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The National Environmental Policy Act after United States v. Scrap: The Timing Question and Substantive Review

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THE NATIONAL ENVIRONMENTAL POLICY ACT
AFTER UNITED STATES v. SCRAP: THE TIMING
QUESTION AND SUBSTANTIVE REVIEW

By Virginia Nolan*

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On June 24, 1975, the United States Supreme Court rendered
a decision1 in its first substantive review of the provisions of the
National Environmental Policy Act of 1969 (NEPA).2 Holding
that the procedural requirements imposed by NEPA had been
fully complied with by the Interstate Commerce Commission
(ICC) during its consideration of the rate increases proposed
by the nation’s railroads, the Court reversed the decision of the
United States District Court for the District of Columbia3 and

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   (SCRAP), [hereinafter cited as United States v. SCRAP] 95 S. Ct. 2336 (1975). This case
   had previously reached the Supreme Court on the issue of SCRAP’s standing to challenge
   v. SCRAP, 95 S. Ct. 2336 (1975).
may have cast well-established case law interpreting the decision-making process mandated by NEPA into a state of confusion.

Part I of this article analyzes the Supreme Court decision with an examination of how the law interpreting NEPA has been changed, while Part II focuses on the substantive mandate of NEPA by assessing the methods through which judicial review of agency decisions on the merits can be achieved.

PART ONE

I. UNITED STATES V. STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP)

Under scrutiny in United States v. Students Challenging Regulatory Agency Procedures⁴ (SCRAP) was the ICC's compliance with the procedures mandated by NEPA for incorporation of environmental considerations into the agency's general revenue proceeding. The decisionmaking process to be followed by federal agencies in considering environmental factors is set forth in section 102 of NEPA.⁵ Essentially, section 102 requires all agencies

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⁴. 95 S. Ct. 2336 (1975). SCRAP is an unincorporated association of law students formed to work for improvement in the quality of the environment.
⁵. NEPA § 102, 42 U.S.C. § 4332 (1971) provides in part:

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

(A) utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
(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 irrevocable commitments of re-
National Environmental Policy Act

of the federal government to submit an environmental impact statement with every proposal for "major federal action" significantly affecting the quality of the human environment.

Since this case has a lengthy history and involves questions of ICC ratemaking procedures, a brief summary of the important events and relevant ICC procedures is necessary to fully understand the issues presented to the Supreme Court.

II. BACKGROUND

Pursuant to section 15(7) of the Interstate Commerce Act, unless the ICC decides that an investigation into the lawfulness of a proposed rate increase is advisable and that the rates should be suspended pending such investigation, tariff changes filed by carriers go into effect automatically. The increase initiated by a railroad may relate to only a single commodity or to all or substantially all rates. Proceedings in which the ICC decides whether to question an across-the-board rate increase have become known as general revenue proceedings.

Arguing that costs had increased sharply while profits had decreased, the nation's railroads in December, 1971, proposed to file tariffs which would increase freight rates by 2.5 percent. The across-the-board "surcharge," referred to as temporary, was to be supplanted later by a larger, somewhat selective rate increase filing. Having determined that the railroads had a critical need for revenue, the ICC did not exercise its power to suspend the proposed rate increases and on February 5, 1972, the surcharge went into effect.

March 17, 1972 marked the date of the filing of the permanent selective rate increases by the railroads. An across-the-board average increase of 4.1 percent over the original rates was to be effected by the selective increases. Pursuant to ICC request, the railroads filed an environmental impact statement (EIS) with sources 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 jurisdiction 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 available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes . . . . (Emphasis added.)

respect to the rate increases and served it on interested parties, including SCRAP, on January 3, 1972. The ICC served a brief draft environmental impact statement on all parties to the proceeding on March 6, 1972, and on April 24, 1972, the ICC exercised its power and suspended the effectiveness of the selective rate increases for the maximum allowable seven-month period.7

During the period of the suspension of the selective rate increases, but while the surcharge was in effect, a complaint was filed in the United States District Court for the District of Columbia. SCRAP and other environmental groups alleged that the decision by the ICC not to suspend the 2.5 percent surcharge pending its investigation was a violation of NEPA, since this decision was a major federal action significantly affecting the environment and an environmental impact statement had not been prepared nor had environmental issues been considered. It was argued that the across-the-board surcharge aggravated the discriminatory preexisting rate structure by inhibiting the use of recyclable materials and encouraging the use of virgin materials. Plaintiffs sought to compel the ICC to suspend the 2.5 percent surcharge and to enjoin the railroads from collecting it. Although the three-judge court issued a preliminary injunction restraining the temporary surcharge insofar as it applied to recyclable commodities,8 the Supreme Court reversed,9 and held that section 15(7) of the Interstate Commerce Act10 vested exclusive jurisdiction in the ICC to suspend rate increases pending final determination of their lawfulness.11

