Major Federal Actions Under the National Environmental Policy Act

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MAJOR FEDERAL ACTIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA),\(^1\) although it marked a significant step on the path toward improving the quality of the environment, fell short of becoming a panacea by its failure to delineate clearly the substantive rights which the legislation was designed to enforce. In view of expanding concepts of standing and reviewability, NEPA has produced a great deal of litigation in the past few years, much of it centered on the standards of judicial review outlined in the Administrative Procedure Act (APA).\(^2\) The purpose of NEPA was to promote a national environmental policy, but its broad and general terms seem to invite interpretational dispute, and implementation of its provisions has yet to be carried out uniformly. Congress' failure to establish definite standards has left delineation of NEPA's mandate to the slower, more haphazard process of judicial review of agency actions. Initially, some courts were unwilling to review an agency's findings concerning the environmental impact of their action under any standard. However, courts now recognize their obligation to review substantive findings, but most use the narrow "arbitrary and capricious" standard of APA. Until courts are willing to engage in a more thorough review of environmental impact, at a minimum, they must continue to emphasize and expand the procedural duties mandated by NEPA and to review more closely how agencies make their decisions. Such has been the perceptible trend in NEPA litigation.

II. LEGISLATIVE HISTORY OF NEPA

NEPA was enacted after Congress realized that, although national policies were not designed to cause environmental damage, they did little to prevent it.\(^3\) Those policies were designed mainly to enhance material wealth\(^4\) and thus planning became "the exclusive province of the engineer and the cost analyst."\(^5\) The humanistic viewpoint, concerned with man's relationship with the environment, was being "overlooked or purposely ignored."\(^6\) Congress realized that actions having possible irreversible consequences were being undertaken without adequate consideration of their impact. Congress hoped

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6. Id.
to accomplish three goals with NEPA. First, Congress wanted to restore public confidence in the federal government's ability not only to achieve important public goals, 7 but also to maintain and enhance the quality of the environment. Second, it hoped to shift the emphasis towards handling environmental problems on a "preventive and . . . anticipatory basis" 8 rather than on a remedial one. Third, by using an "interdisciplinary approach"—with consideration given not only to the opinions of engineers and cost analysts but also to those of economists, sociologists, and landscape architects 9—decisions would be made with a more humanistic emphasis. Finally, NEPA was to provide all federal officials with a legislative mandate to consider the consequences of their actions on the environment. Consciousness-raising was necessary because "[a]s a nation we have no controlling ethical relationship with our natural environment; some persons wish to exploit, others to preserve, and most are in between." 10 Therefore, by setting forth a statement of national policy and a declaration of national goals, 11 some controlling relationship between man and the environment could perhaps be fostered. As NEPA states:

The purposes of this [Act] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. 12

The Council on Environmental Quality was not given any actual authority to review and enforce agency compliance. 13 Its purpose was to provide an organization at the highest level of government whose focus would be on environmental management, with one of its tasks being to "recommend national policies [and] to promote the improvement of the quality of the environment." 15 It was not vested with any legal authority and has no regulatory functions. It does have the duty to issue guidelines 16 to assist agencies in their preparation of detailed environmental statements required by

7. Senate Report, supra note 3, at 8. Such goals consist of "material wealth, greater productivity, and other important values." Id. at 8-9.
11. 1 A. Reitze, Environmental Law 1 (1972). The author discusses how, in the absence of such a relationship, legal change comes very slowly.
NEPA. These guidelines, though purely advisory, are entitled to deference by agencies and the courts.

The detailed environmental impact statement (EIS) is the crux of NEPA. It is the device created by Congress to insure that consideration would be given to environmental quality and management when "major Federal actions significantly affecting the quality of the human environment" are proposed. Its purpose is to "build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action and to assist agencies in implementing not only the letter, but the spirit, of the Act." This distinction between the "letter" and the "spirit" (minimal procedural as opposed to enthusiastic substantive compliance with NEPA), combined with the fact that an EIS is required only for "major Federal actions significantly affecting the quality of the human environment," have caused non-uniformity in the implementation of NEPA.

III. JUDICIAL REVIEW OF NEPA

A. Development

Since administrative agencies, to a large extent, control the use of most natural resources, the restoration and maintenance of the environment rests in their hands. Thus, environmental litigation almost inevitably involves the problem of judicial control of such agencies. No mention of the judiciary is made in NEPA; nor is there any indication in the legislative history that Congress intended the courts to review agency compliance with NEPA. Yet

17. 40 C.F.R. § 1500 (1975).
20. This detailed statement should contain: "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).
21. Such consideration is to be insured by requiring proposed environmental statements to be circulated to other federal, state, and local agencies and to be made available to the public for comment. The final statements are to be drawn in such fashion as to be responsive to comments received. 42 U.S.C. § 4332 (1970); 40 C.F.R. §§ 1500.2(b), 1500.7 (1974).
the courts have become the overseers of NEPA through their review of agencies’ EIS determinations.

