an EIS be prepared for every major federal action that significantly affects the human environment.¹⁶ The apparent majority view¹⁷ is that an agency should be granted wide latitude in deciding NEPA's applicability to a proposed action, and relegates to the court the task of ascertaining merely whether the agency has abused its discretion by arbitrary and capricious decision-making.¹⁸ The other view, which was adopted in *MPiRG*, subjects the agency's negative determination to close scrutiny and analyzes all the relevant factors to see whether the agency's decision was reasonable.¹⁹

The statutory language in NEPA provides a strong indication that a strict standard of review was intended by Congress, at least as far as the agency's threshold determination is concerned. Section 101(b)²⁰ requires all agencies to "use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources [in order to] fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; [and] . . . attain the widest range of beneficial uses of the environment without degradation"²¹ Thus, environmental concerns are included in "essential considerations of national policy" and as such command a very high standard of compliance by the federal agencies. To effectuate this congressional policy, section 101 should not be read as a vacuous declaration of the national policy on the environment or as a policy to be implemented in any manner that the federal agencies choose. Instead, section 102²² in clear and mandatory language prescribes the procedure to be followed by the agencies to attain the goals expressed in section 101, namely the preparation of an EIS.

Further statutory analysis indicates that the high standards required of a federal agency should be complemented by a rigorous judicial scrutiny whenever the government agency has decided not

of review, and not upon the issue of whether the agency's decision is reviewable. The Administrative Procedure Act, 5 U.S.C. § 701 (1970), provides that all agency decisions are subject to judicial review except where: "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The second exception was narrowly confined in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410, quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

¹⁶ See *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971); Note, 13 B.C. Ind. & Com. L. Rev. 802 (1972).

¹⁷ It is difficult to state with certainty what is the majority viewpoint in regard to this issue, because often an expression of judicial deference to wide agency discretion "is undercut by what the decisions actually require." F. Anderson, *NEPA in The Courts* 96 (1973).

¹⁸ See, e.g., *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

¹⁹ 498 F.2d at 1320.

²⁰ 42 U.S.C. § 4331(b) (1970).

²¹ 42 U.S.C. §§ 4331(b)(1), (3) (1970).

²² 42 U.S.C. § 4332 (1970). See note 9 *supra*.

to prepare an EIS. Section 102(1)²³ directs that the policies, regulations, and public laws of the United States be interpreted in accordance with NEPA's policies "to the fullest extent possible. . . ."²⁴ That language seems to be addressed not only to the agency but also to the reviewing court. Since an agency may not possess full objectivity in analyzing its proposed action,²⁵ it may be more likely to conclude unjustifiably that NEPA is inapplicable. Therefore, a pro forma judicial review could thwart the broad purposes of NEPA.

The advocates of the standard of review based on arbitrariness contend that an agency's decision not to file an EIS is essentially a factual and not a legal determination.²⁶ The reasonable rule proponents argue that deciding NEPA's applicability to a proposed action involves critical questions of statutory interpretation, and therefore constitutes a question of law.²⁷ For example, the Forest Service must decide whether an action with respect to the timbering contracts constitutes a major federal action significantly affecting the quality of the human environment, which is not a question of fact, but of law.²⁸

Generally, an agency's decision that NEPA is inapplicable to any proposed project involves "mixed" questions of law and fact.²⁹ The Supreme Court's approach to "mixed" agency decisions in other areas of law³⁰ has been to choose the standard of review which it

²³ 42 U.S.C. § 4332(1) (1970).

²⁴ *Id.*

We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow discretionary. Congress did not intend the Act to be such a paper tiger. Indeed, the requirements of environmental consideration to the fullest extent possible sets a high standard for the agencies, . . . which must be rigorously enforced by the reviewing courts.

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

²⁵ See *Arizona Pub. Serv. Co. v. FPC*, 483 F.2d 1275 1282 (D.C. Cir. 1973).

²⁶ See *Hanly v. Kleindienst*, 471 F.2d 823, 829-30 (2d Cir. 1972). In order to ascertain the environmental effects of timbering in the BWCA, the Forest Service in *MPIRG* had to make numerous factual findings such as how many acres of woodland had been timbered, whether these areas were formerly enjoyed by hikers, how long tree stumps remain before decomposing, and which kinds of native trees and vegetation would never again thrive in a timbered forest.

