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### Book Review. NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act by F. R. Anderson

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## BOOK REVIEW

**NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT.\*** By Frederick R. Anderson.\*\* Baltimore: Johns Hopkins University Press, 1973. Pp. xii, 324.

*Reviewed by A. Dan Tarlock\*\*\**

The implementation of the National Environmental Policy Act of 1969<sup>1</sup> (NEPA) is one of the most fascinating chapters in recent American jurisprudence. A vague statute drafted in large part by a public-administration scholar with a preference for management rather than adjudication and sponsored by a Senator with little taste for the anti-developmental thrust of most environmental litigation<sup>2</sup> has been transformed by the courts into a rigid set of procedural requirements for a wide variety of federal action. There are even indications NEPA may become a means by which agency missions which are inconsistent with the protection and enhancement of the environment can be questioned.

Early drafts of the legislation were intended only to promote the research necessary for environmental impact assessment. The final version, however, finessed the difficult problems of inadequate scientific information and assessment methodology and joined a loose set of goals<sup>3</sup> with the "action-forcing" requirement that an impact statement be prepared for all "major Federal actions significantly affecting the quality of the human environment."<sup>4</sup>

The requirement apparently was intended to perform two important but limited functions. Agencies which claimed they did not have the statutory authority to consider environmental values would have to show strong Congressional intent to limit their jurisdiction, and

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\* Hereinafter cited as ANDERSON.

\*\* Editor-in-chief, Environmental Law Reporter, Environmental Law Institute. Mr. Anderson was assisted by Robert H. Daniels, Environmental Law Institute.

\*\*\* Professor of Law, Indiana University, Bloomington.

1. 42 U.S.C. §§ 4321 *et seq.* (1970).

2. Many of the important background papers and concepts were supplied by Professor L.K. Caldwell of Indiana University. Senator Henry Jackson's early reactions to interpretations of NEPA are given in Jackson, *Environmental Policy and the Congress*, 11 NATURAL RESOURCES J. 403 (1971).

3. Judge Friendly has characterized the statute as "so broad, yet opaque, that it will take even longer than usual fully to comprehend its import." *City of New York v. United States*, 337 F. Supp. 150, 159 (E.D.N.Y. 1972). See also Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace*, 72 COLUM. L. REV. 963, 965 (1972).

4. 42 U.S.C. § 4332(2)(C) (1970).

Congress itself would be provided with a more systematic analysis of the environmental implications of programs it was being asked to fund. From this slim base the courts, aided by some creative lawyering, have created a common law of environmental impact assessment which has radically changed the procedures by which federal administrative decisions affecting the environment are made.

The ultimate effect of NEPA remains unclear, for to date the courts have moved through two stages of NEPA lawsuits and are now entering a third. In the first stage many agencies argued that, whatever the reach of the Act, it did not apply to an activity well underway before its effective date because there was no Congressional intent to apply the statute retroactively. In the second stage impact statements which were hastily thrown together and were often little more than post hoc rationalizations for a project or activity were closely scrutinized and often found insufficient. The third stage may well determine the long-term effectiveness of NEPA. Agencies and license applicants, with the help of consultants, have learned to play the impact statement game, and the courts are now facing the difficult question of whether a decision can be reviewed on substantive grounds even though an agency strictly complies with the procedural requirements.<sup>5</sup>

The first two stages are the principal subject of Frederick L. Anderson's excellent book, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act*. He also offers his opinion on the proper judicial response to third-stage lawsuits. Lawyers, scholars, and public administrators will find this book an extremely useful and insightful commentary on the application of the statute by courts and agencies to mid-1973, as well as an indispensable guide for approaching future problems.

The first chapter is a good, concise summary of NEPA's legislative history, which is important for two reasons. First, since the statute is so vague as to what is actually required for compliance, an understanding of the basic objectives and underlying philosophy of the drafters is necessary in order to translate NEPA into specific agency duties. This is especially true when the argument is raised that NEPA should apply to federal activities in which the environmental connection is not obvious. Second, the long-run impact of NEPA on

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5. Section 102 of NEPA (42 U.S.C. § 4332 (1970)) requires agency compliance "to the fullest extent possible," and the courts, following the lead of *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), have held that the phrase requires strict compliance with the "action-forcing" requirements of NEPA. Anderson traces this development in chapter three.