The courts’ willingness to take cognizance of such challenges to agency determinations concerning environmental impact statements reflects a liberalized attitude toward judicial review of administrative agency decisions. Numerous reasons have been advanced to explain this attitude, but two are particularly compelling. First, NEPA was enacted when “courts were generally tightening their review of agency decision making, so that they welcomed NEPA as an additional statutory basis for close judicial review. . . .” Second, the courts may be evolving a higher standard of review in environmental cases. “Judicial review as it evolved in the heyday of economic regulation may be inadequate for today’s agency decisions affecting health, life, and similar intensely personal interests, which have always had a special claim to judicial protection.” Indeed, it has been recognized that, absent the right to a healthful environment, one may be deprived of all rights. Evidence of this is the expansion of standing to sue in environmental cases.

If litigants had to prove economic injury in order to challenge action which they felt was damaging their environment rather than their pocketbook, few such cases would be brought. As long as a plaintiff can show that he has

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25. It has been said that the court’s role is to make the promise of environmental legislation a reality. The promise referred to is “the commitment of the Government to control, at long last, the destructive engine of material ‘progress.’” Calvert Cliffs’ Coord. Comm., Inc. v. AEC, 449 F.2d 1109, 1111 (D.C. Cir. 1971). The courts are to do this by seeing that “important legislative purposes [NEPA’s, for instance], heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”


27. Id.

28. 115 Cong. Rec. 40,419 (1969). Section 101(c) of NEPA originally read: “The Congress recognizes that each person has a fundamental and inalienable right to a healthful environment . . . .” Id. at 40,416 (italics omitted). As such, it would have clearly created substantive rights under NEPA, but this was changed by the Conference Committee to its present form “that each person should enjoy a healthful environment . . . .” Id. at 40,419. Senator Jackson, Chairman of the Committee on Interior and Insular Affairs to which the bill was referred, opposed the change. He felt that the Senate bill only expressed what was already the law of the land. Id. at 40,416.

29. The landmark cases on the subject of standing to sue when the claimed injury is more aesthetic than economic are Sierra Club v. Morton, 405 U.S. 727 (1972), and United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). At issue was the meaning of “a person . . . aggrieved” under section 10 of the APA, 5 U.S.C. § 702 (1970). In Sierra Club, the Court held that a person aggrieved must suffer “injury in fact” (405 U.S. at 734) and that the appellants had failed to allege such injury. However, in SCRAP, the Court found that the appellees had “sufficiently alleged that they were ‘adversely affected’ or ‘aggrieved.’” 412 U.S. at 685.

30. As it is, plaintiffs have enough obstacles to overcome. The relaxation of standing requirements only eased in part the difficulty of bringing an environmental suit. Often plaintiffs in environmental cases are groups organized in an ad hoc fashion to challenge a particular operation or project. E.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973). Since NEPA’s EIS requirement applies only to federal actions, the plaintiff’s adversary inevitably
suffered or will suffer injury, economic or otherwise, he will be deemed to have standing to raise his environmental claim.

Environmental cases which arose before the enactment of NEPA or which were not brought under NEPA show that the environment is afforded special treatment in the eyes of the law. Therefore, when NEPA was passed courts could easily view it as an authorization for "special judicial solicitude of those who seek pro bono publico to ensure that the Government and its agents live up to [its demands]."

### B. Procedural versus Substantive Distinction

Early in NEPA litigation the question arose as to what judicially enforceable duties had been created under NEPA's vague mandate. Under section 101, federal agencies were "to use all practicable means" to foster the quality of the environment; under section 102, agencies were to carry out "to the fullest extent possible" the procedures outlined therein. When the meaning of a particular statutory term is in doubt, the courts will look to Congressional intent; in this case Congress clearly intended full agency compliance. NEPA was intended to be "concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation." Section 102 was intended to establish "action-forcing" procedures to insure that the basic substantive policy of section 101 be followed. NEPA did not intend solely "[p]ro forma compliance" nor did it intend merely that these "detailed impact studies . . . fill governmental archives." Its primary purpose was to "compel federal agencies to give

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34. Id. § 4332 (1970).
38. Scherr v. Volpe, 466 F.2d 1027, 1031 (7th Cir. 1972).
serious weight to environmental factors in making discretionary choices." In *Calvert Cliffs' Coordinating Committee v. AEC*, although the court found that the substantive policy of section 101 left room "for a responsible exercise of discretion," the procedural provisions were found to require strict compliance. Under section 102, Congress authorized and directed federal agencies to perform the EIS requirement "to the fullest extent possible." Each federal agency is to comply unless there is an existing law applicable to the agency's operations which makes compliance impossible. Thus, absent a clear conflict of statutory authority, section 102 duties must be complied with fully.

