

Judicial Review Under NEPA

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ENVIRONMENTAL LAW

JUDICIAL REVIEW UNDER NEPA

Introduction

In 1965, the Second Circuit's opinion in *Scenic Hudson Preservation Conference v. Federal Power Commission (FPC)*¹ presaged an environmental awakening. The court and its decision represented the bright hopes of newly combative conservationists.

When *Scenic Hudson* returned to the Second Circuit this year, there were many who anticipated that it would again break ground, this time in interpreting the provisions of the National Environmental Policy Act of 1969 (NEPA).² However, as this Note will demonstrate, when *Scenic Hudson* was finally laid to rest, many optimistic expectations of environmentalists went with it.

During the seven years that the case was in the courts, environmental legislation and litigation greatly increased and expanded. Indeed, *Scenic Hudson I* was largely responsible for this increase by recognizing environmental groups as "aggrieved parties" with standing to sue³ and by construing section 10(a) of the Federal Power Act⁴ as mandating consideration of ecological factors in the FPC's decision-making process.

The adoption of NEPA between the Second Circuit's two encounters with *Scenic Hudson* was a development influenced at least in part by that decision⁵ and was also to significantly affect the final outcome of the case. Hailed by some as the most important piece of environmental legislation to date and as "an environmental 'bill of rights,'"⁶ NEPA recognizes as a national concern the attainment of "the widest range of beneficial uses of the environment without . . . undesirable . . . consequence,"⁷ and the need to "preserve important

¹ 354 F.2d 608 (2d Cir. 1965), cert. denied 384 U.S. 941 (1966); 453 F.2d 463 (2d Cir. 1971), cert. denied, 40 U.S.L.W. 3599 (U.S. June 19, 1972).

² 42 U.S.C. § 4321 et seq. (1970).

³ *Scenic Hudson I* recognized that "aggrieved parties" under § 313(b) of the Federal Power Act included those who have shown a special interest in "aesthetic, conservational, and recreational aspects of power development." 354 F.2d at 615-16. But see *Sierra Club v. Morton*, 405 U.S. 727 (1972) (discussed in note 100 infra). See generally Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 *RUTGERS L. REV.* 234, 245 (1970) [hereinafter Hanks].

⁴ Federal Power Act (FPA) § 10(a), 16 U.S.C. § 803(a) (1970).

⁵ "In a very real sense this Act is a legislative response to and embodiment of the far-sighted and significant *Scenic Hudson* decision of this court . . ." 453 F.2d at 491-92 (1971) (dissenting opinion).

⁶ Hanks, *supra* note 3, at 230; see note 93 infra.

⁷ 42 U.S.C. § 4332(b)(3) (1970).

historic, cultural, and natural aspects of our national heritage."⁸ It further directs, as a means to effectuate this end, that all federal agencies, "to the fullest extent possible,"⁹ follow the policies set forth in the Act and include, along with every report or recommendation "significantly affecting the quality of the human environment"¹⁰ an environmental impact statement. Such statement is to include:

- (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.¹¹

⁸ *Id.* § 4331(b)(4).

⁹ 42 U.S.C. § 4332. The Conference Report on NEPA, H.R. REP. No. 91-765, 91st Cong., 1st Sess. 9010 (1969), indicated that the phrase "to the fullest extent possible" was to apply to the specific mandates of section 102 (*i.e.*, the preparation of an impact statement), as well as to the general statement of intent set forth in section 101. In addition, the severely limiting phrase "nothing in this act shall increase, decrease, or change any responsibility or authority of any Federal office or agency created by other provisions of law" was deleted by the House conferees. This was to assure compliance with NEPA even where an agency might have a pre-existing duty to give some consideration to environmental factors in the course of its decision-making. That is, absent *express* agency provisions to the contrary, other agency directives "shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102." In addition, the hearings on S. 1075, S. REP. No. 91-296, 91st Cong., 1st Sess. 13-14 (1969), indicate the desire to grant new authority to federal agencies having no current responsibility for protecting the environment. See Environmental Quality—The Third Annual Report of the Council on Environmental Quality 224-25 (1972) [hereinafter CEQ THIRD ANNUAL REPORT]; Hanks, *supra* note 3, and notes therein for comments and criticisms of this legislative history; see note 22 and accompanying text *infra*.

¹⁰ 42 U.S.C. § 4332(2)(C) (1970).

¹¹ *Id.* For salutary effects of the NEPA on prior and subsequent water pollution legislation see Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1125-26 (1970). For a comparison of the NEPA with other recent legislation see O. GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW 9 (1970). For international ramifications of NEPA see CEQ THIRD ANNUAL REPORT at 258. Additional legislation was enacted and guidelines were published in succeeding years to implement NEPA. The Council on Environmental Quality (CEQ) was created to oversee administration of NEPA. National Environmental Policy Act of 1969, Pub. L. 91-190, §§ 202-06, 83 Stat. 854-56. It subsequently published guidelines in 1970 for following § 102 procedural requirements, and issued two annual reports in August, 1970 and August, 1971. The Environmental Protection Agency (EPA) was established under Reorg. Plan No. 3 of 1970, 7 C.F.R. § 2762 (1970), to execute policies of the CEQ and to coordinate and, in some cases to assume, functions of other agencies. The Environmental Quality Improvement Act of April 3, 1970, Pub. L. No. 91-224, 84 Stat. 91, provided the administrative staff for the CEQ. Exec. Order No. 11514 further requires agencies to continually monitor their activities with respect to

In sum, "[t]he Environmental Policy Act made the obligation imposed by *Scenic Hudson* on the FPC . . . one generally applicable to all agencies . . ."¹² The adoption of the operating procedures of section 102 to be followed by all agencies was to a large extent predicated on the concepts set forth in *Scenic Hudson I*.¹³ Some of the most optimistic observers hoped that NEPA "may be an effective instrument for easing the severity of the substantial evidence — rational basis test in environmental cases."¹⁴

But there were some who doubted the efficacy of NEPA because it did not set forth specific standards for agencies to follow and for courts to review.¹⁵ Indeed, hearings held in 1970 to determine how NEPA was faring revealed that problems due to differing interpretations of the language of the Act were arising, that some projects were being approved in blatant disregard of NEPA procedures and that some agencies deliberately suppressed unfavorable information or refused to change existing policies to conform to NEPA.¹⁶

But, in spite of this, NEPA was declared to be "having an effect on agency thinking beyond what even its optimistic proponents could have anticipated."¹⁷

How greatly agency thinking has been affected by NEPA has yet to be accurately measured, but for awhile the courts proceeded to apply it liberally.¹⁸ In fact, environmentalists met with such success in these

enhancing the environment. In 1972 the EPA issued Proposed Environmental Protection Agency Procedures on Preparation of Environmental Impact Statements, 40 C.F.R. part 6 (1972).

