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Case Note: Environmental Law - Harlem Valley Transportation Association v. Stafford, 500 F.2d 328 (2d Cir. 1974)

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ENVIRONMENTAL LAW—Draft Impact Statements Under the National Environmental Policy Act—The Interstate Commerce Commission as the Responsible Agency Must Make the Threshold Determination of Whether an Environmental Impact Statement is Required; If the Statement is Required, the Commission Staff Must Prepare and Circulate a Draft Impact Statement Prior to a Hearing Before an Administrative Judge. *Harlem Valley Transportation Association v. Stafford*, 500 F.2d 328 (2d Cir. 1974).

In 1973, there were several proceedings pending before the Interstate Commerce Commission (ICC) wherein the agency was asked to approve the abandonment of all or portions of railroad lines in the Northeast.¹ Plaintiffs, a group of public interest associations, business firms, and individuals who resided in the Harlem Valley,² brought suit in the United States District Court for the Southern District of New York to enjoin the ICC from acting upon those

1. The proceedings were brought pursuant to 49 U.S.C. §§ 1(18)-(20) (1970).

2. The issue of the plaintiffs' standing was contested in the district court but not on appeal. The assertions by the individual plaintiffs that because of their limited funds they would be unable to present a complete analysis of environmental factors involved, that they would suffer from increased noise and air pollution caused by the replacement of trains by trucks, and that they would suffer economic injury and personal inconvenience were found to confer standing pursuant to *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), and *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Sierra* the Court found that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* at 734. Plaintiff organizations, such as the National Resources Defense Council, had standing to sue on behalf of their affected members pursuant to *Sierra* because of their interest and expertise in environmental policy implementation, satisfying the dictates of *Baker v. Carr*, 369 U.S. 186 (1962), by lending the required adverseness that would clarify the issues before the court. *Harlem Valley Transp. Ass'n v. Stafford*, 360 F. Supp. 1057, 1064-65 (S.D.N.Y. 1973), *aff'd*, 500 F.2d 328 (2d Cir. 1974). See generally 40 BROOKLYN L. REV. 421 (1973). The chairman of the ICC, George Stafford, in both his individual and designated official capacity, was made codefendant with the ICC.

applications,³ claiming that they or their members would suffer inconvenience and economic hardship if rail service were terminated.⁴ They contended that the ICC had failed to comply with the National Environmental Policy Act (NEPA)⁵ in determining whether to approve the abandonment of rail service.⁶ A single judge enjoined the ICC approval, holding that the Commission must determine at the outset of an abandonment proceeding whether "major federal actions significantly affecting the quality of the human environment" were involved.⁷ Such a "threshold determination" would require the ICC staff to prepare an environmental impact statement under NEPA.⁸ If such a statement were required, the ICC staff would have to prepare a draft environmental impact statement prior to any hearing on the proposed abandonment.⁹

3. *Harlem Valley Transp. Ass'n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973).

4. *Id.* at 1064.

5. 42 U.S.C. §§ 4321-47 (1970) [hereinafter cited as NEPA]. See generally F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* (1973); Seeley, *The National Environmental Policy Act: A Guideline for Compliance*, 26 VAND. L. REV. 295 (1973). The plaintiffs complained that NEPA § 102(2)(C), in particular, had not been complied with by the ICC. See note 15 *infra* for the text of section 102(2)(C).

6. 360 F. Supp. at 1060-61.

7. *Id.* at 1066.

8. That a railroad abandonment proceeding could require the preparation of an environmental impact statement was made clear in *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972). In that case the district court decided that an order of the ICC authorizing abandonment of an entire railroad line was invalid because of the failure of the ICC to prepare a statement. The Council on Environmental Quality (CEQ), discussed at note 26 *infra*, had issued guidelines concerning the circumstances that might require preparation of draft impact statements. 35 Fed. Reg. 7390-93 (1970), *revision proposed*, 36 Fed. Reg. 1398-1402, *guidelines published*, 36 Fed. Reg. 7724-29 (1971). The court found these guidelines inadequate, basing its decision on the ICC's determination that railroad abandonment proceedings could constitute "major Federal actions significantly affecting the quality of the human environment." 337 F. Supp. at 158, *citing ICC Notice of Proposed Rule Making: Implementation of National Environmental Policy*, 36 Fed. Reg. 10807, 10809 (1971).

9. 360 F. Supp. at 1060-61.