²⁷ E.g., *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248 (10th Cir. 1973).

²⁸ Cf. 498 F.2d at 1320.

²⁹ *Hanly v. Kleindienst*, 471 F.2d 823, at 828 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). "The action involves both a question of law—the meaning of the word 'significantly' in the statutory phrase 'significantly affecting the quality of the human environment'—and a question of fact—whether the [Manhattan Civic Center] will have a 'significantly' adverse environmental impact." *Id.*

³⁰ Although there has been no Supreme Court decision dealing with the standard of review under NEPA, a 1971 case, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), dealt with the question of the correct standard of review under § 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1964 ed., Supp. V), and § 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1964 ed., Supp. V), and

believes best serves the policy of the statute, and then to classify the agency decision as "factual" or "legal" in accordance with the chosen standard of review.³¹

Most courts have adopted the Supreme Court's policy-oriented approach to the extent that even those courts espousing the standard of review for arbitrariness have strictly scrutinized the agency's decision in light of the court's own evaluation of whether an EIS is required, so as to implement the underlying policy of NEPA.³² Thus the Eighth Circuit's affirmation of the district court's injunction in *MPIRG*³³ stems not so much from its choice of reasonableness standard as from its own definition of "major" and "significantly affects the quality of the human environment."³⁴

II. DEFINING A MAJOR FEDERAL ACTION UNDER NEPA

The decision of the Eighth Circuit in *MPIRG* is significant not only for the application of a standard of review under NEPA based on the reasonableness of agency action, but also for the finding that a project begun before the effective date of NEPA but only partially completed as of that date, is subject to the statutory mandate that an EIS be prepared for "major Federal actions significantly affecting the quality of the human environment." Various federal agencies have attempted to define further the meaning of this statutory phrase: the Council on Environmental Quality (CEQ)³⁵ in promulgating its Guidelines for the agencies, the agencies themselves in their definitional Guidelines³⁶ and the courts in adjudicating the cases arising under these interpretations.³⁷ The primary question in defining this phrase is whether Congress intended to create one criterion or whether it intended to create two tests whereby: "[F]irst,

this case has been cited by lower courts struggling with the standard of review under NEPA. See, e.g., *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973); *Hanly v. Kleindienst*, 471 F.2d 823, 829 (2d Cir. 1972).

³¹ See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124-35 (1944).

³² See, e.g., *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971), where the court reviewed under the "arbitrary" standard, the decision of the Department of Housing and Urban Development (HUD) not to prepare an EIS in regard to a loan of \$3.1 million for the construction of a 16 story high-rise building in Portland, Oregon. *Id.* at 879. The court remanded the case to HUD and ordered the preparation of an EIS on the basis of its own decision that the housing project would cause significant environmental effects. *Id.* at 879-80. See also *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 968 (1973).

³³ 498 F.2d at 1325.

³⁴ 42 U.S.C. § 4332 (1970). See note 9 *supra*.

³⁵ CEQ Guidelines, 38 Fed. Reg. 20550-62 (1973); CEQ Guidelines, May 16, 1972 (not published in Fed. Reg.); CEQ Guidelines, 36 Fed. Reg. 7724-29 (1971); CEQ Interim Guidelines, 35 Fed. Reg. 7390-93 (1970).

³⁶ See, e.g., *Forest Service Manual* § 1941.22, quoted in *Minnesota Pub. Interest Research Group v. Butz*, 358 F. Supp. 584, 623 (D. Minn. 1973).

³⁷ For cases interpreting this phrase, see note 14 *supra*. See also Yarrington, *The National Environmental Policy Act*, BNA Env. Rep. Vol. 4, No. 36, at 22-24 (1974) (Monograph No. 17).

it must be determined whether there is a major federal action; next, if there is a major action, the impact of that action on the environment must be determined."³⁸

The Eighth Circuit has aligned itself with what is probably the minority³⁹ of jurisdictions which specifically reject the two tier test and instead merge the two requirements into a single standard under which the NEPA requirement for filing an EIS is triggered whenever a federal project has a significant environmental effect.⁴⁰ Thus, the existence of a major federal action is inferred from the judicial finding of a significant environmental effect.⁴¹ This line of reasoning⁴² seems to further the legislative policy enunciated in section 101 of NEPA by promoting efforts by federal agencies "which will prevent or eliminate damage to the environment"⁴³