federal decision-making depends on the extent to which the assessment process constrains agency discretion to weigh policy considerations. The legislative history of the Act and the objectives of the drafters provide some insight into the extent to which courts can use NEPA to restructure existing agency missions through review of the impact assessment process.<sup>6</sup>

Anderson describes the evolution of NEPA from a bill with no consequences for day-to-day decision-making to a set of "action-forcing" procedures. He properly emphasizes the role of Professor L.K. Caldwell of the political science department of Indiana University in drafting NEPA and especially for contributing the "action-forcing" requirement of the impact statement. Since this quoted phrase has become the cornerstone of judicial interpretations of the statute, this chapter would have been more complete had Anderson included a discussion of Professor Caldwell's scholarly background writings,<sup>7</sup> as well as more of his short but significant testimony when he introduced the "action-forcing" requirement.<sup>8</sup> The book does emphasize the important difference between legislative purpose and subsequent interpretation. The drafters were almost exclusively concerned with broadening the scope of agency mandates to include consideration of environmental values and requiring the agencies to take an affirmative step to implement the Act, thereby distinguishing other Congressional declarations calling for no agency response other than the balancing of costs and benefits which the courts have required.

The other important changes in the text of the Act are well covered, such as the replacement of a section giving citizens a "fundamental and inalienable right" to a decent environment with a section guaranteeing only that "each person shall enjoy a healthful environment," and the Muskie-Jackson compromise on the relationship be-

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6. NEPA is superimposed on all federal agencies and does not explicitly amend either their existing organic legislation or their missions. For example, the Bureau of Public Roads is still required to spend the highway trust fund on roads. *But cf.* Judge Oakes' wistful dictum in *Conservation Soc'y Inc. v. Secretary of Transp.*, 362 F. Supp. 627, 637-38 (D. Vt. 1973) (footnote omitted):

Indeed, one would go so far as to suggest that perhaps the very existence of so-called highway "trust funds," usable only for highway construction and not other forms of mass transportation is in a very fundamental sense inconsistent with the NEPA requirements that other alternatives be considered. 42 U.S.C. § 4332(2) (C) (iii). Be this as it may, we have to deal with the here and now, and here we are once again with environmental consideration entrusted to departments with promotional aims.

7. See L. CALDWELL, *ENVIRONMENT: A CHALLENGE TO MODERN SOCIETY* (1970). See the reference to Caldwell's background papers in ANDERSON at 4, 10.

8. *Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 1st Sess. 115-17 (1969).

tween NEPA and the power of the Environmental Protection Agency (EPA) to set standards under the air and water pollution control and pesticide registration acts. In addition, Anderson explains why the Act contains no provision for judicial enforcement or central review (a fact which has puzzled, albeit briefly, courts and lawyers) by showing that Senator Jackson and Professor Caldwell considered Congress and perhaps the Office of Management and Budget to be the primary enforcers.

The second chapter, "How a NEPA Suit Reaches the Courts," might have been better titled "Further Thoughts on the Relationship Between the Legislative History and Litigation." Problems of federal jurisdiction and non-statutory review of administrative decisions are not covered. Instead, the author places NEPA in the context of recent developments in administrative law in arguing that the Act reinforces the trend toward more intensive scrutiny of the process of formal administrative adjudication as well as informal agency decision-making and in explaining the hospitable reception of NEPA in the courts. Prior to NEPA's enactment, the courts were abandoning their blanket deference to administrative expertise by requiring agencies to show affirmatively that all relevant factors were considered and by opening both the administrative process and the courts to third parties who wished to argue for alternative constructions of an agency's statutory duties. The essence of this "new" administrative law is that courts have

asked that agencies take a wider array of public interests into account in carrying out their statutory missions, that agencies consider alternatives to their proposals, that they articulate the grounds for their decisions, that they spell out procedures for principled decisionmaking, and that they provide for public participation of various kinds.<sup>9</sup>

My only quibble with Anderson's analysis of the relationship between the cases developing these new standards and the Act is that, although NEPA and the cases now require an identical process of decision-making, I see some danger in interpreting NEPA too closely in terms of the appellate opinion models which the courts are imposing on the administrative process. Ultimately, the balancing induced by these models to justify an action may not be in accordance with the comprehensive and long-range planning dictated by Section 102(C) of NEPA.<sup>9.1</sup>

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9. ANDERSON at 22.