¹² Hanks at 267.

¹³ See *id.* and n.146.

¹⁴ Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 644 (1970) [hereinafter Sive].

¹⁵ Morris, *Environmental Statutes: The Need for Reviewable Standards*, 2 ENVIRONMENTAL LAW 75, 76 (1971) [hereinafter Morris]. For a comparison of the explicitness and effectiveness of environmental statutes, see *id.* at 79 nn.35 & 81. See also Grad, *Intergovernmental Aspects of Environmental Controls* in ENVIRONMENTAL CONTROL: PRIORITIES, POLICIES AND THE LAW 172 (1971), reviewed in Wandesforde-Smith, 1 ECOLOGY L.Q. 866 (1971); Brecher, *Environmental Litigation: Strengths & Weaknesses*, 1 ENVIRONMENTAL AFFAIRS 565, 571 (1971) [hereinafter Brecher] and CEQ THIRD ANNUAL REPORT at 226 for effect of Presidential action on environmental issues.

¹⁶ ADMINISTRATION OF NEPA, REPORT BY THE COMMITTEE ON MERCHANT MARINE AND FISHERIES, H.R. REP. NO. 92-316, 92d Cong., 1st Sess. (1971), cited in A. REITZE, JR., 1 ENVIRONMENTAL LAW one-112 (1971) [hereinafter REITZE]. Only about 300 impact statements per year have been submitted, in contrast to the thousands of projects and actions initiated annually.

¹⁷ REITZE at one-113. For some indications of new agency rules and procedures, see CEQ THIRD ANNUAL REPORT at 227-29.

¹⁸ In *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971), the court ordered compliance with the NEPA requirement for an impact statement where the project was two-thirds complete; accord, *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401 (D.D.C. 1971). But see *Ely v. Velde*, 321 F. Supp. 1088 (D. Va. 1971); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

cases that some government spokesmen and industry leaders began to express fears that courts were going beyond legislative intent.¹⁹ As a result of three cases in the District of Columbia Circuit,²⁰ Congress requested that NEPA be amended and called on CEQ²¹ Chairman Russell Train to testify. But in a letter to Congress²² and at subsequent hearings, Train indicated his satisfaction with the general approach of the courts in their application of NEPA²³ although he said he

In *Zabel v. Tabb*, 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the court of appeals approved the Army's refusal, solely on ecological grounds, to license a plan to extend a shoreline, although NEPA was enacted after the denial of the permit.

¹⁹ Representative C. Holifield told a group of industrial executives that the purposes of NEPA were being thwarted by "unreasonable interpretations . . . by the courts and by agency overreaction to those interpretations." 2 (Current Developments) ENV. REP. 1396 (Mar. 17, 1972). See Like, *Multi-Media Confusion*, 1 ECOLOGY L.Q. 495, 507-8 (1971) [hereinafter Like] for a history of the restrictive attitude of the Atomic Energy Commission toward NEPA, which generated adverse criticism from the press and the public, and led the court in *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), to chastise the Commission's "crabbed interpretation of NEPA" and forced it to adopt different standards. *Id.* at 1117.

²⁰ *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971); *Izaak Walton League v. Schlesinger*, 337 F. Supp. 287 (D.D.C. 1971). *Kalur* held that NEPA did not exempt the Army from an impact statement and went along with the general intent of *Calvert Cliffs'* that although standards set by other agencies, in this case the Federal Water Pollution Control Agency, are to be recognized . . . [o]bedience to [other specific environmental mandates] is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties. 335 F. Supp. at 14.

²¹ See note 11 *supra*.

²² In his letter, Train generally approved of the *Kalur* decision (see note 20 and accompanying text *supra*) but disagreed with that part of the opinion holding that final judgments as to water pollution control requirements were to be made by the Corps of Engineers rather than the Environmental Protection Agency, the agency with specific statutory responsibility and expertise in this area. Since it was deemed important to centralize the responsibility for abating water pollution and since directives under the Federal Refuse Act Permit Program would insure the same conscientious compliance with environmental safeguards, it was felt NEPA would offer little if any additional protection. Train also

made it quite clear the NEPA was not intended to apply to environmental regulatory actions taken or concurred in by Federal or state agencies charged with the mission of regulating and protecting the environment. Instead, NEPA was intended to require agencies who have some other primary mission to consider environmental protection where they had no previous statutory mandate to do so . . .

2 (Current Developments) ENV. REP. 1248 (Feb. 11, 1972); see note 9 and accompanying text *supra*. This statement was clarified in CEQ THIRD ANNUAL REPORT at 239, *i.e.*, that NEPA was to "supplement, but not supplant" requirements existing with other agencies.

²³ The judicial role under NEPA appears to be in line with the traditional one of ensuring that the governmental process prescribed by statute is working correctly without attempting to second-guess agency decision as to the proper balance to strike between environmental concerns and other national goals . . . by and large we think the courts have been doing a sound job in applying NEPA.

Testimony of CEQ Chairman Russell Train as quoted in 2 (Current Developments) ENV. REP. 1324 (Mar. 3, 1972).

would support "legislative proposals to correct problems created" by the controversial cases.²⁴ At any rate, worries were probably somewhat allayed when in 1971 *Scenic Hudson* reached the Second Circuit again.

The following discussion will present *Scenic Hudson II* in context with two other 1971 Term cases dealing with judicial review under NEPA. The cases appear in reverse chronological order²⁵ so that the issues may be presented in the sequence in which they would arise in a single agency proceeding. Specifically, those issues are: necessity of an impact statement; the agency's role in compiling the impact statement; and the agency's final determination based on the impact statement. It is hoped that presentation of the cases in this framework will enable the reader to assess the impact of *Scenic Hudson II*.

Necessity of an Impact Statement

In *Hanly v. Mitchell*²⁶ the Second Circuit was called upon to determine under what conditions courts may review an administrative agency's determination that an NEPA environmental impact statement is not required for a particular agency action.

The General Services Administration (GSA) had planned the construction of a federal courthouse annex and detention facility in lower Manhattan and plaintiffs, residents of the surrounding neighborhood,²⁷ had sought unsuccessfully to obtain a preliminary injunction. The basis of the complaint was the GSA's alleged failure to comply with the procedural requirements of NEPA by not drafting an environmental impact statement.²⁸ The Second Circuit held that GSA acted

²⁴ *Id.* at 1323. Part of the problem, centering on the extent of the exemption under NEPA to agencies with previously existing statutory mandates, is being studied by EPA, but no recommendation has been made yet. CEQ THIRD ANNUAL REPORT at 240.