In utilizing the two-step test, other courts⁴⁴ have devised several definitions of "major federal action," as, for example, those activities which are different from the myriad minor activities with which the federal government becomes involved and are instead limited to a federal action that "requires substantial planning, time, resources or expenditure."⁴⁵ Even courts which have not articulated a standard often examine " 'the character of the project' [T]hey have considered the physical magnitude, cost and duration of a project as indicia of its 'majority.' "⁴⁶

The court in *MPIRG* aptly criticized these definitions by show-

³⁸ 498 F.2d at 1321. See Note, 49 Wash. L. Rev. 939, 942 (1974).

³⁹ It is difficult to state with certainty what is the majority viewpoint in regard to this issue of statutory interpretation, because very few opinions articulate the criteria used to reach their determination that the challenged actions were federal, major, and of significant environmental effect. "Whether a project is a 'major federal action' is, of course, a question which can only be resolved through a careful case-by-case analysis." *Transcontinental Gas Pipeline Corp. v. Hackensack Meadowlands Dev. Comm'n*, 464 F.2d 1358, 1366 (3d Cir. 1972). But see F. Anderson, *supra* note 17, at 84.

⁴⁰ 498 F.2d at 1321-22. "[I]f the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA" *Id.* at 1322.

⁴¹ See *id.* at 1321-22.

⁴² The majority's approach in *MPIRG*, however, appears to violate a basic tenet of statutory interpretation, namely, that "[e]very word and clause must be given effect." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed*, 3 Vand. L. Rev. 395, 404 (1949). Inclusion of the term "major" in NEPA raises the obvious inference that not all federal actions are meant to be included.

⁴³ 42 U.S.C. § 4321 (1970).

⁴⁴ Two cases which adopted the two-step test without discussion are *Jicarilla Apache Tribe of Indians v. Morton*, 2 ELR 20287, 20295 (D. Ariz. 1972), *aff'd*, 471 F.2d 1275 (9th Cir. 1973); *McLean Garden Residents Ass'n v. National Capital Planning Comm'n*, 2 ELR 20659 (D.D.C.), motion for stay of injunction and summary reversal denied, 2 ELR 20662 (D.C. Cir. 1972).

⁴⁵ *Citizens Organized to Defend the Environment, Inc. v. Volpe*, 353 F. Supp. 520, 540 (S.D. Ohio 1972). *Accord*, *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972). See *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), where the court implicitly adopted the defendant's description of "major federal action." *Id.* at 644.

⁴⁶ Note, 49 Wash. L. Rev. 939, 947 (1974).

ing how the bifurcation in the statutory language creates the possibility that a "minor federal action significantly affecting the quality of the human environment"⁴⁷ would be held outside the scope of NEPA. As one commentator has suggested: "It makes little sense to call a project minor when its environmental effects are significant, because it is just these effects which section 102(2)(C) requires to be discussed in the impact statement."⁴⁸ It is submitted that, if an action will have a significant environmental effect, an EIS should be required, regardless of how little money is spent on it or time is consumed by it.

The task of defining the phrase major federal action becomes complicated in situations like that dealt with in *MPIRG*, where the challenged project was initiated prior to January 1, 1970, the date on which NEPA became effective.⁴⁹ In addition to the primary question of how to define a major federal action under the statute where the project is begun after the statute's enactment, the cases where the federal project was planned, begun or substantially completed before that date, raise the corollary issue of whether to examine only those actions commencing after January 1, 1970. Most of the case law in this area of "NEPA and retroactivity"⁵⁰ involves an interpretation of the CEQ Guidelines, which place a premium on the practicality of applying NEPA to actions already underway:

Application of Section 102(2)(C) procedure to existing projects and programs. To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970.

Agencies have an obligation to reassess ongoing projects and programs in order to avoid or minimize adverse environmental effects While the status of the work and degree of completion may be considered in determining whether to proceed with the project, it is essential that the environmental impacts of proceeding are reassessed pursuant to the Act's policies and procedures⁵¹

Basically, the courts have employed two different tests in determining NEPA's applicability to activities partially completed as of the date of NEPA's enactment: (1) where the federal government

⁴⁷ 498 F.2d at 1321-22.

⁴⁸ F. Anderson, *supra* note 17 at 95.

