

RECENT DEVELOPMENT

ELY V. VELDE: THE APPLICATION OF FEDERAL ENVIRONMENTAL POLICY TO REVENUE SHARING PROGRAMS

The National Environmental Policy Act of 1969 (NEPA),¹ a principal congressional response to deterioration of the environment, seeks to restore and maintain healthful and productive living conditions² by requiring federal agencies to comply with both substantive and procedural duties³ in implementing the environmental policy set forth in the statute.⁴ The primary thrust of NEPA is to require federal agencies to consider environmental effects in evaluating "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . . ."⁵ Recently, NEPA has

1. 42 U.S.C. §§ 4321 *et. seq.* (1970). See generally H.R. REP. NO. 378, 91st Cong., 1st Sess. (1969). For a summary of the developments culminating in the enactment of NEPA, see Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 BROOKLYN L. REV. 139, 140-41 (1970).

2. 42 U.S.C. § 4331(a) (1970). The section sets forth the congressional declaration of policy based upon a recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances . . ." The Congress further recognizes "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man . . ." *Id.*

3. *Id.* §§ 4331(b), 4332. See notes 14-20 *infra* and accompanying text.

4. 42 U.S.C. § 4331 (1970). NEPA expresses a basic policy that the federal government shall employ "all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." *Id.* § 4331(a).

The original Senate version of the measure included a statement recognizing that "each person has a fundamental and inalienable right to a healthful environment . . ." This language was deleted from the conference bill because of "doubt on the part of the House conferees with respect to the legal scope of the original Senate provision." H.R. CONF. REP. NO. 765, 91st Cong., 1st Sess. (1969), reprinted in 2 U.S. CODE CONG. & AD. NEWS 2767, 2768-69 (1969). As enacted, NEPA includes a provision indicating congressional recognition "that each person *should* enjoy a healthful environment." 42 U.S.C. § 4331(c) (1970) (emphasis added). For an examination of theories possibly justifying judicial recognition of a *constitutional* right to enjoy a quality environment, see Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 459-73 (1970). But see *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) ("We decline to elevate to a constitutional level the concerns voiced by the appellants.").

5. 42 U.S.C. § 4332(2)(C) (1970). The House and Conference Reports are silent with respect to the meaning of the terms "significantly affecting" the environment. It can reasonably

been successfully invoked to compel federal administrative agencies to consider the environmental effects of any proposed actions.⁶ Presently unresolved, however, is the question of whether a federal agency in administering block grants of funds to states is within the ambit of NEPA. This issue will assume increased importance with adoption of federal revenue-sharing programs designed to assist states in financing local projects.⁷ Resolution of the issue turns on the determination of the distinction, if any, between an agency subject to NEPA's requirements and one whose enabling legislation precludes it from giving effect to the congressional mandate. A corollary of the first issue is a determination of the instrumentality responsible for deciding whether NEPA applies to a particular agency action.

The legislative history of NEPA indicates that Congress did not consider the operation of the measure with respect to essentially unrestricted block grants of federal resources to states. Congressional attention focused exclusively upon federal programs in which an agency maintains an intimate and continuing role in the execution of the program at the state level. However, a recent case, *Ely v. Velde*,⁸ has considered the issue of NEPA's application to block grants. In *Ely*, the Fourth Circuit held that, in administering block grants to local law enforcement agencies, the Law Enforcement Assistance Administration (LEAA) was not relieved from complying with NEPA by virtue of the agency's enabling legislation⁹ which eliminated federal discretionary authority over grant recipients in their use of federal funds. In the context of that decision, this discussion will explore the extent to which NEPA has expanded the grant of authority to federal agencies and the implications of that expansion in relation to the block grant system of federal aid to states.

be inferred that providing a definition was left to the administrative branch, subject to judicial review. Guidelines issued by the Council on Environmental Quality provide that this provision "is to be construed by agencies with a view to the overall, cumulative impact of the action proposed." 36 Fed. Reg. 7724 (1970), reprinted in BNA ENVIRONMENT REP.—FEDERAL LAWS 71:0302 (1970).

6. See, e.g., *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *National Helium Corp. v. Morton*, 326 F. Supp. 151 (D. Kan.), *aff'd*, 455 F.2d 650 (10th Cir. 1971); *Environmental Defense Fund Inc. v. Corps. of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971).