²⁵ *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.) (decided May 17, 1972); *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.) (decided Jan. 17, 1972); *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir.) (decided Oct. 22, 1971).

²⁶ 460 F.2d 640 (2d Cir.), *cert. denied*, 41 U.S.L.W. 3247 (U.S. Nov. 6, 1972).

²⁷ NEPA contains no provision granting standing to question the lack of an agency impact statement and the Second Circuit did not discuss the standing issue. However *Pizitz v. Volpe*, 4 E.R.C. 1195 (M.D. Ala., May 1, 1972), held that NEPA does create a private right of action but this right is only procedural and not substantive. In *San Francisco Tomorrow v. Romney*, 342 F. Supp. 77 (N.D. Calif. 1972), the lack of an impact statement did not give a citizen's group with no pecuniary interest standing to sue to enjoin construction of an urban renewal project.

NEPA gives citizens' groups the right to be a plaintiff only against federal agencies. *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972), makes it clear that NEPA gives no private cause of action against a private corporation.

²⁸ See text accompanying note 11 *supra* for the Act's provisions as to the factors that must be discussed in an impact statement. The Act also states:

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has juris-

in an arbitrary and capricious manner in failing to consider all relevant environmental factors, and the injunction was issued.

NEPA contains a clear command to agencies of the federal government to consider environmental factors in evaluating proposed actions and to disclose to other government agencies and the public anticipated environmental consequences of such actions, as well as possible alternatives.²⁹ The vehicle for such disclosure is the impact statement required under section 102(2)(C) for "major" federal actions.³⁰

The entire record of GSA's consideration of the environmental impact of the proposed project consisted of a short intra-agency memorandum.³¹ In terse, conclusory language this document stated that adverse effects on the environment would be minimal; that the project would not contribute in any significant way to air and water pollution or urban congestion nor would it threaten public health; that utilities and trash removal would be provided for; and that there would be no material impact upon public transportation. While this was an adequate summary of the environmental impact of that portion of the project devoted to the office building, it failed to even touch

diction by law or special expertise with respect to the 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 . . . , and shall accompany the proposal through the existing agency review processes.

42 U.S.C. § 4332(2)(c).

²⁹ NEPA does not require that federal actions which are detrimental to the environment be abandoned but it has properly been characterized as an "environmental full disclosure law." *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749, 759 (E.D. Ark. 1971). The responsible federal agency must consult with other agencies which have expertise in the environmental area, must prepare an impact statement detailing the consequences to the environment of the contemplated action and must also propose alternatives which would reduce the environmental damage. This statement must then be distributed to the President, the Council on Environmental Quality, and the public.

Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), stressed the Act's requirement that full consideration be given to environmental factors. *Id.* at 1112-14. A balancing of environmental factors versus other factors (*e.g.*, cost) at each stage of the deliberation process is suggested.

³⁰ 42 U.S.C. § 4332(2)(C). When the challenged action does not qualify as "major", courts will not entertain suits under NEPA. In *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Mo. 1972), plaintiffs sought to enjoin the Marine Corps from carrying out a mock amphibious landing on the beaches of Reid State Park in Maine. The court held that environmental damage from the operation would be minimal, and indicated that this was not therefore a major action within the purview of NEPA. *See also* *Echo Park Residents Comm. v. Romney*, 3 E.R.C. 1255 (C.D. Cal., May 11, 1971), upholding the Department of Housing and Urban Development's determination that an impact statement was not required for a proposed 66-unit apartment project in Los Angeles.

³¹ 460 F.2d at 645-46. The court held that the fact that this document was entitled "Environmental Statement" did not estop GSA from denying the need for an impact statement. *Id.* at 645.

upon very significant effects of the jail upon the community. Plaintiffs and the court suggested that squeezing a jail into a densely populated area might affect the area adversely; that authentic fears of riots and disturbances would threaten the living environment; and that noise and traffic congestion would be greatly increased by the flow of people and supplies to and from the jail.

The defendants contended that these were not "environmental considerations" within the purview of NEPA. However, the court concluded that these factors had definite bearing upon the quality of life in an urban environment and were not excluded from consideration by the language of NEPA.³² While it appeared that GSA had not adequately considered all the environmental problems posed by the jail, it remained uncertain whether the court could upset the agency's determination that the project did not "significantly affect the quality of the human environment."³³ The court had not determined the scope of judicial review of the agency decision.

The federal defendants urged that the decision as to whether an impact statement was required was one for the agency to make and could be disturbed only upon a finding that it was arbitrary or capricious or an abuse of discretion.³⁴ Plaintiffs argued for a more

³² "The National Environmental Policy Act contains no exhaustive list of so-called 'environmental considerations', but without question its aims extend beyond sewage and garbage and even beyond water and air pollution." *Id.* at 647. In *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971), the Fourth Circuit held that the Law Enforcement Assistance Administration was required to submit an impact statement in connection with the federally-aided construction of a state penal facility in a scenic area. It was felt that the jail would create an architectural clash with the scenic character of the countryside. In *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971), the Department of Housing and Urban Development was held to have acted arbitrarily in failing to consider the impact of a high-rise apartment building on a residential neighborhood, insofar as it might change the character of the community, and the Department was enjoined from disbursing federal funds for use on the project until a sufficient NEPA statement was filed.

In *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972), an Interstate Commerce Commission order authorizing the abandonment of a railroad line was challenged on the grounds that allowing the abandonment would increase the use of alternate modes of transportation, especially trucks, and would, therefore, contribute to air pollution. The court remanded the case to the Commission with directions to consider these environmental effects and to file a supplemental report with the court in order that the court may determine whether an impact statement need be filed.

While these cases denoted the outer limits of NEPA, it is noteworthy that courts are accepting more imaginative suggestions of circumstances that would constitute environmental impact, and are requiring, particularly in urban settings, that federal agencies pay close scrutiny to these effects. The *Hanly* court declared: "The Act must be construed to include protection of the quality of life for city residents." 460 F.2d at 647.

³³ 42 U.S.C. § 4332(2)(C) (Supp. 1972).

³⁴ 460 F.2d at 648. This language comes from section 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (1967), which establishes standards for judicial review of administrative action. This was the standard applied in *Citizens to Preserve Overton Park*

liberal standard of review in the environmental context, citing several recent decisions which seemed to indicate such a trend.³⁵ The court, however, did not reach the issue of a relaxed standard of judicial review, holding that GSA's failure to consider all relevant factors in arriving at its determination was in itself arbitrary and capricious. The court felt that consideration given to environmental factors by the agency was inadequate even to make a threshold determination as to the necessity for an impact statement.³⁶ For this reason, jail construction was enjoined until GSA makes a proper determination, taking account of all relevant factors, as to whether the jail will significantly affect the quality of the human environment, and hence whether compliance with NEPA procedures is mandated.³⁷

v. Volpe, 401 U.S. 402 (1971), and followed in *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971), and *Echo Park Residents Comm. v. Romney*, 3 E.R.C. 1255 (C.D. Cal., May 11, 1971).