⁴⁹ In *MPIRG*, the Forest Service had allowed timbering in the BWCA since the 1940's and all contracts in the present controversy were awarded before 1970. 358 F. Supp. at 594, 604-09.

⁵⁰ Yarrington, *supra* note 37, at 32-33.

⁵¹ 38 Fed. Reg. 20553 (1973).

is itself responsible for the project, *e.g.*, dam construction, the courts have examined the amount of work remaining to be performed on the project⁵² as an indication of whether the costs incurred in undertaking an environmental review⁵³ outweigh the benefits from such a study;⁵⁴ (2) where the federal agency's role in the project was simply to approve the plans of a nonfederal actor, *e.g.*, granting a loan, an easement, or authorizing the action, most courts have looked to the date of some critical legal event,⁵⁵ such as the date the loan was approved, the easement granted, or the permit issued. If this critical legal event occurred before NEPA's passage, the federal action is deemed to be complete⁵⁶ and the project, under non-federal operation, may continue without the preparation of an EIS.

In *Lee v. Resor*⁵⁷ the federal district court seemed to adopt a third approach by distinguishing between *continuing projects* begun before January 1, 1970 and *ongoing projects* begun before that date:

An ongoing project is a project which has a definite termination date which is known when the project commences, *e.g.*, construction of a highway. A continuing project, on the other hand, is a project which has no definite termination date but which is intended to continue indefinitely, *e.g.*, spraying the St. John's River with a herbicide to control water hyacinths.⁵⁸

Although the preparation of an EIS might be impracticable for ongoing projects that were substantially completed at the time of NEPA's enactment,⁵⁹ it is not impracticable in connection with

⁵² See, *e.g.*, *Environmental Defense Fund, Inc. v. Corps of Eng'rs of the U.S. Army*, 470 F.2d 289, 301 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973) (NEPA held applicable to the Gilham Dam project); *Maddox v. Bradley*, 345 F. Supp. 1255, 1259 (N.D. Tex. 1972) (building a fence around an already constructed reservoir held to be insubstantial remaining action); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573, 577-78 (E.D. Va. 1972) (NEPA held inapplicable to an airport that was entirely built before 1970).

⁵³ The costs of preparing an EIS may involve the cost of abandoning or substantially changing the project after a lot of time and money has been invested in it. *Virginians for Dulles v. Volpe*, 344 F. Supp. 573, 578 (E.D. Va. 1972).

⁵⁴ The benefits of undertaking an EIS, would include: (1) the assessment of environmental effects of the project by agencies with special expertise in environmental concerns; (2) a possible alteration in the project so as to lessen its environmental impact; and (3) permitting public participation in the agency decision. See *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

⁵⁵ See, *e.g.*, *National Helium Corp. v. Morton*, 326 F. Supp. 151, 157 (D. Kan.), *aff'd*, 455 F.2d 650 (10th Cir. 1971) (NEPA held applicable where Secretary of Interior exercised termination clause of a pre-existing contract after 1970); *Sierra Club v. Hardin*, 325 F. Supp. 99, 125 (D. Alas. 1971) (NEPA held applicable to granting of permit to construct mill at Echo Grove).

⁵⁶ See *F. Anderson*, *supra* note 17, at 143.

⁵⁷ 348 F. Supp. 389 (M.D. Fla. 1972).

⁵⁸ *Id.* at 394.

⁵⁹ *Environmental Defense Fund, Inc. v. Corps of Eng'rs of the U.S. Army*, 325 F. Supp. 728, 746 (E.D. Ark. 1971).

"continuing projects" which by definition have no completion date. The court in *Lee* took note of congressional concern with the urgent problem of detrimental environmental effects of federal governmental activities and the need for rectification without delay.⁶⁰ If the Act were applicable only to actions both begun and completed after January 1, 1970, and not to continuing projects which were initiated prior to that date, then the congressional intent that the legislation address itself immediately to existing problems⁶¹ would be thwarted.

The district court in *MPIRG* extended the *LEE* distinctions between continuing projects and those projects with definite termination dates, although it did not use the same terminology.⁶² The court of appeals in *MPIRG* concluded that NEPA was applicable to the timbering project in the BWCA, on the basis of three categories of Forest Service involvement—"contract extensions, contract modifications, and the *administrative actions required by the contracts*."⁶³ The court did not seem to sanction the critical legal event approach because its finding of a major federal action was not restricted to the existence of federal contract changes after January 1, 1970.⁶⁴ In *MPIRG* the termination of six of the eleven contracts in the early 1970's was merely fortuitous. Had all contracts run into the year 2000 before termination, the entire forest could have been razed without finding a major federal action under the critical event test.