7. See notes 64-66 *infra*.

8. 451 F.2d 1130 (4th Cir.), *rev'g*, 321 F. Supp. 1088 (E.D. Va. 1971) (the court of appeals affirmed the lower court's determination that NEPA was inapplicable to state officials named as defendants in the action. This result is not relevant for purposes of the following discussion).

9. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701, 3711, 3751-69 (1970).

NEPA: Its Supplementary Character and Duties

It is generally agreed that NEPA constitutes a grant of authority supplementing agencies' existing authorizations and mandates.¹⁰ The basis for this conclusion is found in section 105 of NEPA, which states that the policies and goals set forth in the statute "are supplementary to those set forth in existing authorizations of Federal agencies."¹¹ NEPA thus enlarges the responsibilities of federal agencies insofar as it requires them to carry out the policies of the statute in their major actions. Viewed in light of section 103,¹² which directs federal agencies to review their statutory authority to determine if there are any deficiencies or inconsistencies in the legislation preventing full compliance with NEPA, section 105 appears to be a present grant of authority except to the extent that such a grant would clearly violate an agency's existing statutory responsibility. The accuracy of this construction is supported unequivocally by the conference report.¹³

Assuming the validity of the interpretation of NEPA as a supplemental conferral of authority, the nature of the statutory grant of power must be examined. Section 101 of NEPA broadly articulates a continuing policy to use all practicable means to restore and maintain a quality environment.¹⁴ The provision imposes upon federal agencies the duty to carry out the policies of the statute "consistent with other essential considerations of national policy. . . ."¹⁵

The mechanisms employed to implement the substantive policies of section 101 are the procedural requirements embodied in section 102.¹⁶ The most potent procedural technique is the requirement of section 102(2)(c) that an environmental impact statement by the re-

10. See Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 251-65 (1970).

11. 42 U.S.C. § 4335 (1970).

12. *Id.* § 4333.

13. This section [105] does not, however, obviate the requirement that the Federal agencies conduct their activities in accordance with the provisions of this bill unless to do so would *clearly* violate their existing statutory authorizations. H.R. CONF. REP. NO. 765, 91st Cong., 1st Sess. 10 (1969), reprinted in 2 U.S. CODE CONG. & AD. NEWS 2767, 2771 (1969) (emphasis added).

14. See note 4 *supra*.

15. 42 U.S.C. § 4331(b) (1970). See also *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971), wherein the court read this provision as applying to the substantive declarations of section 101 and not as diluting the procedural duties of section 102.

16. 42 U.S.C. § 4332 (1970).

sponsible official be included in every recommendation or report on proposals for legislation and other federal actions significantly affecting the quality of the environment. The statement must be detailed and must treat certain matters, including the environmental impact of the proposed action, any unavoidable adverse effects if the proposal is implemented, alternatives to the proposed action, and any irreversible commitment of resources necessitated if the action is implemented.¹⁷ The language of section 102 strongly suggests the existence of a mandate. Congress "directs" that policies and laws *shall be interpreted and administered* in accordance with the substantive policies outlined in section 101 *to the fullest extent possible*.¹⁸ Additionally, section 102 "directs" all federal agencies to accompany proposals for major federal action with the prescribed impact statement.¹⁹ The legislative history of NEPA, moreover, clearly indicates that the statute is to be implemented unless the existing law applicable to an agency's operations "*expressly prohibits* or makes full compliance with one of the directives [of NEPA] impossible."²⁰ Thus, the expansive substantive policy declarations of section 101, although phrased in discretionary terms, are reinforced by the strongly worded procedural requirements in section 102 suggestive of a mandate.

17. *Id.* § 4332(C). In addition to amplifying the statutorily prescribed requirements, guidelines for federal agencies issued by the Council on Environmental Quality require "[w]here appropriate, a discussion of problems and objections raised by other Federal, State, and local agencies and by private organizations and individuals . . ." 36 Fed. Reg. 7725 (1970), reprinted in BNA ENVIRONMENT REP.—FEDERAL LAWS 71:0302 (1970).

18. 42 U.S.C. § 4332 (1970). The measure provides in pertinent part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this [Act], and (2) all agencies of the Federal Government shall—

. . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

. . . . *Id.*

19. *Id.* § 4332(C).