The United States Court of Appeals for the Second Circuit affirmed,¹⁰ determining that the ICC staff had to participate in making the threshold determination and in preparing the statement if required.¹¹ Further, the court held that the ICC's environmental impact statement must accompany the abandonment proposal through the review process, which included hearings.¹²

NEPA was enacted as a statement of federal attitude toward the protection of the environment.¹³ It was designed to induce federal leadership in the battle to protect and enhance the quality of the national environment.¹⁴ All federal agencies were mandated to institute procedures and policies which were in accord with the national environmental goals set out in NEPA.¹⁵

10. *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974), *aff'g* 360 F. Supp. 1057 (S.D.N.Y. 1973).

11. *Id.* at 336-37.

12. *Id.* at 337.

13. As set forth in NEPA § 101(b), 42 U.S.C. § 4331(b) (1970), the goals of the federal environmental policy are 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 aesthetically 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."

14. Exec. Order No. 11,514, 35 Fed. Reg. 4247 (1970).

15. *Id.* The basic implementing provision of NEPA is section 102 which provides, in pertinent part: "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall . . . (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

Fundamental to the purpose of NEPA are the procedural provisions of section 102, which were included in the Act to ensure that federal agencies do in fact make "exploration and consideration of environmental factors an integral part of the administrative decision-making process."¹⁶ The language of section 102 indicates that it applies to "all agencies of the Federal Government."¹⁷ There can be no doubt that the ICC is included within the ambit of the statute. Indeed, in 1971 the ICC issued a notice of proposed rule-making for implementation of national environmental policy wherein it not only recognized its duty to fulfill the requirements of NEPA but also promised to take the necessary steps to implement that duty:

This Commission must and will implement the directives of the NEPA and related pronouncements. We must and will investigate the methods of meeting these statutory directives to create a more meaningful relationship between this Commission's regulatory responsibilities and the Nation's battle to save the environment. Our regulatory duties are broad, and we are daily confronted with a sweeping variety of cases We must and will, therefore, adopt practical procedures that are adaptable to the wide variety of cases we handle.¹⁸

Under section 102(2)(C), an environmental impact statement is required whenever a proposal before a federal agency constitutes a

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 statement and the comment 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" 42 U.S.C. § 4332 (1970).

16. 337 F. Supp. at 160. See also *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

17. See note 15 *supra*.

18. 36 Fed. Reg. 10807 (1971).

“major federal action” which will have a “significant” effect on the environment.¹⁹ There has been continuous litigation involving the interpretation of this provision, due in large part to the language of the section, which offers little interpretative guidance for those charged with making the threshold decision.²⁰

The Court of Appeals for the District of Columbia in *Calvert Cliffs' Coordinating Committee v. AEC*,²¹ one of the first cases involving construction of NEPA to reach an appellate court, found section 102(2)(C) to constitute a mandate to consider “environmental values at every distinctive and comprehensive stage of the [agency's] process”²² This interpretation was relied on in a subsequent Second Circuit case, *Greene County Planning Board v. Federal Power Commission*.²³ Here the Federal Power Commission (FPC), in connection with an application by the Power Authority of the State of New York (PASNY) to construct a power complex, conceded that a major federal action significantly affecting the environment was involved. Nevertheless, the FPC contended that its staff was not required to prepare an impact statement since the statement prepared by PASNY would suffice for a hearing before an administrative judge.²⁴ Having determined that

19. 42 U.S.C. § 4332(2)(C) (1970).

20. See, e.g., *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). See generally Greis, *The Environmental Impact Statement: A Small Step Instead of a Giant Leap*, 5 URBAN LAW. 264 (1973); 26 S.C.L. REV. 119 (1974).

21. 449 F.2d 1109 (D.C. Cir. 1971).

22. *Id.* at 1119. The Atomic Energy Commission (AEC) had issued a permit for the construction of a power plant prior to the effective date of NEPA. Although the operating license had not yet been issued, the AEC rules prohibited any consideration of environmental issues unless raised by one of the parties and specifically required that no consideration be given to environmental factors by its hearing boards at proceedings officially noticed before March 4, 1971. The court concluded that the rules contravened the directives of section 102(2)(C), and that: “[a] full NEPA consideration of alternatives in the original plans of a facility, then, is both important and appropriate well before the operating license proceedings. It is not duplicative if environmental issues were not considered in granting the construction permit.” *Id.* at 1128.

23. 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).

