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AMERICA'S CHANGING ENVIRONMENT—IS THE NEPA A CHANGE FOR THE BETTER?

I. INTRODUCTION

The Gross National Product (GNP)¹ has traditionally been one of the most significant indices of national well-being. In the United States last year, this leading indicator reached the unprecedented level of one trillion dollars.² In stark contrast, the Task Force on Noise Control recently noted after three years of study that noise in New York City, the economic and financial center of the nation, had "reached a level intense, continuous and persistent enough to threaten basic community life."³ To be sure, the problem is in no sense limited to noise nor localized in any one area.⁴

This incongruity can perhaps best be explained in terms of misplaced priorities in the economic system,⁵ a system stressing "objects" while "[h]uman values and aspirations [are] submerged in programs and numbers, and the issues tend to become quantitative and objective."⁶ The devastating environmental impact of these traditional national policies, designed primarily to "enhance the production of goods and to increase the [GNP]"⁷ has become

1. Boulding, *Fun and Games with the Gross National Product—The Role of Misleading Indicators in Social Policy*, in *The Environmental Crisis* 157 (H. Helfrich ed. 1970); Jackson, *Foreword: Environmental Quality, The Courts, and the Congress*, 68 *Mich. L. Rev.* 1073 (1970). The gross national product is basically a measure of the value of an economy's total current output of goods and services. G. Ackley, *Macroeconomic Theory* 28 (1967).

2. The actual figure has been reported as \$1,072,900,000,000. 52 *Survey of Current Business* No. 2, at S-1 (1972).

3. *N.Y. Times*, Jan. 13, 1970, at 47, col. 5.

4. See 1970 Annual Report of the Council on Environmental Quality [hereinafter cited as *Annual Report*]; F. Grad, *Environmental Law* (1971) [hereinafter cited as *Grad*]. See generally L. Caldwell, *Environment: A Challenge for Modern Society* (1970); G. Laycock, *The Diligent Destroyers* (1970); G. Leinwand, *Air and Water Pollution* (1969); *Advances in Environmental Science and Technology* (J. Pitts & R. Metcalf eds. 1971); R. Revelle & H. Landsberg, *America's Changing Environment* (1970).

5. *Annual Report* 12.

6. Jackson, *Environmental Policy and the Congress*, 11 *Nat. Res. J.* 403, 403 (1971); see Jackson, *Environmental Quality*, *supra* note 1, at 1074.

7. S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969) [hereinafter cited as *Senate Report*]. That the Senate Committee on Interior and Insular Affairs was fully cognizant of the environmental consequences of national policies is clearly evidenced by the Committee's detailed statement of the type of problems the NEPA was designed to solve: "Examples of the rising public concern over the manner in which Federal policies and activities have contributed to environmental decay and degradation may be seen in the Santa Barbara oil well blowout; the current controversy over the lack of an assured water supply and the impact of a super-jet airport on the Everglades National Park; the proliferation of pesticides and other chemicals; . . . federally sponsored or aided construction activities such as highways, airports, and other public works projects which proceed without reference to the desires and aspirations of local people.

....

The purpose of [the NEPA] is, therefore, to establish a national policy designed to cope with environmental crisis, present or impending." *Id.* at 8-9.

apparent. A state now exists which clearly indicates that "the real measure of economic welfare is not [the GNP]. It is the state or condition of the person, or of the society."⁸ Although these traditional policies were not intended to have such adverse environmental side effects, neither were they specifically designed to prevent them.⁹ Thus, traditional economic indices, spawned in relative ignorance of the overall societal impact of the condition of the environment, can no longer validly attach as the sole measure of national achievement.¹⁰ There must be a shifting of emphasis from the economic system as an entity unto itself to the eco-system as an integrated whole.¹¹

II. THE TRADITIONAL REMEDIES

Set against this background of national economic determination, environmental protection was, until very recently, obtained, if at all, primarily through the vehicle of private litigation.¹² Emphasis was placed on the areas of nuisance and trespass, with other actions based on inverse condemnation or breach of a local ordinance.¹³ But the effectiveness of each of these ostensible remedies is impaired by its individual idiosyncracies, as well as the more general deficiencies inherent in the nature of both the remedy and our environment.

Nuisance involves "an [unreasonable] interference with the use and enjoyment of land."¹⁴ As such it has been a tool of the environmental litigator from an early date.¹⁵ However, unless the plaintiff can show damages different from

8. Boulding, *supra* note 1, at 161.

9. Senate Report 5.

10. Jackson, *supra* note 6, at 403.

11. Senator Edmund Muskie (D. Me.) has noted that "environmental quality must assume a priority equal to that of our other basic goals . . ." Muskie, Foreword to Symposium: Law and the Environment, 55 Cornell L. Rev. 663 (1970). That the focus of attention has indeed shifted is evidenced by the proliferation of material now in print on the general topic of ecology. Textbooks include: Grad, *supra* note 4; O. Gray, *Cases and Materials on Environmental Law* (1971); L. Jaffe & L. Tribe, *Environmental Protection* (1971); N. Landau & P. Rheingold, *The Environmental Law Handbook* (1971); J. Sax, *Defending the Environment* (1971). One of the most helpful collections of materials may be found in U.S. Dep't of HUD, *Environment and the Community: An Annotated Bibliography* (1971).

12. See Grad & Rockett, *Environmental Litigation—Where the Action Is?*, 10 Nat. Res. J. 742, 743-46 (1970); Rheingold, *A Primer on Environmental Litigation*, 38 Brooklyn L. Rev. 113, 114 (1971); Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 Wayne L. Rev. 1085, 1087 (1970); Note, *Legal Aspects of Air Pollution Control in Ohio 1971: Critique and Proposals*, 40 U. Cinn. L. Rev. 511, 511 (1971). See generally Brecher, *Environmental Litigation: Strengths and Weaknesses*, 1 Env. Affairs 565 (1971).

13. Recently the focus of private attempts to deal with environmental problems has been on the use of statutes, ordinances and administrative rulings. Comment, *Equity and the Eco-System: Can Injunctions Clean the Air?*, 68 Mich. L. Rev. 1254, 1258 (1970); Comment, *A History of Federal Air Pollution Control*, 30 Ohio St. L.J. 516, 516-19 (1971).

14. W. Prosser, *Torts* § 89, at 591 (4th ed. 1970) [hereinafter cited as Prosser].

15. E.g., *William Alfred's Case*, 77 Eng. Rep. 816 (K. B. 1611), construed in Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 Duke L.J. 1126, 1130.

those suffered by the general public (which of course encompasses the majority of large scale pollution problems), the court will deem it to be a public nuisance, a classification which may be fatal to a private action.¹⁶ This barrier notwithstanding, many courts have held that activities conducted in conformity with local zoning ordinances are presumptively not nuisances.¹⁷ The courts also tend to use a "balancing of equities" test which weighs the plaintiff's right itself or the extent of his damages against the benefit and needs of the community at large.¹⁸ In effect, the test establishes a right to pollute to a reasonable extent.

Trespass deals with the unauthorized invasion of one's interest in the exclusive possession of land,¹⁹ and as such avoids the balancing test applicable to nuisance actions.²⁰ But pollution as a form of trespass may pose unique problems for a party attempting to prove an invasion. If there is no tangible or visible invasion as some courts require,²¹ the plaintiff may be out of court without further ado. Other courts have adopted a more contemporary standard and will find trespass "whether [the] intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist."²² Few courts, however, have adopted this approach.

Noise, clearly a form of environmental pollution,²³ has been deemed a form of inverse condemnation—a taking of land in the constitutional sense.²⁴ But

16. *Graceland Corp. v. Consolidated Laundries Corp.*, 7 App. Div. 2d 89, 90-91, 180 N.Y.S.2d 644, 646 (1st Dep't 1958), *aff'd mem.*, 6 N.Y.2d 900, 160 N.E.2d 926, 190 N.Y.S.2d 708 (1959). See also Prosser, *supra* note 14, at § 88, at 586-87.

17. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914); *Sawyer v. Davis*, 136 Mass. 239 (1884); *Bove v. Donner-Hanna Coke Corp.*, 236 App. Div. 37, 258 N.Y.S. 229 (4th Dep't 1932).

