

## JUDICIAL REVIEW, DELEGATION, AND PUBLIC HEARINGS UNDER NEPA

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> establishes a national policy of environmental protection<sup>2</sup> and directs that all federal agencies follow certain operating procedures<sup>3</sup> intended to effectuate that policy.<sup>4</sup> The most important of these procedural requirements is that any agency undertaking a "major federal action significantly affecting the quality of the human environment" must prepare an environmental impact statement.<sup>5</sup> That statement must in-

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1. 42 U.S.C. §§ 4321-47 (1970).

2. This policy is set forth in section 101 of the Act, 42 U.S.C. § 4331 (1970), which provides in pertinent part:

(a) The Congress . . . declares that it is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . .

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

3. These procedures are outlined in section 102 of NEPA and call for all federal agencies to, *inter alia*, utilize a systematic, interdisciplinary approach in environmental planning, section 102(2)(A), 42 U.S.C. § 4332(2)(A) (1970); develop methods for giving appropriate consideration to "presently unquantified environmental amenities and values," section 102(2)(B), *id.* § 4332(2)(B); and make available to state and local governments and other organizations and individuals information and advice useful in maintaining the quality of the environment, section 102(2)(F), *id.* § 4332(2)(F).

4. S. REP. No. 296, 91st Cong., 1st Sess. 9 (1969). These "action-forcing" procedures are intended to help ensure that the policies enunciated in section 101 are implemented. *Id.*

5. This requirement is embodied in section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1970), which requires all federal agencies to

(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,

(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 commitment of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has juris-

clude, *inter alia*, a detailed discussion of the environmental impact of the proposed action, the unavoidable adverse environmental impacts which would result from the implementation of the proposal, and the possible alternatives to the proposed action.<sup>6</sup> Compliance with these and other mandates of NEPA may impose a substantial burden on an agency,<sup>7</sup> a burden which will often tend to interfere with the agency's traditional functions.<sup>8</sup> Significantly increasing the burden imposed on federal agencies by this requirement of NEPA are the actions of environmentalists and others opposing federal projects who have employed the impact statement requirement as a useful legal weapon by attacking purported agency compliance with the requirement on a variety of grounds. Among these lines of attack have been challenges of (1) the accuracy of an agency determination that an impact statement is not required with respect to a certain agency action, (2) the sufficiency of impact statements which have been prepared, and (3) the validity of an agency's decision to implement a project after the preparation of an impact statement. Resolution of these challenges has required the courts to attempt to balance the often competing interests of environmental protection and administrative efficiency, both of which are recognized in the vague language of NEPA.<sup>9</sup>

Emphasizing 1973 cases, this Note will survey the present judicial confusion as to the proper interpretation of statutory language and the

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diction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes.

This requirement has been referred to as the only provision in section 102 "with teeth." *Hanly v. Kleindienst*, 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, C.J., dissenting), *cert. denied*, 412 U.S. 908 (1973).

6. 42 U.S.C. §§ 4332(2)(C)(i)-(iii) (1970). See the text of section 102(2)(C), set forth in note 5 *supra*, for the remaining requirements regarding the content on an environmental impact statement.

7. The preparation of impact statements can be time-consuming and expensive. For example, the final impact statement issued in connection with the recent \$15.3 million Gillham Dam project in Arkansas cost \$250,000. See *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 294 (8th Cir.), *cert. denied*, 409 U.S. 1072 (1972). See also Note, *Applicability of NEPA's Impact Statement Requirement to the EPA*, 1974 DUKE L.J. 353, 374 n.102, in *1973 Developments*.

8. Illustrative of this fact is the statement of the General Counsel of the ICC that the preparation of impact statements in connection with railroad abandonment proceedings interferes with the vital but elusive goal of creating a streamlined and economically viable railroad system in the Northeast. Remarks of Fritz Kahn, Meeting of Metropolitan N.Y. Chapter of the Ass'n of ICC Practitioners, Sept. 11, 1973.

9. See NEPA section 101(b), 42 U.S.C. § 4331(b) (1970), which is reprinted in part in note 2 *supra*.

proper standards of judicial review to be applied in resolving the problems which have arisen in each of the preceding areas. Following this discussion, the Note will then examine cases which have considered the propriety of allowing agencies subject to NEPA to delegate the preparation of the required impact statement to third parties. Finally, the recently debated role and timing of public hearings in the agency review process will be discussed.

#### JUDICIAL REVIEW OF AN AGENCY DETERMINATION THAT NO IMPACT STATEMENT IS REQUIRED FOR A PROPOSED FEDERAL ACTION

As was previously noted, the most important of NEPA's procedural requirements is section 102(2)(C)'s mandate that an environmental impact statement be prepared for all "major Federal actions significantly affecting the quality of the human environment."<sup>10</sup> In determining whether an impact statement is required for a given project under this statutory provision, the courts have been called upon to perform two basic tasks. The first of these tasks has been resolution of the questions of law presented by the need to give greater meaning to the statutory language of section 102(2)(C). The second, development of an appropriate standard of judicial review for a given agency decision not to file an environmental impact statement, requires a valid application of the statutory standards to the particular facts of each case. While these tasks are functionally distinct, the statutory interpretation of section 102(2)(C) and the standard of judicial review adopted by the courts cumulatively play a principal, if not conclusive, role in determining whether preparation of an environmental impact statement will ultimately be required with respect to a given federal action.

#### *Judicial Definition of "Significant" Effect*

The agencies have somewhat narrowed the scope of the first of these tasks, that of statutory interpretation, by generally conceding that a proposed action is "major" if substantial time or money will be devoted to the proposed project,<sup>11</sup> and similarly delimited it by holding

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10. 42 U.S.C. § 4332(2)(C) (1970). See note 5 *supra* and accompanying text.

11. See, e.g., *Hanly v. Kleindienst*, 471 F.2d 823, 826-27 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 879 (D. Ore. 1971). See also *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 698 (2d Cir. 1972) (4.25 mile segment of six lane expressway "major"); *Scherr v. Volpe*, 466 F.2d 1027, 1032-33 (7th Cir. 1972) (court followed agency's own guideline which states that upgrading of existing road which has potential of significantly affecting the environment is "major" action).

that even a proposed state or private action is "federal" if the action involves federal funding, licensing, or other such "enablement."<sup>12</sup> On the other hand, the meaning of the phrase "significantly affecting the quality of the human environment," was vigorously disputed in a 1972 case where a federal agency made a determination that no environmental impact statement was required.<sup>13</sup> In *Hanly v. Kleindienst*,<sup>14</sup>

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12. See, e.g., *National Forest Preservation Group v. Butz*, 485 F.2d 408, 411-12 (9th Cir. 1973); *Ely v. Velde*, 451 F.2d 1130, 1137 n.22 (4th Cir. 1971). But see *City of Boston v. Volpe*, 464 F.2d 254, 258-59 (1st Cir. 1972) ("tentative allocation" of federal funds to state project did not constitute sufficient federal involvement to make action "federal").

13. The Council on Environmental Quality (CEQ), the executive branch's principal advisory body on environmental protection matters, has issued guidelines in an attempt to give more concrete meaning to this particular statutory language. The guidelines provide in part:

The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. CEQ Guidelines, § 5(b), 36 Fed. Reg. 7724 (1971).

This language is substantially unchanged in the current CEQ Guidelines. CEQ Guidelines, § 1500.6(a), 38 Fed. Reg. 2055 (1973). It should be noted, however, that the CEQ Guidelines are merely advisory since the CEQ has no authority to prescribe regulations governing compliance with NEPA. *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 426 (5th Cir. 1973); *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 421 (2d Cir.), cert. denied, 409 U.S. 849 (1972). But see 1972 DUKE L.J. 667, 677.

Since each agency is required to establish procedures for ensuring that environmental values are considered in its major actions, 42 U.S.C. § 4332(2)(B) (1970), the guidelines of each of the various agencies attempt to clarify the statutory language as it applies to that agency. See, e.g., Department of Transportation Policy and Procedure Memorandum 90-1: Environmental Impact and Related Statements (DOT PPM 90-1), 37 Fed. Reg. 21,809 (1972); GSA Implementation Procedures, 36 Fed. Reg. 23,336 (1971). However, such agency guidelines, like those issued by the CEQ, do not have the force of law. See *Lathan v. Volpe*, F.2d (9th Cir. 1973). See generally 1 K. DAVIS § 5.03. Moreover, in a case such as that presented by NEPA, where the applicable statute imposes burdensome duties not directly related to the primary task of the agency and therefore outside that agency's scope of expertise, judicial deference to agency guidelines in interpreting the statute seems inappropriate. See Note, *Substantive Review Under the National Environmental Policy Act: Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 3 ECOLOGY L.Q. 173, 186 (1973). But see *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 855 (8th Cir. 1973).

14. 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). This case and other earlier cases involving NEPA negative statements are discussed in Comment, *Judicial Review of a NEPA Negative Statement*, 53 BOSTON U.L. REV. 879 (1973), and Note, *NEPA, Environmental Impact Statements and the Hanly Litigation: To File or Not to File*, 48 N.Y.U.L. REV. 522 (1973).

a group of neighborhood residents and businessmen sought to enjoin the General Services Administration (GSA) from continuing construction of a proposed federal jail in Manhattan on the ground that no environmental impact statement had been prepared. Following the functional analysis suggested above, the Second Circuit held that the GSA's threshold decision that no impact statement was required involved both a question of law, the meaning of the word "significantly," and a question of fact, whether the particular proposed project under consideration would have a significant adverse environmental impact.<sup>15</sup>

In defining the term "significantly," the *Hanly* court held that an agency would have to consider at least the following two factors in making its determination of whether a proposed action would significantly affect the quality of the environment:

- (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and
- (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.<sup>16</sup>

By delineating these factors, the Second Circuit emphasized that an agency's primary consideration in assessing the significance of the impact of a proposed action should be the relative adverse environmental effects of the proposed project as compared to the current environmental conditions in the affected area and the absolute quality of the environment which would result from implementation of the proposed project. Thus under the *Hanly* court's standards, where the proposed actions would conform with the existing uses, the adverse consequences of that project would be less "significant" than when it constituted a radical change,<sup>17</sup> and it would therefore be less likely that an environmental impact statement would be required. However, the *Hanly* majority augmented this attempt to substantively define the term "significantly" with an attempt to give greater effect to section 102(2)(B)'s requirement that the agency "identify and develop . . . procedures . . . which [would] insure that presently unquantified environ-

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15. 471 F.2d at 828-29.

16. *Id.* at 830-31.

17. *Id.* at 831. This reasoning has also been endorsed by the Court of Appeals for the District of Columbia Circuit in *Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973). In that case the court noted that in the context of land-use planning, there might be a presumption that the environmental impact of a proposed action would not be significant if the proposed use of the land conformed to local regulations governing land use. 487 F.2d at 1036-37.

mental . . . values may be given appropriate consideration in decision-making . . . ."<sup>18</sup> To implement this directive, the Second Circuit held that prior to its threshold decisions, an agency should "give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision."<sup>19</sup> While recognizing that these provisions were not required by any statutory or administrative provisions, the court noted that they were necessary "to assure a fair and informed preliminary decision."<sup>20</sup> This attempt by the *Hanly* majority to lend greater definition to the term "significantly" in section 102(2)(C) has been described by at least one commentator as providing little more guidance than the vague statutory language,<sup>21</sup> and was criticized at the time of the case by dissenting Chief Judge Friendly as resulting in too narrow a definition to adequately protect environmental values.<sup>22</sup> Chief Judge Friendly stated that the proper application of section 102(2)(C) requires a liberal interpretation of the term "significantly" rather than the implementation of procedures unsupported by NEPA's statutory language.<sup>23</sup> Noting that one of the purposes of the impact statement was to insure that the agency consider the relevant environmental data prior to its decision to proceed with a proposed project, Judge Friendly felt that NEPA had to be so construed as to assure that an agency would not make its decision without a detailed study of the relevant information.<sup>24</sup> Consequently, he maintained that the term "significantly" should be interpreted broadly, thereby requiring the preparation of an impact statement wherever it was "fairly arguable" that the proposed action would have an adverse environmental impact.<sup>25</sup>

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18. 42 U.S.C. § 4332(2)(B) (1970).

