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Environmental Law -- National Environmental Policy Act of 1969 -- Procedural Requirements of the Act Must Be Followed in Good Faith -- Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission

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CASE NOTES

Environmental Law—National Environmental Policy Act of 1969—Procedural Requirements of the Act Must Be Followed in Good Faith—*Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission.*[1]—In late 1968, the Atomic Energy Commission (AEC) granted a construction permit to the Baltimore Gas and Electric Company for construction of the Calvert Cliffs Nuclear Power Plant. Concern over the potential environmental damage that the plant might cause led the Calvert Cliffs' Coordinating Committee, composed of local civic groups, the Sierra Club and the National Wildlife Federation, to seek review of four AEC procedural rules[2] and their application in the granting of the construction permit. In substance, the petitioner charged that the AEC's procedural rules constituted a violation of the National Environmental Policy Act (NEPA).[3] The Court of Appeals for the District of Columbia, in holding that the Commission's rules and their application did not conform to the provisions of NEPA, remanded the case to the Commission for rule changes, including further consideration of the environmental impact of the Calvert Cliffs Nuclear Power Plant.[4]

The *Calvert Cliffs'* decision marks the first time[5] that a federal court of appeals has reviewed the application of NEPA to the AEC. Of more importance, however, the court's interpretation and rigorous application of NEPA suggest, indeed compel, the belief that other federal

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[1] 449 F.2d 1109 (D.C. Cir. 1971).

[2] 10 C.F.R. § 50, App. D, 246-50 (1971). The court's summary of these rules is found in 449 F.2d 1109, 1116-17 (D.C. Cir. 1971):

> (1) Although environmental factors must be considered by the agency's regulatory staff under the rules, such factors need not be considered by the hearing board conducting an independent review of staff recommendations, unless affirmatively raised by outside parties or staff members. (2) Another part of the procedural rules prohibits any such party from raising non-radiological environmental issues at any hearing if the notice for that hearing appeared in the Federal Register before March 4, 1971. (3) Moreover, the hearing board is prohibited from conducting an independent evaluation and balancing of certain environmental factors if other responsible agencies have already certified that their own environmental standards are satisfied by the proposed federal action. (4) Finally, the Commission's rules provide that when a construction permit for a facility has been issued before [National Environmental Policy Act] compliance was required and when an operating license has yet to be issued, the agency will not formally consider environmental factors or require modifications in the proposed facility until the time of the issuance of the operating license.

[3] 42 U.S.C. § 4321 et seq. (1970).

[4] The AEC has promulgated new procedural rules, as mandated by the court, in 36 Fed. Reg. 18071 & 19158 (1971). They are discussed in Landau, A Postscript to *Calvert Cliffs'*, supra p. 705.

[5] In a previous decision involving NEPA's application to the AEC, this same court of appeals held the case not yet ripe for review. Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970).

agencies must now similarly reform their procedures and decision-making processes. In effect, the *Calvert Cliffs'* decision further expands federal recognition of national environmental policy. Environmental criteria, having statutorily germinated in congressional committees, have now matured through the judicial system and will persist in assuming their due importance in all "major Federal actions."[6]

The grounds for this decision are uniquely founded upon NEPA.[7] This note will first examine the court's application of NEPA's provisions to the AEC. In that context, the required degree of agency compliance under the Act will be discussed; the mechanics of compliance in regard to all federal agencies will then be analyzed in terms of *when* the provisions of NEPA are to be considered and, once considered, *how* the various data are to be collected and evaluated. Following this examination of NEPA's application in the principal case and in general, the decision's implications for future federal agency actions and reviewing courts will be discussed. Finally, the expanded opportunity for reviewing courts to compel agency compliance with the Act will be elucidated.

The proper application of NEPA to agency actions requires initially a determination of the degree of compliance demanded by the Act. The question of whether the statute is mandatory, or merely hortatory, in intent influenced the court's determination of the adequacy of AEC actions. Since the statute manifests both of these intentions, the court in *Calvert Cliffs'* structurally divided NEPA into two parts. Section 101, the court found, manifests the philosophical, substantive basis of the Act through a general statement of statutory goals:[8]

> Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities,

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[6] 42 U.S.C. § 4332(2)(C) (1970).

[7] The court deals with no other statute in its decision. In Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971) the court had to deal with the effects of several statutes on an agency decision. NEPA's role in *Zabel* was minimal, as the court preferred to emphasize other statutes.