The *Calvert Cliffs' decision established that courts could review agency action under NEPA, but that such review would not be uniform. Agency action under the substantive directives of section 101 was to be reviewed under the "arbitrary and capricious" standard, while procedural compliance under section 102 would be more strictly reviewed.

An analogous standard of review was set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*. The suit in *Overton Park* was not brought under NEPA, but rather concerned an alleged violation of the Department of Transportation Act of 1966 and the Federal-Aid Highway Act of 1968.

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41. 449 F.2d 1109 (D.C. Cir. 1971).

42. Id. at 1112. Petitioners claimed that the rules promulgated by the AEC to effect environmental consideration were too lenient to comply with NEPA. AEC argued that NEPA's vagueness allowed for much discretion. The court disagreed; it stated that, unlike section 101, section 102 "mandate[d] a particular sort of careful and informed decisionmaking process . . . which was to be rigorously enforced.

43. NEPA § 102, 42 U.S.C. § 4332 (1970). The House amendment provided that "nothing in this Act shall increase, decrease or change any responsibility or authority of any Federal . . . agency created by other provision of law." 115 Cong. Rec. 40,418 (1969). This would seem to require a different standard of compliance than that required by the present terminology. But neither in the view of the Senate conferees nor in that of the House conferees was this semantic change in any way meant to limit the Congressional directive to all federal agencies to carry out the policies of the Act. Id.

44. 115 Cong. Rec. 40,418 (1969). The House conferees went further and added that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." Id. at 39,703. "[T]he words [to the fullest extent possible] are an injunction to all federal agencies to exert utmost efforts to apply NEPA to their own operations. In short, the phrase . . . reinforces rather than dilutes the strength of the prescribed obligations." Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).

45. 449 F.2d at 1115. The court took this into consideration when it stated: "We must stress as forcefully as possible that this language [to the fullest extent possible] does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies . . . ." Id. at 1114.

46. Id. at 1115.

47. 401 U.S. 402 (1971).


These acts forbid the use of federal funds for highway construction through public parks if a "feasible and prudent" alternative route exists. If there is no alternative, the construction program must include all possible planning to minimize harm to the park.\(^5\) Overton's landmark decision expanded the concept of judicial review\(^5\) in that it called for a penetrating inquiry by the court to see if all relevant environmental factors should ever be considered by the agency.\(^5\) The in-depth review espoused by Overton has been used in NEPA cases to test initial determinations of the need for an EIS.\(^5\) Yet, as Overton made clear, the ultimate decision based upon the weighing of environmental considerations is to be reviewed under a much narrower standard of review—the "arbitrary, capricious, [or] abuse of discretion" standard.\(^5\) This standard, coupled with the presumption of validity which


\(^{51}\) This is true even though the Court applied a narrower standard of review than that sought by petitioners who sought the application of the substantial evidence test or, in the alternative, de novo review. 401 U.S. at 414. The former requires the reviewing court to consider all evidence and then exercise its own judgment as to whether there is sufficient evidence supporting the agency's action. De novo review requires independent factfinding by the court. The Court stated that neither of these standards was applicable. It limited the substantial evidence test to instances "when the agency action is taken pursuant to a rulemaking provision of the [APA] itself ... or when the agency action is based on a public adjudicatory hearing." Id. at 414 (citations omitted). De novo review was also limited to two situations: (1) when action is adjudicatory and the agency's factfinding procedures inadequate and (2) when new issues are raised in proceedings to enforce non-adjudicatory agency action. Id. at 415.

\(^{52}\) Id. at 416.


\(^{54}\) 5 U.S.C. § 706(2)(A) (1970). This standard presumes that administrative agencies possess expertise in environmental affairs, and thus that the agency has made the best decision possible. Yet, as suggested by some writers, environmental litigation, like any other litigation, requires the particular skills of judges to balance opposing interests. Practicing Law Institute, Legal Control of the Environment 314 (1970).

