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NEPA'S IMPACT STATEMENT IN THE FEDERAL COURTS: A CASE STUDY OF NRDC V. MORTON

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I. INTRODUCTION

The enactment of the National Environmental Policy Act of 1969 (hereinafter NEPA) has significantly increased the amount of environmental litigation in Federal courts. When NEPA was enacted, however, most experts did not anticipate the scope of the forum that has resulted.

One of the reasons this result was unanticipated is the absence of any mention of judicial review in the procedural portion of the Act; furthermore, there is no indication in the legislative history that Congress intended the Federal courts to review agency compliance with the new procedures. NEPA, therefore, has been an unexpected—and possibly unintended—aid to environmental groups.

An initial determination has been made, however, that judicial review will be limited primarily to the procedural portions of Section 4332 (a restriction which will be discussed below); and, consequently, courts have been left with only one means of enforcing the policy proclaimed by NEPA, namely, the impact statement.

* Natural Resources Defense Council v. Morton (hereinafter NRDC v. Morton) demonstrates the application of NEPA's procedural requirement compelling agency consideration of the full range of available alternatives to a proposed Federal project, a requirement that arguably requires agencies to consider substantive rather than merely procedural matters. It is clear from this decision, however, that the effectiveness of NEPA in requiring full consideration of substantive environmental concerns has been limited by earlier judicial interpretations. The need to take further steps to ensure a continued effective forum for environmental groups may
be fulfilled by a judicial reassessment of the role of the courts or through a legislative expansion of the Act.

This article will discuss first the legislative construction of NEPA and the initial restrictions on the scope of judicial review instituted by the Federal courts. The second section will discuss NRDC v. Morton and its relation to other NEPA cases. The third and final section will make recommendations for providing an effective forum for full judicial review of substantive matters under NEPA.

II. The Statute

A. Legislative Construction

Subchapter I of NEPA contains a general statement of national environmental policy which the Federal government is to achieve in cooperation with state and local governments and “other concerned public and private organizations.” Section 4331(b) sets forth the national goals of environmental policy as specified in the Senate bill. More significant is the prefacing remark that it is “the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy” to help achieve the enumerated goals. Section 4331(c) is critical, at least as much for what it does not say as for what it does, stating that “[t]he Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.” This language is a conference substitute for the Senate version which stated that the Congress recognizes that “each person has a fundamental and inalienable right to a healthful environment.” The compromise language was adopted because of doubts of the House conferees concerning the legal scope of the original Senate wording. The significance of this change will be discussed later.

The most important section of the Act for consideration here is Section 4332, which has been designated by the courts as the “procedural” portion of the Act. The procedures set out for implementing NEPA’s stated policy are to be followed “to the fullest extent possible.” The purpose of this language is to ensure that “no [Federal] agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.” Among the enumerated procedures is a requirement that a detailed statement (i.e. the impact statement) by the responsible official be in-
cluded in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the environment. The impact statement shall include:

... the environmental effects which can not be avoided should the proposal be adopted, alternatives to the proposed action, the relationship between the short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved.15

Most litigation to date involving NEPA has concerned whether the impact statement is required at all for a particular project, or whether the finished impact statement is adequate and has been developed and circulated properly.

The remainder of Subchapter I (Sections 4333, 4334, and 4335) concerns the effect of NEPA on existing law. In essence, these sections make the policies and goals of the Act supplementary to existing authorizations. While the Act does not repeal existing law, agencies are required to comply with NEPA unless compliance would violate any existing statutory authorizations.16

B. Judicial Interpretation

In a previous case decided under NEPA, Environmental Defense Fund v. Corps of Engineers of the United States Army17 (hereinafter EDF v. Corps), conservation groups sought injunctive relief against work on the Gilham Dam project. The court concluded:

At the very least, NEPA is an environmental full disclosure law. The Congress, by enacting it, may not have intended to alter the then existing decisionmaking responsibilities or to take away any then existing freedom of decisionmaking, but it certainly intended to make such decisionmaking more responsive and more responsible.18

Little else seems certain except that Congress wished to express a national policy in favor of protecting the environment.19 Nowhere is it mentioned who is assigned the task of enforcing this general policy.20 Furthermore, judicial review is not mentioned, a fact of particular interest to this article.