20. H.R. CONF. REP. NO. 765, 91st Cong., 1st Sess. 9 (1969), reprinted in 2 U.S. CODE CONG. & AD. NEWS 2767, 2770 (1969) (emphasis added). Congressional intent, as revealed by the legislative history, clarifies an ambiguity present in the language of section 102 itself. The statutory language requiring compliance with NEPA "to the fullest extent possible" was clearly not intended by Congress to operate as an escape clause. "[I]t is the intent of the conferees that the provision . . . shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102." *Id.*

Title II of NEPA creates the Council on Environmental Quality (CEQ) in the Executive Office of the President²¹ and lists its functions and duties.²² Despite the limited nature of its statutory authority, which is confined to investigative and advisory functions, CEQ has issued guidelines for federal agencies to round out the requirements of section 102.²³ Authority to so act is to be found in Executive Order 11514,²⁴ which charges CEQ with the duty of issuing guidelines for the preparation of detailed impact statements.²⁵

Since NEPA arguably contemplates no power in CEQ to enforce statutory provisions,²⁶ suits under NEPA have been brought exclusively by private interests. Judicial response to the measure in early suits varied, with some courts labelling NEPA "nothing less than a mandate"²⁷ and others viewing it merely as a declaration of policy which was insufficient to support a cause of action.²⁸ The developing

21. 42 U.S.C. § 4342 (1970). The statute provides that the Council is to be composed of three members designated by the President, subject to Senate confirmation. Certain qualifications requisite to appointment are designated by statute:

Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in [section 101]; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment. *Id.*

22. *Id.* § 4344. The Council's duties include: (1) assisting and advising the President in preparation of the Environmental Quality Report prescribed by NEPA; (2) gathering, analyzing and interpreting information concerning conditions and trends in the quality of the environment; (3) reviewing and appraising programs and activities of the federal government; (4) developing and recommending national policies to promote environmental improvement; and (5) reporting at least annually to the President on the condition of the environment.

23. 36 Fed. Reg. 7724 (1970), reprinted in BNA ENVIRONMENT LAW REP.—FEDERAL LAWS 71:0301 (1970).

24. 3 C.F.R. § 531 (1971), reprinted in 42 U.S.C. § 4321, at 10658 (1970).

25. *Id.* Neither the language of NEPA nor the President's executive order expressly authorizes CEQ to "interpret" NEPA. However, it is within the power of the President to take any action reasonable and necessary to execute a legislative enactment. Banks, *Steel, Sawyer, and the Executive Power*, 14 U. PITT. L. REV. 467, 514-16 (1953). The issuance of guidelines for the preparation of impact statements is easily justifiable as reasonable and necessary means to implement the action-forcing procedures of NEPA.

26. See generally Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 BROOKLYN L. REV. 139, 142 (1970); Note, *NEPA: Full of Sound and Fury . . . ?*, 6 U. RICHMOND L. REV. 116, 122 (1971). But cf. Project, *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149, 171.

27. *National Helium Corp. v. Morton*, 326 F. Supp. 151, 156 (D. Kan. 1971).

28. *Bucklein v. Volpe*, 1 BNA ENVIRONMENT REP. 1082, 1083 (N.D. Cal. 1970). But see *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

trend, however, is toward a judicial recognition of the binding role of NEPA within the general framework of administrative law. Accordingly, NEPA has been affirmatively applied to an agency loan for park construction,²⁹ termination of a federal production contract,³⁰ administrative rule-making,³¹ issuance of land-use permits³² and to the authorization of a cross-state barge canal.³³ Unlike these cases, *Ely* involved a federal agency whose enabling legislation, the Omnibus Crime Control and Safe Streets Act (Safe Streets Act),³⁴ limits considerably the extent of discretionary authority enjoyed by the agency in carrying out its statutory duties.

The Safe Streets Act and LEAA

The portion of the Safe Streets Act relevant to *Ely* is Title I, which establishes LEAA and authorizes it to make grants to states to aid law enforcement activities.³⁵ The technique of employing block grants, as distinguished from the categorical grant system under which most federal programs operate, was written into the Safe Streets Act to reduce the likelihood of federal domination of local police efforts.³⁶ Under the categorical grant system, the federal gov-

29. Texas Comm. on Natural Resources, 1 BNA ENVIRONMENT REP. 1303 (W.D. Tex.), *vacated on other grounds*, 430 F.2d 1315 (5th Cir. 1970).