The approach to judicial review of the administrative process taken by the Court in Overton has been termed the "New Era" view. F. Anderson, Some Perspectives on Environmental Decision-Making in the Administrative Process, 4 Environmental L. Rep. 50,123, 50,126 (1974). Two other views concerning the subject are the "pessimistic" (espoused by Professor Sax) and the "status quo" views. Id. at 50,125-27. Proponents of the former contend that courts rather than agencies should have the primary responsibility for environmental decision-making. They would substitute a judicial balancing process, incorporating opposing economic and social interests for administrative agency expertise. Id. at 50,127. The advocates of the "status quo" view feel that the administrative process has worked reasonably well, whereas Congress and the courts have performed inadequately. Id. at 50,125. Although Professor Sax' view would allow for in-depth substantive review by the courts, this radical departure from traditional policy has not been accepted. As Chief Justice Burger stated: "Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The
attaches to agency decisions, leaves substantive review of NEPA statements somewhat limited. Under principles of administrative law, courts should "intervene not merely in case of procedural inadequacies . . . but more broadly if [they become] aware . . . that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." Thus, the real emphasis is on how the decision is made and not on its substance. The procedural provisions of NEPA, as opposed to the substantive, have therefore naturally been used as the vehicle for challenging agency operations which appear to threaten the environment.

C. Review of Negative Threshold EIS Determinations

Backed by the legislative history of NEPA and the Supreme Court's decision in Overton, the standard which has evolved in some courts to test threshold EIS determinations is the "rule of reasonableness" standard. This was the standard of review explicitly held to govern judicial review of an agency's threshold determination not to file an EIS in Save Our Ten Acres v. Kreger. In this case of first impression, the Fifth Circuit Court of Appeals reversed the district court's refusal to enjoin the construction of a federal office building in downtown Mobile, Alabama. The General Services Administration, the agency in charge of the construction, had decided that although the action was "major," it would not significantly affect the quality of the human environment. The district court refused to enjoin the operation on the grounds that this determination could not be set aside unless arbitrary, capricious, or an abuse of discretion. On appeal the court said that a more relaxed rule of reasonableness should be used: "The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." The court also noted that the General Services Administration's world must go on . . . ." Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP), 409 U.S. 1207, 1217-18 (1972) (opinion in chambers). In a subsequent decision in Aberdeen, the Supreme Court refused to interfere with an ICC general revenue proceeding which involved the preparation of an EIS. 95 S. Ct. 2336 (1975).

57. 472 F.2d 463 (5th Cir. 1973).
58. Id. at 465.
59. Id.
60. Id. at 466. The treatment of the terms "major" and "significantly" as two separate criteria, both of which must be found before an EIS is required, has been criticized as allowing the possibility that a "minor" action, though significantly affecting the environment, would not require an EIS. "By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA . . . ." Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1321-22 (8th Cir. 1974). Unfortunately, the guidelines of the Council on Environmental Quality indicate that each criterion of the phrase
contention that the stricter standard set forth in Overton only applies where a statute expressly conditions the agency’s actions on certain prerequisites was “overly formalistic” and thus without merit.

Under the “reasonableness” standard the court is to weigh the evidence of both parties to determine if the agency could reasonably have concluded that its proposed action does not constitute a “major Federal action significantly affecting the quality of the human environment.” Where the agency's record is inadequate, supplementary proof may be considered. This relaxed standard of review gives less weight to an agency's initial determination that an EIS is not required. It represents an expansion of Overton and thus differs from the “arbitrary and capricious” standard. But this does not mean that it is inconsistent with the APA. The APA provides that it is the reviewing court's duty to decide questions of law. Agency findings and conclusions are to be set aside when arbitrary. Therefore by interpreting the phrase “major Federal actions significantly affecting the quality of the human environment” as involving primarily questions of law, rather than fact, the reviewing court is no longer bound by the narrower standard. Agency decision-making generally involves mixed questions of fact and law. In such

“major Federal action significantly affecting the quality of the human environment” must be met separately. 40 C.F.R. § 1500.6(c) (1975).

61. 472 F.2d at 466.
62. Id. at 467 n.7 (italics omitted).
63. Id. at 467.
64. “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706 (1970). Cf. Hanly v. Kleindienst, 471 F.2d 823, 828 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (Hanly II) (reviewing court is to determine all questions of law de novo).
67. 471 F.2d at 828. See Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1319 (8th Cir. 1974); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1248-49 (10th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973). “The administrative decision [not to file an EIS] was not one of discretion such as administrative agencies have in innumerable matters and which is referred to in the general terms of § 706(2)(A) . . . . NEPA’s specific requirements in § 102 clearly speak in mandatory terms, and do not leave the determination to administrative discretion . . . . Of course, there must be a determination whether the statute applies and some area of judgment is involved. However, we are convinced that the compass of the judgment to be made is narrow and that the determination must be reasonable in the light of the mandatory requirements and high standards set by the statute.” 484 F.2d at 1248-49.
68. The court in Hanly I and II recognized that they were not bound by the “arbitrary and capricious” standard, but they failed to reject it. Hanly v. Kleindienst, 471 F.2d 823, 829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (Hanly II); Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir.), cert. denied, 409 U.S. 990 (1972) (Hanly I). Similarly, in Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973), the court found that although the challenge was made against the procedural section of NEPA, the matter was one requiring technical expertise. Id. at 1281.
cases the standard of review adopted by the court should accord with that which best serves the policy behind the statute.69