24. 455 F.2d at 418-19.

the hearing constituted an existing agency review process,²⁵ the court found that the then existing Council on Environmental Quality (CEQ)²⁶ guidelines²⁷ “[flew] in the face of Section 102(2)(C) of NEPA which explicitly requires the agency’s *own* detailed statement to ‘accompany the proposal through the existing agency review processes.’ ”²⁸ Thus, the FPC was required to prepare an environmental impact statement prior to the hearings.²⁹

The court in *Greene County* also reasoned that statements submitted by applicants, such as PASNY, would not satisfy NEPA’s requirements³⁰ because of “the potential, if not likelihood” of the applicant’s statement being based upon “self-serving assumptions,”³¹ and the probability that many intervenors would have limited financial resources and expertise and would therefore be unable to present a complete analysis of all the environmental factors involved.³²

Although the ICC was fully aware of the holding of *Greene*

25. *Id.* at 422.

26. The Council on Environmental Quality (CEQ) was established pursuant to NEPA, 42 U.S.C. § 4342 (1970). Composed of three members appointed by the President, the Council is charged with various duties including development and recommendation to the President of national policies to improve environmental quality, conduct of research and investigations relating to the environment, review and appraisal of programs of the federal government in view of national environmental policy, and assisting and advising the President in the preparation of the Environmental Quality Report. *Id.* § 4344(1). The Council also publishes guidelines which are designed to assist federal agencies in meeting the requirements of NEPA. These guidelines are advisory in nature. *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 421 (2d Cir. 1972). However, the guidelines may be accorded substantial weight since they constitute the interpretation of NEPA by the agency charged with implementation of the Act. *See, e.g., Environmental Defense Fund v. TVA*, 339 F. Supp. 806, 811 (E.D. Tenn.), *aff’d*, 468 F.2d 1164 (6th Cir. 1972). For an argument that the guidelines issued by the CEQ do have the force of law, see 1972 DUKE L.J. 667, 677 (1972).

27. 36 Fed. Reg. 7724-27 (1971).

28. 455 F.2d at 421.

29. *Id.* at 422.

30. *Id.*

31. *Id.* at 420.

32. *Id.*

County, it nevertheless attempted in *Harlem Valley* to bypass that decision³³ and the revised CEQ guidelines complying therewith,³⁴ and rely on its own procedural regulations, which were promulgated prior to *Greene County* but published after that decision was handed down.³⁵ It argued that *Harlem Valley* was void on jurisdic-

33. As brought out by the court in *Harlem Valley*, several abortive attempts to render *Greene County* ineffective were made before the *Harlem Valley* litigation was commenced. In fact, in *Harlem Valley* some of the arguments raised prior to the litigation were repeated. The ICC made a motion to submit a memorandum to support the FPC's motion for a rehearing on the grounds that *Greene County* would require a substantial revision of its procedures. The ICC motion was denied, as was the Solicitor General's petition for certiorari which advanced similar arguments. 500 F.2d at 332. The ICC made another attempt to circumvent *Greene County* by filing a petition for modification of the CEQ guidelines on the grounds that a substantial staff increase would be required. The CEQ chairman refused the petition for modification, pointing out that the estimated required staff increase of twenty percent was not realistic in view of estimates made by other agencies. *Id.*

34. 38 Fed. Reg. 20550 (1973). Section 1500.7(d) of the CEQ guidelines specifically provides: "Agency procedures developed pursuant to § 1500.3(a) of these guidelines should indicate as explicitly as possible those types of agency decisions or actions which utilize hearings as part of the normal agency review process, either as a result of statutory requirement or agency practice Agencies should make any draft environmental statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings." *Id.* at 20553.

35. 49 C.F.R. § 1100.250 (1973). The ICC report accompanying the regulation provided in part: "The guidelines finally adopted by the Council on Environmental Quality . . . require each agency responsible for a major Federal action significantly affecting the quality of the human environment to prepare and circulate to the Council and other appropriate government agencies a draft environmental impact statement. A final impact statement is to be similarly prepared and circulated after comments have been received on the draft statements. The essential question to be resolved at this point, which has been specifically raised by [the Department of Transportation], concerns the methods which this Commission should utilize in issuing draft and final environmental impact statements. All Commission hearings (whether oral or on the written record) in proceedings involving environmental issues will be public ones subject to the Administrative Procedure Act. We believe, and the Council has informally advised, that *draft* impact statements are not necessary in any of these proceedings. As a consequence, and in compliance with the

tional grounds,³⁶ that the district court had engaged in an inappropriate "wooden application" of *Greene County*,³⁷ and that *Greene County* was distinguishable from *Harlem Valley*.