30. National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan. 1971).

31. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

32. Wilderness Soc'y v. Hieckel, 325 F. Supp. 422 (D.D.C. 1970).

33. Environmental Defense Fund Inc. v. Corps. of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971).

34. *Id.* §§ 3701 *et. seq.* (1970).

35. 42 U.S.C. §§ 3701, 3711, 3751-69 (1970). The statute establishes LEAA as a part of the Department of Justice "under the general authority of the Attorney General", *id.* § 3711(a), although provision is also made for an Administrator who "shall be the executive head of the agency and shall exercise all administrative powers . . ." *Id.* § 3711(b). The purpose of the measure, in view of the "high incidence of crime in the United States", *id.* § 3701, is "to assist State and local governments in strengthening and improving law enforcement at every level by national assistance." *Id.*

36. *See, e.g.*, 113 CONG. REC. 21083 (1968) (remarks of Mr. Celler), wherein it was suggested that proposed statutory language should allay the "qualms about this bill having any tendency to set up a Federal police force . . ."; assurances were made that "[t]he act before us does not contemplate a takeover of law enforcement functions by the Federal Government or a complete subsidization of local law enforcement efforts . . . [C]ontrol and supervision [will remain] with the State and local authorities." *Id.* at 21089 (remarks of Mr. Rodino). However, a threat to local autonomy was perceived by some legislators to result from granting "enormous leverage" to governors over local law enforcement. "[T]he block grant amendment will plunge the new Federal programs into continuing political controversies and partisan rivalries between State and local governments, between Governors and mayors, between urban areas and rural areas, and between State and local police." 114 CONG. REC. 14756 (1968) (remarks of Senator Muskie).

ernment sets the specific purpose and terms for the use of grant funds by state and local governments. Typically, extensive federal control over local recipients is maintained under this system.³⁷ The block grant method, on the other hand, provides for "overall approval of Statewide comprehensive plans at the federal level, but the actual devising and implementing of plans and programs at the State and local level."³⁸ In accordance with this model, the Safe Streets Act provides that LEAA "shall make grants" if it has on file an approved comprehensive state plan which comports with the generalized purposes and requirements of the statute.³⁹ Furthermore, the agency is precluded from exercising control or supervisory powers over a state law enforcement agency.

Ely v. Velde: An Accommodation of Block Grants with National Environmental Policy

The United States District Court for the Eastern District of Virginia held in *Ely*⁴⁰ that NEPA was not applicable to the construction of a state prison medical center funded in part with a block grant from LEAA under the authority of the Safe Streets Act.⁴¹ Plaintiffs, residents of the area in which the center was to be constructed, brought suit against the administrators of LEAA seeking to enjoin allocation of funds for construction of the facility on the ground that LEAA failed to consider the environmental impact of the facility on the local area, which was characterized by the court as "a uniquely historical and architecturally significant rural community."⁴² Upon examining the relation between NEPA and the Safe Streets Act, the court discerned a fundamental conflict in the application of the statutes in the instant circumstances. The conflict perceived by the court presumably arose by virtue of the criteria set forth in the Safe Streets Act to be utilized by LEAA in making grants to the states, since considerations specified by Congress did not include those mandated by NEPA. Consequently, the court accepted LEAA's contention that the Safe Streets Act prevented the agency from imposing conditions

37. 114 CONG. REC. 14753 (1968) (remarks of Senator Dirksen). *See, e.g.*, Federal-Aid Highways Act, 23 U.S.C. §§ 101 *et. seq.* (1970), under which the Department of Transportation is required to maintain close control over the planning and construction of authorized projects.

38. 114 CONG. REC. 14758 (1968) (remarks of Senator Thurmond).

39. 42 U.S.C. § 3733 (1970).

40. 321 F. Supp. 1088 (E.D. Va. 1971).

41. 42 U.S.C. §§ 3702, 3711, 3751-69 (1970).