The urgency of the problems facing the environment and the growing concern on the part of the public prompted the enactment of NEPA. The main goal of NEPA's requirement of an EIS was to insure that opposing views and alternatives are weighed in the balance with technical and economic factors thereby restoring public confidence in the ability of the federal government to maintain a balance between economic and environmental considerations.71 In order to promote this objective, agencies are required to build into their decisionmaking process, beginning at the earliest possible point, an appropriate and careful consideration of the environmental aspects of proposed action in order that adverse environmental effects may be avoided or minimized . . . .72

For this requirement to be effective, courts must review agency determinations at the earliest possible point. This requires in-depth review of an agency's decision not to file an EIS. If agency action is totally shielded from impartial review, as it is when courts refuse to effectively scrutinize even the threshold decisions concerning the need for an EIS, NEPA's objective is thwarted.

Not all courts have adopted the broader standard of review evolved from Overton. Some still abide by the "arbitrary and capricious" standard of the APA, interpreting the phrase "major Federal action significantly affecting the quality of the human environment" as primarily a question of fact. But included in this group are some courts which require a statement of reasons why an EIS was found to be unnecessary.73 This requirement is somewhat consistent with NEPA's intent because, without a statement of reasons, the reviewing court has no way of knowing whether or not the agency has made its decision arbitrarily. In NEPA, Congress was in effect saying that decisions concerning actions which will significantly affect the quality of the human environment can no longer be left solely to administrative agency expertise.74

70. 40 C.F.R. § 1500.1(b) (1975).
71. Senate Report, supra note 3, at 8.
72. 40 C.F.R. § 1500.1(a) (1975) (emphasis added).
73. Hanly v. Mitchell, 460 F.2d 640, 646 (2d Cir.), cert. denied, 409 U.S. 990 (1972). This requirement was later expanded in Hanly II when the court called for public notice before a threshold determination was made. Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).
74. "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has . . . special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . ." NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970). But cf. Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (absent clear-cut
Although there is as yet no one standard used in all courts to test EIS determinations, the trend is away from presuming that an agency has made a satisfactory decision and toward demanding more of an agency, both in terms of the consideration given the environment and the proof provided the public.

IV. WHAT CONSTITUTES A MAJOR FEDERAL ACTION

The fact that NEPA's language is broad is not disputed; in fact, courts have said that it is intentionally broad in order to cover the whole spectrum of agency operations. It is this very breadth and generality of terms which has spurred most of the litigation arising under NEPA. The phrase most often the subject of dispute is that of section 102(2)(C) which states that all federal agencies shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official ....

There has been litigation on almost every aspect of this phrase's terminology—the meaning of "major," the meaning of "Federal," whether an action "significantly affects the environment," whether an action affects the "human" environment, and whether the "responsible official" can delegate to another the duty to prepare this detailed statement. By claiming that their actions do not fit the description set out in section 102(2)(C) agencies have tried to avoid complying with the duty to file an EIS. In accordance guidelines Congress was content to depend on agency's good faith determinations; Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1286 (9th Cir. 1973).


77. E.g., Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 698 (2d Cir. 1972) (approval and 60% funding of expressway); Scherr v. Volpe, 466 F.2d 1027, 1032-33 (7th Cir. 1972) (highway construction).


81. E.g., Greene County Planning Bd. v. FPC, 455 F.2d 412, 422 (2d Cir.), cert. denied, 409 U.S. 849 (1972) (EIS must be prepared by the federal agency involved). As a result of the litigation surrounding the sufficiency of an EIS when prepared by one other than the appropriate federal agency, NEPA was amended to allow for a state agency or official to prepare the EIS in certain instances. Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424.
with its duty to aid policy makers in their decisions, the Council on Environmental Quality has issued guidelines which help identify major federal actions significantly affecting the environment. According to the guidelines, the terms "'major' and 'significantly' are intended to imply thresholds of importance and impact" which, if met, would require the agency to file an EIS. A federal action is one "where there is sufficient Federal control and responsibility," and this "action must be one that significantly affects the quality of the human environment either by directly affecting human beings or by indirectly affecting human beings through adverse effects on the environment." None of these guidelines furnishes specific standards and the terms remain vague and "amorphous." As a result, the parameters of the phrase have been drawn by the courts. Examples of projects held initially to constitute "major Federal action" are the building of a dam, highway construction and the construction of a correctional center. More recently, federal approval of otherwise private projects, such as the approval of coal leases, has been held to be "major" action. Such examples generally cover single projects of considerable magnitude. Later this was expanded to include the cumulative effect of several individually "minor" federal actions.