9.1. See Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. PA. L. REV. 1, 55-70 (1973).

In the section on standing Anderson summarizes the relation between NEPA and the case law as developed by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*<sup>10</sup> and *Sierra Club v. Morton*.<sup>11</sup> He correctly concludes, contrary to some recent commentaries on standing under NEPA, that the Act does not dispense with the necessity of plaintiffs' showing a nexus between a failure to comply with the mandates of the Act and actual injury to plaintiffs' interests. No court has yet held that all citizens have an equal interest in the assessment process.<sup>12</sup>

Chapters four and five address the threshold questions of which federal activities trigger the duty to file an impact statement and to what extent NEPA applies to activities underway when the Act became effective. Many of the early cases turned on these two questions rather than on the content of an environmental impact statement or a review of the merits of the activity itself.<sup>13</sup> Anderson's fine analysis brings order to the fragmentary and often conflicting treatment previously given these questions.

NEPA applies to "all major Federal actions significantly affecting the quality of the human environment." The agencies have the initial discretion to decide if and when the Act applies. Agency discretion is sensible, for otherwise NEPA might become attenuated by application to so many federal activities that those with a significant environmental impact will be inadequately or tardily evaluated. However, many low-level activities have cumulative environmental consequences, and an impact statement should be filed when such activities are commenced to avoid frustrating the objectives of the Act. Agencies are likely to avoid the hard assessment problems by making an initial determination that NEPA does not apply. A high level of judicial enforcement would thus seem in order. Fortunately, many agencies err on the side of caution and have adopted regulations which resolve doubts in favor of the preparation of a statement.

The most important insight Anderson brings to these problems is that different standards of review are appropriate at different stages of NEPA decision-making. The Act nowhere suggests such graduated standards, and the idea, although counter to prevailing concepts of administrative law, has merit. As administrative actions are not generally subject to judicial review until they are final, the courts have logically adopted a single standard of review. As a result

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10. 397 U.S. 150 (1970).

11. 405 U.S. 727 (1972).

12. See Redish, Book Review, 48 N.Y.U.L. REV. 577, 586 n.45 (1973).

13. 42 U.S.C. § 4332(2) (C) (1970).

of *Abbott Laboratories v. Gardner*<sup>14</sup> the definition of final action has been expanded to allow earlier review of questions of law before an agency applies a construction of its authority in a focused proceeding. Generally courts refrain from reviewing interlocutory decisions, and effective redress of most agency decisions is possible only after termination of the administrative process. NEPA, however, can only be effective if applied before the agency begins to compare the costs and benefits of its activities. Since the question of judicial enforcement was not considered by Congress, the standards of review must be developed by the courts.

To date the cases have adopted differing and confusing standards to decide when an impact statement must be filed. The leading case of *Hanly v. Kleindienst*<sup>15</sup> significantly classified the standard of review as a question of law and the application of the standard to the activity as a mixed question of law and fact, holding that the standard is the arbitrary and capricious test of the Administrative Procedure Act as applied in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>16</sup> The Fifth and Tenth Circuits have read *Overton Park* as requiring that threshold questions be subjected to "a more penetrating inquiry"<sup>17</sup> in making a negative determination to insure that the agency considered all relevant factors. The circuits differ little in the level of review actually undertaken notwithstanding the differing standards.

Anderson finds the Second Circuit standard unsatisfactory and supports de novo review by the courts. He does not think self-policing is likely because

NEPA is unlike the majority of usual regulatory statutes. It neither sets up an agency to supervise private conduct nor supplements existing regulatory authority. Nor does the statute pinpoint a particular ill, for which a precisely focused statute may legislate a cure.<sup>18</sup>

He also argues that most agencies do not have the expertise to evaluate the environmental impact of their decisions. Two other commentators have recently agreed that a higher level of review is appropriate under NEPA, but reject de novo review and urge the courts to adopt

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14. 387 U.S. 136 (1967).

15. 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) (Hanly II). The case was initially remanded to the General Services Administration because the agency's memorandum asserting the environmental impact to be minimal was found inadequate. *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972) (Hanly I).

16. 401 U.S. 402 (1971).