19. 471 F.2d at 836. The court stated that in many cases a public hearing might be necessary as the best method of developing relevant information and an understanding of the proposed action, although the court felt that the decision whether or not to hold a hearing was "better left to the agency." *Id.*

20. *Id.* at 835.

21. Note, *supra* note 14, at 541.

22. 471 F.2d at 838.

23. *Id.* at 837-38 (Friendly, C.J., dissenting). Chief Judge Friendly noted that, in addition to being unsupported by the statutory language of NEPA, the procedural requirements imposed by the majority amounted to a "mini-impact statement" which might replace the more detailed impact statement in close cases while wasting time and money in truly insignificant ones. *Id.*

24. *Id.*

25. *Id.* In support of this "low threshold" reading of "significantly," Judge Friendly cited *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 346 F. Supp. 189 (D.C.C. 1972), *rev'd on other grounds*, 412 U.S. 669 (1973), and the CEQ Guidelines (discussed in note 13 *supra*). The court in *SCRAP* implied that the question was one for the reviewing court to decide, requiring an impact statement "whenever the action *arguably* will have an adverse environmental impact," at least

Several factors suggest that the interpretation of “significantly” advocated by Judge Friendly more faithfully vindicates the purposes of section 102(2)(C)’s impact statement requirement. Since the broad purpose which underlies NEPA is to ensure that federal agencies will include environmental considerations in their decision-making processes, there should be a presumption in favor of impact statements in order to effectuate the policy of the Act.<sup>26</sup> Such a presumption is created and the purpose of the Act is effectuated by a broad definition of the term “significantly” which establishes a low threshold for impact statement preparation and thus encourages agencies to prepare impact statements in doubtful cases. Judge Friendly’s definition of a “significant” federal action as one which “arguably” may have an adverse environmental impact represents such a broad definition. On the other hand, the two “objective” criteria created by the majority would require the preparation of an impact statement only if a certain level of absolute and incremental adverse environmental impact was anticipated as a result of the proposed agency action.<sup>27</sup> Furthermore, the necessarily vague language used in describing these factors<sup>28</sup> makes it doubtful that they will contribute much more greatly than the standard suggested by Judge Friendly to the predictability and certainty of agency threshold decisions. Finally, the procedural requirements imposed by the *Hanly* majority have, as noted above,<sup>29</sup> no

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where the record does not reveal a detailed study by the agency. 346 F. Supp. at 201 (emphasis in original).

The *Hanly* majority agreed with Judge Friendly that an impact statement should be required in *doubtful* cases, but was skeptical as to whether his approach would be of practical assistance in achieving this objective: “[T]he problem . . . cannot be solved by an interchange of adjectives. In our view such a morass can be avoided only by formulation of more precise factors that must be considered in making the essential threshold determination.” 471 F.2d at 831.

However, the majority and dissent would disagree as to where the threshold should be set, *i.e.*, whether a given case was “doubtful” or not, as was evidenced by their conflicting resolution of the case before them. The majority indicated that the agency’s decision not to prepare an impact statement would have survived an arbitrary and capricious test of judicial review had it not been for inadequate investigation of certain problems by the agency; whereas Judge Friendly concluded that an impact statement should be prepared. *See id.* at 835, 839.

26. *Cf.* Maryland-Nat’l Capital Park & Planning Comm’n v. United States Postal Serv., 487 F.2d 1029, 1040 (D.C. Cir. 1973) (low threshold for impact statements); SCRAP v. United States, 346 F. Supp. 189, 199 (D.D.C. 1972), *rev’d on other grounds*, 412 U.S. 669 (1973).

27. *But see* *Hanly v. Kleindienst*, 471 F.2d 823, 831-32 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), where the *Hanly* majority argued that the combination of its “objective” criteria and procedural requirements would themselves encourage impact statement preparation.

28. See notes 16, 21 *supra* and accompanying text.

29. See note 23 *supra* and accompanying text.

express statutory foundation and seem of doubtful utility in encouraging impact statement preparation. Merely requiring that an agency give the public notice of its impending decision regarding the necessity *vel non* of an impact statement and that the agency accept any information offered will do little if anything to assure that the information received will actually be relied upon by the agency in making its decision.<sup>30</sup>

### *Judicial Review of the Negative Determination*

Resolution of the second threshold task presented by NEPA's impact statement requirement—that of determining the appropriate standard of judicial review to be applied to an agency's decision *not* to file an environmental impact statement—has produced conflicting results.<sup>31</sup> Representative of the contrasting standards are the Second Circuit's decision in *Hanly* and the Fifth Circuit's decision in *Save Our Ten Acres v. Kreger*.<sup>32</sup>

In *Hanly*, the Second Circuit held that an agency's determination as to whether a project would have a "significantly" adverse environmental impact" is a question of fact, which is subject to the general review provisions of the Administrative Procedure Act.<sup>33</sup> Conse-

30. See Note, *supra* note 14, at 547.

31. See, e.g., *Kisner v. Butz*, 350 F. Supp. 310 (N.D.W. Va. 1972) (*de novo* review); *SCRAP v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd on other grounds*, 412 U.S. 669 (1973) (*de novo* review); *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972) (*de novo* review); *Scherr v. Volpe*, 336 F. Supp. 886 (W.D. Wis. 1971), *aff'd*, 466 F.2d 1027 (7th Cir. 1972) (*de novo* review); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972) (rational basis test); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971) (arbitrary and capricious standard).

32. 472 F.2d 463 (5th Cir. 1973), *noted in* 7 GA. L. REV. 785 (1973).

33. The court felt this standard of review was in accord with the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), discussed in note 94 *infra*. The court thereby rejected application of a so-called rational basis or reasonable basis standard of judicial review, see notes 36-41 *infra* and accompanying text. This test is generally applied in cases where an agency exercises rulemaking authority to construe a statutory term. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402, 412 (1941). In *Hearst*, the Supreme Court helped to define this standard when it accepted the NLRB's decision that the term "employees" covered newsboys, by stating that review in such a case was limited to deciding if the agency's determination had a reasonable basis in law and warrant in the record. 322 U.S. at 131. While the *Hanly* court recognized that the "rational basis" test was available for mixed questions of law and fact, the court believed it inappropriate in a case such as *Hanly* where it found that the legal and factual questions could be isolated. 471 F.2d at 829. *But see* *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 789 (D. Me. 1972) (rational basis test applied).

The Supreme Court does not always apply the deferential rational basis standard



quently, the court stated that an agency's negative determination was to be set aside if the agency's decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law" or if the agency failed to adhere to the necessary procedural requirements.<sup>34</sup> Under this standard of review, an agency's decision, which is otherwise in accordance with the applicable law, would be held invalid only if the reviewing court found that the agency had made a "clear error of judgment."<sup>35</sup> Thus, the *Hanly* court felt that a narrow standard of judicial review should be applied to an agency's threshold determination that an impact statement was not required.

The Fifth Circuit, on the other hand, in *Save Our Ten Acres v. Kreger*<sup>36</sup> (*SOTA*), rejected the arbitrary and capricious standard. Noting that the threshold decision as to the need for an impact statement "must be subject to inspection under a more searching standard," the Fifth Circuit held that the agency's decision should have been reviewed under a rule of reasonableness test.<sup>37</sup> Under this test, in-

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of review to cases involving the application of legal concepts to the facts; in some cases it applies a broader "rightness" test. See 4 K. DAVIS, §§ 30.07, 30.13.

34. 471 F.2d at 828, citing 5 U.S.C. § 706 (1970). While Judge Friendly apparently accepted the majority's adoption of the arbitrary and capricious standard of review, he was suspicious of giving too much discretion to agencies, upon which NEPA places a duty to make impact statements, thus implying that a broader standard of review might be wisest. *Id.* at 838 (Friendly, C.J., dissenting). Indeed, one possible reading of his opinion would be that he *did* advocate a different standard of review in his espousal of a definition of significant as "arguably significant."

Other cases have, like *Hanly*, adopted the arbitrary and capricious test to govern judicial review of an agency's decision not to file an impact statement with respect to a proposed agency action. See, e.g., *Morningside Renewal Council, Inc. v. AEC*, 482 F.2d 234 (2d Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3502 (U.S. Jan. 29, 1974) (No. 73-1315) (the dissent felt that an impact statement was needed and objected to what it felt to be the majority's use of a less strict "rational basis" test rather than the *Hanly* arbitrary and capricious test); *Citizens for Clean Air, Inc. v. Corps of Eng'rs*, 349 F. Supp. 696 (S.D.N.Y. 1972); *Durnford v. Ruckelshaus*, 5 Environmental Rep. Cas. 1007 (N.D. Cal. 1972); *Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972).

35. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

36. 472 F.2d 463 (5th Cir. 1973).

37. *Id.* at 466. In a somewhat misleading use of terms, the *SOTA* opinion describes this standard as a "more relaxed" standard of judicial review. *Id.* at 465. It is clear from the context of the opinion, however, that when compared to the arbitrary and capricious test, the "rule of reasonableness" test is only more relaxed in the sense that it requires a lesser finding by the judiciary to justify reversal of agency action. This interpretation is clearly implied by the court's explanation of its reasons for imposing the rule of reasonableness standard:

The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review. Every such decision pretermits all consideration of that which Congress has directed be considered "to the fullest extent possible." *Id.* at 466.

stead of only overturning an agency's negative determination if it were shown to be arbitrary and capricious, a court would weigh the evidence presented by the agency with that produced by any opposing parties to determine if the agency had "reasonably concluded" that the proposed project would have no significant adverse environmental impact.<sup>38</sup> More importantly, as formulated by the Fifth Circuit, the rule of reasonableness standard would allow the reviewing court to consider evidence outside the administrative record, if it were shown that the agency had failed to develop an adequate evidentiary basis for its decision.<sup>39</sup> If upon review of all the evidence, the court found that the proposed project would have a significant adverse effect on the environment, the agency would be required to prepare an impact statement.<sup>40</sup> Thus, in contrast to the relatively narrow standard advocated by the Second Circuit in *Hanly*, the Fifth Circuit in *SOTA* adopted a standard which approaches that of de novo review, whereby the reviewing court makes its own independent de novo determination of the necessity of an agency's preparing an impact statement.<sup>41</sup>

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38. *Id.* at 467. The court considered this "reasonableness" test to be another way of describing the "scope of authority" standard of review laid down by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). See 472 F.2d at 466. Under that standard, the court must determine the range of choices allowed the agency by the statute concerned, then determine if the agency's choice can reasonably be said to be within that range. 401 U.S. at 415-16.

In a later case, involving a 272-unit public housing project, the Fifth Circuit again applied this "reasonableness" test, but found the agency's determination correct as a matter of law. A full trial on the issue had been held and, on that record, the court found that "it was not unreasonable for HUD to determine that an environmental impact statement was not required." *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 426 (5th Cir. 1973).

39. 472 F.2d at 467.

40. *Id.*

41. The more deferential *Hanly* standard of review was also rejected by the Tenth Circuit in *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973). In rejecting the arbitrary and capricious standard, the Tenth Circuit noted that it properly applies only to matters within the discretion of an agency, where "NEPA's specific requirements in § 102 clearly speak in mandatory terms, and do not leave the determination to administrative discretion." *Id.* at 1249. However, the Tenth Circuit did not explicitly adopt the broad standard of review presented in *SOTA*. Rather, the Tenth Circuit maintained only that the agency decision be "reasonable" so as to be "in accordance with the law." *Id.* at 1248.