³⁵ In two of the cases, *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972), and *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971), a more liberal standard was applied. However, the decisions dealt only with the conditions under which a preliminary injunction may issue, not with the general scope of judicial review. As the court of appeals said in *Natural Resources*, "[a] greater amplitude of judicial review is called for when the appeal presents a substantial issue that the action of the trial judge was based on a premise as to the pertinent rule of law that was erroneous." 458 F.2d at 832. This statement referred, however, to the requirements (such as a probability of prevailing on the merits) that generally must be met in order to obtain an injunction. The court felt these requirements should be relaxed for critical issues of public moment.

In *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972) and *Scherr v. Volpe*, 336 F. Supp. 886 (W.D. Wis. 1971), it was held that, while the administrative agency had discretion to determine whether compliance with the statute was required, the court itself must construe the statutory language when that determination is challenged. Nevertheless, in neither case did the court suggest a broader scope of review in environmental cases. While the *Scherr* court overturned the Federal Highway Administration's ruling, it did so on the basis of the traditional standard that the agency acted in an arbitrary and unreasonable manner in failing to prepare an impact statement.

The Second Circuit had previously put this issue to rest in *Scenic Hudson Preservation Conference v. FPC (Scenic Hudson II)*, 453 F.2d 463, 468 (2d Cir. 1971). In that case it was held that where all relevant factors have been considered, and the findings are supported by substantial evidence based on that full consideration, the court will not substitute its judgment for that of the responsible agency. (See notes 61-84 and accompanying text *infra* for a thorough discussion of *Scenic Hudson II*.) Clearly, in *Hanly*, the failure of GSA to consider fully all relevant factors prompted the court to issue the injunction.

³⁶ See *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972), where a similar perfunctory statement was rejected as inadequate to suffice as full consideration of environmental factors. "[C]onsideration of environmental matters must be more than a pro forma ritual." *Calvert Cliffs' Coordinating Comm., Inc., v. AEC*, 449 F.2d 1009, 1128 (D.C. Cir. 1971).

³⁷ In addition to *Hanly*, the following cases have enjoined federal agencies from continuing construction of federal projects because they did not file a NEPA impact statement: *Northside Tenants' Rights Coalition v. Volpe*, 346 F. Supp. 244 (E.D. Wis. 1972) (highway enjoined); *Conservation Society of Southern Vermont v. Volpe*, 343 F. Supp. 761 (D. Vt. 1972) (highway enjoined); *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925 (D.D.C. 1971) (waterways project enjoined); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971) (dam enjoined).

The Agency's Role in Compiling the Impact Statement

Once the agency determines that the requirements of NEPA are applicable, it must then proceed to implement them. But as is so often the case in American jurisprudence, the transformation of Congressional language into functional reality is not without disagreement as to the precise road to be followed. In *Greene County Planning Board v. Federal Power Commission*,³⁸ the Second Circuit Court of Appeals was faced with the issue of determining the duties and responsibilities of the Federal Power Commission in relation to the preparation of an NEPA impact statement. The court stated that the agency has a "primary and non-delegable responsibility"³⁹ to independently consider environmental consequences at "every distinctive and comprehensive stage of [its] process."⁴⁰ Thus, it held that the failure of the agency to prepare its own detailed statement of environmental impact prior to agency hearings was in violation of NEPA.⁴¹

The Power Authority of the State of New York had applied, in August 1968, to the Federal Power Commission for authorization to construct, operate and maintain a pumped storage power project which would include construction of three high-power transmission lines through rural areas of New York, generally through Greene County and, particularly, through Durham Valley. The license was granted by the Federal Power Commission but construction was prohibited pending approval of plans for the preservation and enhancement of the environment as it may be affected by the design and location of the transmission lines.⁴² Motions to intervene were filed by the Greene County Planning Board, the Town of Durham, the Association for the Preservation of Durham Valley, the Sierra Club, and several individuals.⁴³

In December 1970, the Federal Power Commission required the Power Authority of the State of New York to file a detailed statement of projected environmental impact. This statement was filed in March 1971, at which time it was circulated among various federal agencies having "special expertise" as required by NEPA section 102(2)(C).⁴⁴

³⁸ 455 F.2d 412 (2d Cir.), *cert. denied*, — U.S. — (1972).

³⁹ *Id.* at 420.

⁴⁰ *Id.*, *citing* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971).

⁴¹ 455 F.2d at 422. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

⁴² Two of the three transmission lines were approved without protest or hearing in April, 1970, after the effective date of NEPA.

⁴³ The Commission granted these motions on May 19, 1970.

⁴⁴ The Power Authority prepared an environmental statement which the FPC cir-

In May, 1971, the Commission ordered a hearing on the proposals of the Power Authority.

Plaintiffs subsequently moved to revoke the 1969 license and to enjoin further construction. They also asked that the Power Authority or, in the alternative, the Commission, be required to pay their legal fees and expenses. It was from the ultimate denial of these motions that the plaintiffs appealed.⁴⁵

In holding that the Commission violated provisions of NEPA by conducting hearings prior to preparing an independent statement of environmental effect of the project, Circuit Judge Kaufman stated that the Commission, as representative of the public interest, has a duty to afford active and affirmative protection to the rights of the public, and that the substitution of the Power Authority's statement was an abdication of that responsibility.⁴⁶

The court points out that section 102(2)(C) requires the agency to integrate the technical sciences and aesthetic arts into a cohesive system of decision-making in order to discover and pursue the course that most effectively serves the environment.⁴⁷ Therefore, the role of

culated to other federal agencies in accordance with § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970):

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

The FPC argued that it had adopted a regulation holding the applicant's draft statement "to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality." 36 Fed. Reg. 22740, § 2.81(b) (Nov. 30, 1971), Federal Power Commission Order No. 415-B. Thus, the Power Authority's study was deemed to fulfill the requirements of § 102(2)(C) and the FPC prepared no statement of its own before holding any hearings.

⁴⁵ These motions were initially denied by the Presiding Examiner of the Commission. Notice of appeal was filed with the Commission, and they were denied sub silentio by operation of law. Rehearings were subsequently granted by the Commission, and orders were issued formally denying the appeals.