17. *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-66 (5th Cir. 1973). See also *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

18. ANDERSON at 104.

the standard that the Second Circuit rejected.<sup>19</sup> In *Hanly v. Klein-dienst* (Hanly II) the Second Circuit chose an arbitrary and capricious standard in preference to the reasonable-basis-in-law standard announced by the Supreme Court in the pre-Administrative Procedure Act case of *NLRB v. Hearst Publications, Inc.*<sup>20</sup> The reason offered for the reasonable-basis-in-law standard is that it is in some undefinable way more strict than arbitrary and capricious, but still leaves the agencies the desired amount of flexibility in deciding when an impact statement should be filed.<sup>21</sup>

Neither of these approaches is entirely satisfactory. *Hearst* is an inapposite case to cite for increased judicial review, for it is generally regarded as the highwater mark of judicial deference to administrative expertise. The reasonable-basis-in-law standard as used in *Hearst* seems to have been confused with the reasonableness test as used in *Overton Park* in which the Court held that informal administrative actions would be reviewed to insure that all relevant factors were considered.

*Overton Park* involved a statute in which Congress narrowed the scope of agency discretion by specifying the weights to be assigned to the relevant factors. The case does not compel strict scrutiny of threshold decisions since NEPA does not provide the weights to be assigned to the relevant factors. However, Justice Marshall's emphasis on the need for a reviewable record, even when informal action is involved, to determine if the agency has considered all relevant factors is sufficient precedent for requiring the agency to disclose its reasoning when it makes a decision not to file an impact statement.

A recent federal district court opinion, *Simmons v. Grant*,<sup>22</sup> suggests that Anderson's arguments can be reconciled with the need to preserve some initial agency discretion by focusing less on the standard to be applied to a decision than on the agency's burden of demonstrating the validity of a negative decision. The court held that the plaintiff must establish a prima facie case for filing an impact statement, but that then the burden shifts to the agency to support its decision by a preponderance of the evidence because it possesses "the labor, public resources and expertise to make the proper environmental assessment."<sup>23</sup> If a negative decision is made, the agency

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19. Note, *NEPA, Environmental Impact Statements and the Hanly Litigation: To File or Not to File*, 48 N.Y.U.L. REV. 522, 540 (1973) (hereinafter cited as *To File or Not to File*); Note, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. REV. 878 (1973).

20. 322 U.S. 111 (1944).

21. *To File or Not to File*, *supra* note 19, at 540.

22. 370 F. Supp. 5 (S.D. Tex. 1974).

23. *Id.* at 12.

can meet its burden only by preparing a mini-impact statement based on recent EPA guidelines:

Initially, even though no formal impact statement is thought to be necessary, NEPA requires an agency to develop affirmatively a reviewable environmental record. In January 1972, the Environmental Protection Agency issued proposed regulations governing the preparation of such a record. These regulations, since implemented, require the preparation of a "negative declaration", a brief statement reciting that a named agency has determined that a named project will not have a significant environmental impact and that no environmental impact statement will be prepared. More significant to our concern here, the negative declaration must be accompanied by a separate document entitled "environmental impact appraisal" wherein the following items are to be considered and summarized:

- (1) brief description of project;
- (2) probable impact of the project on the environment;
- (3) any probable adverse environmental effects which cannot be avoided;
- (4) alternatives considered with evaluations of each;
- (5) relationship between local short-term uses of environment and maintenance and enhancement of long-term productivity;
- (6) an irreversible and irretrievable commitment of resources;
- (7) public objections to project, if any, and their resolutions;
- (8) agencies consulted about the project;
- (9) reasons for concluding there will be no significant impacts.

What is actually required under NEPA and these regulations is that the federal agency prepare a "mini" environmental analysis after consultation with the appropriate agencies and authorities, although obviously not in the same detail as a regular environmental impact statement. Without such a record it is impossible for a district court to determine whether or not the agency has complied with Sections 102(A), (B), and (D) of NEPA, 42 U.S.C. §§ 4332(2)(A), (B) and (D).<sup>24</sup>

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24. *Id.* at 17.

The emphasis in *Simmans* on the record which the agency must produce to justify its negative decision makes more explicit what other courts have in fact required. The benefit of this approach is that it will sufficiently expand the class of major actions significantly affecting the quality of the human environment to insure that the objectives of NEPA will not be frustrated by miserly agency constructions, while at the same time allowing agencies the discretion to opt out in appropriate cases. In addition, it makes the standard applied to the final decision less important. The purpose of a standard of review is to indicate the attitude courts should take toward an agency's reasoning process, and the *Simmans* approach does this. Attempts to distinguish between arbitrariness and reasonableness are likely at best to be fruitless and at worst to divert the court's attention from working out the new relationships between court and agency which NEPA requires to be effective.