One of the latest issues arising under this section is whether a comprehensive impact statement must be filed for a combination of individually major projects, each of which was already preparing a separate EIS. This question was answered in *Scientists' Institute For Public Information v. AEC (SIPI).* The plaintiffs in *SIPI* challenged the AEC's failure to issue a comprehensive EIS to cover its Liquid Metal Fast Breeder Reactor Program. The AEC contended that NEPA does not require separate analysis of an entire program, only detailed statements for particular facilities. To this the court responded:

82. See generally 40 C.F.R. § 1500.1 (1975).
83. Id. § 1500.
84. Id. § 1500.6(c).
85. Id.
86. Id.
87. Hanly v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). Speaking of the term "significantly," the court stated that as "[y]et the limits of the key term have not been adequately defined by Congress or by guidelines issued by the CEQ." Id. at 830.
89. Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972).
94. 481 F.2d 1079 (D.C. Cir. 1973).
95. Id. at 1085.
Indeed, quite the contrary is true. "Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement." 96

Similarly, in Conservation Society v. Secretary of Transportation,97 improvement was planned for a twenty-mile segment of U.S. Route 7, but the court found that conversion of this route into a divided lane, limited access highway was a "goal possible of accomplishment" and therefore held that before such contemplated construction was undertaken, a comprehensive study of the environmental impact was needed.98

The question of when to issue an EIS is another consideration. In response to the contention that an agency would be forced to speculate in order to issue an EIS for a research and development program,99 the SIPI court devised a four-factor balancing test100 to be used in determining when a statement should be filed. In applying its own test, the court decided that a statement was necessary, even though no specific action had yet been taken to implement the program. The court also noted that the "environmental survey" being prepared by the AEC would not be an adequate substitute for a NEPA statement unless it contained the type of analysis and followed the procedures required by NEPA.101

The latest decision in this area, Sierra Club v. Morton,102 was more complex in that the appellees, the Departments of the Interior, the Army, and Agriculture, denied that they were even involved in a "program." They contended that, until they themselves designated their individual actions as such, they were exempt from the requirement of a comprehensive EIS.103

96. Id. at 1087, quoting Council on Environmental Quality, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972).
98. Id. at 930.
99. 481 F.2d at 1086.
100. "How likely is the technology to prove commercially feasible, and how soon will that occur? To what extent is meaningful information presently available on the effects of application of the technology and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as the development program progresses? How severe will be the environmental effects if the technology does prove commercially feasible?" Id. at 1094.
101. Id. at 1092. Since the agency has broad discretion as to the form and content of an EIS there is no reason to issue a substitute to avoid complying with NEPA. Id.
103. Id. at 873. In another recent case, Cady v. Morton, No. 74-1984 (9th Cir., June 19, 1975), the Bureau of Indian Affairs had approved leases covering over 30,000 acres of land, but it had prepared an EIS covering only 770 acres. That the issuance of leases, including those pertaining to Indian lands, constitutes "major federal action" had been established in an earlier case, Davis v. Morton, 469 F.2d 593 (10th Cir. 1972). Therefore, the issue here involved the adequacy of the EIS. Defendants contended that since an adequate EIS had been prepared governing a segment of the entire project, no comprehensive one was needed. The court disagreed stating that "the breadth and scope of the possible projects made possible by . . .
Appellants, on the other hand, relying on the guidelines issued by the Council on Environmental Quality, contended that “whenever a group of individual federal projects are related geographically, environmentally, or programmatically,” a comprehensive statement is necessary.\textsuperscript{104} Faced with the problem of whether to extend \textit{SIPI} to cover situations where agencies deny involvement in a broad program, the court rejected the appellees' restricted construction of NEPA's requirements.\textsuperscript{105} The court further noted that “the duty to plan comprehensively [may even] be imposed on the Government apart from the duty to file an impact statement for comprehensive plans.”\textsuperscript{106}

The challenged agency action in \textit{Sierra Club} was the development of the valuable coal resources in the Northern Great Plains Province. Although the Secretary of the Interior had ordered a study “to assess the potential social, economic, and environmental impacts that development of the Province would cause,”\textsuperscript{107} and had suspended the issuance of long-term coal leases pending completion of an impact statement covering a national coal policy,\textsuperscript{108} federal activity in the Province continued.\textsuperscript{109} The district court had found that “[t]here is no existing or proposed Federal regional program, plan, project, or other regional ‘federal action’ within the meaning of NEPA Section 102(2) for the development of coal . . .”\textsuperscript{110} and that “in the absence of regional federal action, multiple applications for individual federal action”\textsuperscript{111} do not constitute major federal action and consequently, do not require a comprehensive impact statement. The court of appeals disagreed, stating:

when the federal government, through exercise of its power to approve leases . . . attempts to “control development” of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, whether it labels its attempts a “plan,” a “program,” or nothing at all.\textsuperscript{112}