The lack of this latter provision is not unusual,21 but, coupled with the legislative history of the Act,22 courts have been reluctant to deal with the issue of judicial review. Although some sources suggest that the lack of specific limitations has given the courts arbitrary powers,23 the case law is quite to the contrary.
Federal courts have interpreted the statute as limiting their powers of review largely to matters arising under Section 4332, the procedural portion of the Act. The Court in *EDF v. Corps* reasoned that, since the compromised version of NEPA falls short of vesting substantive rights in anyone, substantive administrative decisions could be reversed "only if they were not made in the manner required by law or if they were arbitrary and capricious under constitutional standards." These limitations were followed in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC* (hereinafter *Calvert Cliffs*), in which the Atomic Energy Commission was enjoined from continuing work on a nuclear power plant project because the AEC's procedural requirements for hearings and licensing did not comply with NEPA. Each of the four parts of the AEC decision-making regulations in question in some way limited full consideration and separate balancing of environmental values. The Court differentiated between Section 4331, which sets forth the Act's basic substantive policy, and Section 4332, which enumerates procedural provisions designed to insure that Federal agencies implement that policy. While the substantive duties of Section 4331(b) are discretionary, since agencies are required to "use all practicable means consistent with other essential considerations," the procedural duties of Section 4332 must be fulfilled to the "fullest extent possible." The court interpreted the latter phrase as establishing a strict standard of compliance, subject to judicial review to ascertain whether the standard has been met. However, the Court did qualify the substantive/procedural dichotomy by stating that, although a substantive policy determination was beyond its scope, a reviewing court could reverse a substantive decision on its merits under Section 4331, if "it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." In other words, the Court applied a traditional administrative law rule that an agency decision may be reversed on the merits only when the agency has abused its discretion. In addition, the Court stated that compliance with procedural duties to the "fullest" possible extent would seem to require that environmental issues be considered at every important stage in the decisionmaking process.

Although *EDF v. Corps* and *Calvert Cliffs* emphasize procedural review, substantive review in a limited sense to a limited extent is also available: the decision as to whether or not NEPA applies to a particular Government project is reviewable by the courts. The
NEPA language "major federal actions significantly affecting the quality of the human environment," has generally been broadly interpreted by the courts as requiring impact statements for such diverse projects as a proposed Federal jail,\(^{31}\) a dam and reservoir project,\(^{32}\) highway construction\(^{33}\) and renovation,\(^{34}\) and a 2.5 percent surcharge on all rail freight, because that surcharge increased the shipping costs of recyclable materials.\(^{35}\) Regardless of how broadly the courts apply this aspect of substantive review power, litigation in this area will more than likely decrease as certain routine Federal activities—highway construction, for example\(^{36}\)—are designated by the courts as falling within NEPA. NEPA, therefore, has been instrumental in forcing Federal agencies to establish procedures to consider carefully in a timely fashion the environmental consequences of their activities.

The second and more emphasized area of effectiveness of the Federal courts under NEPA has been that of procedural review. The courts have reviewed Government compliance with Section 4332,\(^{37}\) and hence will decide whether an agency has produced a procedurally acceptable impact statement. Calvert Cliffs' indicates that the review shall be limited to whether or not an agency has made a good faith effort to comply with the procedural requirements of the section, irrespective of the agency's substantive remarks or conclusions. Obviously, substance and procedure are not easily differentiated, which gives the courts some flexibility even within the Calvert Cliffs' restrictions.\(^{38}\)