The jurisdictional arguments were viewed as mere "procedural hurdles"³⁸ and were found to be without merit. The court was also

Council's requirements, an environmental impact statement will be issued together with and as part of each initial determination made as a result of any hearing (oral or written), in those cases determined to involve environmental issues. The impact statement and initial determination will be circulated to the appropriate government agencies and made available to the public in the manner prescribed by the Council." 340 I.C.C. 431, 441-42 (1972) (emphasis in original).

36. 500 F.2d at 332.

37. *Id.* at 335.

38. The defendants made three arguments that the court lacked jurisdiction to hear the case. First, they claimed that only a three-judge court could issue such an injunction. They cited as controlling the provisions of the Urgent Deficiencies Act, 28 U.S.C. §§ 2321-25 (1970). Section 2325 of that Act provides that a three-judge court shall determine whether to issue an injunction "restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission" The court of appeals cited extensive authority in support of its finding "that not every determination of the ICC is an 'order' for purposes of the Urgent Deficiencies Act." 500 F.2d at 332. It further agreed with the district court that a procedural regulation specifying when the ICC must issue its impact statement under NEPA in an abandonment proceeding is not the kind of determination requiring review by a three-judge court under the Urgent Deficiencies Act. *Id.* at 333. Secondly, the defendants argued that the court did not have jurisdiction to review the ICC rules under any other statutory provision. The court held that the case was "a proper case for an action in the nature of mandamus under 28 U.S.C. § 1361" since the ICC might have a statutory duty under NEPA to have its staff prepare a statement prior to any hearings. *Id.* at 334. Finally, the defendants argued that judicial review of the case was barred because plaintiffs had failed to exhaust administrative remedies. The court again agreed with the district court and decided that the ICC argument was in essence one of finality or ripeness for review. As to the question of finality, the court relied upon the finding of the United States Supreme Court in *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), that "the relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or

unconvinced by the allegation of "wooden application" since two other courts had either stated or implied that *Greene County* did apply to the ICC.³⁹

Two bases for differentiating *Greene County* from *Harlem Valley* were advanced. The ICC first argued that the FPC staff, unlike its own, participated in the examination of applications prior to an environmental hearing.⁴⁰ The implication was that since the ICC staff did not participate in the examination of applications prior to such hearings, the ICC did not have a staff adequate to draft an impact statement. Therefore, the ICC contended that "the *Greene County* requirement that an impact statement be served by the participating agency staff member prior to the hearing is entirely inappropriate."⁴¹ The argument was rejected by the court of appeals, which found that the ICC had previously recognized its affirmative duty under NEPA and had failed to meet that duty.⁴²

Several justifications were enumerated by the court. First, as had been pointed out in *Greene County*, complainants seeking a NEPA hearing might not have sufficient resources to present a complete

legal consequences will flow from the agency action." *Id.* at 71. In *Harlem Valley* there was no proceeding to disrupt, an interlocutory challenge to a specific environmental statement was not involved, and the case did not involve the interlocutory exclusion of certain matters from a hearing. What was involved was simply a review of a set of procedural rules for implementing NEPA that the ICC would apply to all abandonment proceedings before it. On the issue of ripeness, the court found that the case was ripe for review because of the strain on the resources of the environmental intervenors if review were postponed and because of the serious consequences for the ICC and all interested parties if a later court should find that the proceedings had been inadequate. 500 F.2d at 335.

39. *Id.* at 335. In *City of New York v. United States*, 344 F. Supp. 929 (E.D.N.Y. 1972), preparation by the ICC of an impact statement in advance of a hearing on the proposed abandonment by a railroad of its entire operation was found to be "procedure consonant with that mandated" by the court in *Greene County*. *Id.* at 939. In *Students Challenging Regulatory Agency Procedures v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd for lack of juris.*, 412 U.S. 669 (1973), the court noted that a statement prepared by the railroad parties to the action would not satisfy the requirements of NEPA, referring again to *Greene County*. *Id.* at 193 n.4.

40. 500 F.2d at 335.

41. 360 F. Supp. at 1065, quoting Brief for Defendant at 25.