⁴⁶ The Second Circuit has uniformly taken this position. The "act [is] designed to require federal agencies to affirmatively develop a reviewable environmental record." *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972).

In *Scenic Hudson Preservation Conference v. FPC (Scenic Hudson I)*, 354 F.2d 608 (2d Cir. 1965) the court stated:

[T]he Commission has claimed to be the representative of the public interest.

This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive an affirmative protection at the hands of the Commission.

Id. at 620.

In *Scenic Hudson II* the court held that no environmental impact statement was necessary since the Commission's final opinion, containing its environmental findings, was a valid substitute for the § 102(2)(C) statement. In his dissenting opinion to the Court's denial of certiorari, Mr. Justice Douglas cites *Greene County* as authority for reversing this aspect of *Scenic Hudson II*. He states that "the impact statement must be written before action is taken If this kind of impact statement is undated . . . [it will be] the beginning of the demise of the mandate of NEPA." 407 U.S. 926, 931-33 (1972).

⁴⁷ 42 U.S.C. § 4332(2)(A), (D), & (E) (1970).

the agency is to be played as an independent party, culminating in an objective statement as to the probable environmental effect of the proposed project.⁴⁸

The court proceeded to state three requirements for ensuring the most efficient implementation of NEPA policies in this project. They are: (1) that the Commission staff prepare a detailed statement before the initial decision by the Presiding Examiner; (2) that the intervenors be given a reasonable opportunity to comment on the statement; and (3) that the intervenors be given the opportunity to cross-examine both Authority and Commission witnesses in light of the statement.⁴⁹ In addition, the Commission is deemed to have planning responsibility and, although its immediate decision must be whether or not to license a single project, it should consider all available and relevant information, particularly that involving plans for future development.⁵⁰

In reaching its conclusions, the Second Circuit relied in part upon the views expressed by the Court of Appeals for the District of Columbia in *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*.⁵¹ There the court held invalid the Atomic Energy Commission rule dispensing with an NEPA statement if the license application were uncontested.⁵² The court stressed that NEPA's primary worth was in making the agency "itself take the initiative of considering environmental values at every distinctive and comprehensive stage

⁴⁸ The court stresses the fact that the applicant's study can hardly be considered objective. It quotes from the Power Authority's statement: "Neither the construction nor the operation of the Gilboa-Leeds transmission line will have any significant adverse impact on the environment." The court continues: "But, the Gilboa-Leeds line . . . will cut a swath approximately 35 miles long and 150 feet wide across the face of Greene and Schoharie Counties. It is small consolation that the line will not scar either existing historical sites or designated park land." 455 F.2d at 420.

Judge Kaufman also notes that the requirement that the agency circulate its initial report to others having "special expertise" is to ensure that there is a comprehensive analysis of the environmental factors early in the review process, prior to preparation of the agency's final detailed statement. He also notes that independent intervenors would likely have only limited resources in terms of money and expertise.

⁴⁹ *Id.* at 422.

⁵⁰ In this regard, the court quotes Justice Douglas' statement, writing for the Supreme Court in *Udall v. Federal Power Commission*:

[Determination whether to license any one project] can be made only after an exploration of all issues relevant to the "public interest", including future power demand and supply, alternative sources of power, [and] the public interest in preserving reaches of wild rivers and wilderness areas . . .

Id. at 423.

⁵¹ 449 F.2d 1109 (D.C. Cir. 1971).

⁵² The court also held that the AEC could not defer to certification by other state and federal agencies that their environmental standards were satisfied. This procedure violates NEPA in that an agency's certification that a particular standard is met does not ensure that the project as a whole will not be harmful to the environment.

of the process."⁵³ *Calvert Cliffs'* is considered the leading case on a liberal interpretation of the National Environmental Policy Act.⁵⁴

The expansive view of the agency's role with respect to the impact statement, while generally a pro-environmentalist stand, can also work against such groups, as the plaintiffs in *Greene County* discovered. The Second Circuit disallowed plaintiffs' request for expenses and fees since it had concluded that it was the Commission's and not the intervenors' duty to prepare a comprehensive environmental record. Thus, since the plaintiffs were under no duty and there was no clear Congressional authority granting counsel fees and expenses, they were denied.⁵⁵

With respect to retroactivity, the court joined the general trend holding that NEPA is not to be applied retroactively to projects that have received final approval before the effective date of its enactment.⁵⁶ However, despite the fact that two of the power lines involved

⁵³ *Id.* at 1119. As a result of *Calvert Cliffs'* the AEC has formulated new rules (36 Fed. Reg. 18071 (Sept. 9, 1971)) which require the AEC to first draft its own environmental statement which is then sent to other federal agencies. The agencies' comments, the applicant's own statement plus other comments from interested parties become the basis for the AEC's final detailed statement which is presented at the hearings.

The Second Circuit suggested that the FPC formulate new rules similar to these so as to facilitate compliance with the spirit of NEPA "to the fullest extent possible." 455 F.2d at 422.

Calvert Cliffs' took note of Congressional intent to preclude the phrase "to the fullest extent possible" from "[being] used by any Federal agency as a means of avoiding compliance with directives set out in § 102 . . . [N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." 2 U.S. CODE CONG. & AD. NEWS 2770, 91st Cong., 1st Sess. (1969). Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority." 449 F.2d at 1115. *City of New York v. U.S.*, 337 F. Supp. 150 (E.D.N.Y. 1972), also holds that this phrase is meant to be broadly interpreted.

⁵⁴ See Cohen and Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. IND. & COM. L. REV. 685, 696-97 (1972); Note, 20 KAN. L. REV. 501, 512 (1972).

⁵⁵ 455 F.2d at 426. The court acknowledged that intervention is a costly, lengthy process which can be a deterrent to interested citizens. In *Scenic Hudson I* the court noted: "Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken." 354 F.2d 608, 617 (2d Cir. 1965). "A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in a manner not possible for the uninformed and poorly financed public." *Id.* at 620. Indeed, by the time of the Second Circuit's remand hearing on *Scenic Hudson*, conservationists had spent nearly \$250,000 on the case. Hanks, *supra* note 3, at 265.

The agency itself should prepare a single coherent and comprehensive environmental analysis because "[i]t is moreover, unrealistic to assume that there will always be an intervenor with the information, energy, and money required to challenge a staff recommendation which ignores environmental costs." 449 F.2d at 1118-19.

⁵⁶ See generally Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 22 HASTINGS L.J. 805 (1971); Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971).