[T]he compass of the judgment to be made [by the agency] is narrow . . . .  
 . . . under the specific terms of NEPA we feel that the proper standard . . . is whether the negative determination was reasonable in the light of mandatory requirements and high standards set by the statute so as to be "in accordance with law"—another ground of review in § 706(2)(A) which may be applied consistently with the procedural demands of NEPA (footnote omitted). *Id.* at 1249.

While the Tenth Circuit in *Wyoming Outdoor* thus joined the Fifth Circuit in rejecting the arbitrary and capricious standard as too deferential a standard for judging

A number of policy considerations provide substantial support for adherence to the more rigorous reasonable basis standard of judicial review adopted by the Fifth Circuit in *SOTA* and for its application in a manner approaching that of de novo judicial review. Like Judge Friendly's broader definition of the term "significantly" under section 102(2)(C), application of a more rigorous standard of judicial review promotes the broad purposes of NEPA by encouraging agencies to file impact statements in doubtful cases.<sup>42</sup> Furthermore, if the allocation of determinations between agency and court should depend on the "comparative qualifications of the agency and of the courts to decide the particular issue," as Professor Davis asserts,<sup>43</sup> then the question of what is a "major Federal action significantly affecting the quality of the human environment" within the intent of NEPA is arguably a question for the courts, experts in synthesizing the conflicting goals of society, rather than for the agencies, whose expertise lies in much narrower fields.<sup>44</sup> This argument is made even more compelling when one considers the contention that the very newness and vagueness of the statutory terms of section 102(2)(C) arguably transforms the initial agency decisions construing them into inextricably related questions of law and fact more appropriately determined by a court than an agency.<sup>45</sup> Finally, applying this more rigorous standard in such a manner as to approach a process of de novo review represents a more effective means of overcoming the potential administrative bias against the preparation and filing of impact statements on the part of development-minded agencies.<sup>46</sup>

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the validity of an agency's negative determination under section 102(2)(C), there is no indication that it shared the Fifth Circuit's view that the reviewing court should look outside the administrative record to determine whether the applicable standard of review had been met by the agency whose decision was under scrutiny. In this sense, then, the Tenth Circuit's position would seem to be an intermediate one, when compared to that of the Second Circuit in *Hanly*, on the one hand, and that of the Fifth Circuit in *SOTA*, on the other.

42. See notes 23-25 *supra* and accompanying text.

43. 4 K. DAVIS § 30.09.

44. See Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629 (1970); Note, *supra* note 14, at 539.

45. See Sive, *supra* note 44, at 625-26.

46. See L. JAFFE 621. The compliance of federal agencies with NEPA has often been grudging. See Dinwoodey, *New Factors in Agency Decision-Making*, 6 SUFFOLK U.L. REV. 498, 517 (1972); COMPTROLLER GENERAL OF THE UNITED STATES, IMPROVEMENTS NEEDED IN FEDERAL EFFORTS TO IMPLEMENT THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, at 13-20 (1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

One district court has observed that negative determinations had been routinely used by the ICC as a "ruse" for avoiding the requirements of NEPA. *SCRAP v. United States*, 346 F. Supp. 189, 200-01 (D.D.C. 1972), *rev'd on other grounds*, 412 U.S.

As compelling as are these factors supporting the standard of judicial review adopted by the Fifth Circuit in *SOTA*, it seems reasonable to conclude that the utilization of the more deferential arbitrary and capricious standard by the Second Circuit in *Hanly* rests on a substantially sounder analysis of case precedent and statutory authority and that, especially if that standard were combined with a broad definition of "significant" impact as was advocated by Judge Friendly, it would seem to balance more satisfactorily the competing objectives of the various federal agencies and NEPA's objective of environmental protection. Since NEPA directs that the "agencies . . . shall" perform the procedures prescribed by section 102(2),<sup>47</sup> it would seem inaccurate to assume, as did the Fifth Circuit, that the threshold decision to prepare an impact statement should be placed in the hands of a reviewing court.<sup>48</sup> Moreover, since agencies are already required to substantiate a negative determination with a statement of reasons why they believe an impact statement to be unnecessary,<sup>49</sup> there is little reason to allow reviewing courts to consider evidence outside the scope of the administrative record, as does the standard of de novo review adopted by the Fifth Circuit in *SOTA*.<sup>50</sup> Finally, such a standard en-

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669 (1973). The General Counsel of the ICC had a more innocent explanation, but did not deny an inclination not to file:

I must confess . . . that I, for one, did not think that NEPA reasonably could be said to apply to regulatory agencies such as the Commission and counseled that none of its determinations properly could be deemed to be major actions significantly affected [sic] the quality of the human environment. Remarks of Fritz Kahn, *supra* note 8, at 4.

47. 42 U.S.C. § 4332(2) (1970) (emphasis added).

48. Although the *SOTA* court indicated that it was applying a standard of reasonableness test to the agency's determination not to issue an environmental impact statement, language in the opinion suggests that the court viewed that test as permitting the court itself to perform that function:

If the court concludes that no environmental factor would be significantly degraded by the project, GSA's determination not to file the impact statement should be upheld. On the other hand, if the court finds that the project may cause a significant degradation of some human environmental factors (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement or grant *SOTA* such other equitable relief as it deems appropriate. 472 F.2d at 467 (emphasis added).

49. See *Arizona Pub. Serv. Co. v. FPC*, 483 F.2d 1275, 1282 (D.C. Cir. 1973). See also *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir.), cert. denied, 409 U.S. 990 (1972); *Ely v. Velde*, 451 F.2d 1130, 1138-39 (4th Cir. 1971).

50. The *SOTA* court clearly indicates that the judicial review of an agency's decision not to prepare an environmental impact statement is not limited to the administrative record. The court notes that

the court should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality. This inquiry must not necessarily be limited to consideration of the administrative record, but supplemental affidavits, depositions and other proof concerning the environmental impact of the pro-

courages those opposed to an agency's actions to challenge in the courts every agency's decision on the grounds of an "inadequate evidentiary development" and would thus unduly burden those agencies which have complied fully with the procedural and evidentiary requirements of NEPA.<sup>51</sup>

#### JUDICIAL REVIEW OF THE SUFFICIENCY OF IMPACT STATEMENTS

After an agency has prepared an impact statement in connection with a proposed action, the adequacy of that statement may then be subjected to judicial scrutiny. As noted by one court, "the mere filing of a document labelled 'final impact statement' is insufficient to shield an agency from judicial review if the document fails to comply with the standards outlined in NEPA."<sup>52</sup> Thus, to prepare an adequate statement, an agency must comply with section 102(2)(C)'s five-fold requirement of "detailed statement" on: the environmental impact of the proposed action; the unavoidable adverse environmental effects which would result from the implementation of the project; the alternatives to the proposed project; the irretrievable and irreversible commitment of resources entailed in the project; and the relationship between the short-term use of the environment and the enhancement of long-term productivity.<sup>53</sup> Initial court decisions held the agencies to a strict standard of compliance with the procedural requirements of section 102.<sup>54</sup> Consequently, under these decisions, compliance

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ject may be considered if an adequate evidentiary development before the agency can be shown. 472 F.2d at 467.

Such broad scope of review appears inconsistent with the Supreme Court's recent decision in *Camp v. Pitts*, 93 S. Ct. 1241 (1973) (per curiam), wherein the Court held that in reviewing informal agency decisions the court must confine its review to the administrative record, "not some new record made initially in the reviewing court." *Id.* at 1244. Although the Court stated that if the basis for the administrative decision is inadequately explained, the court may seek "additional explanation of the reasons for the agency decision as may prove necessary" *id.*; it clearly rejected the contention that parties dissatisfied with informal agency decisions may introduce evidence before the court which supports their position. *Id.*

51. It should be noted that some agencies have not been reluctant to prepare impact statements. See F. ANDERSON, *NEPA IN THE COURTS* 84-85 (1973). Moreover, where agency rules require impact statements, the courts will demand agency compliance therewith. See *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972); *Nolop v. Volpe*, 333 F. Supp. 1364 (D.S.D. 1971).

Another factor which may be asserted in support of a narrower scope of judicial review is an agency's need to make its decision with some feeling of certainty that its decision will be upheld. Compare Comment, *supra* note 14, at 894-98, with *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 880 (D. Ore. 1971).

52. *SCRAP v. United States*, 346 F. Supp. 189, 195 n.8 (D.D.C. 1972), *rev'd on other grounds*, 412 U.S. 669 (1973).

53. For text of section 102(2)(C); see note 5 *supra*.

54. See, e.g., *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Calvert Cliffs' Coor-*

with that standard required detailed discussions of *all* known possible environmental consequences<sup>55</sup> and a wide range of alternatives to the proposed action.<sup>56</sup> As the frequent impossibility of an agency's complying with such strict requirements became more evident,<sup>57</sup> however, courts began to manifest a more lenient attitude.<sup>58</sup> Thus, more recent cases generally reflect a realization by the judiciary that substantial

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dinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); *Daly v. Volpe*, 350 F. Supp. 252 (W.D. Wash. 1972); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971).

The courts have continued to interpret the language in section 102 that the agencies shall "to the fullest extent possible" perform the tasks contained in section 102(2) as requiring full compliance unless there is a clear conflict of statutory authority. *Scherr v. Volpe*, 466 F.2d 1027, 1031 (7th Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). This view is supported by the legislative history of NEPA. The Conference Committee report explained this phrase as follows:

The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . . . Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. CONF. REP. No. 91-765, 91st Cong., 1st Sess. 9-10 (1969).

55. See *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

56. See *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (requiring discussion of all possible alternatives that would alter environmental impact and the cost-benefit balance).

Even alternatives beyond the power of the agency to implement must be included. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). Moreover, the CEQ Guidelines specifically require the discussion of alternatives not within the existing authority of the agency. CEQ Guidelines § 1500.8(a)(4), 38 Fed. Reg. 20,554 (1973). Such an interpretation of the requirement no doubt advances the informational purpose of impact statements. However, in a dissenting opinion to the *Natural Resources* case, *supra*, Judge MacKinnon stated: "I just do not consider that the law requires, or that reason dictates, the discussion of unrealistic alternatives or their environmental impact." 458 F.2d at 846.

Contrast the view taken in a more recent case where the court indicated that alternatives beyond the power of the agency need not be considered. See *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3595 (U.S. Apr. 23, 1974).

57. See note 85 *infra*.

58. The change in judicial attitude may also be attributable to a change in the attitude of the agencies: the strongest judicial statements may be seen as responses to early, perfunctory agency attempts to comply with NEPA. In one case arguably applying a more relaxed test of impact statement sufficiency than that laid down in an earlier case involving the same project, the court contrasted the twelve-page statement originally issued with the "voluminous" report costing approximately a quarter of a million dollars that the agency thereafter submitted. Compare *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 342 F. Supp. 1211, 1217 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir.), *cert. denied*, 409 U.S. 1072 (1972), with *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971).

compliance with section 102(2)(C)'s impact statement requirement is sufficient, even in cases where preparation of a more comprehensive and detailed impact statement would be possible.<sup>59</sup> This approach implicitly recognizes that the environmental goals served by the impact statement must be balanced against the limited resources and competing goals of society, and that at some point a "better" impact statement does not merit the additional burden on an agency's manpower and budget which its preparation would entail.