42. 500 F.2d at 336.

picture of the environmental factors involved, while the applicant to the federal agency might well submit a self-serving statement.⁴³ Next, as was also pointed out in *Greene County*, there was no way to escape the literal language of NEPA which required that statements accompany the proposal throughout the entire agency review process.⁴⁴ Finally, the court examined the Interstate Commerce Act and found that nothing therein "prohibit[ed] the ICC staff from investigating environmental matters and preparing a draft impact statement, if needed, prior to any public hearings."⁴⁵

The second argument raised by the ICC to differentiate *Harlem Valley* and *Greene County* was that in the latter case it was clear that an impact statement was required, whereas it was not clear in the many proceedings before the ICC whether such a statement was necessary.⁴⁶ On addressing this argument the court considered the proposal which the CEQ director made to the ICC staff to the effect that the administrative law judge could make the initial determination of whether an impact statement was required. If he decided affirmatively, the judge could adjourn the hearing and prepare the statement.⁴⁷ The court found the proposal to be inadequate, as the administrative law judge would not have the requisite staff assistance to arrive at a "fair and informed preliminary decision."⁴⁸ Thus there could be no question that the staff of the responsible federal agency had to participate in making the threshold decision.⁴⁹

The court's rationale was rooted in solid precedent. *Hanly v. Kleindienst* (*Hanly II*)⁵⁰ held that the requirement of NEPA section 102(2)(B) applied regardless of whether the agency determined that an environmental impact statement was required.⁵¹ Section 102(2)(B) provides that all federal agencies "identify and develop

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 335.

47. *Id.* at 332.

48. *Id.* at 337, quoting *Hanly v. Kleindienst*, 471 F.2d 823, 835 (2d Cir. 1972).

49. 500 F.2d at 337.

50. 471 F.2d 823 (2d Cir.), cert. denied, 412 U.S. 908 (1973); see 1973 WASH. U.L.Q. 235 (1973).

51. 471 F.2d at 835-36.

methods and procedures . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration"⁵² The court in *Hanly II* required that the same factors be considered in making a threshold determination as in making an environmental impact statement.⁵³ Thus, to ensure the consideration of all essential information, the responsible agency is required to maintain a sufficient staff to make the threshold determination.

The court in *Harlem Valley* gives very little indication of what factors must be considered by the ICC in making its threshold decision. It merely held that the determination had to be governed by "a rule of reason, similar to that used in determining whether certain matters must be considered in the impact statement itself."⁵⁴ This limited delineation was intentional; the court feared that if the standards set down were too rigid the prediction of Justice Harlan that "they are apt in their application to carry unintended consequences which once accomplished are not always easy to repair"⁵⁵ might be borne out.⁵⁶ The court did, however, remind the ICC that under *Hanly II* "it [had] an affirmative obligation to develop a reviewable record of this threshold determination. . . . and its decision on this matter must be sufficiently reasoned so that a reviewing court can determine whether or not it was arbitrary or capricious"⁵⁷

The ICC has not been left without some operational guidelines.⁵⁸ An indication of the factors to be considered is supplied by the court in *City of New York v. United States (City of New York II)*,⁵⁹ which approved an ICC decision allowing abandonment. Generally, each

52. 42 U.S.C. § 4332(2)(B) (1970).

53. 471 F.2d at 835.

54. 500 F.2d at 337.

55. *Sanders v. United States*, 373 U.S. 1, 32 (1963) (dissenting opinion).

56. 500 F.2d at 337.

57. *Id.*

58. See 2 FORDHAM URBAN L.J. 419 (1974).

59. 344 F. Supp. 929 (E.D.N.Y. 1972). This is the second of a pair of cases commonly referred to as *City of New York I* and *City of New York II*. The other case, *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972), is discussed at note 8 *supra*.

of the five areas outlined in NEPA section 102(2)(C)⁶⁰ should be considered.⁶¹ Such consideration should include the potential environmental impact on a larger area than that within which the railroad operates.⁶² In *City of New York II*, the court examined the possible increased traffic congestion in other geographical areas due to the probable increase in the number of trucks. Also examined were the environmental implications of soil, water, noise, and land pollution.⁶³ In short, the approach of the reviewing agency should be "interdisciplinary . . . taking into account the 'natural and social sciences and the environmental design arts' . . ."⁶⁴