The investigation by the Commission of the proposed permanent increases culminated in a hearing during which briefs were submitted and oral arguments were heard. An environmental impact statement was not prepared for consideration at this hearing, however, nor was one available prior to the issuance of the Commission’s decision which substantially declined to declare the selective rate increases unlawful and terminated the suspension order previously entered.

The ICC’s final report, issued on October 4, 1972, stated that the “principal issue” in a general revenue proceeding was the

7. Id.
need for additional revenue by railroads. Asserting that the railroads had demonstrated such a need and that environmental factors had been given extensive consideration, the report concluded that the new tariffs would not significantly affect the quality of the human environment and therefore a formal impact statement was not necessary.

The ICC's declaration that an EIS would not be prepared met with severe criticism and protest from the Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA), as well as from the plaintiff. On November 7, 1972, the plaintiff (SCRAP) filed a motion to enjoin the approved increases. The same day, the ICC suspended until June, 1973, rate increases on all goods being shipped for purposes of recycling and reopened Ex parte No. 281 for "the limited purpose of further evaluating, in accordance with [NEPA], the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling . . . ." As a result of the ICC's action, SCRAP's request for a preliminary injunction was denied.

The ICC commenced preparation of an EIS on the environmental impact of the rate increases on recyclables. The draft EIS issued March 5, 1973 and circulated to interested parties for comments, received extensive criticism from EPA, CEQ, the General Services Administration, the Department of the Interior and the Department of Commerce. Although acknowledged by the Commission in its final statement, the negative comments did not cause the ICC to change either its conclusions or its analysis to any significant degree. Refusing to schedule a new set of hearings in the reopened proceedings, the ICC issued its final EIS on May 1, 1973.

The impact statement, covering 150 printed pages, expanded

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12. [The report noted] two possible adverse effects on the environment which might flow from failure to declare the increases unlawful. First, the increase in rail rates might divert traffic to trucks, which are allegedly heavier polluters than trains. Second, the increase in rates for recyclables might discourage their use resulting in increased solid waste—disposal of which creates environmental problems—and an accelerated depleting of the country's natural resources.


on the discussion of the underlying rate structure in the October 4, 1972 report and indicated the "marginal impact of the most recent rate increases" on each of the recycling industries. It was maintained in the statement that a general rate increase proceeding was not the appropriate vehicle for an examination of the underlying rate structure. The ICC reemphasized that the analysis in a general revenue proceeding might fall short of the coverage afforded in other types of proceedings. More specifically, it suggested that in a proceeding under section 13(1) of the Interstate Commerce Act complaints could be filed asserting that a particular rate or group of rates is unjust and unreasonable or otherwise illegal. Attention was also focused on another Commission case, Ex parte No. 270, in which a "separate comprehensive investigation into the entire rate structure" was in progress to determine whether the current rate structure interfered with the government's environmental program.

The statement's conclusion was in accord with the Commission's original position in the October, 1972 order, i.e., that the increases would not have a significant adverse effect on the environment, and "even if some adverse impact could be anticipated the rate increases would be justified by the need to ensure a viable and efficient railroad system." The ICC did not develop a new opinion and merely appended a one-sentence order to the statement's last page wherein the Commission adopted the EIS as part of its principal opinion on the rate increases and discontinued the case.