[8] These goals are set forth in 42 U.S.C. § 4331(b) (1970): They are intended to:
(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.

> so that environmental costs and benefits will assume their proper place along with other considerations.[9]

In this respect, NEPA's goals reflect the nation's growing awareness that environmental resources, once freely expended, now need vigilant preservation. The measure of compliance with section 101 is that the federal government must "use all *practicable* means and measures"[10] at its disposal to achieve this compliance. The court indicated that this provision "may not require particular substantive results in particular problematic instances."[11] Thus the *Calvert Cliffs'* court concluded that Section 101 of the Act is general and discretionary.

In contrast, the court determined that Section 102 embodies the critical procedural provisions of the Act. These requirements, the court noted, reflect congressional concern in more specific areas, such as "radiation hazards . . . [and] thermal pollution."[12] The measure of agency compliance under section 102 is that it should be "to the fullest extent possible."[13] The procedures outlined in the section are specific, not general; mandatory, not discretionary.[14] Thus the court emphasized "the necessity to separate the two, substantive and procedural, standards."[15]

The AEC claimed that its own procedural rules satisfied the general, substantive mandates of the Act. The court agreed that the *substantive* provisions embodied in section 101 do allow broad agency discretion. However, the court ruled that full compliance with the *procedural* provisions of section 102 was compulsory, desirable, and subject to close judicial scrutiny. The court's rigid observance of these procedural requirements formed the basis of the decision.

On the surface, the application of NEPA's procedures to agency decision-making processes appears to be uncomplicated. The Act basically requires that any agency action be preceded by a full consideration[16] of all environmental factors and alternatives as they exist at present or may exist in the future. Once these factors are identified and catalogued, they are to be balanced[17] against other criteria, such

[9] 449 F.2d at 1112.

[10] 42 U.S.C. § 4331(a) (1970) (emphasis added).

[11] 449 F.2d at 1112.

[12] S. Rep. No. 296, 91st Cong., 1st Sess. 4 (1969). These two specific areas are clearly under the aegis of the AEC.

[13] 42 U.S.C. § 4332 (1970).

[14] 449 F.2d at 1112. But see Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970). In Ely v. Velde, 321 F. Supp. 1088 (E.D. Va. 1971), the court ruled that NEPA was discretionary vis-à-vis the Safe Streets Act. 42 U.S.C. § 3731 (1970). The *Calvert Cliffs'* court noted that the discretionary nature of NEPA was derived from a consideration of the substantive goals of NEPA only, and not from the Act's procedural mandates. 449 F.2d at 1115 n.13. It would appear that this interpretation is correct. Contrary decisions may perhaps be excused on judicial inexperience in assessing compliance with NEPA. Nonetheless, the present court should have emphasized more strenuously its disagreement with such decisions.

[15] 449 F.2d at 1114 n.10.

[16] 42 U.S.C. § 4332(2)(B) (1970).

[17] 449 F.2d at 1113.

as economic and technical feasibility. Despite their appearance of simplicity, however, the procedures are in fact complex because in the balancing test, numerous environmental factors must first be ascertained, then weighted equal in importance to other factors. Moreover, NEPA's provisions are not, nor could they be, intended to detail the procedures for each of the multifarious activities regulated by federal agencies. Instead, the Act attempts to effect its purpose by creating a framework structured from various procedural requirements and made cohesive by a matrix of good faith.

Before deciding *how* to apply NEPA's procedures, agencies as well as courts must first determine *when* they apply. Two criteria are primary in this determination: (1) the stage of project completion as of the Act's effective date, and (2) the need for further agency approval of the project subsequent to the Act. For convenience of analysis, a project may be considered to move through three stages: it may be (a) fully completed, requiring no further agency approval; (b) partially completed and requiring further agency approval; or (c) not yet initiated and requiring full agency approval. Clearly, when a project has yet to be initiated, agency approval must conform to NEPA.[18] When a project has been fully completed, NEPA is inapplicable. The most complex and troublesome situation is that of partial completion. The Calvert Cliffs Nuclear Power Plant fell within the latter category.