But, in spite of the success of the impact statement in providing a Federal forum, its effectiveness remains limited. If the courts continue to limit their review to whether an impact statement meets the procedural requirements of the Act, it is inevitable that agencies will master the necessary techniques, with no assurance that substantive matters will be fully examined.\(^{39}\)

III. THE PRINCIPAL CASE: NRDC v. MORTON

A. Background

On October 28, 1971, the Department of the Interior filed its "Final Environmental Impact Statement"\(^{40}\) for its proposal for a lease sale of eighty tracts of submerged lands, primarily off eastern Louisiana.\(^{41}\) A motion to enjoin this sale was made by plaintiffs\(^{42}\) on November 1, 1971 prior to the opening of bids on the almost 380,000 acres which was scheduled for December 21, 1971. On
December 16, the United States District Court for the District of Columbia held a hearing on plaintiffs' motion for a preliminary injunction, and granted the motion on a finding that the Department had not complied with NEPA. On December 20, just one day before the scheduled sale, a hearing in which the Government sought termination of the injunction before the Court of Appeals resulted in an order permitting bids to be received on condition that they remain unopened pending further order of that court. On January 13, 1972, the Court of Appeals denied the Government's motion for summary reversal of the injunction order, on the grounds that the impact statement did not contain sufficient discussion of alternatives to the proposed sale. On remand, the District Court held that the Department still had not complied with Section 4332(2)(C) of NEPA because the amended statement had not been submitted to any other Federal agencies for review, nor had the views of appropriate agencies been solicited.

There was no dispute concerning the conservation groups' standing, nor as to the appropriateness of the equitable remedy they sought. The issues in dispute concerned only the Government's impact statement.

B. Analysis

It is evident that the sale of oil lease rights should be characterized as a "major federal action" and hence should fall within the scope of the NEPA impact statement requirement. The dispute in NRDC v. Morton was not whether an impact statement was necessary, but, rather, whether the statement produced by the Government had been properly prepared within the wording of the Act.

The Court of Appeals decision denying the Government's summary reversal motion was predicated on the Government's failure to discuss adequately alternatives to their lease sale proposal. The "pertinent instruction of Congress" was Section 4332(2)(C)(iii) and Section 4332(2)(D), both of which deal with the responsibilities of Federal agencies in regard to alternatives.

Section 4332(2)(C)(iii) requires that alternatives must be included in the impact statement, while Section 4332(2)(D) calls for a study of "appropriate alternatives to recommended courses of action in any proposal which involves unreasonable conflicts." The agency is also called upon to "describe" those "appropriate alternatives," but the statute isn't clear as to who is to receive the description. The Court of Appeals, however, concluded that the impact
statement is "the proper instrument to provide this focus,"\textsuperscript{46} pursuant to guidelines promulgated by the Council on Environmental Quality.\textsuperscript{47} The Court therefore combined the requirements of Sections 4332(2)(C) and (D) to compel a detailed statement that included, not only a statement of the alternatives, but also a study and description of these alternatives. The Court stated that a sound construction of NEPA also required a presentation of the environmental risks incident to "reasonable alternative courses of action."\textsuperscript{48}

Up to this point, the Court of Appeals opinion was in keeping with the \textit{Calvert Cliffs}' substantive/procedural dichotomy and a harmonious conclusion was reached.\textsuperscript{49}

\textit{NRDC v. Morton}, however, goes on to deal with substantive considerations, while striving to remain within a procedural framework. For example, the Court held that Interior's Impact Statement was in error in declaring that one of the possible alternatives, the elimination of oil import quotas, was entirely outside its cognizance.\textsuperscript{50} The Impact Statement should have presented the environmental effects of that alternative, regardless of whether or not Interior had the power to adopt it, since Interior has the duty to discuss all "reasonably available"\textsuperscript{51} alternatives. The Court reasoned that, since Congress and the President are to take guidance from the Impact Statement,\textsuperscript{52} they should be informed by Interior of the \textit{environmental effects} of that alternative. This result was accomplished, first, by categorizing oil imports as a "reasonably available" alternative; second, by inferring that the ultimate decisionmakers might have need of such information; and, third, by limiting the required information to environmental effects.