On May 30, 1973, SCRAP and the Environmental Defense Fund (EDF) filed a motion for a preliminary injunction restraining the implementation of the freight rate increases with respect to recyclable commodities. The three-judge court entered an order temporarily enjoining the railroads from collecting the rates; however, on motion by the railroads, Chief Justice Burger stayed the order and on June 25, 1973, the full Court declined to vacate the stay. Subsequently the rate increases on recyclables were placed into effect. On November 19, 1973, the Supreme

Court vacated the preliminary injunction and remanded the case to the district court for reconsideration.33

III. SCRAP v. UNITED STATES

On remand,24 the district court reviewed the ICC's compliance with the requirements imposed by NEPA. In challenging the ICC order authorizing railroad rate increases on the shipment of recyclable commodities, the plaintiffs reasserted that increasing the rates for shipment of recyclable goods discouraged the environmentally sound use of such recyclables by raising costs as well as aggravating "'the preexisting disparity in shipping costs between these materials and the primary goods with which they compete.'"25

Plaintiffs moved for summary judgment and requested: 1) a declaration that the ICC has failed to comply with NEPA, and that therefore the orders were void; 2) an order requiring the Commission to reconsider the general rate increases in accordance with NEPA; and 3) an injunction forbidding the railroads from collecting the rate increases on recyclables until the Commission complied with NEPA.26

In responding to the defendants' argument that the court lacked jurisdiction to review the Commission's compliance with the commands of NEPA, the district court rejected the appliability of a line of lower court cases27 holding unreviewable decisions of the ICC not to declare proposed rate increases unlawful in general revenue proceedings. The question presented in this case was not the reasonableness of a given rate, but rather the general issue of whether the environmental costs of the increased rates were justified by the railroad's revenue requirements. Finding this to be a NEPA case, the court determined that environmental issues were best considered in a single direct review of the Commission's revenue proceeding rather than by a myriad of

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individual proceedings testing the reasonableness of selected rates. The court noted that delay would be of greater significance in this case than in previous cases where review of general rate orders had been refused. Whereas under the Interstate Commerce Act reparation can always be made to shippers who successfully challenge particular rates, "the environmental degradation which continues while challenges to particular rates are being considered may not be reparable at all."\textsuperscript{28}

In examining the question of the ICC's fulfillment of its NEPA duties, the court emphasized that "the courts have required strict compliance with the procedural commands of NEPA."\textsuperscript{29} Finding that the Commission's mode of preparation and utilization of the EIS violated both the fundamental purpose and specific command of section 102(2)(C) of NEPA, the court held that the ICC reached its October 4, 1972 order granting the general rate increase without benefit of the EIS, and that only when this order met with an "avalanche of criticism"\textsuperscript{30} from environmental groups did the Commission decide to reopen the case to study the environmental effects of the rate increase. Thus, the court thought that the Commission had\textsuperscript{31}

already made its decision and all that remained was to determine if the environmental effects of that decision could be justified . . . . Only if the statement is prepared before an agency decision is made can it serve its purpose of informing the decision-making process at every stage . . . . If the agency fails to prepare an impact statement before making a decision significantly affecting the environment, it must start its procedures over again, including the procedure required by Section 102 of NEPA, so that the decision-making process can be fully informed throughout.

A vital step in the decisionmaking process for rate increases is the hearing process. The SCRAP court determined such hearings to be "key aspects of agency review processes during which environmental impact statements must be considered."\textsuperscript{32} After

\textsuperscript{29} Id.
\textsuperscript{30} Id. at 1299.
\textsuperscript{31} Id. at 1299-1300 (emphasis added).
\textsuperscript{32} Id. at 1300. The court's recognition of the crucial role played by the hearing process is not unique. The Court of Appeals for the Second Circuit in Greene County Planning Bd. v. FPC, 455 F.2d 412, 422 (2d Cir. 1972) stated: [W]e conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement . . . .
reviewing the case law interpreting the hearing requirement in the Interstate Commerce Act and those sections of the Administrative Procedure Act dealing with rulemaking proceedings such as the instant ratemaking proceeding, the district court determined that nothing required the Commission to conduct a full adjudicatory hearing. The court concurred with previous decisions by refraining to hold that NEPA always requires an adjudicatory hearing where agency procedures do not provide for one.

... [T]he statement may well go to waste unless it is subject to the full scrutiny of the hearing process (emphasis in original and footnote omitted).

35. However, the court stated that a “strong argument could be made that oral public hearings should be held based on the CEQ advisory guidelines.” 371 F. Supp. 1291, 1307 n.49 (D.D.C. 1974). Those guidelines state:

(e) Agency procedures developed pursuant to section 3(a) of these guidelines shall include provision for public hearings on actions with environmental impact whenever appropriate, and for providing the public with relevant information, including information on alternative courses of action. In deciding whether a public hearing is appropriate, an agency should consider: (i) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved; (ii) the degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held; (iii) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; (iv) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action.