There has been some confusion regarding the retroactive application of NEPA. See

were subject to the requirements of NEPA, the court found "no compelling basis for halting construction" where the projects were 80 percent complete at the time of suit.⁵⁷

Despite the Second Circuit's suggestion that the FPC formulate new rules as the Atomic Energy Commission has done,⁵⁸ the FPC has refused to do so.⁵⁹ This blatant failure to comply with both NEPA and the dictates of a federal court of appeals has not passed without criticism.⁶⁰ Furthermore, such an obstructionist attitude, in light of

Pennsylvania Environmental Council v. Bartlett, 454 F.2d 613 (3d Cir. 1971), and *Concerned Citizens v. Volpe*, 459 F.2d 332 (3d Cir. 1972), holding that NEPA is not retroactive, and *Zabel v. Tabb*, 430 F.2d 199, 213 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), holding that it is.

The general trend seems to be that if final federal approval has been given or if construction is substantially completed then NEPA will not be applied retroactively. If further federal action or approval is necessary, however, then NEPA is applied even if construction began before NEPA became effective.

The courts seem to utilize a standard of reasonableness in determining retroactivity of the statute. In *Civic Improvement Committee v. Volpe*, 4 E.R.C. 1160 (W.D.N.C., Mar. 24, 1972), for example, the court considered the practical ramifications of holding for retroactivity. The court did not enjoin construction because no impact statement was prepared but it directed that NEPA's environmental aims be implemented during the completion of the project.

⁵⁷ The court gave three reasons for refusing to stay construction. First, plaintiffs had not made a timely petition for review of these two lines according to § 313(b) of the Federal Power Act, 16 U.S.C. § 8251(6). Second, the court felt that there was no "significant potential for subversion of the substantive policies expressed in NEPA." 455 F.2d at 425. This was found to be so since the FPC had considered alternative routings and because the Power Authority was required to consider environmental protection in its plans. Third, "[i]t would be unreasonable to expect instant compliance with all of the Act's procedural requirements." *Id.*

The court cites *Calvert Cliffs*⁶ as the basis for its holdings. However, *Calvert Cliffs*⁶ implies that if a project is subject to NEPA, then NEPA must be applied to the remaining construction. "Although the Act's effective date may not require instant compliance, it must at least require that NEPA procedure . . . be applied to consider prompt alterations in the plans or operations of facilities approved without compliance." 449 F.2d at 1121.

See also Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 746 (E.D. Ark. 1971): "[T]he degree of the completion of the work should not inhibit the objective and thorough evaluation of the environmental impact of the project as required by NEPA . . . [T]he Congress of the United States is intent upon requiring the agencies of the United States government . . . to objectively evaluate all of their projects, . . . regardless of the degree of completion of the work."

⁵⁸ *See note 53 supra.*

⁵⁹ The Commission has held in other certification applications that the *Greene* decision is not applicable. *Arkansas Louisiana Gas Company, Federal Power Commission Opinion*, No. 612, Docket No. CP70-267, Feb. 18, 1972, *cited in* 3 E.R.C. 1735. However, following the Supreme Court's denial of certiorari, 409 U.S. — (1972), the FPC announced that it would require impact statements to be produced by its staff for certain proposed projects. Nonetheless, as reported by the N.Y. Times, "[e]nvironmentalists expressed doubt that the new procedure would overnight make the five-member power commission significantly more environmental-minded in its decision (sic)." N.Y. Times, Oct. 31, 1972, at 26, col. 3.

⁶⁰ Mr. Robert Cahn, a former member of the Council on Environmental Quality has criticized federal agencies in general for their lack of "wholehearted compliance" with NEPA. "He said a slowness in giving adequate weight to environmental factors in decision-making persisted throughout the Federal bureaucracy, generally, but singled out the

Scenic Hudson II, presents serious questions as to the ultimate effectiveness of NEPA.

Scope of Review of the Agency's Final Determination

In 1965, when *Scenic Hudson I* was decided, the only source of ecological guidelines before the court was the Federal Power Act. Con Edison had requested and received a license from the FPC to construct the largest pumped storage hydroelectric project in history at Storm King Mountain in upstate New York. The major components were to include a storage reservoir, a power plant and both underground and overhead transmission lines. Objections were raised by the Scenic Hudson Preservation Conference and other conservationist groups who asserted that the project did not adequately protect fish whose spawning ground was located nearby, and that it would do substantial permanent harm to the environment to deface the mountain which was of unique scenic beauty and major historic significance.⁶¹ In deciding that the "recreational purposes"⁶² referred to in the Federal Power Act "undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites,"⁶³ the court held that the FPC had failed to compile a record sufficient to support its decision, had ignored certain relevant factors, and had failed to make a thorough study of possible alternatives to the project.⁶⁴ Furthermore, there was an "affirmative duty to inquire into and consider all relevant facts . . . in order to make a complete record."⁶⁵ The FPC, on remand, held extensive new hearings

Department of Transportation and the Federal Power Commission as two agencies he considered particularly deficient . . . The Federal Power Commission, he continued, has accorded less than full compliance to the law." N.Y. Times, Sept. 6, 1972, at 12, col. 1.

⁶¹ 354 F.2d at 613.

⁶² Section 10(a) of the FPA, 16 U.S.C. § 803(a), states that licenses shall be issued under the following conditions:

(a) that the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for . . . utilization of water-power development, and for other beneficial public uses, including recreational purposes

⁶³ 354 F.2d at 614.

⁶⁴ *Id.* at 624-25.

⁶⁵ *Id.* at 620 (emphasis added). Environmentalists were, if not exuberant, at least very optimistic. The decision was viewed as an assertion of leadership by the courts in setting new standards and priorities in the environmental decision-making process, as well as a broadening of the traditional remedies available and rules of procedure to be followed. Sive, *supra* note 14, at 631. (The author was counsel for intervenors, the Sierra Club, in both *Scenic Hudson* cases). McCloskey, *Preservation of America's Open Space: Proposal for a National Land-Use Commission*, 68 MICH. L. REV. 1168 & n.5 (1970). In *Udall v. FPC*, 387 U.S. 428 (1967), the Supreme Court in remanding to the FPC consideration of a hydroelectric power project to be constructed at High Mountain Sheep on the Snake River affirmed the view that "recreational purposes" provided for in section 10(a) should be read broadly. The remand order included instructions to consider alternatives to the

and affirmed its earlier decision to approve Con Edison's project which differed only in minor ways from the one originally proposed. This time, having found that the FPC had given adequate consideration to environmental factors as mandated by NEPA⁶⁶ and section 10(a) of the FPA, the court upheld the FPC decision. Declining to accept plaintiffs' pleas for a broad rule of review,⁶⁷ the court held that the traditional standards of judicial review of agency actions applied and it would not therefore reverse the FPC's determination since the agency's findings were supported by the substantial weight of the evidence. Since, here, the Commission had weighed (albeit rejected) alternate plans,⁶⁸ had considered the effect on scenic impact (and found it minimal), had found that no historic site would be adversely affected,⁶⁹ had provided adequate protection for fish,⁷⁰ and had improved the project in some aesthetic ways, it fulfilled its mission to the court's satisfaction.⁷¹ Holding that NEPA was applicable although passed after the close of the FPC hearings, the court nevertheless felt that submission of an "environmental statement" in the form of the Commission's opinion met the statutory requirement.⁷²

Judge Oakes dissented, primarily on the factual questions presented,⁷³ but also because he felt that the Commission had failed to give proper treatment to NEPA's requirement of an impact statement.⁷⁴

Following its usual pattern in environmental cases to date, the

project and all other relevant issues including preservation of wilderness areas and anadromous (*i.e.*, salmon, shad) fish. Furthermore, one alternative to be given consideration was whether there was a present need for any project at all. *Id.* at 436.