There was evidence of further substantive considerations in \textit{NRDC v. Morton}:

We are aware that the 1953 Outer Continental Shelf Lands Act contains a finding of an urgent need for OCS development and authorization of leasing. Similarly we are aware that the oil import quota program was instituted by the President on a mandatory basis in 1959, following earlier voluntary programs ... As to both programs Congress contemplated continuing review.\textsuperscript{54}

The tone of the opinion seems to indicate that the Court would have liked to order, were it within its power, the "contemplated continuing review" by the other two branches.

It should be noted that the above examples of treatment of substantive issues were only dicta. Interior is thus required to dis-
cuss the alternatives which the Court deemed necessary, but it is in no way bound to implement, or even to recommend, the alternatives. The holding can be summarized by seven guidelines concerning the scope of the alternative provision(s) to be included in the impact statement:

1. All “reasonably available” alternatives must be discussed, whether or not the reporting agency or official can effectuate them. \(^{55}\)

2. The statement must set forth the required material in a form suitable for the enlightenment of the others concerned, and must not be dependent upon implication or subsequent justification by counsel. \(^{56}\)

3. Past determinations by Congress or the President do not eliminate the need for continuing review. \(^{57}\)

4. The discussion of environmental effects of alternatives need not be exhaustive; rather, it should be sufficient to permit “a reasoned choice of alternatives.” \(^{58}\) When these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, detailed discussion is not required. \(^{59}\)

5. When alternatives are not within the scope of authority of the responsible official, reference may be made to studies of other agencies, including other impact statements. \(^{60}\)

6. Alternatives should not be disregarded simply because they do not offer a complete solution to the problem. \(^{61}\)

7. The necessity of legislative implementation does not automatically place an alternative beyond NEPA’s scope. \(^{62}\)

These seven procedural guidelines are intermingled with the substantive matter in the court’s opinion. The court characterizes these guidelines as “a construction of reasonableness.” \(^{63}\) As a consequence of this decision a court will not actively interject itself within the area of executive discretion, as long as NEPA’s procedural requirements are followed reasonably and in good faith. \(^{64}\) It is submitted that the Court of Appeals fell just short of overstepping its own guidelines contained in *Calvert Cliffs*, because it spoke to the substantive issues of the merits of certain alternatives. Circuit Judge MacKinnon’s opinion, concurring in part and dissenting in part, concluded that the majority had in fact overstepped its limitations, though for other reasons. It was not the discussion of alternatives on their merits which disturbed him, \(^{65}\) but rather the narrowness of the procedural guidelines which had been enumerated. \(^{66}\)
Two weeks after the Court of Appeals denied the Government's motion for summary reversal of the preliminary injunction, Interior returned to District Court with an addendum to its impact statement. This time the District Court concluded that Section 4332(2)(C) still had not been complied with, because the addendum, which the court categorized as a draft statement, had not been properly circulated among the agencies, nor had the comments and views of "the appropriate Federal, state, and local agencies" been solicited. The District Court followed Calvert Cliffs' and found that impact statements must accompany proposals through the whole agency review process. The reasoning behind this decision was that "compliance to the 'fullest' possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process . . . ." To read the word "accompany" more narrowly would make the impact statement a mere formality, which was not the intent of Congress. However, in view of the fact that the motion to dissolve had been withdrawn and that an addendum had been prepared, although not yet circulated, the Court concluded that the case was moot.

NRDC v. Morton demonstrates the effectiveness of the impact statement in the courts. However, the submission and rejection of impact statements is a finite process; once the Government masters the procedural technicalities, the environmentalists may find themselves without a judicial remedy.

C. Other NEPA Cases

Calvert Cliffs' is among the most important precedents for judicial interpretation of NEPA, and NRDC v. Morton was the first opportunity for the Calvert Cliffs' Court to apply its own guidelines from that case. As is suggested above, even in the first instance of application on the merits, the Court seemed to be straining against the narrow guidelines they had set for themselves.