Three decisions by the District of Columbia Circuit illustrate the courts' transition from requiring strict compliance with section 102 to recognizing that the requirements of that section should be applied in a more tempered fashion. In the 1971 decision of *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,<sup>60</sup> the court noted that not only were section 102 duties "not inherently flexible" but that "[c]onsiderations of administrative difficulty, delay, or economic cost will not suffice to strip the section of its fundamental importance."<sup>61</sup> Less than six months later, the District of Columbia Circuit loosened its standard of compliance in *Natural Resources Defense Council v. Morton*<sup>62</sup> by introducing a "rule of reason" test for the sufficiency of an environmental impact statement.<sup>63</sup> Recognizing that the discussion of environmental effects of a proposed project need not be "exhaustive," the court held that section 102 required only sufficient discussion "to permit a reasoned choice of alternatives."<sup>64</sup> Moreover, in contrast to its statement in *Calvert Cliffs*, the court noted that proper implementation of section 102 required recognition of the fact "that the resources of energy and research—and time—available to meet the nation's needs are not infinite."<sup>65</sup> In the 1973 opinion of *Scientists' Institute*

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59. See, e.g., *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814 (9th Cir. 1973); *Sierra Club v. Froehke*, 486 F.2d 946 (7th Cir. 1973); *Citizens Environmental Council v. Volpe*, 484 F.2d 870 (10th Cir. 1973), cert. denied, 42 U.S.L.W. 3584 (U.S. Apr. 15, 1974); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836-37 (D.C. Cir. 1972) (discussion of impact of alternatives subject to a rule of reason and need only provide information sufficient to permit a reasoned choice).

60. 449 F.2d 1109 (D.C. Cir. 1971).

61. *Id.* at 1115.

62. 458 F.2d 827 (D.C. Cir. 1972).

63. *Id.* at 834.

64. *Id.* at 836. While the "rule of reason" was initially introduced by the court with reference to the required discussion of alternatives, that standard may also be applied to the other areas of the impact statement.

See *National Helium Corp. v. Morton*, 486 F.2d 995, 1002 (10th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3423 (U.S. Jan. 17, 1974) (No. 73-1120); *Scientists' Institute for Pub. Information, Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); ANDERSON, *supra* note 51, at 201.

65. 458 F.2d at 837. The rationale behind the court's use of the "rule of reason"

for *Public Information v. AEC*,<sup>66</sup> the court explicitly recognized that NEPA provides a degree of flexibility and agency discretion as to the contents of the impact statement.<sup>67</sup> More importantly, however, the court elaborated on the type of compliance required of agencies under its rule of reason standard. While noting that the standard was subject to section 102's mandate that the procedural requirements be followed "to the fullest extent possible," the court asserted that there would be adequate compliance with section 102(2)(C) if the agency made a "good faith" effort to present the information required by that section.<sup>68</sup>

Thus, it is apparent that the Court of Appeals for the District of Columbia Circuit has retreated from its standard of strict compliance presented in *Calvert Cliffs*. However, in adopting language of "good faith" compliance in the *Scientists' Institute* case, it may be argued that the District of Columbia Circuit retreated too far. The policy considerations of competing social goals and administrative efficiency which justified abandoning the requirement of strict procedural compliance for a reasonableness test of impact statement sufficiency would seem to provide little support for taking the additional step of abandoning any type of objective test for a subjective test such as that embodied in a rule of reason standard which is met by a mere showing of "good faith." While this language in *Scientists' Institute* and the other cases in which it has appeared may represent mere dictum,<sup>69</sup>

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standard is depicted in the following statement from the court's opinion:

Mere administrative difficulty does not interpose such flexibility into the requirements of NEPA as to undercut the duty of compliance "to the fullest extent possible." But if this requirement is not rubber, neither is it iron. The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible . . . . *Id.*

66. 481 F.2d 1079 (D.C. Cir. 1973).

67. It is now clear that an agency's duties to issue a statement on a project and to consider environmental factors at each stage of agency decision making as to that project are not inherently flexible or discretionary. But we have also recognized that the statute admits of some discretion in determining the contents of impact statements. *Id.* at 1091.

68. *Id.* at 1092. In *Scientists' Institute*, the Atomic Energy Commission sought to avoid issuing an "environmental survey" which it had previously prepared as an impact statement. Although the Commission was not attempting to circumvent NEPA, it apparently felt that section 102's requirements were so strict that its "survey" would fail to meet the applicable standards. Because the court's holding was simply that an impact statement was required for the proposed project, its discussion of the requirements of section 102 and the rule of reason constituted dictum. *See id.* at 1091-92.

The case nonetheless illustrates a significant fact: that agencies sometimes decide not to file an impact statement in cases of debatable significance, rather than prepare one to be subjected to an unreasonably exacting review for sufficiency which might entail more than one round of litigation and rewriting. *See id.* at 1091.

69. As was noted previously, the court's discussion in *Scientists' Institute* concerning the appropriate standard of review for the adequacy of an impact statement consti-



if such language were seized by a future court and elevated to the status of an affirmative standard, the seemingly inevitable result would be to undermine NEPA's basic goal of environmental protection by placing in the hands of those whose actions the requirement of an impact statement was intended to circumscribe the definition of the standard by which their conduct would be judged.<sup>70</sup>

While some version of the rule of reason standard has been adopted in other recent cases,<sup>71</sup> two circuits have advocated standards

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tuted dictum. See note 68 *supra*. Nevertheless, in *National Helium Corp. v. Morton*, 486 F.2d 995 (10th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3423 (U.S. Jan. 17, 1974) (No. 73-1120), the Tenth Circuit Court of Appeals relied on the court's language in *Scientists' Institute* when defining the "rule of reason" standard. Thus, the Tenth Circuit held that the review of an impact statement was limited to the following determinations: (1) whether the impact statement includes a discussion of each of the five procedural requirements of NEPA; (2) whether the impact statement "constitutes an objective good faith compliance with the demands of NEPA"; and (3) whether the statement includes a "reasonable discussion of the subject matter involved in the five required areas." *Id.* at 1002-03. Consequently, while the Tenth Circuit's standard included a requirement of "good faith compliance," the mandate that the impact statement contain a "reasonable discussion of the subject matter" could well recognize the need of that statement to provide a basis upon which one could make a reasoned decision. See *id.* at 1002.

70. Application of the "good faith" standard as opposed to a more objective criterion would provide too much leeway for even those agencies whose failure to abide by NEPA's requirements was only the result of a misapprehension as to the applicability of that statute. See Remarks of Fritz Kahn, *supra* note 8. Where such an agency did attempt to comply with NEPA through the issuance of an impact statement, that agency might in "good faith" tend to emphasize the budgetary aspects or the projected results of the proposed action rather than its potential environmental consequences. Although such an impact statement might well have been issued in good faith, it is probable that it would fail either to alert interested parties of possible environmental effects of the project or to serve as a basis for decision-making as to the merits of proceeding with the project. See notes 72-76 *infra* and accompanying text.

71. Two recent decisions by the Tenth Circuit have also endorsed the application of the rule of reason. In *Citizens Environmental Council v. Volpe*, 484 F.2d 870 (10th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3584 (U.S. Apr. 15, 1974), the court rejected an attack on the sufficiency of the discussion of alternatives contained in an impact statement prepared in connection with a proposed highway bypass, on the ground that "[t]he discussion of the environmental effects of alternatives in the EIS in this case are [sic] sufficient to allow a reasoned choice." *Id.* at 873. Thus, as formulated in *Citizens Environmental Council*, the court clearly adopted the objective criterion which was initially introduced in *Natural Resources*. See notes 62-65 *supra* and accompanying text. In its subsequent decision of *National Helium Corp. v. Morton*, 486 F.2d 995 (10th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3423 (U.S. Jan. 17, 1974) (No. 73-1120), the Tenth Circuit again endorsed the rule of reason standard. However, in defining that standard, the court required an "objective good faith compliance with the demands of NEPA," thereby endorsing the subjective standard presented in *Scientists' Institute*. *Id.* at 1002.

The Ninth Circuit Court of Appeals also appears to have adopted a standard essentially equivalent to *Scientists' Institute's* good faith requirement. In *Lathan v. Volpe*, — F.2d — (9th Cir. 1973), the Ninth Circuit held that the adequacy of an

which are possibly distinguishable from a rule of reason test but which seem open to substantial criticism. In *Iowa Citizens for Environmental Quality, Inc. v. Volpe*<sup>72</sup> the Eighth Circuit initially appeared to follow *Natural Resources* by citing that case for the proposition that the impact statement's discussion of environmental effects "need only provide sufficient information for a 'reasoned choice of alternatives.'"<sup>73</sup> After further discussion of the case, however, the Eighth Circuit then concluded, as if it were reiterating the same standard through the use of interchangeable wording, that section 102 required only that the impact statement contain a "notice of the environmental consequences" of the proposed action.<sup>74</sup> In utilizing this notice of consequences language, the Eighth Circuit stated that the purpose of the impact statement is to "alert the public, other interested governmental agencies, the Council on Environmental Quality, the President, and the Congress of possible environmental consequences of the proposed agency action."<sup>75</sup> Such a notice of consequences standard, however, is inadequate in that it recognizes only one of the important functions of the impact statement. In addition to alerting interested parties to the environmental consequences of a proposed action, the information in an impact statement must be sufficient to allow decision makers to make an informed choice as to whether to proceed with the proposed action and, if so, in what manner.<sup>76</sup> Such a choice requires not

impact statement was a procedural question which was to be reviewed in accordance with section 706(2)(D) of the Administrative Procedure Act. Under that section, an agency's action is to be set aside if it was "without observance of procedure required by law." 5 U.S.C. § 706(2)(D) (1970). In describing the implications of that standard, the Ninth Circuit held that courts should "require firm, fair, bona fide compliance with NEPA." — F.2d at —. Thus, like the court in *Scientists' Institute*, the Ninth Circuit appeared to be requiring merely "good faith" compliance with NEPA. Only a month before, in *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814 (9th Cir. 1973), the court had adopted the arbitrary and capricious test.

72. 487 F.2d 849 (8th Cir. 1973).

73. *Id.* at 852.

74. *Id.* at 849.

75. *Sierra Club v. Froehke*, 345 F. Supp. 440, 444 (W.D. Wis. 1972), *aff'd*, 486 F.2d 946 (7th Cir. 1973). The district court opinion was cited by the court in *Iowa Citizens*. 487 F.2d at 852.

76. As noted by the District of Columbia Circuit in *Scientists' Institute*

[the] procedural requirements [of NEPA] are not dispensable technicalities, but are crucial if the statement is to serve its dual functions of informing Congress, the President, other concerned agencies and the public of the environmental effects of agency action, and of ensuring meaningful consideration of environmental factors at all stages of agency decision making. 481 F.2d at 1091.

Similarly, as noted by a district court, the impact "statement must be sufficiently detailed to allow a responsible executive to arrive at a reasonably accurate decision regarding the environmental benefits and detriments to be expected from the program

only information regarding the environmental impact of the proposed action, but also some knowledge of the benefits to be obtained from that action, the resource commitments which the proposed action would entail, and other factors either stated in or inferrable from the language of section 102 of NEPA. Therefore, the “notice of consequences” test would seem to be at best only a partial standard for the judicial review of the adequacy of an impact statement.

In *Silva v. Lynn*,<sup>77</sup> the First Circuit made references to a broader standard of review than that of the rule of reason. Rather than limiting the scope of review to a determination of whether the agency complied with NEPA’s procedural requirements, the First Circuit indicated that a reviewing court’s inquiry might also extend to a determination of whether the agency’s “findings and conclusions . . . are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>78</sup> The application of arbitrary and capricious as a review standard for the sufficiency of impact statements has been considered and expressly rejected by two circuits. Thus in *National Helium Corp. v. Morton*,<sup>79</sup> the Tenth Circuit held that the arbitrary and capricious test was the wrong standard of review for NEPA’s “statutory procedural requirements” since that standard applies to agency action while NEPA requirements are merely prerequisites to agency action.<sup>80</sup> Similarly, in *Lathan v. Volpe*,<sup>81</sup> the Ninth Circuit rejected the use of the arbitrary and capricious test on the grounds that the adequacy of an impact statement is a procedural question, governed by the procedural test of section 706(2)(D) of the Administrative Procedure Act.<sup>82</sup>

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implementation.” *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401, 1403-04 (D.D.C. 1971). For additional support for the dual function of an impact statement, see *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971); *Environmental Defense Fund v. Corps of Eng’rs*, 342 F. Supp. 1211, 1217 (E.D. Ark. 1972). See also *National Helium Corp. v. Morton*, 486 F.2d 995, 1002 (10th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3423 (U.S. Jan. 17, 1974) (No. 73-1120).