The decision that individually major actions may cumulatively constitute a major federal action is fully consistent with the Council on Environmental Quality's position that the statutory phrase, “major Federal actions significantly affecting the quality of the human environment,” is to be construed by agencies with a view to the overall, cumulative impact of the approval of the leases require the type of comprehensive study that NEPA mandates adequately to inform the Secretary of the possible environmental consequences of his approval.” No. 74-1984 at 11.

\textsuperscript{104} 514 F.2d at 873.

\textsuperscript{105} Id.

\textsuperscript{106} Id. at 874.

\textsuperscript{107} Id. at 863.

\textsuperscript{108} Id. At the time this action was brought, a draft EIS had been issued pursuant to the Secretary's order. It was highly criticized and a second draft was called for. Instead, however, the Department of the Interior has gone ahead and issued the final impact statement despite the controversy and challenge in court seems imminent. \textit{N.Y. Times}, Sept. 21, 1975, § 1, at 21, col. 1.

\textsuperscript{109} 514 F.2d at 864-65.

\textsuperscript{110} Id. at 867 (emphasis in original).

\textsuperscript{111} Id.

\textsuperscript{112} Id. at 878.
action proposed, related Federal actions and projects in the area, and further actions contemplated. . . . [A]n environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action.\textsuperscript{113}

The question of timing of such a comprehensive EIS was also raised in \textit{Sierra Club}. Although the court found that major federal action was being contemplated by the appellees, this did not \textit{ipso facto} require the filing of a comprehensive statement.\textsuperscript{114} SIPI's four-factor test relating to timing was adopted by the court and modified to apply to all federal actions:

[T]he agency, or the reviewing court, should inquire as follows: How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?\textsuperscript{115}

Applying these factors to appellees' actions proved inconclusive.\textsuperscript{116} Therefore, the case was remanded so that appellees could determine if and when an EIS would be needed.\textsuperscript{117} The court indicated that a statement of reasons would be

\textsuperscript{113} 40 C.F.R. § 1500.6(a) (1975).
\textsuperscript{114} 514 F.2d at 879.
\textsuperscript{115} Id. at 880. The last two factors, the extent to which irretrievable commitments are being made and the severity of environmental effects upon implementation, led to the denial of a preliminary injunction in a recent case, New York v. Nuclear Regulatory Comm'n, Civil No. 75-2121 (S.D.N.Y., Sept. 9, 1975). In that case plaintiffs sought to enjoin the further transportation by air of plutonium and other nuclear materials (SNM). Plaintiffs claimed that failure to comply with NEPA by not issuing an EIS constituted irreparable harm per se and thus justified the issuance of an injunction. Judge Conner disagreed, stating that the cases supporting plaintiffs' position involved "some Federal action, such as the construction of a building or highway or the activating of a nuclear power plant, which could not be easily undone or changed. Thus it would be impossible or at least impracticable to make the modifications which might subsequently be indicated by an EIS." Id. at 7. The court failed to see that a denial of the injunction would make future compliance with NEPA "a hollow gesture." Id. The court also noted that air transportation of SNM had been going on for twenty-five years without incident. Id. at 9.

\textsuperscript{116} The court found that as for two of the factors the time for an EIS was ripe—meaningful information was available, and the environmental consequences of coal development in the Province would be severe. Although the information had not yet been compiled, it is the mere availability of the information which governs; the purpose of the EIS is to compile and analyze the information. 514 F.2d at 880.

\textsuperscript{117} "The most usual form of judgment adverse to [the] agency is a remand" for further fact finding. L. Jaffe, Judicial Control of Administrative Action 589 (1965). Perhaps this is the judgment most appropriate in NEPA litigation in light of the fact that NEPA was not intended to establish environmental protection as an exclusive goal. Rather, Congress intended to restructure priorities so that adequate consideration would be given to the environment when projects, undertaken to achieve other ends, were proposed. "Although this sort of control (remanding a cause to an agency for further findings) may seem to the layman ineffectual, or only a stalling of the inevitable, . . . these demands for further findings can make a difference. It may encourage the institution whose actions threaten the environment to really think about what it is doing, and
required if the agencies determined that an EIS was unnecessary, and it noted that such a determination could be challenged.