An interim case in the D.C. Circuit, Committee for Nuclear Responsibility v. Seaborg (hereinafter Seaborg), shows even greater frustration. The plaintiffs in Seaborg were conservation groups seeking to enjoin an underground nuclear explosion on Amchitka Island, Alaska. The District Court found, inter alia, that the AEC's impact statement satisfied all requirements of NEPA, and, based on their limited powers of review under Calvert Cliffs', denied plaintiffs' motion for a preliminary injunction. The Court of Appeals affirmed the order, but on other grounds entirely:
Our failure to enjoin the test is not predicated on a conviction that the AEC has complied with NEPA in setting forth the dangers of environmental harm. The NEPA process—which is designed to minimize the likelihood of harm—has not run its course in the courts.

While the Government's assertion of monetary damage from the injunction is not minimal, it does not weigh as heavily with us as its assertions of potential harm to national security and foreign policy—assertions which we obviously cannot appraise—and given the meager state of the record before us, we are constrained to refuse an injunction.

Thus, the court refrained from applying even its limited procedural powers, in spite of the fact that the AEC had failed to disclose several adverse reports from other Federal agencies. This is not a further restriction of the Court's power of review under NEPA. Rather, the Court is applying the long-standing "emergency doctrine," arising from the Administrative Procedure Act. Under this doctrine normal disclosure processes do not apply to matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The majority of the Seaborg Court felt constrained to accept the Government's contention that this nuclear test fell within the protected exception. The court admitted that it could not be sure that the test was not a matter of national security, and therefore the risk of an injunction could not be allowed. The Supreme Court in a memorandum decision without opinion denied appellants' application for an injunction in aid of jurisdiction. There was, however, a dissenting opinion by Justice Douglas, who would have granted the injunction so that the case could be heard on the merits. Justice Douglas felt that the Calvert Cliffs' "good faith" requirement was applicable to the Seaborg case, and that the Supreme Court should go down on record in support of the D.C. Circuit Court's position in Calvert Cliffs.

A few months after NRDC v. Morton, the District Court for the District of Columbia found itself facing another major NEPA case, Wilderness Society v. Morton. This is the first of two cases which suggest that agencies may master the procedural technicalities and hasten the need for further legislative or judicial steps. Here, the Court granted a preliminary injunction preventing the Secretary of the Interior from proceeding with a trans-Alaska pipeline until the courts could determine whether there had been compliance with
NEPA prior to the issuance of either the impact statement or the order. At the same time, the Court denied an application for intervention by a Canadian environmental group and a non-resident citizen. Because the impact statement had not yet been issued, the Court of Appeals addressed itself only to the latter point and reversed the denial of the application for intervention. Subsequently, Interior produced the Trans-Alaska Pipeline Environmental Impact Statement and, together with Interior's proof of all necessary statutory authorization and permits, this led the District Court to conclude (somewhat reluctantly) that an injunction was precluded.

This conclusion was based solely on the fact that Interior's impact statement "reasonably sets forth . . ." each of the requirements stipulated in Section 4332(C). The court noted that "It can be confidently anticipated that the final decision in this matter rests with the Supreme Court of the United States." But at the first level, at least, the Government appears to have mastered the procedural requirements enumerated in \textit{Calvert Cliffs'} and \textit{NRDC v. Morton}.