42. 321 F. Supp. at 1089.

upon grantees not specified by the Safe Streets Act, despite the fact that the measure pre-dated NEPA.⁴³ According to the court, resolution of the conflict required an examination of the obligatory nature of the two measures. Since Congress directed that federal programs be administered in accordance with NEPA "to the fullest extent possible," the court found that the measure was discretionary⁴⁴ in nature inasmuch as agencies were expressly granted authority to determine the extent to which NEPA would be implemented. On the other hand, the court noted that the mandate of the Safe Streets Act to make grants to states upon compliance with specified criteria did not provide agencies with discretionary authority and that the non-discretionary language of the statute precluded any application of NEPA in the LEAA decision to grant funds for construction of the center.⁴⁵

The court of appeals reversed in part.⁴⁶ While the district court found a conflict between NEPA and the Safe Streets Act which it resolved by construing the former measure as discretionary and the latter as non-discretionary,⁴⁷ the Fourth Circuit attempted to "dove-tail" the statutes by piecing together the underlying policies of both acts to create a coordinated federal scheme which would give effect to the dominant features of each statute.⁴⁸ Focusing on the Safe Streets Act's provision ostensibly enjoining all federal instrumentalities from exercising any "direction, supervision, or control" over a state law enforcement agency,⁴⁹ the appellate court acknowledged the congressional attempt to strike a balance in assigning roles to state and federal agencies in the delicate area of law enforcement.⁵⁰ The court observed that while the legislative history of the statute is silent as to the precise scope of the provision, prevailing

43. The Safe Streets Act was passed in 1968, 82 Stat. 197, whereas NEPA was enacted in 1970, 83 Stat. 852.

44. 321 F. Supp. at 1093. The court did recognize, however, that the language "to the fullest extent possible" was not intended to be an escape provision. *Id.* See note 20 *supra* and accompanying text.

45. *Id.*

46. 451 F.2d 1130, 1139 (4th Cir. 1971).

47. The district court compared NEPA's language "to the fullest extent possible . . . ," 42 U.S.C. § 4332 (1970), with the Safe Streets Act's provision that "[t]he Administration shall make grants . . . ," *id.* § 3733, and concluded that the two statutes were in conflict. 321 F. Supp. at 1093.

48. 451 F.2d at 1137.

49. 42 U.S.C. § 3766(a) (1970).

50. 451 F.2d at 1136.

legislative opinion suggested that Congress was alert to the spectre of a federal police force.⁵¹ Construing the statute as a whole in light of this legislative concern, the court held that it was proper to read the prohibition against federal interference narrowly and thus to confine its effect to preclude intrusions into traditional state prerogatives with respect to local police functions. A comprehensive approach to the maintenance of the environment was not deemed within the ambit of that disability.⁵² As illustrative of an analogous federal "presence" in the state law enforcement sphere, the court cited LEAA's practice of conforming its activities with other federal legislation such as the Civil Rights Act of 1964 and the Model Cities Program.⁵³ In view of this practice, requiring LEAA to implement NEPA in extending federal grants would in no manner frustrate the congressional policy of preventing "federalization" of local police agencies.

The court of appeals also dismissed another basis underlying the district court's determination. The lower court emphasized that a reviewing tribunal properly displays deference to the interpretation of a statute by the agency charged with its administration.⁵⁴ According to the district court, when an administrative agency's interpretation of its own legislation is under review, a court need not find that the agency's construction is the only reasonable approach, nor that the interpretation is one which would have been reached had the question first arisen in judicial proceedings⁵⁵—to pass judicial scrutiny, the interpretation need only be a reasonable one. In the instant case, LEAA had interpreted the Safe Streets Act in such a manner that the agency deemed it unnecessary to look beyond the Act's terms for provisions of other federal statutes which might contradict the operation of the Safe Streets Act. In the district court's view, LEAA's interpretation was not unreasonable.⁵⁶ Relying on the general principle that administrative practice is not entitled to special weight when it clashes with the interpretation given to statutes by other agencies

51. See note 3 *supra*. See also S. REP. NO. 1097, 90th Cong., 2d Sess. 227 (1968); 113 CONG. REC. 21188 (1968) (remarks of Mr. Hutchinson).

52. 451 F.2d at 1137.

53. *Id.*

54. 321 F. Supp. at 1093.

55. *Id.*, citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In *Udall*, the Supreme Court promulgated a doctrine that the authoritative interpretation of a statute by an executive official charged with its administration has the legal consequence of commanding deference from a court if the interpretation is reasonable and consistent with legislative intent. See Project, *Federal Administrative Law Developments—1971*, 1972 Duke L.J. 115, 290.