⁶⁶ The court held NEPA applied retroactively; *see* note 56 *supra*.

⁶⁷ The plaintiffs contended that such a standard was called for by *Scenic Hudson I* and *Zabel v. Tabb*, 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

⁶⁸ 453 F.2d at 470.

⁶⁹ *Id.* at 475.

⁷⁰ *Id.* at 476-77.

⁷¹ *Id.* at 480. The court found compliance with the statute as well as with the remand orders.

⁷² *Id.* at 481. Fortunately the Second Circuit seems to have retreated from this constricted view in later decisions. *See* the discussion of *Greene County Planning Bd. v. FPC* in notes 38-60 and accompanying text *supra*.

⁷³ The City of New York intervened in the second proceeding before the FPC to protest that the change in plans providing for the powerhouse to be completely underground would place it near a link in the Catskill aqueduct system, one of the three systems supplying the city with substantially all its water and that blasting during the construction of the project might endanger the aqueduct. Judge Oakes found that several of the agency findings lent support to the city's position and, on the whole, "fail to convince me that there is no substantial risk to the Aqueduct." *Id.* at 487. He also noted with disapproval the increased danger to New York City's already existing air pollution problem.

⁷⁴ *Id.* at 492.

Supreme Court, in an 8-1 decision, declined to hear the case.⁷⁵ The lone dissent was by Mr. Justice Douglas,⁷⁶ a long-time proponent of the conservation movement. He believed that the belated attempt to satisfy NEPA was inadequate,⁷⁷ that the court had wrongly presumed the validity of Con Ed's proposal and placed on the environmentalists the burden of overcoming this presumption,⁷⁸ and that the substantial evidence test adopted by the Second Circuit should not be the only standard adopted for review of environmental matters.

Some remedies for broadening this standard have been suggested, one by the Supreme Court itself in *Citizens to Preserve Overton Park v. Volpe*.⁷⁹ Adhering to the "arbitrary and capricious" standard for judicial review of that particular agency action,⁸⁰ it nevertheless indicated that, in environmental cases, the phrase should be expanded to apply to decisions that disregard established environmental policies.⁸¹ Another solution was suggested by Professor Jaffe,⁸² and expanded upon by David Sive.⁸³ The solution acknowledges that courts will defer to agency opinion on factual findings, applying only the "substantial

⁷⁵ 407 U.S. 926 (1972). *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970), and *Udall v. FPC*, 387 U.S. 428 (1967), are two notable exceptions.

⁷⁶ 407 U.S. 926 (1972). Mr. Justice Douglas had delivered the majority opinion in the *Udall* case, as well.

⁷⁷ Although it has been conceded that the Act's requirements were applicable in the proceedings, no further hearings were held; and no environmental impact statement was drafted. The Commission approved the project and attempted to satisfy its procedural duties under § 102 by specifying certain environmental impact forecasts in its final opinion.

⁷⁸ *Id.* at 930. The need for articulating standards has been espoused in other environmental cases, even without reliance on NEPA. *EDF v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁷⁹ 407 U.S. at 932. For further discussion of burden of proof in environmental litigation, see note 86 *infra*.

⁸⁰ 401 U.S. 402 (1971).

⁸¹ In *Scenic Hudson II* the Second Circuit applied the "substantial evidence" rule because the Federal Power Act expressly establishes this as the standard of review. 16 U.S.C. § 8251(b).

⁸² 401 U.S. at 415-16; *commented on in CEQ—SECOND ANNUAL REPORT* at 168. Although, in one sense, this was a broadening of judicial review standards, Professor Davis views the *Volpe* decision as a limitation on judicial review because the new arbitrary and capricious standard remains less liberal than the substantial evidence rule. The court in *Volpe* said that the latter was to be applied to agency rule-making decisions only and, in this case, where rule-making was not at issue, the only standard was the "arbitrary and capricious" one. 401 U.S. at 414; K. DAVIS, *ADMINISTRATIVE LAW TEXT* 527 (1972) [hereinafter DAVIS]. Nevertheless, the argument could be made that since the Supreme Court liberalized the arbitrary and capricious test in environmental cases, it would likewise liberalize the substantial evidence test in those environmental cases where that test applied. See note 80 *supra*. Davis comments, on the other hand, that it was in *Udall* that the Supreme Court momentarily relaxed its standards, making an exception to the usual judicial review formulae by looking into areas of agency discretion. DAVIS at 529.

⁸³ L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 550 (1965) [hereinafter JAFFE], whom the Supreme Court favorably cited in *Volpe*, 401 U.S. at 416.

⁸⁴ Sive at 624 *et seq.*

evidence" test to set such findings aside, but utilizes the rule that questions of law are decided by the reviewing court independently of agency findings. Professor Jaffe and Mr. Sive felt that, as long as the law concerning environmental policy is in a state of development, and the terminology of statutes remains to be interpreted, agency determinations are, in effect, "law-making or law-applying" and therefore reviewable as conclusions of law by the courts.⁸⁴

Scenic Hudson II presented two major setbacks to environmental hopes. First, it made clear that, despite prior indications to the contrary, traditional rules of judicial review were not to be set aside—strict adherence to the substantial evidence rule was still in effect. Secondly, although NEPA was applied retroactively, NEPA's procedural requirements seemed to be met with considerably less than a formal impact statement, and there were no clear standards as to how much weight conflicting economic and environmental factors were to be given.

Conclusion

Many debate the role the courts should play in the development of environmental law.⁸⁵ But the normal judicial process poses a heavy burden on the environmentalist as far as burden of proof,⁸⁶ obtaining expert witnesses,⁸⁷ conducting discovery proceedings,⁸⁸ and, the major

⁸⁴ JAFFE at 550; Sive at 625.