The dissent in *Sierra Club* argued that, although forcing "the federal government to engage in comprehensive long-range planning might in some sense be socially 'good'," NEPA does not contain this requirement. It also felt that requiring an agency to justify its determination that an EIS is unnecessary is inconsistent with NEPA and unduly burdensome since there might be an "infinite number of 'negative' impact statements." But this is really not the case. It is true that NEPA did not mandate any particular level of environmental quality; instead, it meant to encourage planning as a natural part of any decisions significantly affecting the environment. Therefore, in the statement that agencies do not have to plan comprehensively, the most important aspect of NEPA has been overlooked. The broader an agency's anticipated actions are, the more severe the consequences on the environment are likely to be. The argument that a "negative impact statement" is unduly burdensome is equally unpersuasive because the agencies are permitted to formulate this statement, as well as a regular EIS, in any manner they feel appropriate, subject to a standard of reasonableness.

V. CONCLUSION

In passing NEPA, Congress established a body of principles to govern that is neither an ineffectual nor a small feat." C. Stone, *Should Trees Have Standing?* 37 (1974) (emphasis deleted).

118. 514 F.2d at 882. Compare with Hanly I and II, note 73 supra. In *Sierra Club*, not only did the court require a statement of reasons but it also applied the reasonableness standard.

119. 514 F.2d at 882-83. An affirmative decision to file an impact statement may also be challenged by attacking the adequacy of an EIS. Such appears to be the likely result of the Department of the Interior's decision to issue a final EIS despite the public demand for a second draft. In a recent case, *National Resources Defense Council, Inc. v. Callaway*, No. 75-7048 (2d Cir., Sept. 9, 1975), plaintiffs successfully challenged the defendant's failure to issue an adequate comprehensive EIS. This case involved a dredging project in the Thames River to accommodate a new class of submarines. The EIS covered only one project, although other groups intended to dredge and dump the spoil at the same site. Although none had gained final approval, they were "beyond the stage of mere speculation" and should have been included in the EIS. *Id.* at 6090.

120. 514 F.2d at 893 (MacKinnon, J., dissenting).

121. Id. at 893 n.20. See also Hanly v. Kleindienst, 471 F.2d 823, 836-37 (2d Cir. 1972) (Friendly, C. J., dissenting) (agency must now go through procedures formerly needed only when an EIS was required—thus a threshold determination now becomes a mini-impact statement). The dissent in *Sierra Club* argued that "the realm of things the federal government does not do is still rather large." 514 F.2d at 893 n.20 (MacKinnon, J., dissenting) (emphasis deleted). This argument against requiring a statement of reasons, however, is very weak. It is precisely this type of inaction and lack of actual environmental consideration which prompted NEPA's enactment. Senate Report, supra note 3, at 4-5.

122. The Senate recognized the importance of long-range planning, stating that the "principal threats to the environment . . . were the spinoff, the fallout, and the unanticipated consequences which resulted from the pursuit of narrower, more immediate goals." Senate Report, supra note 3, at 8-9.

federal agencies' decisions affecting the environment; neither Congress nor the Council on Environmental Quality established any specific standard of environmental concern to which agencies could refer. Instead, Congress' goal was to "build" into the decision-making process a genuine change of thinking which would mandate consideration of environmental factors as well as the traditional technical and economic aspects of a proposed project. Such a change in traditional policy would, understandably, be hard to implement, particularly since the nation as a whole had not yet become environmentally-oriented when NEPA was passed in 1969. But because Congress failed to clearly delineate the substantive duties under NEPA, the courts, faced with its interpretation according to the principles of review of administrative agency action, were left with only one effective tool—the environmental impact statement. It was decided early that courts had the obligation to review agency compliance with NEPA's procedural requirements, although not all courts would engage in any substantive review. Subsequently, courts scrutinized more closely agency decisions not to file an EIS, and were willing to engage in review on the merits. Still, no one standard was established to cover any phase of review, and as yet, five years after its enactment as a national environmental policy, a national standard has yet to surface. But the trend has been to expand the duties surrounding an EIS and to fill in the gaps left by Congress. By requiring that comprehensive EIS's be issued, the courts are following Congress' instruction to heed the long-term effects of agency action. The government must use all practicable means to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."

The establishment of tests which are to balance clear-cut and relevant factors would cure any doubt about what constitutes compliance and violation of NEPA.

Thus, it appears that the "policy" of environmental concern will become an on-going part of agency planning, if only because conscientious plaintiffs make it so. The court's willingness in Sierra Club to extend agency duties even in light of a growing energy crisis is strong evidence that the environment has attained an important status in the hierarchy of national priorities. If the courts' trend of steadily increasing agency duties under NEPA continues, NEPA will perhaps prove itself to be a truly effective weapon against degradation of the nation's life support system.

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124. See notes 77-86 supra and accompanying text.
125. See note 11 supra and accompanying text.