18. E.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), noted in 39 *Fordham L. Rev.* 338 (1970). In *Boomer* the court, with its talk of balancing equities, set a new standard by allowing a one-time payment for substantial damages, at least where a defendant has used every available means of abatement. *Id.* at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 317. The decision has been widely criticized (e.g., Cass, *Judicially Licensed Pollution: Condemnation of Private Property for Private Use*, 1970 *Wash. U.L.Q.* 367, 369-70; 45 *N.Y.U.L. Rev.* 917 (1970)), but it is the current state of New York law. See *Diamond v. Allegheny Ludlum Indus., Inc.*, 67 Misc. 2d 854, 858, 324 N.Y.S.2d 658, 663 (Sup. Ct. 1971); *Diamond v. Mobil Oil Corp.*, 65 Misc. 2d 75, 79, 316 N.Y.S. 2d 734, 738 (Sup. Ct. 1970). See generally Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 *Mich. L. Rev.* 1254 (1970).

19. Prosser, *supra* note 14, at § 13, at 68.

20. *Id.* § 89, at 596.

21. E.g., *Arvidson v. Reynolds Metals Co.*, 125 F. Supp. 481 (W.D. Wash.), *aff'd per curiam*, 236 F.2d 224 (9th Cir. 1956), cert. denied, 352 U.S. 968 (1957); *Waschak v. Moffatt*, 379 Pa. 41, 109 A.2d 310 (1954); *Bartlett v. Grasselli Chem. Co.*, 92 W. Va. 445, 115 S.E. 451 (1922).

22. *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 94, 342 P.2d 790, 794 (1959), cert. denied, 362 U.S. 918 (1960) (minute dust particles). See also *Fairview Farms, Inc. v. Reynolds Metals Co.*, 176 F. Supp. 178 (D. Ore. 1959); *Davis v. Georgia-Pacific Corp.*, 251 Ore. 239, 445 P.2d 481 (1968); *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411 (1961).

23. See text accompanying note 3 *supra*.

24. *United States v. Causby*, 328 U.S. 256 (1946).

the application of a remedy has generally been restricted to airport situations where the taker is a government or governmental agency and the plaintiff suffers an unreasonable, direct overflight of his property.²⁵ Although airports clearly pose a noise problem, the limited scope of this remedy would seem to render it of little import in controlling overall environmental quality.

Many local environmental ordinances have been invalidated on grounds of federal preemption;²⁶ others have been rendered ineffectual through a lack of consistent enforcement or the absence of penalties sufficient to operate as a deterrent.²⁷ Additionally, in the past private litigation based on environmental legislation had offered no salutary results as many statutes specifically denied such action.²⁸ Courts, too, have been reluctant to act. Where the nuisance was a by-product of a public interest activity, courts precluded any injunctive relief.²⁹ The use of *qui tam* actions—basically an action brought by a private citizen against another private citizen to collect a portion of a penalty for the violation of some statute—has proven to be of little value in controlling environmental quality,³⁰ even where expressly authorized by statute.³¹

25. See Note, Airport Noise, Property Rights and the Constitution, 65 Colum. L. Rev. 1428, 1437-47 (1965). But see *State v. Board of Educ.*, 3 Env. Rptr.—Cases 1159 (N.J. Super. Ct. 1971), where the court awarded a considerable sum for damages from noise after a portion of land adjacent to a school was condemned for a highway. But cf. *Dennison v. State*, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968).

26. E.g., *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir.), cert. denied, 393 U.S. 1017 (1969) (town ordinance seeking to limit air activity); *City of Newark v. Eastern Airlines, Inc.*, 159 F. Supp. 750 (D.N.J. 1958); *People v. Atchison, T. & S.F. Ry.*, 268 Cal. App. 2d 501, 74 Cal. Rptr. 222 (Dist. Ct. App. 1968); *Currie, Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption*, 68 Mich. L. Rev. 1294 (1970).

27. See *Hilderbrand, Urban Noise Control*, 4 Colum. J.L. & S.P. 105 (1968). See also *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

28. E.g., N.Y. Air Pollution Control Law, Pub. Health Law §§ 1264-98 (McKinney 1971). The statute reads in part: "Nothing in this article shall abridge or alter rights of action or remedies . . . [nor estop] individuals . . . from the exercise of their . . . rights to suppress nuisances or to prevent or abate air pollution or air contamination." *Id.* § 1294. Cf. *United States v. Republic Steel Co.*, 362 U.S. 482 (1960); *United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill. 1969).

29. E.g., *East St. Johns Shingle Co. v. City of Portland*, 195 Ore. 505, 246 P.2d 554 (1952); *Hannum v. Gruber*, 346 Pa. 417, 31 A.2d 99 (1943); *Powell v. Superior Portland Cement, Inc.*, 15 Wash. 2d 14, 129 P.2d 536 (1942) (en banc).

30. *Kafin & Needleman, The Use of Qui Tam Actions to Protect the Environment*, 17 N.Y.L. Forum 130 (1971), citing inter alia *Bass Anglers Sportsman Soc'y of America v. United States Steel Corp.*, 324 F. Supp. 412 (D. Ala.) (per curiam), aff'd per curiam, 447 F.2d 1304 (5th Cir. 1971); *Reuss v. Moss-American, Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971); *Bass Anglers Sportsman's Soc'y of America v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971); *Durning v. ITT Rayonier, Inc.*, 325 F. Supp. 446 (W.D. Wash. 1970).

31. E.g., N.Y. C.P.L.R. § 7203(a) (McKinney 1963). The statute provides: "Where a penalty or forfeiture is given by statute to any person, an action to recover it may be maintained by any person in his own name . . ." *Id.*

Generally speaking, there are several factors which militate against the use of private remedies as an efficient vehicle for the preservation of our environment. First, the agglomerative nature of most pollution problems poses a major technical difficulty in developing a case,³² particularly in the urban setting where it is most unlikely that any one defendant is solely at fault.³³ This can prove to be particularly troublesome not only from a legal standpoint, but also in a physiological framework due to the synergistic interaction of various factors.³⁴ Second, it is important to note that the private remedies are tied to the use and enjoyment of one's land and, as such, are poorly adapted to meet the needs of by far the greatest segment of any urban community, *e.g.*, commuters, visitors and residents in transit. Cost, a third factor, can be a major deterrent to private action.³⁵ Even where a class action is allowed, the cost of maintaining a successful action against an affluent corporate defendant may be prohibitive.³⁶ A fourth defect inherent in private actions is their basically remedial nature.³⁷ In most situations an action will be brought only after the investment of substantial sums of money has become a *fait accompli*.³⁸ Thus, many authorities agree that the main assault on presently existing sources of pollution, if it is to be effective, must create positive incentives for expenditures incurred pursuant to abatement.³⁹ Finally, even when a private action is successful, its main effect is by definition personal, with merely incidental and unsystematic effects on overall environmental protection.⁴⁰

32. See, *e.g.*, Note, Legal Aspects of Air Pollution Control in Ohio 1971: Critique and Proposals, 40 U. Cinn. L. Rev. 511, 518-23 (1971).

33. *Bonan v. Sarni*, 2 Env. Rptr.—Cases 1484, 1485 (Mass. Sup. Ct. 1971); Note, *supra* note 32, at 519-22.

34. Pollutants and weather may interact in a manner such that "the whole is greater than the sum of its parts, with interactions between particles and gasses, pollutants, and weather . . ." Cassell, *The Health Effects of Air Pollution and Their Implications for Control*, 33 Law & Contemp. Prob. 197, 214 (1968).

35. Brecher, *Environmental Litigation: Strengths and Weaknesses*, 1 Env. Affairs 565, 568 (1971).

36. The expense involved is great even when the burden is spread among many persons through the employment of a class action. Brecher, *supra* note 35, at 569. Moreover, the procedural aspects of class actions pose threshold problems for the would-be litigant. Note, *The Cost-Internalization Case for Class Actions*, 21 Stan. L. Rev. 383, 384 (1969).

37. See text accompanying notes 12-32 *supra*.

38. Brecher, *supra* note 35, at 569.

39. Suggested incentives include tax credits or deductions, federal grants in aid and federal contracts. See, *e.g.*, Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action*, 7 Harv. J. Legis. 533, 550-56 (1970); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 Harv. L. Rev. 705 (1970). But see Roberts, *River Basin Authorities: A National Solution to Water Pollution*, 83 Harv. L. Rev. 1527, 1532-36 (1970); Comment, *supra* note 18, at 1258.