The Eighth Circuit's holding provides a more flexible test than the critical event test. Its flexibility lies in its definition of a major federal action as one which causes a significant environmental impact. If there is a significant environmental effect, then it is inferred

⁶⁰ 348 F. Supp. at 395. "The intent of Congress to take immediate steps toward implementing a policy of national awareness of the need to consider environmental repercussions . . . pervades the entire Act. The immediacy of the action necessary to implement the Congressional mandate implies an intention to give the Act application to continuing projects." *Id.*

⁶¹ See 42 U.S.C. §§ 4331(b), 4332 (1970).

⁶² This matter is unlike cases dealing with construction of buildings and highways in which it may make little sense to require an impact statement after the project is well under way. In such situations, there may be an irrevocable commitment of resources to the policy decisions previously made, and thus, any review of the environmental impact of such action may be untimely. However, in the instant case, the Court finds no such irrevocable commitment to past policy decisions. The Forest Service is continually involved in making policy decisions on a day to day basis . . . Minnesota Pub. Interest Research Group v. Butz, 358 F. Supp. 584, 622 (D. Minn. 1973).

⁶³ 498 F.2d at 1318 (emphasis added).

⁶⁴ Some of the administrative actions undertaken by the Forest Service include: approval of the location of temporary logging roads; approval of the use of gravel on such roads; approval of logging equipment; and approval of clean-up methods. 358 F. Supp. at 609. It is not certain, however, that the court would have found that these supervisory actions of the Forest Service taken alone and not combined with the contract alterations, constituted a "major Federal action significantly affecting the quality of the human environment." See *id.*

that the federal action causing it was major,⁶⁵ even though substantial work had been done on the project prior to January 1, 1970, the effective date of NEPA. Instead of looking to the magnitude of funds expended in the timbering activities, the Eighth Circuit regarded the dearth of funds allocated to the reforestation program as evidence of a major federal action because such action would not restore the environment. Therefore the timbering would have a significant environmental effect.⁶⁶ If the federal government had sufficient funds to use the most efficient methods of reforestation, such as prescribed burning of spread slash,⁶⁷ there would have been no significant environmental effect and thus the preparation of an EIS would have been unnecessary. Although the small amount of federal funds expended on the projects seems to be at odds with the commonly understood meaning of major action, the significant impact approach⁶⁸ adopted by the majority⁶⁹ does implement the statutory policy. The objective of NEPA is to require that environmental considerations be weighed before federal agency actions are undertaken. Once it was established that timbering in the BWCA caused significant environmental effects, the Eighth Circuit held that NEPA applied to the timber sales.⁷⁰ The court's opinion reflects the weakness in the language of NEPA in that the word "major" can not be given an independent meaning without thwarting the purposes of the Act. The Eighth Circuit's approach *MPIRG* minimizes this defect.

III. EFFECT OF A DRAFT EIS

Once it is determined that the failure of the federal agency to prepare an EIS is a violation of NEPA, the reviewing court has three alternatives: (1) to retain jurisdiction of the case pending the agency's preparation of the EIS, and permit work to continue on the challenged project;⁷¹ (2) to issue an injunction, effective after expiration of a stated period of time, to permit the defendant to prepare an EIS without stopping work;⁷² or (3) to issue an injunction which

⁶⁵ See text at notes 39-48 *supra*. Comment, 26 S.C.L. Rev. 119, 130-36 (1974). But see Note, 49 Wash. L. Rev. 939, 942 (1974).

⁶⁶ 498 F.2d at 1322-23.

⁶⁷ This method reduces the "duff"—the organic matter on the forest floor which must be reduced to permit jackpine seeds to root—over the whole area logged, chars the tree stumps to hasten their rotting, releases nutrients evenly over the logged area, releases jackpine seeds, and tends to reduce the visual impact of logging roads. 358 F. Supp. at 617.

⁶⁸ See F. Anderson, NEPA in the Courts 89 (1973).

⁶⁹ 498 F.2d at 1322.