77. 482 F.2d 1282 (1st Cir. 1973).

78. *Id.* at 1283. The court’s opinion does not clearly reveal whether it actually applied the “arbitrary and capricious” test in its determination of the adequacy of the impact statement there in question. See *id.* 1283-85.

79. 486 F.2d 995 (10th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3423 (U.S. Jan. 17, 1974) (No. 73-1120).

80. *Id.* at 1001. The Tenth Circuit did note, however, that had the agency failed altogether to comply with the procedures of NEPA, then the “arbitrary and capricious test might well apply.” *Id.* at 1002.

81. — F.2d — (9th Cir. 1973).

82. *Id.* at —. For a more detailed discussion of *Lathan*, see note 71 *supra*.

While it has been held that NEPA is an "environmental full disclosure law"<sup>83</sup> which requires compliance with its procedures "to the fullest extent possible,"<sup>84</sup> a review of recent decisions indicates that these requirements are increasingly being applied according to a rule of reason. And although the courts have been careless in their articulation of the proper standards to be employed in the review of the adequacy of impact statements, the decisions do at least reveal a growing judicial awareness that, due to economic and time constraints faced by the agencies, the most complete statement possible is not required.<sup>85</sup> Thus, to the extent that these decisions reveal an implicit balancing of environmental protection against other policies in judging the sufficiency of impact statements they appear consistent with the basic thrust of NEPA which establishes environmental protection as an important, but not exclusive national policy.<sup>86</sup>

### SUBSTANTIVE REVIEW UNDER NEPA

Assuming the preparation of an adequate impact statement, the question arises as to whether an agency's decision to proceed with a project can be attacked on its merits under section 101 of NEPA.<sup>87</sup> While the answer to this question was at first unclear, with some courts

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83. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749, 789 (E.D. Ark. 1971); *accord*, *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972); *Conservation Council v. Froehlike*, 340 F. Supp. 222 (M.D.N.C. 1972), *remanded*, 473 F.2d 664 (4th Cir. 1973) (per curiam).

84. A literal interpretation of this phrase in connection with the sufficiency of impact statements could prevent any agency action since more information is always "possible" in the sense that it can be gathered. One court has explained:

[I]n reviewing the sufficiency of an agency's compliance with § 102, we do not fathom the phrase 'to the fullest extent possible' to be an absolute term requiring perfection. If perfection were the standard, compliance would necessitate the accumulation of the sum total of scientific knowledge of the environmental elements affected by a proposal. It is unreasonable to impute to the Congress such an edict. . . . [T]he phrase 'to the fullest extent possible' clearly imposes a standard of environmental management requiring nothing less than comprehensive and objective treatment by the responsible agency . . . . *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 348 F. Supp. 916, 927 (N.D. Miss. 1972).

85. *Cf. Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 342 F. Supp. 1211 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir.), *cert. denied*, 409 U.S. 1072 (1972). The district court there stated: "It is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project." 342 F. Supp. at 1217. *See also Brooks v. Volpe*, 350 F. Supp. 269, 277 (W.D. Wash. 1972).

86. *See* 42 U.S.C. § 4331 (1970). For text of this provision see note 2 *supra*.

87. Plaintiffs often challenge the sufficiency of an impact statement and attack the agency decision on the merits in the same action. *See, e.g., Sierra Club v. Froehlike*, 486 F.2d 946 (7th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 292-93 (8th Cir.), *cert. denied*, 409 U.S. 1072 (1972).

saying there could be no review of agency decisions on the merits,<sup>88</sup> the courts increasingly have recognized the propriety of judicial review of the agency's substantive decision.<sup>89</sup> The courts thus appear to be abandoning the view that NEPA is only a "full disclosure" law encompassing only the procedural duties embodied in section 102,<sup>90</sup> and accepting the view that "NEPA was also intended to effect substantive changes in decisionmaking."<sup>91</sup>

The first case which unequivocally held that an agency has substantive duties under section 101 was *Environmental Defense Fund, Inc. v. Corps of Engineers (EDF v. Corps)*,<sup>92</sup> a 1972 decision by the Eighth Circuit. In that case the court stated that the language of both sections 101(b) and 102(1) creates an agency obligation to carry out the substantive requirements of the Act.<sup>93</sup> Having found a substantive

88. See, e.g., *Upper Pecos Ass'n v. Stans*, 452 F.2d 1233, 1236 (10th Cir. 1971), vacated and remanded, 409 U.S. 1021 (1972); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971). For other cases in accord see Note, *Judicial Review: NEPA and the Courts*, 1973 DUKE L.J. 301, 305 n.20, in 1972 *Developments*.

89. See, e.g., *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 298 (8th Cir.), cert. denied, 409 U.S. 1072 (1972); *Conservation Council v. Froehlke*, 473 F.2d 664 (4th Cir. 1973) (per curiam); *Environmental Defense Fund, Inc. v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1973); *Sierra Club v. Froehlke*, 345 F. Supp. 440 (S.D. Tex. 1973).

90. See *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971).

91. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 297 (8th Cir.), cert. denied, 409 U.S. 1072 (1972).

92. 470 F.2d 289 (8th Cir.), cert. denied, 409 U.S. 1072 (1972). The court's conclusion that section 101 creates substantive duties is supported by commentators and the legislative history of the Act. See Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. IND. & COM. L. REV. 685, 692-94 (1972); Note, *supra* note 88, at 314.

Senator Jackson, sponsor of NEPA, explained that section 102 authorizes and directs federal agencies to administer existing laws, regulations, and policies in compliance with the policies set forth in the Act. 115 CONG. REC. 40,416 (1969) (remarks of Senator Jackson). Thus the policies set out in section 101 impose limits on federal agencies, rather than being merely a general statement of purpose.

For a more detailed examination of the *EDF v. Corps* case, see Note, *supra* note 88, at 301, 304-12; Note, *supra* note 13, at 173-74.

93. 470 F.2d at 297-98. Section 101(b) of the Act states that it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . achieve six specified environmental goals. 42 U.S.C. § 4331(b) (1970). See note 2 *supra*. Section 102(1) directs that, to the fullest extent possible, "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter." 42 U.S.C. § 4332(1) (1970). The "policies" of the Act are those set forth in section 101. *Id.* § 4331; 470 F.2d at 297.

duty under the Act, the Eighth Circuit adopted as the appropriate standard of judicial review the two primary steps of the three-tier standard of review of informal agency action announced by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>94</sup> Summarizing the Supreme Court's standard, the Eighth Circuit held that "[t]he reviewing court must first determine whether the agency acted within the scope of its authority, and next whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>95</sup> The Eighth Circuit then elaborated

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94. 401 U.S. 402 (1971). In the *Overton Park* case a number of individuals and public conservation groups challenged the validity of a decision of the Secretary of Transportation to authorize the spending of federal funds for the construction of a six-lane interstate highway through a public park in Memphis, Tennessee. Because the genesis of the case pre-dated the passage of NEPA, the petitioners based their claim on provisions of two other federal statutes—section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1970), and section 138 of the Federal Highway Act of 1968, 23 U.S.C. § 138 (1970). Just as NEPA leaves to the agency lead, upon the filing of a sufficient environmental impact statement, the initial discretion to determine whether a project should be undertaken, these two statutes at issue in the *Overton Park* case vest in the Secretary of Transportation the authority to appropriate federal funds to finance the construction of highways. Unlike NEPA, however, sections 4(f) and 138 place a clearly defined limit on the Secretary's authority—he may not, under these provisions, authorize the use of federal funds to finance the construction of highways through public parks "if a 'feasible and prudent' alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been 'all possible planning to minimize harm' to the park." 401 U.S. at 405 (citations omitted). The *Overton Park* petitioners claimed, *inter alia*, that the Secretary's authorization of funds for the highway violated these statutory provisions because "feasible and prudent" alternative routes existed for the highway and because the Secretary's plan did not incorporate all possible means, such as the use of tunneling and drainage techniques, to minimize the damage to the park. After holding applicable the review provisions of section 10(e) of the APA, 5 U.S.C. § 706 (1970), and specifically ruling out the application of the subsection invoking the substantial evidence test, *id.* § 706(2)(E), and the provision calling for de novo review, *id.* § 706(2)(F), *see* 401 U.S. at 413-15, the Court set forth a three-tiered standard of judicial review for informal administrative action. It stated that for the Secretary's decision to be sustained under this standard, the reviewing court would be required to decide (1) first, whether the Secretary had acted within the scope of his authority, *id.* at 415; (2) if so, then whether the actual choice made was arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law, *id.* at 416; and (3) finally, whether the Secretary's action followed the necessary procedural requirements, *id.* at 417. After observing that, notwithstanding the existence of a full administrative record upon which the Secretary had based his decision, the district court had based its decision below on litigation affidavits which amounted to mere "*post hoc*" rationalizations, *id.* at 419, the Court remanded the case to the district court for a full hearing on that record.

95. 470 F.2d at 300. The court stated additionally "[i]n making the latter determination, the court must decide if the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment." *Id.*

on the findings which it held must be met for a reviewing court to sustain an administrator's decision to proceed with a project which has been challenged under NEPA. Reflecting the Supreme Court's initial concern with whether the action in question was within the administrator's scope of authority, the court stated that the reviewing court must first determine if the agency reached its decision after a "full, good faith consideration and balancing of environmental factors."<sup>96</sup> Turning next to the substance of the administrator's decision, the court adapted to NEPA the second test of the Supreme Court's multiple standard in *Overton Park* by holding that the reviewing court should then determine, according to the standards set forth in sections 101(b) and 102(1) of NEPA whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."<sup>97</sup> The court then seemed to recognize implicitly that there was no question in the case before it of a limitation on the Corps' statutory authority under NEPA to decide to proceed with the project and moved directly to a review of the substance of that decision by tersely stating: "In light of our holding, there is no alternative but to subject the decision of the Corps . . . to review under the arbitrary and capricious standard."<sup>98</sup> Finding a complete record before it, and observing that the project was authorized eleven years prior to NEPA and was sixty-three percent complete, with previous, irretrievable expenditures approaching ten million dollars when the suit was filed, the court ruled that the Corps' decision to proceed was neither arbitrary nor capricious and affirmed the district court's dismissal of the case.

Slightly over a year later, the Eighth Circuit's opinion in *EDF v. Corps* was followed by the Seventh Circuit's decision in *Sierra Club v. Froehlke*,<sup>99</sup> another suit to enjoin a congressionally approved flood control project. As in *EDF v. Corps*, the suit was based in part on a claim that the Corps of Engineers' substantive decision to proceed

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96. *Id.*

97. *Id.*, quoting *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

98. 470 F.2d at 300-01. This same assumption seems to have been made by the court in *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (dictum), which, while neither rejecting nor mentioning scope of review, said simply that the arbitrary and capricious test is the proper standard for review. It has been suggested that substantive review under NEPA should, as a general rule, be limited to determining whether the substantive decision was arbitrary and capricious, since the limitations which NEPA places on agencies provide no basis for determining whether the substantive decision exceeded the agency's scope of authority. See 24 STAN. L. REV. 1117, 1132 (1972). But see Note, *supra* note 88, at 313-17.