The *Calvert Cliffs'* court attempted to circumvent the problems inhering in the partial completion situation by regarding the AEC's licensing activities as an additional stage which other agencies do not have to consider. Judge Wright noted that "there are two, distinct stages of federal [AEC] approval, one occurring before the Act's effective date and one after the date."[19] That is, the granting of a construction permit for the nuclear plant preceded the granting of an operating license. Since, in *Calvert Cliffs'*, the operating license was a separate stage of agency action subsequent to NEPA's effective date, the court ruled that the AEC was required to review the entire project in accordance with the Act. It is submitted, however, that this "two-stage" distinction was unnecessary and undesirable: unnecessary because the remainder of the court's opinion adequately justifies NEPA's application and enforcement without resorting to this two-stage distinction; undesirable because it artificially attempts to distinguish AEC procedures from those of other federal agencies.[20] Most importantly, the distinction detracts from a proper understanding of NEPA's application to partially completed projects.

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[18] "[A]ny hearing held between January 1, 1970 and March 4, 1971 which culminates in the grant of a permit or license is a federal action taken after the Act's effective date." Id. at 1120 n.25.

[19] Id. at 1129 n.43.

[20] It would appear that NEPA does not support Judge Wright's distinction. The Act encompasses "Federal actions" without distinguishing the diverse procedures of the several agencies. 42 U.S.C. § 4332(C) (1970).

Such an understanding may be acquired by looking to the language of the statute. NEPA speaks in terms of "creating and maintaining" a favorable environment and "preventing and eliminating" damage. "This dual focus . . . [of] rectifying past instances of environmental abuse as well as . . . [of] preventing future abuse"[21] is recognized by the Council on Environmental Quality Interim Guidelines:

> 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 [NEPA] on January 1, 1970.[22]

A critical distinction must be drawn, however, between an agency decision to investigate environmental impacts and a decision ordering the identification and amelioration of harmful impacts.[23] The court's two-stage analysis of AEC decisions unfortunately blurs the distinction. However, the remainder of the opinion indicates that NEPA does indeed apply to unfinished projects under the authority of other federal agencies which require further action:

> Although the Act's effective date may not require instant compliance, it must at least require that NEPA procedures, once established, be applied to consider prompt alterations in the plans or operations of facilities approved without compliance.[24]

As the analysis suggests, the stage at which NEPA should be held to apply should not be difficult to discern: "[T]he degree of the completion of the work should not inhibit the objective and thorough evaluation of the environmental impact of the project as required by NEPA."[25] If a project has been only partially completed and it requires further agency approval, then NEPA compels evaluation of its environmental impact:

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[21] Donovan, The Federal Government and Environmental Control: Administrative Reform on the Executive Level, 12 B.C. Ind. & Com. L. Rev. 541, 546 [hereinafter cited as Donovan].

[22] 36 Fed. Reg. at 7727 (1971), as quoted in the court's opinion, 449 F.2d at 1129 n.43.

[23] For an example of the proper understanding, see Sierra Club v. Hardin, 325 F. Supp. 99, 126 n.52 (D.C. Alas. 1971): "Accepting this evidence at its face value, it nevertheless goes to the merits of the impact statement, not the threshold question of whether the NEPA reporting requirements are applicable."

[24] 449 F.2d at 1121.

[25] Environmental Defense Fund, Inc. v. Army Corps of Eng'rs, 325 F. Supp. 728, 746 (E.D. Ark. 1970). In that case, the project was already two-thirds completed. In Environmental Defense Fund, Inc. v. Army Corps of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971), a canal had been authorized in 1942 and begun in 1964. The construction was one-third completed on the canal and one-sixth completed overall. Nevertheless, the court held that NEPA was applicable.

> Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.[26]

Of critical importance at this stage is the evaluation itself: the balancing and consideration of all known and suspected variables.

One of NEPA's most important evaluation procedures is the requirement that an agency "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 [or impact] statement. . . ."[27] This document, the most complex requirement of the Act, should contain the environmental impact data and alternatives to be considered and weighed by the agency in "a rather finely tuned and 'systematic' balancing analysis. . . ."[28] The impact statement "aid[s] in the agencies' own decision making process and . . . advise[s] other interested agencies and the public of the environmental consequences of planned federal action."[29] As such, it serves an evidentiary function for reviewing parties, including the courts and the public, to determine whether the consideration and balancing process adequately transpired.[30]

If the impact statement is to fulfill the purposes of the consideration and balancing process, quantifiable data, objectively compiled, must be made available. The several components of both sides of the balance, including the costs and benefits of all factors, must be individually evaluated. An agency can and, indeed, must request aid from other departments in this process.[31] Once compiled, the data must be substituted for the previously unknown imponderables in the algebraic balance. Absence of this data constitutes grounds for judicial intervention to enforce NEPA.[32]

The Act's standard, procedurally, is "to the fullest extent possible." Some courts have already investigated research material in the impact statement to insure adequate conformance with this stan-

[26] 36 Fed. Reg. at 7727 (1971), as quoted in the court's opinion, 449 F.2d at 1129 n.43.