The most controversial part of the chapter is Anderson's argument that NEPA should apply to the activities of the EPA—the establishment of air and water pollution standards, the issuance of permits under these programs, the registration of pesticides, and subsequent cancellation proceedings. Senator Muskie has consistently argued in Congress that NEPA should not apply to the EPA since Congress has already struck a balance between environmental and nonenvironmental values or at least narrowly circumscribed the discretion the administrator has to make trade-offs. Accordingly, the application of NEPA would be superfluous and might undercut the effectiveness of the EPA by opening up another forum where industry could argue that comprehensive balancing under NEPA requires that greater attention must be given to the costs of achieving environmental quality. Senator Jackson agrees with this insofar as impact statements are concerned.<sup>25</sup>

These arguments are judiciously considered and rejected by Anderson, who, while appreciating EPA's current record, is properly concerned with the pressures the agency is under to trade off environmental and developmental values. His major thesis is that the application of NEPA would require the EPA to consider the impact of one pollution reduction program on others. Such coordination is needed because the EPA is locked into an economically unjustifiable water pollution control program<sup>26</sup> under which water pollution goals

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25. ANDERSON at 7-8, 108-12.

26. See NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES BY THE NATIONAL WATER COMMISSION 63-108 (1973).

can be met only at the expense of increased air and solid waste pollution. The issue of NEPA's applicability to water pollution control programs is, however, largely foreclosed by the exemptions from the impact statement requirement contained in the Federal Water Pollution Control Act Amendments of 1972.<sup>27</sup> These fundamental conflicts between different resource-use policies must eventually be resolved by Congress.

Although the issue is still open with respect to other programs, on balance I would disagree with Anderson's view. His most questionable argument is that the risk-benefit analysis to be used in setting standards for regulating pesticides and controlling air quality would be improved by the preparation of impact statements. Application of NEPA to pesticides is, as he admits, the "hardest case," since the Federal Environmental Pesticide Control Act of 1972<sup>28</sup> requires an extensive risk-benefit analysis. But Anderson states:

Without NEPA, EPA is not required to document its preliminary position on the ancillary environmental impacts of its impending decision or to solicit comment on that position in a systematic fashion. Nor must the five factors detailed in § 102(2)(C) be addressed systematically. Alternative means of accomplishing the same ends which lie beyond the administrator's power to implement are not required to be studied and set out for public discussion and consideration by other agencies or by Congress. Thus even the quasi-judicial decision-making process that EPA must utilize in order to cancel a pesticide registration does not fulfill several important requirements which NEPA explicitly imposes.<sup>29</sup>

Anderson's arguments are well taken, for the question of whether agriculture should rely on biological and cultural alternatives to the use of chemical pesticides is an important one. Still, a single or even series of NEPA impact statements are unlikely to play a significant role in changing pest management practices. The substitution of non-chemical methods of pest control (or at least a restriction on the use of chemicals) entails a sophisticated restructuring of agricultural practices and a variety of new legal approaches beyond the power of the EPA.<sup>30</sup>

One district court has applied NEPA to the EPA with respect

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27. 33 U.S.C. § 1371(c) (1970), *as amended*, (Supp. II, 1972).

28. 7 U.S.C. § 136a(c) (5) (1970), *as amended*, (Supp. II, 1972).

29. ANDERSON at 120-21.

30. Inability to implement alternatives is not however a bar to preparing an impact statement so long as the alternatives are reasonable. *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

to air pollution, but courts may follow instead the District of Columbia Circuit Court of Appeals decision in *Portland Cement Co. v. Ruckleshaus*,<sup>31</sup> decided after publication of the book. Although the case was limited to its facts, the issue was whether an impact statement need be prepared prior to the issuance of stationary source standards. Judge Leventhal considered and was sympathetic to the arguments raised by Anderson, but held that NEPA did not apply. He relied on the Muskie-Jackson compromise as well as the inconsistency between the time in which the administrator was required to promulgate standards and the longer time permitted for the preparation of a detailed statement. But his primary reason was that Section 111 of the Clean Air Act,<sup>32</sup> "properly construed," itself requires a statement of reasons for the EPA's decision which is the "functional equivalent" of an impact statement.<sup>32.1</sup>