The second case which possibly reduces the impact statement's effectiveness as an environmentalist's tool is \textit{Conservation Council of North Carolina v. Froehlke} (hereinafter \textit{Froehlke}). This case was decided two weeks after the final \textit{NRDC v. Morton} District Court decision, yet the opinion makes no mention even of the earlier D.C. Circuit Court of Appeals decision. The plaintiffs in \textit{Froehlke} were seeking injunctive and declaratory relief in connection with the construction of a dam by the Army Corps of Engineers, but the impact statement prepared by the Corps was three volumes long. Although the court sought for a determinative procedural error, they were unable to find one in the Government's lengthy work-product. The judges refused to refine the substantive/procedural restrictions or to treat the Army's actions as an abuse of discretion. Even though the plaintiffs had presented evidence casting doubt on the advisability of the project, since they did not show that defendants had failed to comply with NEPA, the \textit{Froehlke} Court concluded that they were unlikely to succeed in final determination of the matter. The motion for preliminary injunction was therefore denied.

This case is not in accord with \textit{NRDC v. Morton}, and the \textit{Froehlke} Court is almost surely the one in error. Of the Corps' three volume statement, only seven pages were devoted to discussion of alternatives, and this included no discussion at all of the
environmental effects of those alternatives. In direct opposition to the D.C. Circuit Court of Appeals in *NRDC v. Morton*, the *Froehlke* Court determined that only the alternatives themselves need be included in the statement because the requirement that an agency "study, develop and describe alternatives" was not necessarily part of the impact statement. There was no indication given that the *Froehlke* Court or the Court of Appeals for the Fourth Circuit which later affirmed were aware of the earlier decision to the contrary.

Had the *Froehlke* Court followed *NRDC v. Morton*, the impact statement would have effectively delayed the Government project. The implication of this case is nevertheless critical. The Army prepared a lengthy statement which contained only one apparent flaw. Since the ground rules have now basically been determined, any agency can produce a procedurally acceptable statement with the proper amount of time and effort.

**IV. Recommendations**

NEPA has been interpreted by the Federal courts as compelling government agencies to establish strict procedures for considering the environmental consequences of proposed actions. However, it is evident that there is now a need for judicial or legislative reform in order to ensure a continued, effective forum for the consideration of environmental issues. It is submitted that judicial review of agency compliance should not be limited to merely procedural matters. Among the possibilities for such reform are the following, which are not mutually exclusive:

1. The *Calvert Cliffs'* substantive/procedural dichotomy could be re-examined and refined by the Supreme Court. The *Calvert Cliffs'* Court, in emphasizing the power of judicial review over the procedural portions of NEPA, recognized the traditional administrative law power to reverse or to vacate and remand if the agency conclusion was arbitrary or clearly not based on sufficient evidence. But, it deemphasized this limited area of substantive review in order to emphasize the importance of procedural review. Later courts may, as a result, feel constrained from declaring that an agency has overstepped its substantive discretion. To the same end, *Calvert Cliffs'* distinguished too sharply between Sections 4331 and 4332. The fact that a reviewing court cannot substitute its substantive conclusions for those of an agency does not mean that the court must limit its review to procedural technicalities. If an agency
abuses its discretion under a statute, the reviewing court, as noted in Calvert Cliffs', has a duty to halt the offensive activity. The Calvert Cliffs' Court obviously did not mean to imply that this was not so, but the over-emphasis on Section 4332 might tend to give that impression.

2. The Supreme Court could find that the Constitution, as it now exists, gives every individual a fundamental right to a healthful, enjoyable environment. If such a right were to exist, environmental considerations would weigh more heavily in the cost-benefit analysis required by NEPA, as compared, for example, to increased Government expense or time delays. The standard which the courts would apply in regard to agency abuse of discretion would also undoubtedly be more stringent. This approach was attempted by the plaintiffs in EDF v. Corps, who contended that "the right to enjoy the beauty of God's creation and to live in an environment that preserves the unqualified amenities of life" was part of the liberty protected by the Fifth and Fourteenth Amendments, and was also one of those unenumerated rights retained by the people under the Ninth Amendment. While the EDF v. Corps Court rejected this line of reasoning within the present state of the law, it agreed that such claims might eventually obtain judicial recognition even without altering the Constitution.