40. See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), noted in 39 Fordham L. Rev. 338 (1970); Brecher, *supra* note 35, at 570.

III. THE SYSTEMS APPROACH

Substantial though these issues⁴¹ are, they are for the most part procedural. A substantive and perhaps more conclusive argument weighing against the use of private common law remedies in contemporary environmental litigation emanates from the complexity of the eco-system. These complexities necessitate analysis as a complex whole using "systems approach" of the space and defense programs.⁴² Any efficacious program will demand "overall planning, not possible in a case by case approach, and a greater degree of expertise than that which obtains in the courts."⁴³ An integrated, federal systems approach to environmental protection would seem to be a most urgent priority.⁴⁴ "If we are to survive, we need to become aware of the damaging effects of technological innovations, determine their economic and social costs, balance these against the expected benefits, make the facts broadly available to the public, and take the action needed to achieve an acceptable balance of benefits and hazards."⁴⁵ As the actions of virtually all federal agencies have some effect on the condition of the environment,⁴⁶ it is of paramount importance that these agencies "have a mandate, a body of law, or a set of policies to guide [such] actions . . ."⁴⁷

41. See text accompanying notes 32-40 *supra*.

42. Mayda, *Conservation, New Conservation and Eco-management*, 1969 *Wis. L. Rev.* 788, 793 (1969).

43. Grad & Rockett, *Environmental Litigation—Where the Action Is?*, 10 *Nat. Res. J.* 742, 744 (1970). In *Boomer* the court noted that the "judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution." 26 *N.Y.2d* at 223, 257 *N.E.2d* at 871, 309 *N.Y.S.2d* at 314. See note 202 *infra* and accompanying text.

44. See Annual Report, *supra* note 1, at 232. "It is the function of the law to provide for the establishment of administratively sound and workable institutions capable of carrying on the functions of environmental management across jurisdictional lines, as well as to coordinate the functions of different agencies . . . for better environmental management." Grad, *supra* note 4, § 1.03, at 1-20.

45. B. Commoner, *Science and Survival* 122-23 (1967).

46. Senate Report, *supra* note 7, at 9. See generally J. Sax, *Defending the Environment* (1971).

47. Senate Report 9; The report also noted that: "As a result of [past] failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.

Today it is clear that we cannot continue on this course. Our natural resources—our air, water, and land—are not unlimited. We no longer have the margins for error that we once enjoyed. The ultimate issue posed by shortsighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are clear." *Id.* at 5 (footnote omitted). But there are some factors working to replenish and increase other available supplies of natural resources. Address by J. E. S. Fawcett, David Davies Memorial Institute of International Studies, at 7, June 1970.

IV. THE NEPA

Prior to the passage of the National Environmental Policy Act of 1969 (NEPA),⁴⁸ federal agencies were not required to cope with the broad environmental impact of their actions; in fact, they generally lacked statutory authority to deal with these matters on any comprehensive basis.⁴⁹ As a result, Title 1 of the NEPA⁵⁰ is prefaced by a congressional declaration of purpose⁵¹ setting forth the broad goal of the Act; to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment . . ." ⁵² The statutory authority to evaluate environmental impact was provided by the NEPA's mandate to all federal agencies and officials to "develop methods and procedures . . . which will ensure that . . . environmental amenities and values may be given appropriate consideration in decisionmaking . . ." ⁵³

Section 101 of the NEPA,⁵⁴ a declaration of the Act's substantive policy, requires that the federal government use "all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony . . ." ⁵⁵ While the Act does not provide for environmental protection as an exclusive national goal, it was intended that there be a reordering of national priorities to "utilize a systematic, interdisciplinary approach . . . in planning and in decisionmaking which may have an impact on man's environment," ⁵⁶ to assure that environmental considerations assume their proper place.⁵⁷

Contrasted with the broad mandate of section 101 are the rigid procedural provisions of section 102,⁵⁸ which establish "action-forcing" procedures de-

48. Act of Jan. 1, 1970, Pub. L. No. 91-190, 83 Stat. 852-56 (codified at 42 U.S.C. §§ 4321-47 (1970)).

49. In *New Hampshire v. AEC*, 406 F.2d 170 (1st Cir.), cert. denied, 395 U.S. 962 (1969), the court affirmed the Commission's contention that it had no authority to consider non-radiological environmental effects, stating that "in enacting the Atomic Energy Acts of 1946 and 1954 . . . the Congress [had] viewed the responsibility of the Commission as being confined to scrutiny of and protection against hazards from radiation." *Id.* at 175.

50. 42 U.S.C. §§ 4331-35 (1970).

51. *Id.* § 4321.

52. *Id.* The report accompanying the original bill noted that: "The purposes of the act are to declare a national environmental policy; to promote efforts to prevent environmental damage and to better the health and welfare of man; to enlarge and enrich man's understanding of the ecological systems and natural resources important to the Nation . . ." Senate Report, *supra* note 7, at 17.

53. 42 U.S.C. § 4332(2)(B) (1970). As Senator Jackson (D. Wash.) put it, the Act would require all federal agencies and officials to consider "the consequences of their actions on the environment." Senate Report 14.

54. 42 U.S.C. § 4331 (1970).

55. *Id.* § 4331(a).

56. *Id.* § 4332(2)(A). "A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations." 115 Cong. Rec. 40416 (1969) (remarks of Senator Jackson).

57. 115 Cong. Rec. 40416 (1969) (remarks of Senator Jackson).

58. 42 U.S.C. § 4332 (1970). The section provides in part: "The Congress authorizes

signed to insure implementation of the policy enunciated in section 101.⁶⁰ "[S]ection 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the *fullest extent possible* in accordance with the policies set forth in [the NEPA]."⁶⁰ As one commentator has pointed out, this standard does not give federal agencies any discretion regarding compliance with the substantive and procedural duties imposed.⁶¹ Where implementation of the policy set forth in the Act is possible, section 102 not only allows but requires that agencies comply unless precluded from doing so by existing law.⁶² Any other interpretation would reduce the provisions of section 101 to no more than lofty declarations.⁶³

Clarifying the extent of environmental consideration required by the Act, sections 102(2)(A)⁶⁴ and (B)⁶⁵ provide, in essence, that wherever the planning or decisions of a federal agency might affect the environment, that agency should, to the "fullest extent possible," consider all relevant views in planning those activities—including environmental values—and make a concerted effort to "incorporate those values in official planning and decisionmaking."⁶⁶ As environmental values will frequently conflict with economic and technical considerations, the NEPA is unwavering in its insistence "that all relevant environmental values and amenities [be] considered in the calculus of project development and decisionmaking."⁶⁷

In order to ensure that the desired balancing process is effected in accordance

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—(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"

59. Senate Report, *supra* note 7, at 19. Senator Jackson, a primary sponsor of the NEPA, stated that the Act ". . . directs all agencies to assure consideration of the environmental impact of their actions in decisionmaking." 115 Cong. Rec. 40416 (1969).

60. Senate Report, *supra* note 7, at 19-20 (emphasis added).

61. Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 *Env. L. Rep.* 50035, 50037 (1971) [hereinafter cited as Peterson].

62. By inserting the "to the fullest extent possible" provision, Congress made it clear that "each agency of the Federal Government shall comply with the directives set out in [the NEPA] unless the existing law applicable to such agency's operations does not make compliance possible." 115 Cong. Rec. 40418 (1969) (major changes passed by the Senate). The Act further provided against this contingency by requiring all agencies to notify the President of any such inconsistencies, including proposed changes, not later than July 1, 1971. 42 U.S.C. § 4333 (1970).

63. *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1113 (D.C. Cir. 1971).

64. 42 U.S.C. § 4332(2)(A) (1970).

65. *Id.* § 4332(2)(B).

66. Senate Report, *supra* note 7, at 20.

67. 115 Cong. Rec. 29055 (1969) (remarks of Senator Jackson). Although it is clear that a balancing process is required, one commentator has observed that "[w]hat constitutes 'appropriate consideration' of these factors is a difficult question." Peterson, *supra* note 61, at 50041.

with the dictates of sections 102(2)(A) and (B), section 102(2)(C)⁶⁸ requires that a "detailed statement" be prepared by the appropriate agency whenever legislative proposals or other major federal action is involved. This statement, in order to facilitate the agency's decisionmaking process and to provide other agencies and the public with information concerning the consequences of planned federal actions,⁶⁹ should explore the environmental impact of the proposed action and, when adverse impact is found to be a possibility, propose alternative methods of implementing the proposal.⁷⁰ Section 102(2)(D), requiring federal agencies and officials 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,"⁷¹ suggests that this consideration of possible alternatives must be equally as extensive as the consideration of environmental impact.⁷² Only when the total picture is thoughtfully viewed can the most intelligent, salutary decision be made.