⁷⁰ *Id.* at 1322-23.

⁷¹ *Minnesota Environmental Control Citizens Ass'n v. AEC*, 3 ELR 20034, 20036 (D. Minn. 1972).

⁷² *Forty-seventh St. Improvement Ass'n v. Volpe*, 3 ELR 20162, 20166 (D. Colo. 1973).

restrains the defendant agency from taking any further action until it has completed an EIS.⁷³

The district court in *MPIRG* chose the third alternative and issued an injunction⁷⁴ after balancing the equities through recognition of the following four circumstances: (1) the probability that the plaintiff would succeed in convincing the Forest Service to prohibit all lumbering in the BWCA;⁷⁵ (2) the irreparable harm to the plaintiff, by the reduction of the virgin land in the BWCA which many of plaintiff's members previously had utilized for recreational enjoyment;⁷⁶ (3) absence of irreparable harm to the defendants;⁷⁷ (4) the strong public interest in preserving a Wilderness Area outweighing the "local public interest in the economic value of the employment and income generated by the timber industry."⁷⁸ The question presented to the court of appeals was whether or not the district court's injunction should be vacated in light of the existence of the Forest Service's draft EIS which provided for the continuation of timber-cutting in the BWCA.⁷⁹ The position taken by the Forest Service in its draft EIS indicated that the plaintiff would have little likelihood of convincing the Forest Service to ban timbering in the BWCA;⁸⁰ therefore it was contended that the injunction should be immediately lifted.

Nevertheless, the Eighth Circuit affirmed the district court's issuance of an immediately effective injunction.⁸¹ The basis of the court's holding was that a draft EIS does not constitute compliance with NEPA. "[A] draft statement is not the basis of an agency decision. Its function is to elicit comment that will contribute to a final statement and it is the final statement that is supposed to serve as the basis for agency assessment of the environmental implications of the project."⁸² Thus, the court implicitly concluded that, even though the plaintiff is not likely to convince the Forest Service to prohibit timbering in the BWCA, it is NEPA's purpose to allow them the opportunity to try.⁸³

Other cases where the courts have refused to issue or uphold

⁷³ *Stop H-3 Ass'n v. Volpe*, 2 ELR 20648 (D. Hawaii), motion to quash order suspending injunction granted, 3 ELR 20130 (D. Hawaii 1972).

⁷⁴ *Minnesota Pub. Interest Research Group v. Butz*, 358 F. Supp. 584, 630 (D. Minn. 1973).

⁷⁵ *Id.* at 625.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 626.

⁷⁹ 498 F.2d at 1323.

⁸⁰ The Forest Service's draft EIS provided for continued lumbering in the BWCA. *Id.* at 1323-24.

⁸¹ *Id.* at 1323.

⁸² *Id.* at 1324.

⁸³ Prior to making the final EIS, the Forest Service must consult with and obtain the comment of agencies with expertise in environmental matters. Then it must circulate copies of its EIS to the President, the CEQ and to the public. See 42 U.S.C. § 4332(2)(C) (1970).

injunctions seem to be based upon a finding that the plaintiff's interests would not be jeopardized by the continuation of the project. In *Minnesota Environmental Control Citizens Association v. AEC*,⁸⁴ District Judge Miles Lord, who issued the injunction in *MPIRG*,⁸⁵ did not enjoin the further development of two nuclear generating plants, although he ordered the AEC to prepare the required EIS's and to consider the alternatives to the projects as they existed when the EIS's were originally due.⁸⁶ He refused to issue an injunction because "[i]n this case, the [CEQ] guidelines do not require suspension of these projects to protect the plaintiffs' interests."⁸⁷ In both *Minnesota Environmental Control* and *MPIRG*, the plaintiffs had only a slight chance of actually convincing the agency to cease or alter its challenged activity—in the former case because the work was substantially completed, and in the latter case because the Forest Service was apparently determined to permit timbering to continue. The Eighth Circuit in *MPIRG*, however, did not seem to accord any weight to the probability that the plaintiff would ultimately not prevail; it agreed with the district court that an injunction was warranted but apparently did not agree that the plaintiff's ultimate chance of success was controlling in determining the propriety of an injunction.⁸⁸

Although it has been recognized that NEPA does not mandate an injunction,⁸⁹ it implements a policy which can be most effectively enforced by utilization of injunction remedies. The essence of the NEPA procedure is to inject environmental criteria into the decision-making process and is based upon the presumption that this new factor might alter the agency's decision to proceed with the project.⁹⁰ It would undercut the congressional intention if an agency were permitted to allow continuation of a project pending the preparation of an EIS, since that would render impartial evaluation difficult during the NEPA process.⁹¹ Additionally, NEPA does not

⁸⁴ 3 ELR 20034 (D. Minn. 1972).