3. The same result could be achieved with greater speed if Congress re-evaluated and amended NEPA to make a healthful, harmonious environment a fundamental right of every individual. This would create the same considerations and stricter standards discussed above and, since the Senate has already passed the bill in this form once, it is not unreasonable to consider such an amendment as a future possibility. This is probably the most effective of the alternatives that can be reasonably foreseen in the near future.

4. Finally, there is the alternative of enacting a Constitutional amendment making a healthful, harmonious environment a fundamental right. To the extent that NEPA then infringed on the courts' attempts to enforce that right, the Act would be preempted by the Constitution. The courts would, theoretically at least, have power to review the activities undertaken by an agency to determine whether or not such activities violated the individual's right. Within the framework of current Constitutional interpretation, if such a violation were found, the Government would probably have to prove some type of compelling interest in the proposed activity. In practice, this would be similar to the current cost-benefit anal-
ysis, but with the scales tipped initially much more in favor of the individual or environmental group.

V. Conclusion

To date, NEPA has provided an effective forum in the Federal courts for environmentalists. Besides giving conservation groups standing to bring suits, the Act as interpreted by the courts forces Government agencies to study and consider the effects of their activities on the environment. The courts have the power of judicial review of Government compliance with NEPA at two stages: first, where challenged by an individual or organization with standing, the courts have made the substantive determination as to whether or not a particular project falls within the meaning of the Act; and second, the courts have determined whether the Federal agency has adequately fulfilled the procedural requirements of the Act. Most litigation in both areas has concerned the impact statement. NRDC v. Morton is an excellent example of the use of that procedural requirement as an environmentalist's tool.

While the Act was being interpreted by the courts, conservationists were frequently able to delay and occasionally to prevent Government projects which they believed to be detrimental to the environment. Now that guidelines have been enumerated in the early NEPA cases, however, there is a great likelihood that agencies will master the procedural technicalities of the Act without incorporating the Act's underlying policy into agency projects. If the Federal courts are to remain an effective forum for environmental disputes, further substantive rights in a healthy and harmonious environment must be created by Congress, by the Supreme Court, or by Constitutional Amendment.

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Footnotes

* Staff Member, Environmental Affairs.


3 See, e.g., Comment, The National Environmental Policy Act's Influence on Standing, Judicial Review, and Retroactivity, 7 Land & Water L. Rev. 115 at 121 (1972). Also, see generally, Rogers, Isaiahs
The Congress authorizes and directs that, to the fullest extent possible: (I) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

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

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

(C) 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 appropriate Federal, State, and local 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;

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

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

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

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

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.


7 The text of 42 U.S.C. §4331(a) is:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the over-all welfare and development of man, declares that it 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, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create 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.

8 The impact statement is the "detailed statement" required by 42 U.S.C. §4332(2)(C).

9 The National Environmental Policy Act is divided into two subchapters: the first, with which this note is primarily concerned is entitled "Policies and Goals," 42 U.S.C. §§4331-4335 (1970), and the second, entitled "Council on Environmental Quality," 42 U.S.C. §4341 et seq. (1970). For purposes of this note it is sufficient to say that Subchapter II provides for the establishment in the Executive Office of the President a Council on Environmental Quality and specifies the composition, duties and management of that Council.

10 The text of 42 U.S.C. §4331(b) reads:

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

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(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.


12 Id.

13 See, e.g., the language in EDF v. Corps, 327 F. Supp. at 755; Calvert Cliffs', 449 F.2d at 1112.

14 Con. Rep. No. 765, supra note 5.

15 Id.

16 Id.


18 Id. at 759.


The original Senate version of the NEPA bill included certain specified goals which the Federal Government should, as a matter of national policy, attempt to attain. The House amendment contained a general statement of policy but no specified goals.

20 The Council on Environmental Quality created by Subchapter II of NEPA, was given the duty:

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.


But this provision does not give the Council any enforcement power, should its review turn up something which it does not consider in keeping with the new national policy.