The topic of public hearings under NEPA is discussed in Guideline 10(e) of the CEQ guidelines, which provides that:

In accordance with the policy of the National Environmental Policy Act and Executive Order 11514, agencies have a responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. 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.


In addition, the legislative history of NEPA indicates a desire by Congress to make administrative decisionmakers responsive to public input. See S. Rep. No. 296, 91st Cong., 1st Sess. 5 (1969) [hereinafter cited as S. Rep.].
The court determined, however, that the words "existing agency review processes" in NEPA should be interpreted as encompass-

Whereas Greene County Planning Bd. v. FPC, 455 F.2d 412, 422 (2d Cir.), cert. denied, 409 U.S. 849 (1972), and SCRAP v. United States, 371 F. Supp. 1291, 1300 (D.D.C. 1974) may be cited as standing for the proposition that public hearings are "key aspects of agency review processes during which environmental impact statements must be considered," id.; Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1285 (9th Cir. 1973) may be seen as holding that absent specific provisions requiring administrative hearings, the decision of whether to hold such hearings is a matter within the realm of agency discretion.

In Jicarilla the court looked at "whether in consideration of the projects involved in this appeal, hearings were so 'appropriate' that the failure of the Secretary to hold them constituted a failure to comply with the requirements of NEPA." Id. It was argued by plaintiffs that such hearings were appropriate for two reasons: the need for a sufficient record for a court to effectively exercise its limited review of the administrative actions in question; and secondly, the public would be denied its right to meaningful participation in the administrative decisionmaking process absent such hearings. Id. The court found the same infirmity in both arguments: "failure to establish that hearings were so 'appropriate' in relation to each of these projects that failure to hold them constituted a failure to comply with the requirements of NEPA." Id.

The court distinguished Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972) on the ground that the FPC was required to hold hearings on the application in question, pursuant to the existing agency review process mandated by the Federal Power Act § 308, 16 U.S.C. § 825(g) (1971), and that "the question before the court was not whether or not to hold [public] hearings, but rather at which point in the process such hearings must be held." Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1286 (9th Cir. 1973). The court refused to hold that unless public hearings were held subsequent to the issuance of a draft environmental impact statement and prior to the preparation of the final document, meaningful public participation in the NEPA process cannot exist. Id. In accord with the Ninth Circuit's holding in Jicarilla is National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

The timing question has also been considered recently by the United States District Court for the Southern District of New York. In Citizens for Clean Air, Inc. v. Corps of Eng'r's, 356 F. Supp. 14 (S.D.N.Y. 1973), plaintiffs argued that the refusal of the Army Corps to hold a public hearing "prior to the issuance of its impact statement" was a violation of due process since "the public must be heard [and] the public view is meaningful only if it is made known before the final environmental impact statement is drawn." Id. at 20. In holding that there is neither a statutory nor a due process reason for holding the public hearing before the impact statement is drafted, the court was in accord with the reasoning expressed by the Ninth Circuit in Jicarilla:

To hold in the abstract that meaningful public participation in the NEPA process cannot exist unless public hearings are held subsequent to the issuance of a draft Environmental Impact Statement and prior to the preparation of the final document would be to substitute our judgment for that of Congress.

Id.

It is clear that if the agency has its own requirements for public hearings, these requirements must be followed. Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972); Citizens for Clean Air, Inc. v. Corps of Eng'r's, 356 F. Supp. 14 (S.D.N.Y. 1973). Unless it can be argued, however, that in consideration of the projects involved, hearings are so appropriate that a failure to hold them constitutes a failure to comply with the requirements of NEPA, the weight of authority holds that a failure to provide for a public hearing is not a violation of NEPA.
National Environmental Policy Act

ing those procedures which an agency customarily employs in consideration of the environmental impact of a proposal, as well as procedures explicitly required by agency regulation. Since an oral hearing was held when the general rate increase was first being considered, the court determined that this action established a "strong presumption" that the "existing agency review processes" included public hearings before the Commission. The court then concluded that the ICC must start its procedures over again and was required under NEPA to consider its impact statement at an oral hearing prior to issuance of a revised order.