While the holding can be justified as a reasonable integration of two potentially inconsistent statutory schemes, such a construction of Section 111 to some extent overlooks the objective of NEPA. This illustrates the problems of applying judicial analogy to the environmental impact assessment process. It is not clear under Section 111 that the Administrator is required to balance the same wide range of factors which are obligatory under NEPA. Arguably, Section 111 only requires the Administrator to determine whether costs preclude the feasibility of abatement technology; whereas NEPA, as Anderson suggests, would require an evaluation of the impact of reducing air pollution on both land and water resources in addition to a determination of whether benefits of the emission reductions exceeded the costs. As of April 1974 the EPA has agreed to prepare impact statements for certain classes of actions, although it takes the position it is not legally obligated to do so.<sup>32.2</sup> Thus we have an opportunity to test the validity of Anderson's thesis.

A NEPA lawsuit is often instituted long after a federal project or activity has begun. The lawyer who argues the applicability of NEPA faces two obstacles at the outset. First, the government has often argued that application of NEPA in this situation would be retroactive and that there is no evidence of congressional intent to apply the Act in this manner. This problem has been largely resolved by decisions which hold that there is no issue of retroactivity where

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31. 486 F.2d 375 (D.C. Cir. 1973).

32. 42 U.S.C. § 1857b(b), (c) (1970).

32.1. 486 F.2d at 384.

32.2. See *Environmental Protection Agency Draft Statement of Policy on Environmental Impact Statements, Current Developments*, 4 ENVIRONMENTAL REP. 2082 (1974).

the project is effectively on-going and that courts should determine if the activity or project is so sufficiently incomplete that the agency can reasonably implement any modifications suggested by the impact statement. However, even if the retroactivity issue is successfully surmounted, there remain the questions of whether the suit is barred by laches and whether a preliminary injunction is unavailable on equitable grounds. Chapter five, "Problems of Transition," contains a good discussion of the retroactivity problem, especially with reference to the highway cases. The relationship of NEPA to the doctrine of laches and the standards for a preliminary injunction are covered in chapters two and six.

The test for determining the adequacy of an impact statement derives in part from the principle that "[a]t the very least NEPA is an environmental full disclosure law."<sup>33</sup> NEPA clearly caught many, if not most, federal agencies by surprise; once they realized the full scope of the Act, they produced hastily drawn statements which were often only thinly disguised justifications for their respective activities. The comprehensive directives of Section 102 were swept aside with a few conclusionary statements. Not surprisingly, many cases were remanded to the agency for preparation of an adequate statement.

A rich case law has developed on the question of adequacy as well as on related questions of whether the duty can be delegated to private parties, state agencies, or, where two or more federal agencies are involved, to one "lead" agency. Chapter six also gives a complete discussion of the rules courts have evolved governing such questions as the range of alternatives that must be studied, the analysis of unquantifiable costs and benefits, the duty to obtain scientific information, the duty to obtain interagency and public comment, and the effects of timing and delegation. The reader should be cautioned, however, to view these early cases in perspective. Since they typically fail to discuss any of the five criteria of Section 102, their precedential value is slight. Full disclosure lends itself to a mechanical set of rules, and both agencies and private parties are growing much more sophisticated in preparing environmental impact statements. The impact statements prepared after remand in many of the cases discussed in chapter six have recently been relitigated and found adequate after the agency manifested enough concern for environmental impact to convince the court that environmental values were considered in good faith.<sup>34</sup>

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33. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728, 759 (E.D. Ark. 1971).

34. *See, e.g., Environmental Defense Fund, Inc. v. Froehkle*, 368 F. Supp. 231 (W.D.