99. 486 F.2d 946 (7th Cir. 1973).

with the project subsequent to the filing of an impact statement should be overturned on its merits.<sup>100</sup> In initially holding that the agency's decision was reviewable, the court noted that Congress had not prohibited judicial review under NEPA and that judicial review would play a positive role in achieving the purposes of the Act.<sup>101</sup> Quoting at length from the Eighth Circuit's opinion in *EDF v. Corps*,<sup>102</sup> the court followed the bifurcated standard of review adopted in that decision and upheld the Corps' decision to proceed by finding first that it was reached after a full, good faith consideration of environmental factors and second that it was neither arbitrary nor capricious.<sup>103</sup>

Thus, while some cases have seemingly continued to follow the view that judicial review is limited to an examination of whether the agency complied with procedural requirements of NEPA,<sup>104</sup> the ma-

100. See *id.* at 951.

101. *Id.* at 952. Judicial review serves the beneficial function of requiring that agencies articulate their reasons and findings with care and precision, thus rationalizing the decision-making process. See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW CASES AND COMMENTS* 111 (5th ed. 1970). Moreover, since the CEQ is without enforcement power, judicial review of agency determinations under NEPA is important if merely perfunctory agency compliance is to be prevented. See note 13 *supra* for a discussion of the advisory nature of CEQ Guidelines.

102. 486 F.2d at 952.

The court also noted that in an intervening case, *Conservation Council v. Froehlike*, 473 F.2d 665 (4th Cir. 1973) (*per curiam*), the Fourth Circuit, in a brief opinion, expressly adopted the Eighth Circuit's holding in *EDF v. Corps* when it held that a district court could not discharge its obligation to review the merits of a substantive agency decision merely by determining that the agency had acted in a procedurally correct manner. 486 F.2d at 952.

103. In announcing the standard of review to be used in its decision, the Seventh Circuit initially stated flatly that "[t]he review should be limited to determining whether the agency's decision is arbitrary or capricious." *Id.* at 953. While this language might, at first glance, seem to indicate that the court was adopting a single standard of review rather than the dual standard followed by the Eighth Circuit in *EDF v. Corps*, such an intent is belied by two factors. First, the court quoted and used the dual standard in reaching its decision. Second, this narrow statement was followed by a quotation from the *Overton Park* case that "[t]he court is not empowered to substitute its judgment for that of the agency," quoting 401 U.S. at 416—a fact strongly indicating that the court's true intent in making that statement was to indicate, as the Supreme Court had done in the earlier portion of its *Overton Park* opinion (see note 94 *supra*), the impropriety of a *de novo* standard of judicial review. This statement may retain additional significance, however, in that it may indicate on the part of the Seventh Circuit an assumption similar to that possibly made by the Eighth Circuit in *EDF v. Corps*, see text accompanying note 98 *supra*, that the case presented no question of the agency's statutory authority to make a decision as to whether to proceed with the project, to be examined under the first step of the *Overton Park* and *EDF v. Corps* tests.

104. See *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814 (9th Cir. 1973); *Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537 (7th Cir.), *cert. denied*, 409 U.S. 1047 (1972); *Citizens for Mass Transit Against Freeways v. Brinegar*, 357 F. Supp. 1269, 1275-76 (D. Ariz. 1973).



majority view now appears to be that an agency's decision on the merits is reviewable.<sup>105</sup> Furthermore, since rarely if ever will there arise a question of an agency's statutory authority to make a decision as to whether or not to proceed with a project after an impact statement has been filed,<sup>106</sup> it appears that judicial review will focus upon the substance of that decision and that the arbitrary and capricious test is now generally considered to be the appropriate standard of review.<sup>107</sup> The view that NEPA creates substantive duties seems the only reasonable result considering the Act's express statutory directive to federal agencies to work toward specific ecological goals.<sup>108</sup> Moreover, since, ex-

105. See cases cited in note 110 *infra*.

106. See note 98 *supra* and accompanying text.

107. See, e.g., *Conservation Council v. Froehke*, 473 F.2d 664, 665 (4th Cir. 1973) (per curiam); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (dictum); *Environmental Defense Fund, Inc. v. TVA*, — F. Supp. —, — (E.D. Tenn. 1973); *Akers v. Resor*, 339 F. Supp. 1375, 1380 (W.D. Tenn. 1972).

Justice Douglas has argued for a broader standard of review. See *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926, 931 (1972) (Douglas, J., dissenting). If the impact statement could be considered a record upon which the agency bases its action, then application of the stricter substantial evidence test of judicial review might be warranted. See 5 U.S.C. § 706(2)(B) (1970). Under the substantial evidence test an agency's findings would only be upheld if supported by evidence that a reasonable mind might accept as adequate to support a conclusion. See *L. JAFFE* 595-96. While at least one court has utilized the substantial evidence test, this seems to have been due to the fact that an adjudicatory hearing required by another statute was held in conjunction with the statement's preparation. See *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir.), *cert. denied*, 407 U.S. 926 (1972). In another case, although the issue was left open, the arbitrary and capricious standard was deemed more appropriate than the broader substantial evidence test by a three-judge court that expressly considered the question. See *City of New York v. United States*, 344 F. Supp. 924 (E.D.N.Y. 1972). See also Note, *supra* note 88, at 317 n.17.

Two commentators have even gone so far as to contend that an agency's compliance with the substantive policies of section 101 should be reviewed by the courts as a matter of law, with the courts deciding what constitutes an "essential consideration of national policy." See *Cohen & Warreu*, *supra* note 92, at 693-94.

108. The specific goals of the Act are set out in section 101(b)(1)-(6), reprinted in note 2 *supra*. As the court pointed out in *EDF v. Corps*, the procedural provisions of section 102(2) are not ends in themselves, but rather a means of assuring that the policies set forth in section 101 are implemented. See 470 F.2d at 297-98. The language of sections 101 and 102 is not without substance, and while the national policy of environmental protection outlined in section 101 is necessarily general and conditioned by the recognition of "other essential considerations of national policy," the congressional intention to effect substantive changes in federal policy is made clear by section 102(1) in which:

The Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . . 42 U.S.C. § 4332 (1970) (emphasis added). For the full text of this section see note 3 *supra*.

Thus NEPA requires compliance "to the fullest extent possible" with substantive poli-

cept for a few narrowly construed exceptions,<sup>109</sup> there is a presumption that administrative action is reviewable by the courts, the existence of substantive duties under section 101 implies the existence of judicial review of agency compliance with those duties.<sup>110</sup> Finally, it seems clear that the courts in *EDF v. Corps* and *Sierra Club v. Froehlke* were correct in adopting the arbitrary and capricious standard as indicated by the Supreme Court in *Overton Park* for reviewing the substance of the agency decisions before them. While even broader review of agency compliance with the substantive provisions of NEPA has its advocates,<sup>111</sup> the scope of review contemplated by the arbitrary and capricious test is of sufficient rigor to ensure that both environmental and competing social values are protected while permitting the exercise of a reasonable degree of discretion by governmental officials.

#### DELEGATION OF IMPACT STATEMENT PREPARATION

Section 102(2)(C) of the Act requires a "detailed impact statement by the responsible official."<sup>112</sup> Several cases have addressed the question of whether an agency may comply with this requirement by delegating the preparation of impact statements to state agencies or private parties and have reached conflicting results.

The leading case holding that an agency may not delegate its responsibility to prepare an impact statement is *Greene County Planning Board v. FPC*.<sup>113</sup> In *Greene County*, the Power Authority of the State

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cies contained in section 101, as well as the operating procedures contained in section 102(2). See Cohen & Warren, *supra* note 92, at 692-93; Note, *supra* note 88, at 314.

109. Such an exception is found where Congress expressly precludes judicial review. See 5 U.S.C. § 701 (1970). Judicial review is also not available when agency action is committed to agency discretion by law. *Id.* Both of these exceptions are narrowly construed. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). There is nothing in the language of NEPA or its legislative history to indicate a legislative desire to foreclose judicial review. See 42 U.S.C. §§ 4321-47 (1970); S. REP. NO. 296, 91st Cong., 1st Sess. (1969). The second exception applies only when a statute is so broad that there is no "law to apply." 401 U.S. at 410. Since the reordering of priorities and consideration of environmental values required by NEPA limits the discretion of federal agencies, this suffices as the necessary "law to apply." See *National Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir. 1973); Note, *supra* note 88, at 308-10; Note, *supra* note 13, at 191.

110. See *Sierra Club v. Froehlke*, 486 F.2d 946, 952 (7th Cir. 1973). The court there stated: "Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits." *Id.*; accord, *Conservation Council v. Froehlke*, 473 F.2d 664 (4th Cir. 1973) (*per curiam*); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 298 (8th Cir.), *cert. denied*, 409 U.S. 1072 (1972).

111. See, e.g., Cohen & Warren, *supra* note 92, at 693-94 (courts should review substantive compliance as a matter of law).

112. 42 U.S.C. § 4332(2)(C) (1970). For full text see note 3 *supra*.

113. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

of New York (PASNY) sought authorization from the FPC to construct a high-voltage transmission line. The FPC required PASNY to prepare a draft impact statement,<sup>114</sup> but maintained that the FPC itself need not prepare an impact statement until it filed its final decision.<sup>115</sup> The FPC found some support for its position in the CEQ Guidelines, which permitted an agency to defer preparation of its own draft statement until after it had conducted a hearing subject to the APA and preceded by adequate public notice.<sup>116</sup> The Second Circuit rejected this interpretation of NEPA, saying that section "102(2)(C) explicitly requires the agency's *own* detailed statement to 'accompany the proposal through the existing agency review processes.'<sup>117</sup> In so holding, the court expressed a concern that the FPC was abdicating a significant part of its responsibility by substituting the statement of PASNY for its own and a fear that applicant-prepared impact statements would likely be "based upon self-serving assumptions."<sup>118</sup>

The *Greene County* analysis was recently followed in *Conserva-*

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114. *Id.* at 422. The FPC's action was consistent with that agency's guidelines for compliance with NEPA which requires that applicants for major power projects submit a "detailed statement of environmental factors . . ." 18 C.F.R. § 2.81(b) (1971).

115. 455 F.2d at 418-19.

116. CEQ Guidelines § 10(e), 36 Fed. Reg. 7724, 7726 (1971). The current guidelines abandon this position, presumably in response to the *Greene County* case. See CEQ Guidelines § 1500.7, 38 Fed. Reg. 20,554 (1973). See note 148 *infra* for the text of these guidelines.

117. 455 F.2d at 421 (emphasis in original). The court noted that the hearings in PASNY's application undoubtedly constituted an "existing agency review process." *Id.* at 422.

It would of course be permissible for an agency to hold a hearing prior to preparation of a draft statement if the sole purpose of the hearing was to collect data to be included in such a statement, as opposed to a hearing on the merits of the proposal as was involved in *Greene County*. *Id.* at 421 n.23; Brief for Petitioner Greene County Planning Bd. at 24-25.

118. *Id.* at 420. A later district court case in the Second Circuit, involving delegation of impact statement preparation to a state highway department, interpreted *Greene County* as allowing a draft, but not a final, statement to be prepared by the applicant. See *Committee to Stop Route 7 v. Volpe*, 346 F. Supp. 731, 741 (D. Conn. 1972). If a draft statement is seen as a statement circulated for comment that is to be followed by an agency-prepared statement which will accompany the proposal through all important steps of the agency review process such as public hearings under the APA, applicant-prepared draft statements would be consistent with *Greene County*. Current CEQ Guidelines allow such a use of a draft statement for which the agency "takes responsibility." CEQ Guidelines § 1500.9, 38 Fed. Reg. 20,554 (1973). However, the court in *Greene County* referred approvingly to the AEC rules, 36 Fed. Reg. 18,071 (1971), which require a draft statement by both the applicant and its own staff. See 455 F.2d at 422. It nonetheless remains that *Greene County* does make clear that an agency-prepared statement is required at some point before the agency conducts hearings which are part of the agency review process.