[27] 42 U.S.C. § 4332(2)(C) (1970).

[28] 449 F.2d at 1113.

[29] Id. at 1114.

[30] The court stated: "Moreover, by compelling a formal 'detailed statement' and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own." Id. at 1114. See also Environmental Defense Fund, Inc. v. Army Corps of Eng'rs, 325 F. Supp. 749, 759 (E.D. Ark. 1971); Peterson, An Analysis of Title I of the National Environmental Policy Act of 1969, 1 ELR 50035, 50038 n.18 (1971) [hereinafter cited as Peterson].

[31] 42 U.S.C. §§ 4332(2)(A) and (C) (1970).

[32] This is the view of 42 U.S.C. § 4332(B) (1970) taken by the court. 449 F.2d at 1115.

dard.[83] In *Daly v. Volpe*,[84] the plaintiffs were denied a preliminary injunction to prevent construction of a bypass of an interstate highway. Research reports from sources other than the involved federal agency (Department of Transportation) were permitted to satisfy the impact statement requirement of NEPA. A similar substitution for an agency's impact statement was allowed in *Sierra Club v. Hardin*,[85] where plaintiffs had challenged the action of the Secretary of the Interior in approving a site for mill construction. In *Calvert Cliffs'*, the AEC did not substitute research reports from other sources in the impact statement, but it did allow outside certifying agencies to perform the required balancing process during the hearings stage of the investigation by accepting their determinations of environmental damages and benefits. This substitution was condemned by the court,[86] which suggests that substitution for the impact statement violates the Act. Thus the *Calvert Cliffs'* court indicates that to accept "substantial compliance"[87] instead of demanding "strict compliance" with regard to documentation from the proper party is an underestimation and misinterpretation of NEPA. Consequently, while quantification of the value of a stream or the cost of restricted recreational facilities appears to be a futile, theoretical exercise, courts have enforced NEPA, and will continue to do so in light of *Calvert Cliffs'*, by requiring a close analysis of these factors.[88]

Another procedural element which the *Calvert Cliffs'* decision may affect concerns Section 102(C)(iii) of NEPA. That section requires that "alternatives to the proposed action"[89] be included in the impact statement. Section 102(D) specifically requires an agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. . . ."[90] The *Calvert Cliffs'* court determined that the environmental impact of these alternatives must be considered and balanced as carefully as was the original project:

> NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligation—consider alternatives to its actions which would reduce environmental

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[83] See Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1403 (D.D.C. 1971): "The adequacy of the research should be judged in light of the scope of the proposed program and the extent to which existing knowledge raises the possibility of potential adverse environmental effects." This court proceeded to construct a "responsible executive test" for determining the adequacy.

[84] 326 F. Supp. 868 (W.D. Wash. 1971).

[85] 325 F. Supp. 99 (D. Alas. 1971).

[86] 449 F.2d at 1123.

[87] 326 F. Supp. 868, 870 (W.D. Wash. 1971).

[88] Environmental Defense Fund, Inc. v. Army Corps of Eng'rs, 325 F. Supp. 749, 759-61 (E.D. Ark. 1971), as cited approvingly in *Calvert Cliffs'*, 449 F.2d at 1121 n.28.

[89] 42 U.S.C. § 4332(2)(C)(iii) (1970).

[90] 42 U.S.C. § 4332(2)(D) (1970).

> damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual. Clearly, it is pointless to "consider" environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings.[41]

A final element considered in the *Calvert Cliffs'* decision involves the role of other statutes and agencies in relation to NEPA. In the compilation of environmental data, a federal agency does not act in a vacuum. Other statutes and other agencies' actions interact in a federal agency decision. For example, both NEPA and the Federal Water Pollution Control Act[42] are relevant to any AEC decision which affects the environment. Some courts have somewhat illogically concluded that NEPA is totally "discretionary"[43] and thus should yield to the demands of less discretionary statutes.[44] This interpretation, in light of the *Calvert Cliffs'* decision, appears to be in conflict with the mandatory provisions of NEPA. Moreover, in *Calvert Cliffs'*, the AEC "indicate[d] that it [would, for purposes of the impact statement,] defer totally to water quality standards devised and administered by state agencies and approved by the federal government under the Federal Water Pollution Control Act."[45] The court concluded that the AEC could not "abdicat[e]"[46] its function and rely on the standards of other agencies, whose role should only be supplemental to the primary responsibility of the AEC.[47]

Thus the court unambiguously defined NEPA's relation to other statutes and agency functions. This delineation is critical if NEPA's substantive goals are to be attained. However, despite the correctness of the decision, the opinion obscures its rationale by meandering

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[41] 449 F.2d at 1128. See also Peterson, supra note 30. One court has suggested that some alternatives need not be explored unless sufficient research material recommends such action. Environmental Defense Fund, Inc. v. Army Corps of Eng'rs, 325 F. Supp. 749, 760 (E.D. Ark. 1971).

[42] 10 C.F.R. § 50, App. D, at 249 (1971).

[43] See Ely v. Velde, 321 F. Supp. 1088, 1093 (E.D. Va. 1971).

[44] Id.

[45] 449 F.2d at 1122.

[46] 449 F.2d at 1124. The court correctly emphasized that "[c]ertifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing remains to be done." Id. at 1123. The certifying agencies may, of course, aid the federal agency but the latter has the ultimate responsibility of consideration and balancing. If an agency's standards are more strict than that of the certifying agency, *Calvert Cliffs'* declares that the stricter standards should be enforced. Id. at 1124.

[47] Id. at 1126. In Kalur v. Resor, 335 F. Supp. 1, Civil No. 1331, 3 E.R.C. 1458 (D.D.C. Dec. 22, 1971), the court held that the Army Corps of Engineers was required to submit an environmental impact statement under NEPA and that it could not defer to the water quality standards of other agencies. The *Kalur* court approvingly cited *Calvert Cliffs'* in delineating a parallel between the Corps' procedures and those of the AEC.

through relevant legislative hearings which are, in some instances, unclear as to NEPA's proper relationship to other statutes.[48] Admitting that the legislature's "analysis does muddy the waters somewhat,"[49] the court concluded, however, that "[i]n cases such as this one, the most we should do to interpret clear statutory wording is to see that the *overriding purpose* behind the wording supports its plain meaning."[50] That purpose is defined by the mandatory measure of compliance with NEPA's procedural provisions, "to the fullest extent possible." It is submitted that more reliance by the court on NEPA's language, and less on the legislative hearings, would have clarified the relation between NEPA and other statutes and agencies.

NEPA requires that, once prepared, the impact statement must be inserted into the decision-making processes, that is, the consideration and balancing processes: "[A]t a minimum . . . such information . . . will alert the President, the Council on Environmental Quality, the public, and, indeed, the Congress, to all known *possible* environmental consequences of proposed agency action."[51] The philosophical basis for the balancing process is admirably enunciated by the *Calvert Cliffs'* court: "The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken."[52]

Within this philosophical framework, difficult decisions must be made, particularly with respect to partially completed projects which need further agency approval. In part, these decisions are dictated by the quantified data available, and, to the extent that this objectively compiled data provides answers to environmental questions, the latitude of agency decisions becomes necessarily restricted. Moreover, these decisions must be made irrespective of the degree of completion or the amount of funds already expended, for NEPA mandates that the agency must minimize additional environmental damage "to the fullest extent possible."

It is most apparent that the agencies' good faith, the cohesive matrix of the entire balancing process, is of paramount importance. In *Environmental Defense Fund v. Corps of Eng'rs of U.S. Army*, the court concluded: "[a]ny reasonable procedure would be adequate so long as the 'detailed statement' requirements of the Act, along with the other applicable provisions of § 102, are complied with."[53] The court in *Calvert Cliffs'* went further, mandating that "a purely mechanical compliance with the particular measures required . . . will

[48] See id. at 1125-26. Excerpts from those hearings may be found in 115 Cong. Rec. 40420 (1969). It is to these sections of the hearings that the court directs its attention in *Calvert Cliffs'*.