Section 104 of the NEPA⁷³ was enacted to ensure that ". . . no agency may substitute the procedures outlined in [the NEPA] for more restrictive and specific procedures established by law governing its activities."⁷⁴ It has been further stated that the section was intended to provide for the use of NEPA procedures "where there is no more effective procedure already established . . ."⁷⁵ A paucity of legislative history hinders conclusive interpretation, but it would appear that this section was adopted as a compromise measure to insure that the NEPA would not undercut the more specific standards of the Water Quality Improvement Act of 1970 (WQIA).⁷⁶

Section 202 of the NEPA establishes the Council on Environmental Quality

68. 42 U.S.C. § 4332(2)(C) (1970).

69. See 115 Cong. Rec. 40416 (1969) (remarks of Senator Jackson). As Senator Jackson put it, decisions adversely affecting the environment are to be made "in the light of public scrutiny." *Id.*

70. 42 U.S.C. § 4332(2)(C) (1970).

71. *Id.* § 4332(2)(D).

72. Donovan, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 1 *Env. Affairs* 299, 310 (1971) [hereinafter cited as *Donovan*]; Peterson, *supra* note 61, at 50039; see *Natural Resources Defense Council, Inc. v. Morton*, 3 *Env. Rptr.—Cases* 1473 (D.C. Cir. 1971).

73. 42 U.S.C. § 4334 (1970).

74. 115 Cong. Rec. 40420 (1969) (section-by-section analysis).

75. *Id.*

76. See *id.* at 29053 (remarks of Senator Muskie). The WQIA is codified at 33 U.S.C. §§ 1151-75 (1970). Basically it is designed to "enhance the quality and value of our water resources . . ." *Id.* § 1151(a). Certification is required where activities will have an impact on our water resources. *Id.* § 1171. Senator Jackson, however, seemed to feel that there was no need for a compromise. This thinking is evidenced by his statement: "It is my understanding that there was never any conflict between [WQIA] and the provisions of [NEPA]. If both bills were enacted in their present form, there would be a requirement for State certification, as well as a requirement that the licensing agency make environmental findings." 115 Cong. Rec. 29053 (1969).

(CEQ) within the Executive Office of the President.⁷⁷ The three members of the Council are appointed by the President and serve at his pleasure.⁷⁸ The duties of the Council include the provision of assistance to the President in the study, appraisal and evaluation of current and prospective environmental trends and their inter-relationship with present federal actions and programs as well as future legislation to promote the improvement of environmental quality.⁷⁹ The Council's effectiveness in carrying out these functions will be analyzed in some depth later in this comment.⁸⁰

V. NEPA IN THE COURTS

A. *Standing to Sue*

Although the NEPA has been in effect for a relatively short period of time, many questions have already been raised which can be resolved only through judicial interpretation.⁸¹ As there is no express provision in the NEPA on standing, this issue quickly became the focus of litigation in several actions.

Procedurally, standing to sue in a federal court emanates from the "case or controversy" clause of the Constitution.⁸² Substantively, this restriction operates in our adversary system to guarantee that "only those with a genuine and legitimate interest can participate in a proceeding . . ." ⁸³ Where such an interest attaches, reason the courts, there will be a greater likelihood of developing that degree of "adverseness which sharpens the presentation of issues . . ." ⁸⁴ All suits are subject to the standing requirements;⁸⁵ however, it is primarily in public interest actions that the issue arises.

Traditionally the test for standing was rather restrictive, requiring an actual injury to some legally protected interest.⁸⁶ Recently the law of standing has undergone significant re-evaluation the result of which, unfortunately, has been considerable confusion.⁸⁷ The liberalization of standing requirements was largely effected through the decision in *Association of Data Processing Service Organizations, Inc. v. Camp*.⁸⁸ In that case the plaintiffs commenced an action challeng-

77. 42 U.S.C. § 4342 (1970).

78. *Id.*

79. *Id.* § 4344. See text accompanying notes 206-18 *infra*.

80. See text accompanying notes 213-26 *infra*.

81. Donovan, *supra* note 72, at 322.

82. U.S. Const. art. III, § 2; see *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151-55 (1970).

83. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1002 (D.C. Cir. 1966). See also *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *Muskrat v. United States*, 219 U.S. 346, 357 (1911); *In re Pacific Ry. Comm'n*, 32 F. 241, 255 ((C.C.N.D. Cal.) 1887).

84. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

85. *Frothingham v. Mellon*, 262 U.S. 447 (1923). See generally Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 469 (1970).

86. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938). See generally Ahlgren, *The Law of Standing in the Federal Courts: Protecting the Environment*, 5 *Clearinghouse Rev.* 570 (1972).

87. Ahlgren, *supra* note 86, at 571-73.

88. 397 U.S. 150 (1970). See also *Barlow v. Collins*, 397 U.S. 159 (1970).

ing a ruling of the Comptroller of the Currency under the National Bank Act.⁸⁹ Fashioning a new, two-pronged test, the Court found that standing would be granted where a plaintiff's interest was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,"⁹⁰ and he "alleges that the challenged action has caused him injury in fact"⁹¹ The Court went on to say that the injury need not be economic, and could reflect "aesthetic, conservational, and recreational . . . values."⁹² Although this test embodied a far more liberal standard than that which had previously obtained, its application in environmental litigation has produced widely divergent results.

In *Environmental Defense Fund, Inc. v. Hardin*,⁹³ the plaintiffs alleged a general biological harm to man through the continued use of DDT.⁹⁴ Reasoning that DDT's harmful properties would affect all people in a similar manner, the court concluded that the plaintiffs were members of a class of persons who would be injured in fact.⁹⁵ The zone of interest doctrine has evolved through two schools of thought; the first enunciates a narrow interpretation limited to those requirements specifically dealt with by the statute; the other a broad interpretation encompassing the total benefit, value or advantage contemplated by the Congress.⁹⁶ In *Hardin* the court adopted the broad interpretation, noting that the statute⁹⁷ involved addressed not only the economic interests of registrants, but also the public safety.⁹⁸ Other courts have shown their approval of this liberal standard, one noting that "if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors"⁹⁹

*Sierra Club v. Morton*¹⁰⁰ presented the Court with an action challenging the issuance of various licenses to Walt Disney Productions for the construction of a ski resort in Sequoia National Park.¹⁰¹ Adopting a very restrictive view of the *Camp* test, the Court noted that the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review

89. Act of June 3, 1864, ch. 106, § 108, 13 Stat. 101, codified as amended, 12 U.S.C. § 24 (1970).

90. 397 U.S. at 153.

91. *Id.* at 152.

92. *Id.* at 154 (citation omitted).

93. 428 F.2d 1093 (D.C. Cir. 1970).

94. *Id.* at 1096.

95. *Id.* at 1096-97.

96. Comment, Conservationist's Standing to Challenge the Actions of Federal Agencies, 1 Ecology L.Q. 305, 320-21 (1971). See also Davis, *supra* note 85, at 455-56.

97. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135-135k (1970).

98. 428 F.2d at 1095-96.

99. Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238, 245 (M.D. Pa. 1970), quoting Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1092 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

100. 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972), *aff'g* 433 F.2d 24 (9th Cir. 1970).

101. 40 U.S.L.W. at 4398.

be himself among the injured."¹⁰² While a broadening of the categories of injury available as a basis for standing met with the Court's approval,¹⁰³ it refused to abandon the "requirement that the party seeking review must have himself suffered an injury."¹⁰⁴ It was in these terms that the Court recognized *Hardin's* irreconcilability with this decision.¹⁰⁵ One commentator has attributed the denial of standing to the considerable interest in the completion of the project on a local level as compared with the opposition of the nationally oriented Sierra Club;¹⁰⁶ others have suggested that the Court was unwilling to open the floodgates to such action.¹⁰⁷ Justice Blackmun was highly critical of this rationale for limiting participation in environmental litigation,¹⁰⁸ noting that "courts will exercise appropriate restraints just as they have exercised them in the past."¹⁰⁹

The *Morton* decision has done little to clear the air on the issue of standing to sue.¹¹⁰ Moreover, the Court declined to give any view on the merits of the complaint.¹¹¹ It is encouraging to note, however, that in *Morton* there was no alleged violation of the NEPA. To date, no suit alleging non-compliance with NEPA provisions has been dismissed for want of standing.¹¹² This can be interpreted as an indication that courts narrowly construing *Camp* will justify standing through strict application of the procedural requirements of the Act,¹¹³ and that more

102. *Id.* at 4400. The Sierra Club had failed to allege that it or any of its members would be injured by the Disney development. *Id.*

103. *Id.* at 4401.