*tion Society v. Secretary of Transportation*,<sup>119</sup> a district court case in the same circuit. In this case an impact statement on a proposed federally funded highway was prepared by the state highway department pursuant to Department of Transportation (DOT) procedures that require state preparation with "review" and "adoption" by federal officials.<sup>120</sup> Even though the impact statement was prepared by a state agency rather than by a private party as in *Greene*, the court found the same impermissible delegation and danger of a self-serving statement.<sup>121</sup>

Directly counter to the Second Circuit's view are several decisions from courts in other circuits.<sup>122</sup> In *National Forest Preservation Group v. Volpe*,<sup>123</sup> a district court examined the issue of delegation of impact statement preparation to a state highway department. The court, in rejecting the *Greene County* rationale, relied heavily on CEQ and congressional approval of the DOT procedure requiring delegation.<sup>124</sup> The court found no reason to interpret the statutory language requiring a statement "by the responsible official" as mandating that the statement be prepared by the federal agency itself. The court also rejected the *Greene County* court's concern over the danger of self-serving statements, noting the dependence of the federal-aid highway program on the close cooperation between state and federal agencies and the

119. 362 F. Supp. 627 (D. Vt. 1973).

120. Under the DOT procedures, the state agency is made responsible for preparation of both the draft and final statement. DOT PPM 90-1, *supra* note 13.

121. The court refused to distinguish *Greene County* on the ground that it involved a private party:

[I]t is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency. This being true, delegation of the preparation of an EIS to the VHD raises the danger that the EIS will reflect "self-serving assumptions" and brings the case directly within *Greene County*. 362 F. Supp. at 631.

The court considered immaterial the fact that the FHWA lacked the staff to prepare impact statements for the large number of federally-assisted highway projects. *Id.*

122. See, e.g., *Citizens Environmental Council v. Volpe*, 484 F.2d 870 (10th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3584 (U.S. Apr. 15, 1974); *Finish Allatoona's Interstate Right, Inc. v. Volpe*, 352 F. Supp. 933 (N.D. Ga. 1973); *National Forest Preservation Group v. Volpe*, 352 F. Supp. 123 (D. Mont. 1972).

123. 352 F. Supp. 123 (D. Mont. 1972).

124. The court noted that the chairman of the CEQ had expressly approved the FHWA procedure in congressional hearings and that Congress had implicitly approved the procedure by its subsequent enactment of section 436(b) of the Federal-Aid Highway Act of 1970, 23 U.S.C. § 109 (1970). That section, which requires the Secretary of Transportation to submit to Congress guidelines ensuring that possible adverse economic, social, and environmental effects of highway construction have been fully considered, 352 F. Supp. at 125-26, was enacted without changing the existing delegation policy.

absence of any presumption that state agencies are unconcerned with environmental problems.<sup>125</sup> In the 1973 case of *Citizens Environmental Council v. Volpe*,<sup>126</sup> the Tenth Circuit followed a similar line of reasoning by rejecting in a brief statement the plaintiff's assertion that the Secretary of Transportation had unlawfully delegated the preparation of an impact statement to a state highway department: "The Secretary of Transportation did not simply 'rubber stamp' the State's work. He reviewed it and adopted it as his own. This procedure is consistent with the goals of NEPA."<sup>127</sup>

Two 1973 circuit court cases have upheld impact statement preparation by a private party in one instance, and a state highway agency in the other, where the responsible federal agency actively participated in statement preparation. In *Life of the Land v. Brinegar*,<sup>128</sup> the Ninth Circuit considered the issue of delegation to a non-governmental concern. Here preparation of an impact statement on a proposed airport runway project had been delegated to a private consulting firm with a financial interest in an affirmative decision to proceed with the project. The court found no improper delegation since NEPA does not require subjective impartiality in statement preparation,<sup>129</sup> and because federal officials actively participated in all phases of the statement preparation process.<sup>130</sup> In *Iowa Citizens for Environmental Quality, Inc. v. Volpe*,<sup>131</sup> also discussed previously in connection with impact statement sufficiency, the Eighth Circuit upheld a delegation to the Iowa State Highway Commission. While the court distinguished *Greene County* by finding "extensive participation,"<sup>132</sup> by the Federal

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125. 352 F. Supp. at 126-27. The court found nothing wrong with preparation by applicant highway departments, "the most obvious and important source of information and expertise." *Id.* at 126. In addition, the court noted that DOT PPM 90-1 provides standards which insure an adequate impact statement. *Id.* at 127.

126. 484 F.2d 870 (10th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3584 (U.S. Apr. 15, 1974).

127. *Id.* at 873.

128. 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3595 (U.S. Apr. 22, 1974).

129. *Id.* at 467. The court relied on cases stating that compliance with section 102 requires only good faith objectivity not subjective impartiality. *Id.*; see *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 296 (8th Cir. *cert. denied*, 409 U.S. 1072 (1972)).

130. 485 F.2d at 467.

131. 487 F.2d 849 (8th Cir. 1973).

132. This participation appeared to consist of the FHWA recommending changes in the draft statement and providing additional information. See *id.* at 854.

The "participation" exception to the *Greene County* rule has gained increasing support. One district court which first held that the impact statement must be prepared by the federal agency, not the state agency, later modified its judgment to provide that the impact statement may be prepared by state and local officials provided that the federal agency participates in the statement's preparation. See *Northside Tenants' Rights Co-*

Highway Administration (FHWA) in the preparation of the impact statement before it, the court's reliance on cases rejecting the *Greene County* rationale<sup>133</sup> indicates that the requisite "participation" will be found quite easily.<sup>134</sup>

The plain language of NEPA seems to support the position of the Second Circuit: NEPA requires a detailed statement by the "responsible official," not state agencies or private parties. But practical considerations favor the view that preparation by those other than federal officials, under certain conditions, does not violate NEPA. Particularly in the area of federal funding of highways, where the FHWA has not been given the resources<sup>135</sup> necessary to prepare the large number of impact statements required,<sup>136</sup> some delegation would seem warranted. A compromise suggested by the cases allowing delegation when the federal agency "participates" in the statement preparation would be to have federal officials direct the preparation process, letting the applicants bear the cost of gathering information, but leaving in the federal officials the authority and responsibility to decide what information is needed and to evaluate the information gathered.<sup>137</sup> While various factors, such as the public or private nature of the applicant<sup>138</sup> might influence the distribution of duties between

alition v. Volpe, 346 F. Supp. 244, 248 (E.D. Wis. 1972), *modified*, 3 ENVIRONMENTAL L. REP. 20,154 (E.D. Wis. Jan. 17, 1973).

133. *Finish Allatoona's Interstate Right, Inc. v. Volpe*, 335 F. Supp. 933 (N.D. Ga. 1973); *National Forest Preservation Group v. Volpe*, 352 F. Supp. 123 (D. Mont. 1972).

134. See 487 F.2d at 854. In reaching its decision, the *Iowa Citizens* court also noted that the DOT procedures allowing delegation deserved "great deference." See *id.* at 855. It should be noted, however, that in a vigorous dissent, Judge Lay stated that the delegation violated both the letter and spirit of NEPA's impact statement provision which he found to require a detailed, independent investigation by the federal agency. *Id.* at 855-58.

135. The district court in *Conservation Soc'y v. Secretary of Transp.*, 362 F. Supp. 627, (D. Vt. 1973), suggested that the FHWA was not adequately staffed to prepare the large number of impact statements required by highway projects. See *id.* at 631.

136. Nearly half of the impact statements submitted to the CEQ have been on highway projects. See Talbot, *Prospect '73*, HIGHWAY USER 9 (Jan. 1973).

137. See ANDERSON, *supra* note 51, at 195. Another proposed solution is to allow *non-applicant* state agencies, such as a state environmental agency, to prepare the impact statements required for projects, such as federally funded highways, within the state. See Comment, *The Preparation of Environmental Impact Statements by State Highway Commissions*, 58 IOWA L. REV. 1268, 1272 n.32 (1973).

138. Arguably more responsibility in the preparation process could be delegated to a state agency than to an interested private party. Cf. *Natural Forest Preservation Group v. Volpe*, 352 F. Supp. 123, 127 (D. Mont. 1972). However, one court that has considered this possible distinction has concluded that delegation to a state highway department is impermissible: "[I]t is impossible for the Vermont Highway Department

the applicant and the federal agency in different situations, the greatest emphasis should be placed upon fulfillment of the intended purposes of an impact statement. Given proper standards with which the applicant must comply,<sup>139</sup> the informational purpose of the requirement can be achieved by a delegated statement. But in order to ensure actual consideration of environmental values by the federal agency and to comply with the statutory requirement of a statement "by the responsible official," the active federal role in statement preparation suggested above should be required.

### NEPA AND PUBLIC HEARINGS

While the CEQ Guidelines provide for public hearings "whenever appropriate,"<sup>140</sup> the courts are unanimous in holding that NEPA does not require hearings in every case.<sup>141</sup> Illustrative of this view is a recent decision by the Ninth Circuit, *Jicarilla Apache Tribe of Indians v. Morton*,<sup>142</sup> in which the plaintiffs challenged the lack of public adversary hearings prior to issuance of final impact statements on proposed construction of coal-fired electric generating facilities. The court rejected the contention that meaningful public participation required hearings in all cases, pointing to the lack of an express provi-

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not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency." *Conservation Soc'y v. Secretary of Transp.*, 362 F. Supp. 627, 631 (D. Vt., 1973). Similarly, one commentator has concluded that the "inherent bias" of state highway departments creates as much danger of self-serving assumptions in impact statements as statement preparation by private applicants. *See Comment, supra* note 137, at 1276-82. *But see National Forest Preservation Group v. Volpe*, 352 F. Supp. 123 (D. Mont. 1972).

139. *See, e.g., DOT PPM 90-1, supra* note 13. *See also CEQ Guidelines* § 1500.7 (c), 38 Fed. Reg. 20,553 (1973).

In most cases the presence of opponents whose views will be included in the statement will reduce the danger of incomplete or biased statements. Consequently, some courts have held that statements must contain responsible opposing views. *See Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971); *cf. Conservation Council v. Froehke*, 340 F. Supp. 222, 226-27 (M.D.N.C. 1972), *remanded*, 473 F.2d 664 (4th Cir. 1973).

140. CEQ Guidelines § 10(e) (1971). The current guidelines provide that public hearings be held "whenever appropriate" and list factors to be considered in making this determination, including the size of the project, the degree of interest in the proposal, the complexity of the issue, the likelihood of the hearing providing useful information, and the extent of public involvement already achieved through other means. CEQ Guidelines § 1500.7(d), 38 Fed. Reg. 20,553 (1973). The executive order implementing NEPA also provides that hearings be held "whenever appropriate." Exec. Order No. 11514, 3 C.F.R. 285 (1973).

141. *See, e.g., Lathan v. Volpe*, —F.2d — (9th Cir. 1973); *Citizens for Clean Air, Inc. v. Corps of Eng'rs*, 356 F. Supp. 14 (S.D.N.Y. 1973).

142. 471 F.2d 1275 (9th Cir. 1973).

sion in NEPA requiring hearings, and stated that the decision whether or not to hold administrative hearings was within the realm of the sound discretion of the Secretary of the Interior.<sup>143</sup> The court then held that in the case at hand there had been no showing that hearings were so appropriate that failure to hold them constituted an abuse of that discretion and a consequent failure to comply with the requirements of NEPA.<sup>144</sup>

Where hearings *are* required by applicable statutes other than NEPA, the issue arises as to when, relative to the preparation of the impact statement, those hearings should be conducted. Section 102(2)(C) provides that the impact statement and the comments upon the proposal "shall accompany the proposal through the existing agency review processes."<sup>145</sup> In the *Greene County* case,<sup>146</sup> the Second Circuit held that, since licensing hearings constituted an "existing agency review process,"<sup>147</sup> the FPC violated section 102(2)(C) when it conducted such hearings prior to its preparation of an impact statement even though this procedure was supported by the CEQ Guidelines.<sup>148</sup> A 1973 district court case, *Harlem Valley Transportation As-*

143. *Id.* at 1284-86.