The court further determined that not only was the Commission derelict in following the decisionmaking process required by NEPA, but the statement itself was deficient and required reparation. The court noted that although the statement seemed to meet the prescriptions of NEPA as to form, the responsibility of the reviewing court extends to more than demanding mere "pro forma" compliance with section 102(2)(C). Citing Calvert Cliffs’ Coordinating Committee v. AEC, the court emphasized that to meet its responsibility a reviewing court “must be assured that the agency engaged in a full and good faith individualized consideration and balancing of environmental factors.” The court concluded that the statement did not present such a full and good faith consideration and balancing.

37. Id.
38. Id. In an attempt to distinguish Calvert Cliffs’ Coordinating Comm. v. AEC, 449 F.2d 1109, 1117 (D.C. Cir. 1971) and Greene County Planning Bd. v. FPC, 455 F.2d 412, 422 (2d Cir. 1972), the defendants noted that in these cases the agency hearings resulted in a report either from the examiner or hearing board and as such constituted an initial stage in the decisionmaking process, whereas in the general revenue proceeding before the Commission no intermediate opinion is rendered after the hearing and the only decision reached is the final Commission order.

The court rejected this argument by stating that nothing in either of the cases or NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1971) indicated that unless a stage in the review process culminates in an intermediate agency opinion, that stage may be circumvented for purposes of NEPA. “Indeed where, as here, the hearing is before the Commission itself, and is the only one provided, it may well be the most important stage in the decision-making process.” 371 F. Supp. 1291, 1301 (D.D.C. 1974).

Defendants supported their decision not to hold hearings during which the impact statement could have been considered, arguing that concerned persons had adequate opportunity to comment on the approval of the rate increase. The court rejected this argument and held that neither the rate hearing held prior to the October order nor the Commission’s circulation of comments in the draft EIS can “substitute for strict compliance with the commands of Section 102(2)(C).” Id.
While characterizing the language and style used in the statement as "combative, defensive and advocatory,"\textsuperscript{41} the court indicated that a more important matter influencing its judgment of the adequacy of the impact statement was the manner in which comments made on the draft statement were handled. With regard to the comment procedure section 102(2)(C) of NEPA states:\textsuperscript{42}

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

The Commission had circulated a draft statement to most of the parties in the action, but the extensive critical comments received were merely attached to the back of its final statement. Some arguments were made against the criticisms in the body of the final statement, however, none of the comments resulted in even a partial alteration by the Commission of its analysis or conclusions.\textsuperscript{43}

The court found as the final statement’s most fundamental and significant deficiency, “the limitation of its analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment.”\textsuperscript{44} The court deemed analysis of the environmental effects of the underlying rate structure to be indispensable to an understanding of the impact of approving the recyclable rate increases. It noted that failing to hold down the rate increases on recyclables could have a cumulative effect on the environment, since the impact on the underlying rate struc-

\textsuperscript{43} The court found the Commission’s unresponsiveness to three of the critical comments of other federal agencies “particularly troublesome.” 371 F. Supp. 1291, 1302 (D.D.C. 1974). First, the Department of Commerce and EPA suggested that a quantitative and thorough economic study be conducted to determine the elasticity of demand for secondary materials with regard to changes in transportation costs.
Second, although EPA suggested a Department of Transportation Burden Study which they felt might establish that at least some secondary materials contribute more revenue over costs than do the virgin materials with which they compete, the statement failed to provide any comprehensive alternative analysis of the relative cost contribution of secondary and primary materials.
Third, the draft statement was criticized by both EPA and CEQ for its failure to consider the impact of the rate increase on long-term investment in facilities which can make fuller productive use of recyclables. 371 F. Supp. 1291, 1302-03 (D.D.C. 1974).
\textsuperscript{44} Id. at 1304.
ture could be eliminated by declining to approve rate increases on recyclables when the railroads request a general rate increase. That such cumulative impact must be considered in NEPA statements is supported by the legislative history of the Act as well as by CEQ guidelines.

The court rejected the Commission's argument that its ongoing, comprehensive investigation into the railroad's freight rate structure, *Ex parte No. 270*, justified its failure to consider the environmental impact of the underlying rate structure in the instant case. Regardless of the comprehensiveness of this study and its nearness to completion, the detailed impact statement required by NEPA mandates that these considerations be taken into account "before federal action significantly affecting the environment is taken . . . ."