104. *Id.*

105. *Id.* See also Comment, *supra* note 96, at 311. But see 40 U.S.L.W. at 4407 (Blackmun, J., dissenting), where Justice Blackmun expressed his belief that decisions such as *Hardin* were of greater merit, citing thirteen cases in which other courts found that justice was better served by "an imaginative expansion of our traditional concepts of standing . . ." *Id.* at 4406.

106. Peterson, *supra* note 61, at 50047-48. See also 40 U.S.L.W. at 4405 (Douglas, J., dissenting). Justice Douglas suggested that environmental issues should be litigated in the name of the inanimate object in question. *Id.* at 4402; see Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972).

107. Comment, *supra* note 103, at 594 (1971); Comment, Standing in the Ninth Circuit, 1 Env. L. Rptr. 10058, 10059 (1971). But the comments point out that not only would the amount of time and effort spent on this issue be a significant portion of the time required for a hearing on the merits, 11 Nat. Res. J. at 594, but also that by allowing class actions the court could eliminate any threat of harassment. 1 Env. L. Rptr. at 10059, citing *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971). See also 40 U.S.L.W. at 4407 (Blackmun, J., dissenting).

108. 40 U.S.L.W. at 4407 (dissenting opinion).

109. *Id.*

110. See notes 100-09 *supra* and accompanying text.

111. 40 U.S.L.W. at 4402. The Court affirmed the lower court decision that the Sierra Club lacked standing to sue. *Id.*

112. Peterson, *supra* note 61, at 50047. For a comprehensive listing of all such cases see *id.* at 50046 n.68.

113. E.g., *Lathan v. Volpe*, 3 Env. Rptr.—Cases 1362, 1368 (9th Cir. 1971); see text accompanying notes 58-63 *supra*.

liberal courts will likewise do so by additionally looking to the broad underlying environmental policy of the Act.¹¹⁴

B. *Judicially Enforceable Duties*

Another question of primary importance to the prospective impact of the NEPA is whether or not the Act creates any legally cognizable duties. In light of the provisions of section 102,¹¹⁵ it would appear that there is a clear procedural duty to consider environmental impact and to prepare a detailed statement. However, there has been one court which has indicated to the contrary. In *Bucklein v. Volpe*,¹¹⁶ the district court was faced with a taxpayers' class action under the NEPA to enjoin the Secretary of Transportation from committing emergency relief funds for road repair.¹¹⁷ Plaintiffs claimed that the county board had abused its discretionary powers when it certified that the proposed road relocation would be environmentally sound.¹¹⁸ While holding that the board's action was proper, the court stated in dictum:

Moreover, it is highly doubtful that the Environmental Policy Act can serve as the basis for a cause of action. . . . the Act is simply a declaration of congressional policy; as such, it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only the general command to federal officials to use all practicable means to enhance the environment.¹¹⁹

This dictum would seem to stand in direct conflict with the legislative intent,¹²⁰ which the court did not discuss at all.

More recently, the district court in *Ely v. Velde*¹²¹ considered a request for a permanent injunction against the construction of a penal institution in a historically unique area. The project was to be financed in part by federal funds granted under the Safe Streets Act.¹²² In approving the grant, the federal Law Enforcement Assistance Administration concededly did not consider the environmental effect of the proposed construction.¹²³ Plaintiffs alleged that this gave rise to a violation of section 102(2)(C)(i) of the NEPA.¹²⁴ The *Ely* court, in

114. See *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1129 (D.C. Cir. 1971).

115. 42 U.S.C. § 4332 (1970); see notes 58-72 supra and accompanying text.

116. 2 Env. Rptr.—Cases 1082 (N.D. Cal. 1970).

117. *Id.* The funds were to be allocated from an emergency relief road repair fund under 23 U.S.C. § 125 (1970).

118. 2 Env. Rptr.—Cases at 1082. The plaintiff alleged that the board and the Secretary of Transportation had failed to adequately evaluate environmental factors. *Id.*

119. *Id.* at 1083.

120. See notes 58-72 supra and accompanying text.

121. 321 F. Supp. 1088 (E.D. Va. 1971).

122. 42 U.S.C. §§ 3701-95 (1970). The Act provides that "[t]he Administration [LEAA] shall make grants under this chapter to a State planning agency if such agency has on file with the Administration an approved comprehensive State plan (not more than one year in age) which conforms with the purposes and requirements of this chapter." *Id.* § 3733.

123. 321 F. Supp. at 1090.

124. 42 U.S.C. § 4332(2)(C)(i) (1970). Plaintiffs alleged that the defendants could have

contrast to the construction given the Act in *Bucklein*, held that the interests sought to be protected by the plaintiffs were within the zone of interests protected by the statute.¹²⁵ However, the court narrowed this construction of the Act, holding that "while the Congress did not intend the clause . . . 'to the fullest extent possible,' to be an escape provision [for agency compliance], it is still discretionary."¹²⁶ At least one commentator has noted that the court apparently did not understand the language of the section as viewed in the context of the clear legislative intent to bring about a "reordering of national priorities."¹²⁷

In *Texas Committee on Natural Resources v. United States*,¹²⁸ plaintiffs brought an action to block the disbursement and spending of a Federal Housing Authority (FHA) loan earmarked for the construction of a golf course in the virgin timber of a state park in Texas. Plaintiffs argued that the FHA's failure to file a "detailed statement" concerning the effects of the proposed golf course on the park's eco-system violated section 102(2)(C) of the NEPA.¹²⁹ Defendants contended that the requirements of this section—one of which is the duty to confer with other agencies having jurisdiction over the environmental impact involved¹³⁰—were not mandatory. The court rejected this contention, noting that compliance is clearly required as "[i]t is hard to imagine a clearer or stronger mandate to the Courts."¹³¹ Therefore, it would appear that the *Ely* court's classification of the duties imposed by the NEPA as discretionary¹³² was unequivocally rejected in *Texas Committee*.¹³³

C. *Calvert Cliffs'*

In view of the contradictions manifested by prior decisions, a thorough judicial review of the NEPA which could serve as a guideline for the implementation of congressional intent was needed.¹³⁴ The void was partially filled by

chosen a more appropriate site. 321 F. Supp. at 1091. See also note 70 supra and accompanying text.

125. 321 F. Supp. at 1092.

126. *Id.* at 1093 (footnote omitted).

127. Donovan, *supra* note 72, at 316.

128. 1 Env. Rptr.—Cases 1303 (W.D. Tex.), vacated as moot, 430 F.2d 1315 (5th Cir. 1970).

129. 42 U.S.C. § 4332(2)(C) (1970).

130. *Id.* The detailed statement required is to be made only "[a]fter consultation with and obtaining the comments of Federal and State agencies which have jurisdiction by law with respect to any environment impact . . ." 115 Cong. Rec. 40420 (1969) (section-by-section analysis).

131. 1 Env. Rptr.—Cases at 1304.

132. See note 126 *supra* and accompanying text.

133. See also *Lathan v. Volpe*, 3 Env. Rptr.—Cases 1362 (9th Cir. 1971); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971); *Nolop v. Volpe*, 333 F. Supp. 1364 (S.D.S.D. 1971).

134. The only circuit to interpret the Act had been the fifth in *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), where the court stated: "This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment." *Id.* at 211 (footnote omitted).

Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,¹³⁵ in which the court of appeals held that "Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties."¹³⁶

In *Calvert*, the petitioners challenged specific portions of the AEC rules which they contended were in violation of the requirements of section 102 of the NEPA.¹³⁷ The first allegation was that although one of the AEC rules provided for agency review of environmental impact of proposed projects, it did not require review of non-radiological impact unless there was an affirmative challenge of such impact by an outside intervenor or a staff member of the Commission.¹³⁸ The rule provided that an environmental report should be submitted by an applicant for a construction permit, but unless this report was challenged, it would merely accompany the application through the review process without being received into evidence.¹³⁹

Although this rule was in technical compliance with the requirement of section 102(2)(C) that the environmental report "accompany the proposal through the existing agency review processes,"¹⁴⁰ the court held that the word "accompany" should not be given such a restrictive reading as to make the Act ludicrous.¹⁴¹ Rather, it should be read as reflective of congressional intent that the environmental impact be "*considered* through agency review processes."¹⁴²

Although this interpretation seems to indicate that the NEPA mandates certain duties on the part of federal agencies, the brevity of the court's analysis weighs against the applicability of such an interpretation.

135. 449 F.2d 1109 (D.C. Cir. 1971).

136. *Id.* at 1115.

137. 42 U.S.C. § 4332 (1970).

138. 449 F.2d at 1116-17; see 10 C.F.R. § 50, at 246-50 (1971) (app. D, pt. 11(b)).

139. 449 F.2d at 1117; see 10 C.F.R. § 50, at 249 (1971) (app. D, pts. 12 & 13), which provides:

"12. If any party to a proceeding . . . raises any [environmental] issue . . . the Applicant's Environmental Report and the Detailed Statement will be offered in evidence. The atomic safety and licensing board will make findings of fact on, and resolve, the matters in controversy among the parties with regard to those issues. Depending on the resolution of those issues, the permit or license may be granted, denied, or appropriately conditioned to protect environmental values.

13. When no party to a proceeding . . . raises any [environmental] issue . . . such issues will not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the Commission's review processes, they will not be received in evidence, and the Commission's responsibilities under the [NEPA] will be carried out in toto outside the hearing process." *Id.* App. D was substantially revised to comport with the holding in *Calvert Cliffs'*. See 36 Fed. Reg. 18071-76 (1971); 37 Fed. Reg. 864 (1972).

140. 42 U.S.C. § 4332 (2)(C)(v) (1970).

141. 449 F.2d at 1117. See Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 Brooklyn L. Rev. 139, 149-51 (1970), for an interesting comparison of this procedure with that of the Department of Transportation.

142. 449 F.2d at 1118 (footnote omitted). The court refused to allow the AEC to defer

Petitioners further contended that the AEC's refusal to consider non-radiological environmental factors at hearings officially noticed before March 4, 1971 violated the NEPA's provision that all environmental factors be considered by government agencies after January 1, 1970.¹⁴³ The court noted that the hearings affected by this exclusionary regulation might continue for a year until final action was taken, thereby allowing the Commission to take major federal actions having an undetermined environmental impact for more than two years after the Act's effective date without complying with the NEPA.¹⁴⁴ In defending this policy, the AEC relied on the alleged failure of the NEPA to enunciate detailed guidelines and inflexible timetables for the Act's implementation,¹⁴⁵ as well as the Commission's desire to provide for an orderly period of transition.¹⁴⁶ The court found these arguments particularly specious and unpersuasive, holding that: "The absence of a 'timetable' for compliance has never been held sufficient, in itself, to put off the date on which a congressional mandate takes effect. The absence of a 'timetable,' rather, indicates that compliance is required forthwith."¹⁴⁷

Petitioners also contested the AEC procedure precluding independent evaluation and balancing of non-radiological environmental factors where the satisfaction of the environmental standards of another responsible agency had been certified.¹⁴⁸ The AEC premised this position on section 104 of the Act which provides:

consideration of environmental effects absent outside intervention. This conclusion is implicit in the court's statement that the "NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy." *Id.* at 1117.

143. *Id.*; see 10 C.F.R. § 50, at 249 (1971) (app. D, pt. 11(b)), which provides in part: "Any party to a proceeding for the issuance of a construction permit or an operating license for a nuclear power reactor or a fuel reprocessing plant may raise as an issue in the proceeding whether the issuance of the permit or license would be likely to result in a significant, adverse effect on the environment. If such a result were indicated, in accordance with the declaration of national policy expressed in the [NEPA], consideration will be given to the need for the imposition of requirements for the preservation of environmental values consistent with other essential considerations of national policy, including the need to meet on a timely basis the growing national requirements for electric power. The above-described issues shall not be construed as including (a) radiological effects, since radiological effects are considered pursuant to other provisions of this part or (b) matters of water quality covered by section 21(b) of the Federal Water Pollution Control Act. This paragraph applies only to proceedings in which the notice of hearing in the proceeding is published on or after March 4, 1971." *Id.*

144. 449 F.2d at 1119.

145. *Id.* (citing brief for respondents). Reliance was also placed on the fact that nowhere in the statute is there a bar to "agency provisions which are designed to accommodate transitional implementation problems." *Id.* (footnote omitted).

146. *Id.*

147. *Id.* at 1120.

148. *Id.* at 1117; see 10 C.F.R. § 50, at 249 (1971) (app. D, pt. 11(b)), which provides: "With respect to those aspects of environmental quality for which environmental quality standards and requirements have been established by authorized Federal, State, and regional agencies, proof that the applicant is equipped to observe and agrees to observe such standards

Nothing in section [102] . . . shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.¹⁴⁹

Ironically, the AEC was arguing that while NEPA reforms do not supersede more specific statutes,¹⁵⁰ the more specific statutes do emasculate the NEPA.¹⁵¹ The court concluded that to read the section as the Commission proposed would be to ignore the basic purpose and spirit of the Act.¹⁵² Thus the effect of the AEC's regulation would be that NEPA procedures, "viewed by the Commission as superfluous, [would] wither away in disuse, applied only to those environmental issues wholly unregulated by any other federal, state or regional body."¹⁵³ In the court's view, certification by another agency would not be dispositive of the issue of environmental damage.¹⁵⁴ For example, the Commission stated that it would "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."¹⁵⁵ The court held that: "Obedience to water quality certifications under WQIA is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties."¹⁵⁶ While such certification does establish "a *minimum condition* for the granting of a license,"¹⁵⁷ it does not have to be the final word.¹⁵⁸ There might still be damage, but not of a sufficient degree to violate the standards set up by the WQIA.¹⁵⁹ Since state certifying agencies set up under the WQIA do not attempt to weigh possible damage against opposing benefits, the Commission's interpretation would circumvent the balancing process required by the Act.¹⁶⁰ Clearly,

and requirements will be considered a satisfactory showing that there will not be a significant, adverse effect on the environment. Certification by the appropriate agency that there is reasonable assurance that the applicant for the permit or license will observe such standards and requirements will be considered dispositive for this purpose." *Id.*

149. 42 U.S.C. § 4334 (1970).

150. See notes 73-76 *supra* and accompanying text.

151. See 449 F.2d at 1124.

152. *Id.* at 1123.

153. *Id.* at 1122-23.

154. *Id.* at 1123.

155. *Id.* at 1122 (footnote omitted); see 10 C.F.R. § 50, at 249 (1971) (app. D, pt. 11(a)). The Act is codified at 33 U.S.C. §§ 1151-75 (1970). While the AEC's rules do not require that applicants' environmental reports and detailed statements include "a discussion of the water quality aspects of the proposed actions," 10 C.F.R. § 50, at 248 (app. D, pt. 6) they prevent independent consideration of such by the Commission in its review process. *Id.* at 249 (app. D, pts. 11-12). See note 148 *supra* and accompanying text.

156. 449 F.2d at 1125.

157. *Id.*

158. *Id.*

159. *Id.* at 1123.