The final two chapters of the book are concerned with the role of NEPA in limiting an agency's discretion to make the final decision on the merits. Administrative agencies do not fit our tripartite constitutional structure and indeed are accountable to no one for their actions. Since the late 1930s it has been assumed that the constitutional and accountability problems have been solved by requiring that legislative declarations of authority be defined by standards which the courts can use to decide whether the agency is acting within the scope of its authority. Such standards have proved virtually worthless as a means of controlling agency discretion, and it is not surprising that the courts have responded by taking a more forceful role in checking agency discretion in situations where the alleged arbitrary action affects large segments of the public. Although we lack an adequate theoretical basis for this "new" judicial review, we are familiar now with its elements and scope. The problems of application combined with the lack of a coherent theory are illustrated by the judicial gloss placed on NEPA by the three leading decisions which have moved beyond full disclosure: *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,<sup>35</sup> *Environmental Defense Fund, Inc. v. Corps of Engineers*,<sup>36</sup> and *Sierra Club v. Froehkle*.<sup>37</sup> In *Calvert Cliffs'*, Judge J. Skelly Wright declared that the thrust of NEPA required the agency to undertake a systematic balancing of the costs and benefits of the decision as displayed in the impact statement. Building on *Calvert Cliffs'* and *Overton Park, Environmental Defense Fund v. Corps* held that NEPA allows review of the merits of a final balancing under Sections 101 and 102. What this means is unclear because the Corps had made a good faith consideration of the environmental impact of the project. The court said it made a detailed analysis of the impact statement to determine if the final decision was arbitrary under Sections 101 and 102, but failed to articulate that analysis.

*Sierra Club v. Froehkle* was decided as the book was being completed and the highlights of the case are discussed, but a reading of the opinion's 102 pages and 450 footnotes is necessary to appre-

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Mo. 1973); *cf.* *National Helium Corp. v. Morton*, 486 F.2d 995 (10th Cir. 1973), *rev'g* 361 F. Supp. 78 (D. Kan. 1973) (which found an impact statement so inadequate that the trial judge concluded the required balancing had not been done) on the ground the district court used a too high standard of review. The court held that the assessment of the adequacy of an impact statement is not a review of "agency action within the meaning of § 706 of the APA," and that only an objective good faith effort is required to comply with NEPA. 486 F.2d at 1001. *See also* the concurring opinion of Judge Breitenstein.

35. 449 F.2d 1109 (D.C. Cir. 1971).

36. 470 F.2d 289 (8th Cir. 1972).

37. 359 F. Supp. 1289 (S.D. Tex. 1973).

ciate its potential reach. An impact statement prepared for a Corps of Engineers project was rejected because the statement evaluated selected environmental benefits without evaluating environmentally related costs. The court was particularly critical of the calculation of recreation benefits.<sup>38</sup> These benefits are seldom calculated according to orthodox price theory, and after a detailed review the court concluded "that the balance struck was 'arbitrary' and 'clearly gave insufficient weight to environmental values', under *Calvert Cliffs*."<sup>39</sup> The court in *Calvert Cliffs* disallowed review of the merits except where the balance struck between environmental and developmental values was arbitrary, and *Sierra Club v. Froehle* is the first case to find such an arbitrary balance. The precedential value of the case may be limited to those situations where a cost-benefit ratio is calculated. Decisions where it is claimed the ratio is positive have often been remanded primarily because benefits and costs were not calculated according to generally accepted price theory principles. NEPA has been used more to justify the relevance of these principles than as an independent source of criteria against which the decision can be evaluated. But, as Anderson suggests, Section 101 could "become a new 'cost-benefit statute' for agency decisions on all manner of federal projects."<sup>40</sup>

Anderson's evaluation of NEPA, after surveying the cases, is cautious but optimistic. At the time he was writing, NEPA had been in effect only three years, and, as he observes, "three or four years may be about right for swinging NEPA's systematic, sometimes cumbersome procedures into place."<sup>41</sup> Beyond this observation, the basis for his optimism is not clearly articulated. He is properly skeptical of achieving the systematic balancing to alter priorities in federal resource allocation, as required under *Calvert Cliffs*. Judge Wright's opinion in that case naively assumes that the process of resource allocation is analagous to the simple balancing of interests in the ordinary private lawsuit. Under this fallacious assumption, *Calvert*

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38. *Id.* at 1376-80. Recreational benefits constituted 70% of the benefits for a project whose primary purpose was flood control. The impact statement made the typical error of projecting net increases in recreational usage and thus the "need" for the project without calculating the demand for a new project. Similar facilities existed in the area, and the court was properly suspicious that the claimed net benefits reflected only shifts by users of existing facilities to the new project and that thus the demand for new facilities was considerably less than that claimed by the Corps. For a complete discussion of this problem see Ackerman, Ackerman, & Henderson, *The Uncertain Search for Environmental Policy: The Costs and Benefits of Controlling Pollution Along the Delaware River*, 121 U. PA. L. REV. 1225 (1973).