⁸⁵ 358 F. Supp. at 587.

⁸⁶ 3 ELR at 20036.

⁸⁷ *Id.*

⁸⁸ *Cf.* 498 F.2d at 1323.

⁸⁹ See, e.g., *Stop H-3 Ass'n v. Volpe*, 3 ELR 20130 (D. Hawaii 1972), where the district court judge held that the injunction which restrained the defendants from undertaking construction work on a highway, also would not permit them to expend \$2.5 million for design and engineering on the project. *Id.* at 20131. The court was not persuaded by the defendant's contention that it should not be restrained because the delay would cause the government a monetary loss, because "[d]elay is a concomitant of implementation of procedures prescribed by NEPA. . . ." *Id.*, quoting *Green County v. FPC* 3 ELR 1595, 1601 (2d Cir. 1972).

⁹⁰ *Cf.* Hearings on S. 1075, 237 & 1752 Before the Comm. on Interior & Insular Affairs, 91st Cong., 1st Sess. 116 (1969). See also S. Rep. No. 91-296, 91st Cong., 1st Sess. 19-21 (1969).

⁹¹ "Defendant . . . is under the mistaken impression that N.E.P.A. contemplates a continuing commitment to a project under review. . . . [S]uch is not the case. N.E.P.A.

provide for monetary damages to groups or individuals who are injured by detrimental federal actions: prophylactic relief is the sole remedy available.⁹² Finally, a court's refusal to enjoin action which is already underway⁹³ conceivably could encourage recalcitrant agencies to delay completion of the NEPA review to the point where reevaluation of the action is no longer practicable.⁹⁴

As a result of the court's decision in *MPIRG*, a federal agency acting in the Eighth Circuit must prepare an EIS in conjunction with any proposed action which might have a significant environmental impact, and its failure to do so should cause the cessation of any work on the project pending the completion of the statement. The cost to the agency in terms of delaying actions until their environmental effects have been studied is readily offset by the benefit inuring to the public from the rigorous enforcement of NEPA.

JUDITH SCOLNICK

Corporations—Successor's Tort Liability for Acts or Omissions of Predecessor—*Cyr v. B. Offen & Co.*¹—Plaintiff appellees, Cyr and the administrator of the estate of Couture, sought damages for personal injuries and wrongful death against the defendant, B. Offen & Co., Inc., on theories of negligence and strict liability.² These actions arose out of an accident which occurred at the Rumford Press in Concord, New Hampshire on October 29, 1969. The head pressman suggested that Cyr and Couture clean the drying ovens that were attached to the press. Cyr and Couture entered the ovens, placed flammable cleaning solvents near the gas burners, and set to work.³ The head pressman, not realizing that Cyr and Couture had entered the ovens, increased the speed of the press. The operation of the press was inextricably tied to the working of the ovens. When the press attained a certain speed, the oven driers automatically activated. This could be avoided by pushing a saferun button; however, this safety measure was not used.⁴ As a result of

contemplates a suspension of commitments." *Stop H-3 Ass'n v. Volpe*, 3 ELR 20130, 20131 (D. Hawaii 1972).

⁹² See 5 U.S.C. §§ 702, 705 (1970). Cf. *Canal Auth. v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974).

⁹³ This was the situation in *MPIRG*. 498 F.2d at 1318.

⁹⁴ This consideration is more relevant where the project is one which has a definite termination date, rather than a project which continues indefinitely.

¹ 501 F.2d 1145 (1st Cir. 1974).

² B. Offen & Co., Inc. was a codefendant with R. Hoe & Co., the manufacturer of the press. Hoe frequently chose Offen ovens to make up the total package of equipment to be supplied to the purchaser. *Id.* at 1149 n.3. Hereinafter the B. Offen & Co., Inc. will be referred to as "the successor" and the B. Offen Company as "the predecessor."

³ *Id.* at 1148.

⁴ *Id.*