⁸⁵ Chief Justice Burger has warned federal courts not "to exercise (their) equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted." 168 N.Y.L.J. 14, July 21, 1972, at 3, col. 5. He stresses the difficult task of balancing that is required of courts during this transitional period when "new environmental legislation must be carefully meshed with more traditional patterns of federal regulation." *Id.* at col. 5-6.

For a discussion of powers and limitations of courts as opposed to the legislature compare Jaffe, Book Review, ENVIRONMENTAL PROTECTION 652 (1971) with Brecher, Morris & Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 560 (1970) and Jackson, *Foreword: Environmental Quality, The Courts, and the Congress*, 68 MICH. L. REV. 1073 (1970) [hereinafter Jackson]. Senator Jackson was the principal sponsor of NEPA in the Senate.

⁸⁶ It has been argued that the NEPA intends the contrary (*cf.* ENVIRONMENTAL QUALITY—THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 161 (1971)), but, if so, agencies have "too often forgotten that an applicant always has the burden of proving that his proposed actions will be in the public interest." Hanks at 268. *See also* Brecher, *supra* note 15; Sive, *Securing, Examining, and Cross-Examining Expert Witnesses in Environmental Cases*, 68 MICH. L. REV. 1175, 1186-87 (1970). Along with the burden of proof is the problem of "proving" aesthetic values, analyzing "scenic beauty" and measuring and balancing natural wonders against economic and technological considerations. *Id.* at 1191.

⁸⁷ *See id.* at 1189-91; Brecher at 569; Sive, *supra* note 14, at 619.

⁸⁸ Courts may be impatient with lengthy discovery proceedings when a temporary injunction is preventing the start of a multi-million dollar project. *See* Brecher at 568.

obstacle of all, meeting the heavy costs of litigation.⁸⁹ At the very least the court offers a forum for publicity and for arousing public sentiment.⁹⁰ At best, the courts offer conservationists the assurance that agencies are living up to the spirit as well as the letter of legislative policy.⁹¹ Some hope the courts will do even more. As has been noted, it is urged that the burden on environmentalists be eased by expanding the bases for judicial review.⁹² Many urge that the question of environmental "rights"⁹³ will give the courts an opportunity for more active intervention in the future. Perhaps the courts should assume a powerful role *temporarily* until judicial decisions in environmental law have developed enough to provide agencies a framework for forming sound decisions on their own.⁹⁴

But the Second Circuit in *Scenic Hudson II* clearly has not assumed such a role. Whether or not other circuits follow this passive approach, there are strong indications that NEPA is forcing positive action toward the protection of the environment. According to the Council on Environmental Quality NEPA has noticeably influenced the federal government in several areas. First, in establishing environmental protection as a national goal, it has broadened agency horizons and brought bureaucratic thinking in line with the growing sentiments of the national community. It also has provided a systematic way of dealing with environmental problems which often cut across agency lines. By opening governmental action in this area to public scrutiny it has assured that agencies articulate their decisions satis-

⁸⁹ See note 55 *supra*.

⁹⁰ "Public participation plays a vital role . . . by sounding an alert when an agency has failed to consider important environmental effects." CEQ THIRD ANNUAL REPORT at 247. See also CEQ THIRD ANNUAL REPORT at 256. The court forum also offers environmentalists a rare chance to cross-examine polluters. Brecher at 566; *cf.* Like, *supra* note 19, at 495.

⁹¹ See Morris, *supra* note 15, at 82; *accord*, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

⁹² See text accompanying notes 82-84 *supra*.

⁹³ For example, Senator Nelson (D. Wis.) has proposed an amendment to the U.S. Constitution providing that "every person has the inalienable right to a decent environment," 116 CONG. REC. 580 (daily ed. Jan. 19, 1970), as cited in Hanks at 268. There has been controversy over the change by the House Conferees from the Senate-passed wording of the original NEPA bill which read "each person has a fundamental and inalienable right to a healthful environment" to "[t]he Congress recognizes" that each person "should enjoy a healthful environment" (as section 101(c) now reads). H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 8 (1969). Whether or not this was a deliberate attempt to stop short of expressly creating a personal "right" to a clean environment has been debated. See Grad, *supra* note 15, at 173. See also REITZE at one-113. The asserted right to a decent environment has been presented as both a personal and a property right, and as a private as well as public right. See Grad at 173; Sive at 642 & n.170. Compare Hanks at 251 with Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

⁹⁴ See 439 F.2d at 598; text accompanying note 83 *supra*.

factorily⁹⁵ and, by allowing citizen groups to enforce NEPA mandates by suing in the federal courts, it has helped to insure agency adherence to these mandates. As a further promise for the future, agencies have been augmenting their staffs with personnel experienced in environmental matters so that more sympathetic viewpoints may be expected. Effects on other areas of governmental decision-making are claimed but are incapable of precise measurement.⁹⁶

But such accomplishments should not lull the courts into assuming "the position of an umpire blandly calling balls and strikes."⁹⁷ Congress has begun the job of establishing national goals by setting forth its legislative intent in NEPA. It is the obligation of the judiciary to insure that agencies do not subvert that intent. Hopefully, *Scenic Hudson II* will, in time, become nothing more than an anomaly in the "environmental awakening"⁹⁸ and the fears of Justice Douglas that this decision marks "the beginning of the demise . . . of NEPA"⁹⁹ will prove unjustified.

⁹⁵ CEQ THIRD ANNUAL REPORT at 255. This trend to demand adequate explanation of agency findings has also been noted by K. Davis, who cited *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971). "[W]e cannot assume, in the absence of adequate explanation, that proper standards are implicit in every exercise of administrative discretion." DAVIS at 333. The *Ruckelshaus* opinion noted:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decision. Strict adherence to that requirement is especially important now that the character of administrative litigation is changing. As a result of expanding doctrines of standing and reviewability, and new statutory causes of action, courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a rate-making or licensing proceeding.

439 F.2d at 597.

The Supreme Court has indicated approval of this belief by its decision in *Volpe*. It refused to allow a district court to rely blindly on the Secretary's discretion without a full record before it, although it declared that no formal findings by the Secretary were required. The court even added that it might be necessary to interrogate the decision-makers themselves if the bare record did not give an adequate basis for review. 401 U.S. at 419.

⁹⁶ CEQ — THIRD ANNUAL REPORT at 255-57.

⁹⁷ 354 F.2d at 620.

⁹⁸ The President's Message on the Environment, Feb. 8, 1972, reprinted in CEQ — THIRD ANNUAL REPORT at 365.

⁹⁹ 407 U.S. at 926.