Concluding that the Commission's preparation and utilization of the impact statement as well as its contents failed to comport with the requirements of section 102(2)(C), the court vacated the orders of the ICC which had terminated *Ex parte No. 281* without declaring the rate increases unlawful. The court ordered the Commission to prepare another environmental impact statement analyzing the underlying rate structure, the elasticity of demand for recyclables, and the effects of the rate structure on investment in manufacturing facilities which can make intensive use of scrap. The court further ordered that after comments were

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45. *Id.* The EPA criticized the final impact statement in this regard: "There is evidence that the current rate structure is inequitable in its treatment of some secondary materials and general rate increases tend to perpetuate these inequities." Letter from Acting Deputy EPA Administrator John Quares to I.C.C. Secretary Robert L. Oswald, dated June 6, 1973.


46. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.


47. 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) . . . . 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.


received a final statement be prepared to "'accompany the [consideration of the proposed rate increase] through the existing agency review processes.' . . . [such] review process [to] include a hearing before the Commission." The court declined to enjoin the collection of the rates pending Commission reconsideration of the case.

**SCARP v. United States** may be regarded as supporting the proposition that the decisionmaking process mandated by NEPA is not highly flexible but rather establishes strict standards for compliance. In support of this view the court quoted from *Calvert Cliffs* where the mandate to federal agencies to identify, develop, and consider environmental factors during the decisionmaking process "to the fullest extent possible" was considered.

We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for agencies, a standard which must be rigorously enforced by the reviewing courts.

The *Calvert Cliffs* court went a step further in stating the role of the courts when reviewing agency compliance with the mandates of NEPA:

> [I]f the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.

With respect to the type of balancing analysis mandated by NEPA, the court in *Calvert Cliffs* described it as "rather finely tuned and systematic":

NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against environmental costs; alternatives must be considered which would affect the balance of values

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49. *Id.* at 1306.
51. *Id.* at 1115.
52. *Id.* at 1113.
In some cases, the benefits will be great enough to justify a certain quantum of environmental costs; in other cases, they will not be so great and the proposed action may have to be abandoned or significantly altered. The point of the individualized balancing analysis is to ensure that the optimally beneficial action is finally taken.

That the court in SCRAP v. United States had considerable authority for requiring strict compliance with the procedural commands of NEPA is evident. Furthermore, in most cases the courts have closely scrutinized the manner in which the agency conducted its final decisionmaking, finding it reasonable and in the public interest to insist on strict compliance with NEPA and enjoining actions until such compliance is forthcoming. The courts have thus made clear that NEPA is not to be regarded as another procedural nuisance by the agencies, but rather as a strong dictate that environmental costs must be thoroughly assessed, balanced against other project benefits and costs, and integrated into every important stage in the decisionmaking process.

The question of when in the decisionmaking process NEPA obligations arise was also reviewed by the district court in SCRAP. The court noted that section 102(2)(C) specifically commands that the EIS and comments of concerned agencies regarding the statement “shall accompany the proposal through the existing agency review processes.” It was determined that the purpose of this command is:

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53. *Id.* at 1123; see, e.g., Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Corps of Eng’rs, 325 F. Supp. 749 (E.D. Ark. 1971).


In response to the argument that an injunction pending strict compliance with the provisions of NEPA would cause undue delay and enormous additional public expense, the court in Calvert Cliffs’ answered:

[S]ome delay is inherent whenever the NEPA consideration is conducted. It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.

449 F.2d 1109, 1128 (D.C. Cir. 1971).


[T]o ensure that federal agencies integrate considerations of the potential environmental impacts of their contemplated actions with the policy considerations traditionally attending such actions.

In assessing the Commission's compliance with the decisionmaking process required by NEPA, the court determined the ICC's proposal to be "consideration of the proposed rate increase." The court noted that "[o]nly if the statement is prepared before an agency decision is made can it serve its purpose of informing the decision-making at every stage." Since the court found that the Commission had already reached its decision to approve the general rate increase, and "all that remained was to determine if the environmental effects of that decision could be justified," the decisionmaking process required by NEPA had been violated. The court relied on the language of Calvert Cliffs'.

58. Id. at 1306. The district court's interpretation of the statutory language "proposal" is of particular import when contrasted with the Supreme Court's interpretation of that term in United States v. SCRAP, 95 S. Ct. 2336, 2355-56 (1975). For a discussion of this issue, see text accompanying notes 79-86 infra.