144. *Id.* at 1285. One court has indicated what it considered to be one set of circumstances in which failure to hold hearings will be held to constitute an abuse of discretion:

In light of the large number of unresolved issues extant in this case, the deep public concern expressed by those responding to the Department's draft statement, the need for public enlightenment in areas involving the future availability of natural resources such as this [helium], and the overriding national policy issue involved in this proposed action, the Court is convinced that the Department's failure to hold public hearings did constitute an abuse of discretion. *National Helium Corp. v. Morton*, 361 F. Supp. 78, 107 (D. Kan.), *rev'd on other grounds*, 486 F.2d 995 (10th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3423 (U.S. Jan. 17, 1974) (No. 73-1120).

In some cases, public hearings might be necessary before an agency could issue a negative statement. See *Hanly v. Kleindienst*, 471 F.2d 823, 835-36 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). See note 21 *supra*.

145. 42 U.S.C. § 4332(2)(C) (1970). For text of this provision see note 5 *supra*.

146. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). See notes 112-39 *supra* and accompanying text for a discussion of the court's holding on the validity of a federal agency's delegating preparation of an impact statement which it is required to file under NEPA.

147. *Id.* at 421-22. The court described the issue involved as follows:

The parties . . . are in vigorous disagreement over when the Commission must make its impact statement. The Commission argues that PASNY's statement, reviewed as to form by the Commission and circulated by it, suffices for the purposes of Section 102(2)(C) and that the Commission is not required to make its *own* statement until it files its final decision. Petitioners argue that the Commission must issue its statement prior to any formal hearings. PASNY . . . proposes a third course of action. It urges that the Commission can draft its statement on the basis of the hearings, but to be circulated by it for comment before its final decision. It is clear to us that petitioners offer the correct interpretation. *Id.* at 418-19.

148. The FPC relied on section 10(e) of the Guidelines which provided:



*sociation v. Stafford*,<sup>149</sup> followed *Greene County* by holding that a draft statement is required before the ICC conducts mandatory hearings in railroad abandonment proceedings.<sup>150</sup>

A different issue involving the relative timing of hearings and impact statement preparation was raised in *Citizens for Clean Air, Inc. v. Corps of Engineers*,<sup>151</sup> another 1973 district court decision. In that case the court rejected the contention that the Corps of Engineers was required to hold hearings prior to filing a final impact statement. Instead, the court held that even if the Corps' regulation required mandatory public hearings, there was neither a statutory nor a due process rationale for requiring that the hearings be held before the filing of the final impact statement rather than after the filing and during the process of agency review.<sup>152</sup>

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Agencies which hold hearings on proposed administrative actions or legislation should make the draft environmental statement available to the public at least fifteen (15) days prior to the time of the relevant hearings except where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by adequate public notice and information to identify the issues and obtain the comments provided for in sections 6-9 of these guidelines. 36 Fed. Reg. 7726 (1971).

The current guidelines abandon this position and provide that draft statements should be issued at least fifteen days prior to those hearings utilized as part of the normal agency review process. CEQ Guidelines § 1500.7(d), 38 Fed. Reg. 20,553 (1973).

149. 360 F. Supp. 1057 (S.D.N.Y. 1973).

150. *Id.* at 1065-66; *accord*, *City of New York v. United States*, 344 F. Supp. 929 (E.D.N.Y. 1972) (three-judge panel). *But cf.* *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972). After holding that 23 U.S.C. § 128 required a public hearing on a proposed highway project the court in the *Monroe County* case stated: "Such a hearing will in any event be most valuable in aiding the agency in its preparation of the impact statement which we have today held is required by NEPA." *Id.* at 702.

In a recent case involving hearings on a proposed highway required by 23 U.S.C. § 128(a), the Ninth Circuit found it unnecessary to expressly decide the issue:

[W]e need not consider whether section 128(a) or NEPA require that the draft environmental impact statement be made available to the public before the hearing is held. Current FHWA procedures, which will apply to the new hearings, assure that this will be done. *Lathan v. Volpe*, —F.2d—, (9th Cir. 1973).

151. 356 F. Supp. 14 (S.D.N.Y. 1973). The controversy involved issuance by the Corps of a permit for construction of a power plant by a public utility.

152. *Id.* at 20, *see* *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1286 (9th Cir. 1973). Current CEQ Guidelines assume that if hearings are held, they will be held after the draft statement is issued, but before the final statement is filed. *See* CEQ Guidelines § 1500.7(a), 38 Fed. Reg. 20,552 (1973). The sequence of draft statement-hearing-final statement is clearly preferable to the issuance of the final statement before a hearing because interposition of the public hearings between the draft and final statements should tend to increase the comprehensiveness of the final statements.

In reaching its decision in *Citizens for Clean Air*, the court noted that NEPA requires only a final statement. 356 F. Supp. at 20. Moreover, as originally issued, the

The problem of the relative timing of hearings and impact statement preparation is part of a larger question: at what point in the agency decision-making process must an impact statement be prepared? The only answer consistent with the spirit of NEPA is that an impact statement must be prepared at the earliest possible time, before an agency becomes committed to a proposal and the impact statement begins to serve as a justification for decisions already made.<sup>153</sup> Although the language of section 102(2)(C) envisions only one statement, prepared after comments on the proposal have been received and to accompany the proposal through the existing agency

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CEQ Guidelines seemed to indicate that the "review process" ended with the final impact statement. Those guidelines required the statement to contain:

Where appropriate, discussion of problems and objectives raised by other Federal, State, and local agencies and by private organizations and individuals in the review process and the disposition of the issues involved. (*This section may be added at the end of the review process in the final text of the environmental statement.*) CEQ Guidelines § 6(vii) (1971) (emphasis added).

The current guidelines contemplate a similar scheme in which a draft statement is circulated for comment at the beginning of the agency review process and then a final statement is made available to the President, the CEQ, and the public toward the end of the review process. See CEQ Guidelines § 1500.2, 38 Fed. Reg. 20,550, § 1500.7, 38 Fed. Reg. 20,552, §§ 1500.9-.11, 38 Fed. Reg. 20,554-56 (1973). Apparently recognizing the conflict between this process and section 102(2)(C) which requires that the final statement (*i.e.*, the statement made after comments on the proposal are obtained) accompany the proposal through the existing agency review processes, the current guidelines provide:

In all cases, agencies should allot a sufficient review period for the final statement so as to comply with the statutory requirement that the "statement and the comments and views of appropriate Federal, State, and local agencies . . . accompany the proposal through the existing agency review processes." *Id.* § 1500.11(b), 38 Fed. Reg. 20,556 (1973).

See also 42 U.S.C. § 4332(2)(C) (1970), note 5 *supra*.

153. See *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 420-22 (2d Cir.), cert. denied, 409 U.S. 849 (1972). See also CEQ Guidelines § 1500.2, 38 Fed. Reg. 20,550, § 1500.7, 38 Fed. Reg. 20,552 (1973), which elaborate on this necessity for providing an impact statement at the earliest possible time:

It is important that draft environmental statements be prepared and circulated for comment and furnished to the Council as early as possible in the agency review process in order to permit agency decisionmakers and outside reviewers to give meaningful consideration to the environmental issues involved. In particular, agencies should keep in mind that such statements are to serve as the means of assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made. This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process. *Id.* § 1500.7(a), 38 Fed. Reg. 20,552 (1973).

A 1972 report by the GAO found that many federal agencies were making decisions that might have important environmental consequences before impact statements were available. See COMPTROLLER GENERAL, *supra* note 47, at 13-20. This report concluded that:

The Federal agencies' environmental impact statements would be more useful in the decisionmaking process if the completed statements for a proposal were available at all organizational review levels of a proposal and at the earliest stages of decisionmaking. *Id.* at 19.

review process, the practice of using a thorough draft statement<sup>154</sup> for this purpose clearly satisfies the statutory purpose of ensuring that environmental factors are considered at every important step in the decision-making process.<sup>155</sup> And while requiring preparation of a draft statement prior to agency hearings held early in the agency's decision-making process imposes a burden on the agencies,<sup>156</sup> it must be remembered that the often burdensome procedural duties imposed by NEPA are a critical part of the statutory scheme.<sup>157</sup>

### CONCLUSION

After three years of interpretation by the courts, the case law construing the "opaque"<sup>158</sup> language of NEPA is in conflict in several important areas. Courts have disagreed on the issue of what constitutes a significant adverse environmental impact requiring the filing of an environmental impact statement and on the related question of a proper standard of review of an agency's "negative determination" that a proposed action does not require a filing; on the proper test of an impact statement's sufficiency; and on the standard of judicial review which should be applied by the courts in examining an agency's

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154. The guidelines of the CEQ require that the draft statement fulfill to the fullest extent possible at the time the draft is prepared the requirements established for final statements by section 102(2)(C). CEQ Guidelines § 1500.7(a), 38 Fed. Reg. 20,552 (1973).

155. See *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 420 (2d Cir.), cert. denied, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

156. The ICC has been particularly concerned that it would have to assign a staff of employees to the task of preparing impact statements, "an assignment for which there are no budgeted funds and no authorized increase in personnel." See *Harlem Valley Transp. Ass'n v. Stafford*, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973). In addition to objecting to the time and expense of statement preparation, the General Counsel of the ICC has stated that the "burdensome and prolonged litigation" that will result from cases holding that the ICC must prepare draft statements prior to railroad abandonment hearings will seriously impair the Commission's efforts to create an economically sound and efficient railroad system in the Northeast. Remarks by Fritz Kahn, *supra* note 8, at 19-20. The possibility of the application of the impact statement requirement to the far greater number of motor carrier applications proceedings was even more frightening to Mr. Kahn. *Id.* at 23-24. Mr. Kahn's fears seem to be well-founded. See *Chemical Leaman Tank Lines v. United States*, 6 BNA ENV. REP. 1129 (D. Del., Dec. 19, 1973) (order streamlining certification procedures for motor carriers transporting waste products requires impact statement).

157. See *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422-23 (2d Cir.), cert. denied, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1128 (D.C. Cir. 1971).

158. *City of New York v. United States*, 337 F. Supp. 150, 159 (E.D.N.Y. 1972) (three-judge court).

decision to proceed with a project once an impact statement has been filed. There also remains disagreement on the validity of an agency's delegating impact statement preparation to a state agency or a private party and on the issue of the proper timing of impact statement preparation within the agency review process.

Because of the vagueness of the language of this "new and unusual"<sup>159</sup> statute the courts have the difficult task of attempting to reconcile the public interest in a healthy environment with a similar public interest in administrative efficiency and the accomplishment of the central tasks of the various agencies. While NEPA was intended to give a high priority to environmental protection,<sup>160</sup> it does not make it the overriding goal of federal agencies. Thus, the courts have been confronted with the difficult burden of ensuring that the purposes of NEPA are advanced while at the same time preventing parties from indiscriminately utilizing NEPA to disrupt and delay important administrative programs.<sup>161</sup> In some areas, serving the statutory purposes will require holding sometimes recalcitrant agencies to a high standard, as by a broad judicial interpretation of the statutory language to encourage the preparation of impact statements and by enforcement of the requirement that impact statements be prepared at the beginning of the agency review process. In other areas reasonable compromises can be made that will accomplish the purposes of the Act while recognizing practical limits to its enforcement, as on the questions of delegations of statement preparation and the required contents of impact statements. While wise judicial interpretation and good faith agency attempts at compliance can help resolve some of the problems arising under NEPA, legislative clarification of the vague and ambiguous statutory language would also seem to be needed to ensure that the final resolution of these competing considerations will be consistent with the congressional intent which underlay the enactment of NEPA.

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159. *Id.* at 164.

160. The high priority given environmental protection is indirectly reflected in the statutory language that refers to "other essential considerations of national policy," see § 101(b) set out in note 2 *supra*, and in the legislative history of the Act in which its sponsor in the Senate referred to "a standard of excellence in man's relationships to his physical surroundings." 115 CONG. REC. 19,009 (1969) (remarks of Senator Jackson).

161. See *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3595 (U.S. Apr. 22, 1974); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 342 F. Supp. 1211, 1217 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir.), *cert. denied*, 409 U.S. 1072 (1972).