160. *Id.* See notes 68-72 *supra* and accompanying text. The fact that another agency's standards are satisfied involves judgment of a different magnitude. "Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect

in the court's view, any interpretation of section 104 that would give rise to such an omission would be in direct conflict with the overriding purpose of the Act.¹⁶¹ While section 104 requires obedience to the standards set by other agencies, the section was not meant to authorize total abdication.¹⁶²

Petitioners' final attack was directed against the AEC's refusal to consider construction halts or alterations of plans for nuclear facilities for which construction permits had been granted prior to January 1, 1970—the effective date of the NEPA—but which could not be operational until after that date.¹⁶³ Of course the Calvert Cliffs plant was of primary and most immediate concern in this respect.¹⁶⁴ While the AEC recognized that environmental measures must be taken *now* in its provision for the drafting of an environmental report in advance of any operating license proceedings,¹⁶⁵ it failed to provide for "any independent action based upon the material in the environmental reports . . ."¹⁶⁶ The AEC claimed that in view of the national power crisis, the rule was as practicable as possible.¹⁶⁷ The court stated, however, that the mandate to use "all practicable means consistent with other essential considerations of national policy"¹⁶⁸ was applicable only in regard to the substantive goals set forth in section 101 of the Act.¹⁶⁹ The procedural requirements of section 102, on the other hand, are inflexible in their requirement of full consideration, thereby imposing a decidedly stricter standard of compliance.¹⁷⁰ The court thus concluded that the AEC's deferral of consideration of environmental impact until the operating license proceedings (at which time correctional action would in all probability be so costly as to shift the balance) violated the intent of the Act.¹⁷¹

of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount." 449 F.2d at 1123.

161. *Id.*

162. *Id.* at 1124. See also *Greene County v. FPC*, 3 *Env. Rptr.—Cases 1595* (2d Cir. 1972); *Kalur v. Resór*, 335 *F. Supp.* 1 (D.D.C. 1971).

163. 449 F.2d at 1127.

164. *Id.*

165. *Id.*; 10 C.F.R. § 50, at 247 (1971) (app. D, pt. 1): "Each holder of a permit to construct a nuclear power reactor or a fuel reprocessing plant issued without the Detailed Statement . . . having been prepared, who has not filed an application for an operating license, shall submit . . . an Environmental Report as soon as practicable." *Id.*

166. 449 F.2d at 1127.

167. *Id.* at 1127-28 (citing brief for respondents).

168. *Id.* at 1128.

169. *Id.* at 1128. See also notes 54-57 *supra* and accompanying text.

170. *Id.* See also notes 58-72 *supra* and accompanying text. .

171. 449 F.2d at 1128. Although the projects in question might have been started prior to January 1, 1970, the Act "clearly applies to them since they must still pass muster before going into full operation." *Id.* at 1179 (footnote omitted). The Commission conceded that such consideration did not amount to a retroactive application of the NEPA, agreeing with the court that the two distinct phases of federal approval involved (construction and operation permits) distinguished this case. *Id.* & n.43. See also *Environmental Defense Fund v. TVA*, 3 *Env. Rptr.—Cases 1553* (E.D. Tenn. 1972). The guidelines issued by the Council on Environmental Quality expressly urged the utilization of NEPA procedures, even when

In regard to the four rules challenged by the petitioners,¹⁷² the court held that revision was necessary and that that revision should reflect "an exercise of substantive discretion which will protect the environment 'to the fullest extent possible.' No less is required if the grand congressional purposes underlying NEPA are to become a reality."¹⁷³

D. *Beyond Calvert*

Although the *Calvert* court unequivocally held that the NEPA requires compliance with its procedural mandates, the Act by its terms requires a detailed statement only when a federal agency is involved with "proposals for legislation and other major Federal actions *significantly* affecting the quality of the human environment . . ." ¹⁷⁴ Several recent cases have focused on the interpretation of this statutory language. *Sierra Club v. Hardin*¹⁷⁵ involved a Department of Agriculture permit for the construction of a U.S. Plywood-Champion Papers, Inc. pulp mill in Tongass National Forest.¹⁷⁶ The defendants contended that

approval of a project had been given prior to January 1, 1970: "To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act 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." 36 Fed. Reg. 7727 (1971); cf. *Lathan v. Volpe*, 3 Env. Rptr.—Cases 1362, 1368 (9th Cir. 1971); *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967) (per curiam), cert. denied, 390 U.S. 921 (1968).

172. The court did not address the issue of retroactivity per se. One implication to be gleaned from the court's discussion is that in determining whether to apply the NEPA retroactively, courts should not adopt a strict position, but rather first determine if the broad policy of the Act can be achieved through such application. Note, *Retroactive Laws—Environmental Law—Retroactive Application of The National Environmental Policy Act of 1969*, 69 Mich. L. Rev. 732, 760 (1971). Other courts have taken the view that projects approved before the effective date of the Act are covered by it since each appropriation thereafter is an action within the contemplation of the Act. *Environmental Defense Fund v. TVA*, 3 Env. Rptr.—Cases 1553 (E.D. Tenn. 1972); See *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). But see *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

173. 449 F.2d at 1129.

174. 42 U.S.C. § 4332(2)(C) (1970) (emphasis added). It would appear, however, that some actions not requiring section 102 statements may require environmental impact statements under section 309 of the Clean Air Act of 1970, 42 U.S.C. § 1857h-7 (1970). See generally Comment, *Section 309 of the Clean Air Act: EPA's Duty to Comment on Environmental Impacts*, 1 Env. L. Rptr. 10146, 10149 (1971). Section 309 requires that the Environmental Protection Agency examine areas of statutory authority and make written comments on possible environmental effects in the areas of legislation, proposed federal guidelines and new federal construction. The EPA is to report all such possible effects to the CEQ. 42 U.S.C. § 1857h-1 (1970).

175. 325 F. Supp. 99 (D. Alas. 1971).

176. *Id.* at 102.

this was not a major federal action, thus requiring no detailed statement.¹⁷⁷ The court, relying on the same U.S. Plywood environmental study used by the Forest Service, found that the Forest Service was justified in concluding that a statement was unnecessary.¹⁷⁸ In anticipation of the CEQ's final guidelines, the court did temper its decision by indicating that in the future such procedures might not be acceptable.¹⁷⁹ Certainly even without the benefit of such guidelines it would seem reasonable to assume that the report used to justify this result should have been prepared by a disinterested party.

In *Davis v. Morton*¹⁸⁰ the district court was faced with a lease of restricted Indian land approved by the Secretary of the Interior.¹⁸¹ The Secretary contended that the action should not be considered a "major federal action."¹⁸² Noting that after the lease had been completed the statutory authority for Indian land leases¹⁸³ had been amended to require environmental consideration, the court concluded that Congress thereby indicated that the NEPA was inapplicable to such actions.¹⁸⁴ Shortly after the decision, however, the CEQ issued its guidelines to be used in classifying major federal actions requiring environmental statements; the list includes any actions "involving a Federal lease, permit, license, certificate or other entitlement for use"¹⁸⁵ Clearly the conclusion of the CEQ was contrary to the interpretation given by the *Davis* court. The guidelines additionally require that the determination of major federal actions be made with a "view to the overall, cumulative impact of the action proposed (and of future actions contemplated)."¹⁸⁶ Even in local actions,¹⁸⁷ the CEQ requires a statement where there is potential for significant environmental effect, and in every case where an action is highly controversial.¹⁸⁸ The implication is that it would be advisable to prepare the statement in all actions likely to have any environmental impact.

In *Scherr v. Volpe*¹⁸⁹ the court concluded that, while federal agencies are called upon to decide what the NEPA requires in certain situations, when such a decision is challenged, it is for the court to construe the meanings of "major" and "significantly affecting" and thereafter apply them to the action in ques-

177. *Id.* at 120 n.52.

178. *Id.* at 127.

179. *Id.*

180. 335 F. Supp. 1258 (D.N.M. 1971).

181. *Id.* at 1259.

182. *Id.* at 1260.

183. 25 U.S.C. § 415 (1970).

184. 325 F. Supp. at 1260-61.

185. 36 Fed. Reg. 7724 (1971).