39. *Id.* at 1364.

40. ANDERSON at 265.

41. *Id.* at 288.

*Cliffs'* imposes on the agencies an impossible burden because in many cases the information required to determine the environmental impact of an activity is unavailable. Instead Anderson seems to put faith in the development of substantive principles based on the statement of objectives in Section 101 and on the long-term efficacy of new decision-making processes to alter agency priorities. He argues on the basis of *Sierra Club v. Froehkle* that Section 101

strongly suggests a nondegradation policy, which when interpreted in light of the plain wording of the statute and its legislative history, may restrict agency decision making to the preservation and enhancement of environmental quality, especially where pollution is the degradation threatened.<sup>42</sup>

Perhaps a fairer reading of congressional purpose is that NEPA is a burden-of-proof law. It modifies our historic preference for resource exploitation by requiring substantial justification for activities which threaten the stability of natural ecosystems and other environmental values, yet tolerates degradation.<sup>43</sup> Modification of the burden of proof should induce considerable change in the pattern of resource decisions, for it is reasonable to expect decision-makers to respond in new ways to new sources of information and values generated by the impact statements.<sup>44</sup> But I think Congress in Section 101 wisely chose not to elevate the preference for environmental protection and enhancement to the level Anderson suggests, although this choice restricts the courts in their ability to derive substantive principles from the Act.

The underlying problem with using NEPA as a source for substantive objectives, not discussed in the book, is that the concept of environmental quality or impact as defined in the Act is too broad

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42. *Id.* at 265.

43. I find it hard to read a non-degradation policy into Section 101(b)(5), which calls for a federal environmental policy that achieves "a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities." See generally Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 47 IND. L.J. 645 (1972).

44. See Note, *Recent Changes in the Scope of Judicial Control Over Administrative Methods of Decisionmaking*, 49 IND. L.J. 118 (1973). This proposition, which seems to be the underlying theory of NEPA, is a controversial one. It is equally possible to argue that procedural reforms will produce only a long-run change in the form but not in the substance of decisions because "of observed institutional behavior patterns . . . as presently structured and enforced, the NEPA will not lead to significant self-reform by agencies." Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239, 245 (1973) (emphasis in original). I am inclined toward Professor Sax's view but agree with Anderson that it is too early to dismiss NEPA as trivial. NEPA has, for example, triggered extensive revisions in the AEC's evaluation of nuclear plants. See *Preparation of Environmental Reports for Nuclear Power Plants*, USAEC REGULATORY GUIDE 4.2 (Directorate of Regulatory Standards, March 1973).

to serve as a standard to rank resource-use priorities. The concepts are being asked to carry too much freight. Presently they mean anything from preserving the Alaskan tundra to opposing a single federally subsidized apartment complex. Recognition of environmental values is only one, albeit very important, legitimate natural resource-use objective, and until Congress speaks with greater precision about the interrelationship of use priorities on a national scale, the courts should properly concern themselves with developing a procedural rather than a substantive common law of NEPA.<sup>45</sup>

*NEPA in the Courts* is an indispensable starting point for any lawyer or public administrator concerned with NEPA. The major problems that courts have faced and will face in interpreting the Act are clearly and thoroughly discussed. Anderson presents a strong case for an expansive interpretation and active judicial enforcement of the Act. While I do not agree with them all, his arguments are logically developed and illuminate the relationship between the legislative history and the possible constructions of the Act. In addition to those discussed in this Note, Anderson makes several other positive suggestions, such as the use of tiered impact statements in order to establish basic principles at the program or overall project level which should be adopted by all agencies.<sup>46</sup> Much legal writing on environmental quality problems has been superficial, repetitive, and ignorant of the basic problems of resource allocation inherent in the recognition of environmental quality values. *NEPA in the Courts* is a welcome addition to the small quantity of high quality analyses of one of the most important problems facing humanity.

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45. This is assuming the White House does not gut the Act. The Administration's proposed revisions of the Clean Air Act of 1970 include legislation to exempt all energy and energy-related activities from NEPA. Louisville Courier Journal, Mar. 11, 1974, at A-9, col. 1.

46. ANDERSON at 290-91.