56. 321 F. Supp. at 1094.

created to administer them, the court of appeals refused to defer to LEAA's interpretation of the Safe Streets Act.⁵⁷ By the same token, however, the court appeared to disregard CEQ's interpretation of NEPA.⁵⁸

Despite the result in the court of appeals, the litigation aptly demonstrates the fundamental weaknesses in NEPA machinery. In the instant case, while the impact of the proposed prison medical facility might be localized, unquestionably the environment would be significantly affected. The record in *Ely* is devoid of evidence contradicting numerous experts' conclusions that degradation of the neighborhood would result if the center were built.⁵⁹ Thus, construction of the facility appears to be the type of action which, according to CEQ's interpretation of section 102, would require an impact statement. Nonetheless, LEAA determined otherwise in its section 103 report to CEQ. This result highlights the structural weakness of CEQ, namely that its grant of authority may not contemplate enforcement powers.⁶⁰ The efficacy of NEPA therefore hinges on the judicial response to suits brought by private interests.⁶¹

LEAA's stance in the instant case raises the broad issue of ascertaining the administrative body which is empowered to determine the extent to which NEPA supplements the existing authority of an agency. Two possible alternatives are immediately apparent—the agency whose authority is supplemented or the agency (CEQ) under whose enabling legislation the supplemental authority is granted. One approach in resolving the issue is to infer from CEQ's lack of enforcement power that it must not have been intended by Congress to be the appropriate agency to determine NEPA's applicability to other

57. 451 F.2d at 1135-36 n.14, *citing* *United States v. Townsley*, 323 U.S. 557, 568 (1945).

58. The court did indicate that "The Council on Environmental Quality, as the agency created by NEPA, interprets its governing statute as binding on *all* federal agencies, 'unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.'" 451 F.2d at 1135-36 n.14, *quoting* *CEQ Guidelines*, 36 Fed. Reg. 7724 (1971), *reprinted in* BNA ENVIRONMENT REP.—FEDERAL LAWS 71:0301 (1970). However, the court showed no explicit deference to that interpretation.

59. Joint Appendix of the parties, *submitted in Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971). (The Joint Appendix included excerpts from the reporter's transcript). The lack of expert testimony which might have contradicted the testimony of plaintiffs' experts was due to LEAA's contention that it was not required to consider the environmental impact of the project. The court of appeals reserved judgment on the factual question of whether the proposed prison facility would cause adverse environmental effects. *Id.* at 1138-39.

60. See note 26 *supra* and accompanying text.

61. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). See *Committee for Nuclear Responsibility v. Schlesinger*, 404 U.S. 917, 918 (1971).

agencies. Moreover, the language employed by Congress directing that laws be interpreted and administered in accordance with NEPA policies "to the fullest extent possible" can reasonably be interpreted to suggest that, since each agency is in the best position to assess the degree of consideration of environmental effects possible in its operations, power to determine the measure's applicability rests with each agency. Under this approach, a reviewing court would necessarily determine the validity of an agency's interpretation through an analysis of the reasonableness of the construction, giving due weight to the presumption of validity which attaches to an agency's interpretation of its governing statutes.⁶² Under such circumstances the administrative interpretation might not be deemed unreasonable and, if the interpretation were similar to that of LEAA, the agency could thus ignore NEPA. On the other hand, in light of the President's Executive Order *directing* CEQ to establish guidelines for the preparation of section 102(2)(c) impact statements, a rational argument could be made in favor of conceding to CEQ the function of interpreting the extent of NEPA's supplemental grant of authority, at least with respect to the procedures specified by NEPA. The logic of the latter approach is convincing inasmuch as the legislation which effected the supplement of authority also created an agency expressly charged with the duty to review and appraise various federal programs in light of the substantive policies and procedural duties of Title I of the statute.⁶³ In view of the language creating CEQ and the subsequent Executive Order, it would, at the least, seem reasonable to conclude that vis-à-vis other agencies CEQ is the agency which could properly be vested with the power to determine the extent of NEPA's applicability. The desirability of this approach, however, is a persuasive reason for its adoption. Empowering an agency established expressly for the purpose of implementing NEPA with authority to determine the statute's applicability will better assure that the national environmental policy promulgated by Congress will be effectively implemented. Under this approach, therefore, the only power of administrative agencies under NEPA would be either to comply with the procedural provisions of the Act, as interpreted by CEQ, or to report to CEQ under section 103 of NEPA that statutory authorizations expressly prohibit compliance or make compliance impossible.