186. *Id.*

187. "Localized actions" are not clearly defined. However, it appears that the term is designed to include individually small or insignificant actions which may have some environmental effect, contribute cumulatively to an overall environmental problem or set a precedent for potentially larger actions. See *id.*

188. *Id.*

189. 336 F. Supp. 886 (W.D. Wis. 1971).

tion.¹⁹⁰ Conversion of twelve miles of highway from two to four lanes¹⁹¹ was then deemed to be within the scope of the NEPA's mandate.¹⁹² It would appear that the courts concur with the CEQ in their conclusion that nearly all actions will require environmental statements in order to comply with both the letter and the spirit of "the Congressional command to assemble the information necessary to an informed decision . . ." ¹⁹³

Following *Calvert* another question has developed with regard to environmental statements. Assuming that they are required and that "environmental issues [must] be considered at every important stage"¹⁹⁴ of a federal action, the issue then becomes *when* must the statement be prepared. The guidelines promulgated by the CEQ suggest that the answer is "[a]s early as possible and in all cases prior to agency decision . . ." ¹⁹⁵ In *Lathan v. Volpe*¹⁹⁶ the court of appeals noted that the statement must obviously be prepared early in the decisionmaking process.¹⁹⁷ Were the statement to be prepared only upon final approval, as the defendants had advocated,¹⁹⁸ "then it could well be too late to adjust the formulated plans so as to minimize adverse environmental effects."¹⁹⁹

*Upper Pecos Association v. Stans*²⁰⁰ involved a grant of federal funds by the Economic Development Administration of the Department of Commerce (EDA) to the Forest Service for the construction of a highway in the Santa Fe National Forest.²⁰¹ While the court properly noted that "the project must be of sufficient definiteness before an evaluation of its environmental impact can be made,"²⁰² it would appear that it misconstrued the Act in holding that the environmental statement was not required where the Forest Service had yet to approve the final location and specific plans.²⁰³ While both agencies had agreed that the proposed highway constituted a major federal action,²⁰⁴ it is significant, as Judge Murrah noted in his dissenting opinion, that at no time did the EDA consider the environmental impact of its grant.²⁰⁵ The NEPA expressly requires that "all

190. *Id.* at 888.

191. *Scherr v. Volpe*, 336 F. Supp. 882, 884 (W.D. Wis. 1971).

192. 336 F. Supp. at 888-89.

193. *Id.* at 890; see 36 Fed. Reg. 7724 (1971). But see *Citizens v. Laird*, 3 Env. Rptr.—Cases 1580 (D. Me. 1972), holding that a mock invasion by the Department of the Navy would not require an environmental impact statement.

194. *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

195. 36 Fed. Reg. 7724 (1971).

196. 3 Env. Rptr.—Cases 1362 (9th Cir. 1971).

197. *Id.* at 1368.

198. *Id.* While federal approval of the highway plans had not yet been given, authorization for the acquisition of property had been granted. *Id.*

199. *Id.*

200. 452 F.2d 1233 (10th Cir. 1971).

201. *Id.* at 1235.

202. *Id.* at 1237.

203. *Id.*

204. *Id.* at 1235.

205. *Id.* at 1239 (dissenting opinion).

agencies . . . include . . . a detailed statement"²⁰⁶ Since all agencies must comply, it is difficult to justify the court's exempting the EDA. Moreover, it is difficult to accept the EDA's contention that a project to which they had previously committed 3.8 million dollars²⁰⁷ was as yet too indefinite to require the preparation of an impact statement.²⁰⁸ In any event, at that point the agency action had been completed within the contemplation of the NEPA.²⁰⁹

VI. CONCLUSION

Calvert Cliffs' and subsequent decisions have shown that compliance with the NEPA's procedural requirements will be strictly enforced. Nonetheless, because the mandate is procedural, it can be argued that the Act affords less environmental protection than would be desirable. "[D]ecision-making in a given agency is required to meet certain procedural standards, yet the agency is left in control of the substantive aspects of the decision."²¹⁰ So long as the agency involved has seriously considered environmental impact, the court will not interject itself within the area of discretion of the executive as to the choice of the action to be taken.²¹¹

Partially underlying this limited standard of review is the practical consideration that, excepting the area of procedural fairness, the courts lack the technical expertise to review such agency decisions.²¹² Conceding that the courts may not be competent to subject the environmental statements issued to a more discriminating standard than that of good faith, the alternative seems to be that the

206. 42 U.S.C. § 4332(2)(C) (1970) (emphasis added).

207. 452 F.2d at 1235.

208. *Id.* at 1236-37.

209. See text accompanying note 195 *supra*.

210. *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233, 1236 (10th Cir. 1971) (footnote omitted). See also *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

211. See *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233, 1236 (10th Cir. 1971); *National Helium Corp. v. Morton*, 326 F. Supp. 151, 154 (D. Kan. 1971); *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 170, 172 (D. D.C. 1972). The initial problem in the area is one of judicial review of agency action. See generally Berger, *Administrative Arbitrariness: A Synthesis*, 78 *Yale L.J.* 965 (1969); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 *Harv. L. Rev.* 367 (1968); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 *Colum. L. Rev.* 612 (1970). The recent trend in this area has been toward greater liberality. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156-57 (1970). Applying this principle where environmental factors are involved, the right to judicial review of agency action or inaction has been widened in an attempt to secure the type of organized evaluation which will be in the overall public interest. See *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

212. Recently the Supreme Court noted in an environmental action involving the pollution of a river that "successful resolution would require primary skills of factfinding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision We have no claim to such expertise" *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 505 (1971). See generally Saferstein, *supra* note 203, at 382-83.

responsibility for enforcing the protection of our nation's environment should be placed elsewhere.

One solution would be to have this function performed under the auspices of the Council on Environmental Quality.²¹³ Not only is this independent body composed of three members "exceptionally well qualified to analyze and interpret environmental trends and information of all kinds,"²¹⁴ but they are also empowered to enlist the aid of a staff, including any experts and consultants, to expedite the execution of their duties.²¹⁵ The problem develops when one considers the severe limitations inherent in CEQ's statutory powers. In essence, the CEQ may assist the President in preparing his annual report²¹⁶ and gather, analyze and interpret current environmental information,²¹⁷ including the detailed statements prepared by federal agencies pursuant to section 102 of the NEPA.²¹⁸ Lacking is any regulatory authority in relation to the statements.²¹⁹ The CEQ apparently has power neither to require that a statement be prepared and submitted nor to veto one which appears to be deficient.²²⁰ This is of substantive significance since the statement's primary function is to assure that adequate environmental consideration has been given in all federal actions.²²¹ One result of the CEQ's lack of authority has been the proliferation of actions in the courts to force preparation of environmental statements. This is not to say that none are being prepared. In fact, as of September 1, 1971 a total of 1,761 lengthy final and draft statements had been filed.²²² With an annual appropriation of only one million dollars,²²³ it is not difficult to see that in addition to its other duties the sheer volume of statements makes a thorough CEQ evaluation highly improbable.²²⁴ The net effect is that the bulk of analysis and

213. The CEQ was created by the NEPA. 42 U.S.C. § 4342 (1970). See text accompanying notes 77-80 *supra*.

214. *Id.*

215. *Id.* § 4343.

216. *Id.* § 4344(1).

217. *Id.* § 4344(2).

218. *Id.* § 4332(2)(C).

219. See Grad, *supra* note 4, § 13.01, at 13-30.

220. *Id.* at 13-20.

221. See note 142 *supra* and accompanying text.

222. Comment, Section 309 of the Clean Air Act: EPA's Duty to Comment on Environmental Impacts, 1 *Env. L. Rptr.* 10146, 10149 (1971).

223. 42 U.S.C. § 4347 (1970).

224. The Environmental Protection Agency functions in close harmony with and to reinforce the mission of the CEQ. Essentially the CEQ is an advisory group while the EPA is a more operation or line oriented organization, charged with protecting the environment through the abatement of pollution. "In short, the [CEQ] focuses on what our broad policies in the environmental field should be; the EPA [focuses] on setting and enforcing pollution control standards. The two are not competing, but complementary . . ." Message from the President, 116 *Cong. Rec.* 23528, 23530 (1970). Thus, while the EPA does in a sense assist the CEQ, the load of the CEQ is not lessened since it must still evaluate the environmental statements submitted pursuant to section 102 of the NEPA, and also in certain instances evaluate statements submitted under an EPA mandate. See note 174 *supra*.

evaluation must be left to the interested agency and, when possible, to the general public.²²⁵ While public scrutiny is highly desirable, the only recourse at that point is to the courts, again raising the problem of judicial review.²²⁶

Rather than to defer these weighty problems to the procedural rubber stamp of the courts, the CEQ should be given a more meaningful function within the framework of the NEPA. Not only must the CEQ be given regulatory power over both the substance and procedure of environmental impact statements, but the Council must also be given a budget which will be reasonably calculated to provide the staff necessary to adequately review the environmental ramifications of all federal actions. At this point the NEPA will become an even more effective tool in man's effort to improve his environment.

225. The NEPA also requires public disclosure of the statements. 42 U.S.C. § 4332(2)(C) (1970). A discussion of some of the problems which have been encountered in this respect may be found in Grad, *supra* note 4, § 13.01, at 13-31 to -33.

226. See text accompanying notes 210-15 *supra*.