21 In administrative law, judicial review frequently goes unmentioned in an agency's enabling act. In such instances, the administrative action
is sometimes reviewable and sometimes not. See Davis, Administrative Law Text §28.01 (8th ed. 1959). The courts interpreting NEPA have limited their review to determining (1) whether the discretion exercised by the Agency was within its statutory authority, and/or (2) whether it has abused its discretion. Such limitation is not new in the administrative law area. Davis, supra at §28.02.

23 See n.3, supra.
24 See text at note 6.
25 325 F. Supp. at 752; see n.21, supra.
26 449 F.2d at 1109.


27 Calvert Cliffs', 449 F.2d at 1112.
28 Id.
29 Id. at 1115.
30 Id. at 1118.
33 Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971).
34 Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972).
36 See 1 ENVIRONMENTAL AFFAIRS 884 (1972).
37 See n.6, supra.
38 The principal case is a case in point.
42 The plaintiffs were Natural Resources Defense Council, Inc., Friends of the Earth, Inc., and Sierra Club, Inc.
43 Since NEPA's enactment, virtually all decisions have granted standing under the Act to conservation groups and individual conservationists. See e.g., the cases discussed in West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 234 (4th Cir. 1971).

For a succinct treatment of standing under NEPA, see 7 Land & Water L. Rev. 115 (1972).
Factors that are to be weighed in considering a motion for preliminary injunction are:

. . . (a) a substantial question, (b) probability of success on the merits, (c) balancing of injuries to parties, (d) and the public interest, which is of paramount importance.


That a defect in an impact statement presents a justiciable question and is a basis for equitable relief was determined in earlier cases. See e.g., EDF v. Corps, 325 F. Supp. at 753.

See ns. 31–35 and accompanying text, supra. In view of the courts' liberal interpretation to date of activities constituting "major federal actions," it seems obvious that activity involving off-shore oil wells would fit the bill.

NRDC v. Morton, 458 F.2d at 833 n.12.

The CEQ guidelines state:

A rigorous exploration and objection evaluation of alternative actions that might avoid some or all of the adverse effects is essential. Sufficient analysis of such alternatives and their costs and impacts on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.


For an opposing view handed down almost simultaneously, see Froehlke, 340 F. Supp. 222.

NRDC v. Morton, 458 F.2d at 834.

I d.

Id. at 835.

Id. at 834.

Id. at 836.

Id. at 834.

Id. at 836.

Id.

Id.

Id. at 838.

Id. at 836.

Id.

Id. at 837.

Id.

Id. at 838.

Id. at 840 (concurring opinion).

Id. at 839–46 (concurring opinion).


Id.
The court did handle another NEPA case in the interim, Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971) (hereinafter cited as Seaborg). Other cases cited Calvert Cliffs’ before NRDC v. Morton did so, but for issues other than the substantive/procedural dichotomy. The court in Lathan v. Volpe, 455 F.2d at 1121, an action to halt construction of a highway until certain statutory requirements were met, cited Calvert Cliffs’ as authority for the proposition that an impact statement should be submitted in the planning stage. EDF v. TVA, 339 F. Supp. at 811, borrowed language from Calvert Cliffs’ defining the NEPA phrase “to the fullest extent possible.”

In other words, the court recognized the possibility that there had been a violation of 42 U.S.C. §4332(2)(C)(ii) and (iii).

Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917, 920 (appendix to dissenting opinion), aff’d mem., 463 F.2d 796 (D.C. Cir. 1971) (hereinafter cited as Schlesinger).


Schlesinger, 404 U.S. at 917.

Id. at 918 (dissenting opinion).


Wilderness Society, — F. Supp. —, 4 ERC at 1467.

Id.

Froehlke, 340 F. Supp. 222.

Id. at 226.

The Froehlke Court cites Seaborg as authority for this dichotomy.

Id. at 225.

Id. at 228.


Calvert Cliffs’, 449 F.2d at 1115.

Id. at 1112.

325 F. Supp. 728.

Id. at 739.