Hanly II also provides the ICC with decisive precedent to aid in its threshold determination. The *Hanly II* court attempted to define the meaning of the word "significantly" so that agencies in the "so-called grey areas" would issue an impact statement rather than face the "delay and expense of protracted litigation."⁶⁵ Thus, in deciding whether the federal action will significantly affect the quality of the environment:

the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area. Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change. Absent some showing that an entire neighborhood is in the process of redevelopment, its existing environment, though frequently below an ideal standard, represents a norm that cannot be ignored Hence the absolute, as well as comparative, effects of a major federal action must be considered.⁶⁶

This definition incorporates the *Calvert Cliffs*' balancing of "environmental amenities" with "economic and technical considera-

60. See note 15 *supra*.

61. See 344 F. Supp. at 938.

62. *Id.* at 939.

63. *Id.* at 936-37, 938 n.15.

64. 471 F.2d at 835. See also 38 Fed. Reg. 20550, 20552 (1973).

65. 471 F.2d at 831-32.

66. *Id.* at 830-31. See also 38 Fed. Reg. 20550, 20551 (1973).

tions.”⁶⁷ Accordingly, when all environmental factors were weighed in the abandonment proceedings in *City of New York II*, the economic considerations of a nearly insolvent railroad were found to outweigh any adverse environmental impacts.⁶⁸ The paucity of facts in the court’s record in *Harlem Valley* precludes determining whether an impact statement is required.

Whatever decision the ICC makes will have to be made on the basis of a reviewable record. A “terse” statement will be sufficient if it takes into account all of the requisite environmental factors,⁶⁹ but “perfunctory and conclusory language [will not] suffice, even for purposes of a threshold section 102(2)(C) determination.”⁷⁰ The more controversial the proposed action the more thorough the record for review should be.⁷¹

Should a negative decision by the ICC be appealed, the court will apply the “arbitrary and capricious” standard for review set forth in the Administrative Procedure Act.⁷² Under that test the facts will be “scrutinized to determine whether the agency decision was ‘arbi-

67. *Calvert Cliffs’ Coordinating Comm. v. AEC*, 449 F.2d 1109, 1113 (D.C. Cir. 1971).

68. 344 F. Supp. at 938. It should be pointed out that NEPA does not compel the abandonment of any railroad line, but merely requires that an environmental impact statement be prepared.

69. See *Hanly v. Mitchell*, 460 F.2d 640, 646 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) [hereinafter cited as *Hanly I*].

70. 460 F.2d at 647.

71. In *Hanly I*, the court considered the same factors with respect to two buildings. *Id.* at 646-47. It approved the terse statement regarding a nine-story office building, but found the statement with respect to the adjacent detention center to be “perfunctory and conclusory” and therefore inadequate. *Id.*

72. See Administrative Procedure Act § 10(e), 5 U.S.C. §§ 706(2)(A),(D) (1970), which provides: “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (D) without observance of procedure required by law . . .” The arbitrary and capricious test was also adopted by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

trary, capricious, an abuse of discretion or otherwise not in accordance with law' . . . and whether the agency followed the necessary procedural requirements."⁷³

Harlem Valley adds to the "flood of new litigation—litigation seeking judicial assistance in protecting our national environment" which was promised by the *Calvert Cliffs*' court.⁷⁴ It is an addition required to prevent a large and powerful federal agency from circumventing the judicial holding of *Greene County*. *Greene County* had established the rule that federal agencies, prior to a hearing, could not depend on statements prepared by applicants; rather, they must make their own NEPA threshold decision and, if necessary, prepare their own environmental impact statement.⁷⁵ In *Harlem Valley* the court made it clear that the procedural requirements laid down in *Greene County* were not a "paper tiger,"⁷⁶ and that such "footdragging agencies"⁷⁷ as the ICC would be forced to comply with the mandates of that decision.

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73. 471 F.2d at 829. The Fifth Circuit applies a "reasonableness test." See, e.g., *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973). The Supreme Court, with respect to a review of mixed questions of fact and law, such as are involved in a review of a decision made pursuant to NEPA, has applied a "rational basis" test by which a decision of an agency will be accepted if it has "warrant in the record" and a "reasonable basis in law." *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944). See also 471 F.2d at 829 n.9; Comment, *The Role of the Courts Under the National Environmental Policy Act*, 23 CATHOLIC U.L. REV. 300 (1973).

74. 449 F.2d at 1111.

75. See notes 23-32 *supra* and accompanying text.

76. 449 F.2d at 1114.

77. *Id.*