62. See notes 29-32 *supra* and accompanying text.

63. 42 U.S.C. § 4344(3) (1970). See discussion of Title I of NEPA, in notes 11-20 *supra* and accompanying text.

The Ely Rationale and Revenue Sharing

Ely is of special significance because the decision of the Fourth Circuit focuses attention on the potential conflict between NEPA and block grants to the states. The block grant approach, with its emphasis on minimizing federal control over local affairs, led LEAA to argue that it was precluded from applying NEPA to its procedures in approving state plans. With the proposed shift in federal assistance programs from the conventional categorical programs to a system of block grants embodied in the General⁶⁴ and Special Revenue Sharing⁶⁵ bills presently before Congress, adoption of a restrictive view of NEPA's applicability to block grants may pose a primary threat to comprehensive federal environmental protection.

Although General and Special Revenue Sharing proposals vary in such respects as the formulae employed in allocating federal resources, the main thrust of these proposals is toward a reduction of federal controls on the use of grants and a corresponding expansion of states' discretion.⁶⁶ At present, the only federal control applied uniformly to revenue sharing bills is the requirement that agencies administer the funds in conformity with the Civil Rights Act of 1964 (Title VI).⁶⁷ Except to this limited extent, state autonomy is largely left intact.

The arguments marshalled by LEAA in *Ely* can be expected to appear in a case testing the effect of NEPA on an agency administering revenue sharing funds. While the Fourth Circuit looked to the unique policy underlying the Safe Streets Act and determined that the restraints on federal control embodied in the measure were more limited than LEAA perceived,⁶⁸ a court focusing on the purposes of revenue sharing legislation would be confronted with a legislative history in which broadsides were levelled at the basic notion of federal control over funds granted to states.⁶⁹ A court would be hard-pressed

64. S. 680, 92d Cong., 1st Sess. (1971); H.R. 4187, 92d Cong., 1st Sess. (1971).

65. See, e.g., S. 1693, 92d Cong., 1st Sess. (1971).

66. See generally Agnew, *The Case for Revenue Sharing*, 60 GEO. L.J. 7, 9-21 (1971); Corman, *Grave Doubts About Revenue Sharing*, 60 GEO. L.J. 29, 34-37 (1971); Rockefeller, *Revenue Sharing—A View from the Statehouse*, 60 GEO. L.J. 45 (1971); *The Question of Federal Revenue Sharing With the States: Pro & Con*, 48 CONGRESSIONAL DIGEST 225 (1969).

67. 42 U.S.C. § 2000d (1970).

68. See notes 50-54 *supra* and accompanying text.

69. See President Nixon's message to Congress, accompanying introduction of S. 1693, 92d Cong., 1st Sess. (1971), 117 CONG. REC. H1750-51 (daily ed. Mar. 18, 1971),

In simplest terms this program means returning Federal tax dollars to States and to local

to answer that federal environmental control was intended to be "dovetailed" with such legislation. Indeed, it could easily be argued that the express provision as to the applicability of the Civil Rights Act of 1964 gives rise to a negative presumption that Congress intended to place additional conditions on otherwise unrestricted block grants. Inasmuch as the *Ely* rationale would be easily distinguishable in this situation, the probable result would be that no federal agency administering block grants would be required to consider the policies of NEPA in its decisions, absent a judicial determination to the contrary. Together with NEPA's inapplicability to state agencies, this result would render the statute nugatory to a substantial degree.

In view of the possibility of such a development, CEQ could draft an amendment to be included in proposed revenue sharing bills making NEPA expressly applicable. Should courts follow the Fourth Circuit's implicit conclusion in *Ely* that CEQ's interpretations of NEPA are not binding upon other agencies, such an amendment, despite the possibility of a judicial determination that no conflict between NEPA and a particular statute exists, would be essential to the continuing viability of NEPA as a meaningful approach to rehabilitation of the environment. However, should courts give recognition to CEQ's power to interpret the applicability of NEPA's procedural provisions, such an amendment may well be unnecessary.

communities for investment in transportation—without the usual federal controls and restraints (emphasis added).

The President further noted:

State and local governments, after all, have often been particularly responsive to citizen pressure in these areas and they have frequently acted as bold pioneers in meeting these concerns. I am confident that as more responsibility is given to governments closer to the people, the true and abiding interests of the people will be even better reflected in public policy decisions. *Id.* at H1753.