[49] 449 F.2d at 1126.

[50] Id. at 1127.

[51] Environmental Defense Fund, Inc. v. Army Corps of Eng'rs, 325 F. Supp. 749, 759 (E.D. Ark. 1971); 42 U.S.C. § 4332(2)(B) (1970).

[52] 449 F.2d at 1123.

[53] 325 F. Supp. at 757.

not satisfy the Act if [it does] not amount to full *good faith consideration* of the environment."[54] Support for this additional demand for good faith is found in the Council on Environmental Quality guidelines, whose objectives are "to assist agencies in implementing not only the letter, but the *spirit* of the Act."[55]

The *Calvert Cliffs'* court sarcastically questioned the presence of the AEC's good faith:

> It is difficult to credit the Commission's argument. . . . And, in any event, the obvious sense of urgency on the part of Congress should make clear that a transition, however "orderly," must proceed at a pace faster than a funeral procession.[56]

Judge Wright also chastised the Commission for intentionally delaying consideration of environmental data until the major part of the construction had been completed. Finally, the court accused the AEC of failing to fulfill its mandated responsibility:

> NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission.[57]

In assuming the responsibility for examining agency "good faith," the court recognized a new role for the judiciary, a role which is implicit in the Act. The source of a court's enforcement power of NEPA lies in the Act's procedural provisions, which establish the requirements for agency compliance. The *Calvert Cliffs'* court exhaustively reiterated the mandatory nature of these provisions. The opinion demonstrates an equally cogent willingness to scrutinize agency actions when the absence of good faith is suspected. The rigor of this scrutiny is attested to by the tone of the decision. Sarcastic and strident language punctuates the holding, and anger and rebuke are manifested ubiquitously. The lack of good faith compels the court "[in its view,] to control, at long last, the destructive engine of material 'progress.' "[58]

Beyond defining the duties and responsibilities of the AEC in this case, the *Calvert Cliffs'* court attempted to construct guidelines for future agency and court actions. For example, "the Commission should consider very seriously the requirement of a temporary halt in construction pending its review and the 'backfitting' of technological

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[54] 449 F.2d at 1112-13 n.5 (emphasis added).

[55] 36 Fed. Reg. at 7724 (1971), as quoted in the court's opinion 449 F.2d at 1118 n.19 (emphasis added).

[56] 449 F.2d at 1121-22.

[57] Id. at 1119.

[58] Id. at 1111.

innovations."[59] In fact, a previous decision by the court contained the harbinger of the present decision:

> If the Commission persists in excluding such evidence, it is courting the possibility that if error is found a court will reverse its final order, condemn its proceeding as so much waste motion, and order that the proceeding be conducted over again in a way that realistically permits de novo consideration of the tendered evidence.[60]

The Commission involved in that decision was also the AEC. Thus the present decision could not have surprised the AEC nor others who accurately predicted the results of a proper interpretation of NEPA.[61] Quite naturally, the *Calvert Cliffs'* court advocated a new role for a reviewing court; one based upon the mandatory procedural provisions of NEPA and focusing on the involved federal agency's requisite good faith.

Calvert Cliffs' focused upon the procedural standards of NEPA and the statutory mandate that they be enforced to "the fullest extent possible." In rigorously observing this standard, the *Calvert Cliffs'* court outlined the proper method and measure of compliance with respect to the mechanics of the consideration and balancing process. More importantly, the court emphasized the need for the Atomic Energy Commission, and, by implication, that of other federal agencies, to act in good faith in following the Act's procedural mandates. The impact of the good faith requirement extends not only to the role of the agency but also to that of the reviewing court. In this respect, the decision suggests that limitations imposed on the enforcing court by the "discretionary" substantive provisions of the Act may be overcome when the good faith of the agency is suspect.

As has been stated metaphorically, NEPA has gone through a maturation process. The ultimate effect of the court in this decision is the hastening of that maturity:

> But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. . . . Our duty, in short, 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.[62]

Overall, the *Calvert Cliffs'* court has given strong direction to the Atomic Energy Commission and other federal agencies to which NEPA applies.

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[59] Id. at 1128.

[60] Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524, 526 (D.C. Cir. 1970).

[61] See Donovan, supra note 21.

[62] 449 F.2d at 1111.