60. Id. at 1299.

61. Id. at 1300, quoting Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1118 (D.C. Cir. 1971) (emphasis in original). A recent decision involving the "difficult question of the proper balance between an agency's discretion in deciding whether, and when, to issue an environmental impact statement, and the judiciary's role in overseeing exercise of that discretion," is Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975), decided only one week before the Supreme Court's decision in United States v. SCRAP. The Court of Appeals for the District of Columbia reviewed the issue of the proper timing of impact statement preparation, reaffirming its decision in Calvert Cliffs':

We think it patent that the term "proposals" does not encompass every suggestion, however unlikely to reach fruition, made by a federal officer. Certainly federal officers are entitled to dream out loud without filing an impact statement. Thus we think it proper to inquire, before an EIS is required, whether the proposal for action has progressed beyond the "dream" stage into some tangible form so that the time for an impact statement is ripe . . . .

[T]he "ripeness" necessary before a statement is required is slight. Preparation of a statement must precede, or at least accompany, preparation of the recommendation or report on the proposal, so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action. An impact statement is designed to aid agency decision-making, not provide an ex post facto justification for it.

Sierra Club v. Morton, 514 F.2d 856, 879 (D.C. Cir. 1975).

See also Scientists' Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079, 1094 (D.C. Cir. 1973) ("[s]tatement must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as input into the decisionmaking process"); Lathan v. Volpe, 455 F.2d 1111, 1121 (9th Cir. 1971); Citizens for Clean Air, Inc. v. Corps of Eng'r's, 349 F. Supp. 696, 708 (S.D.N.Y. 1972) ("Once a project has reached a coherent
Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage in the decisionmaking process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.

In viewing the ICC's proposal as a "consideration of the proposed rate increase" and determining that the decision to grant the general rate increase had been reached prior to consideration of environmental factors associated with the proposal through the preparation of an environmental impact statement, the district court in SCRAP v. United States was in accord with the weight of authority requiring preparation of an impact statement early enough to "accompany the proposal through the existing agency review processes."

It is important to note that the court found that the ICC totally failed to reconsider the question of the recyclable rate increase. No attempt was made to integrate the considerations of national transportation policy, justifying the rate increase in light of the environmental considerations analyzed in the impact statement, nor were critical comments of concerned agencies and environmental groups confronted or even acknowledged.

Because the ICC failed to take these matters into account, the court found that the ICC must start its procedures over again. Specifically, the court ordered that another hearing be held before the Commission. The court reasoned that absent other violations of NEPA,

it might be sufficient for the Commission to hold another hearing in which all parties could participate fully in canvassing the NEPA and national transportation policy considerations concerned with rate increases. The Commission could then make a thorough reconsideration of the proposed recyclable rate increase in light of that hearing and the impact statement which it has already prepared.

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63. Id. at 1299.
64. Id.
65. Id. at 1300, 1306.
66. Id. at 1301.
Given the importance of the public hearing as an instrument for infusing input to effectuate the balancing process required by NEPA, and the court's interpretation of the statutory language "existing agency review processes" as encompassing those procedures which an agency customarily employs in consideration of a proposal as well as those procedures required by agency regulations, it is not surprising that the court viewed the holding of another hearing to be necessary for a thorough reconsideration of the proposed recyclable rate increase.

Case law supports the proposition that an agency found to be in violation of NEPA because the EIS is filed too late in the decisionmaking process, must objectively reconsider the project in light of the environmental factors disclosed. The Court of Appeals for the Tenth Circuit reviewed the timing question in *Upper Pecos Association v. Stans* (Pecos #1). Pecos #1 involved a grant of funds made by the Economic Development Administration (EDA) for a road project. Appellant Upper Pecos Association argued that the preparation of the environmental impact statement after the offer of the grant was "a meaningless gesture." Finding that several steps in the review process had to be accomplished prior to the approval of a necessary right-of-way, and that the EIS would provide the basis upon which the Forest Service would decide on the issuance of this easement, the court upheld the decision of the trial court that the requirements of NEPA had been satisfied.

In *Upper Pecos Association v. Stans* (Pecos #2), the Tenth Circuit again reviewed the issue of the proper timing of NEPA review, holding that "unquestionably appellees should have drafted their environmental impact statement prior to making the grant offer".

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67. See notes 32-38 supra and accompanying text.
68. 492 F.2d 1233 (10th Cir. 1971), vacated and remanded to determine mootness, 409 U.S. 1021 (1972).
69. Id. at 1236.
70. Id. at 1237.
71. 500 F.2d 17 (10th Cir. 1974).
72. Id. at 19, citing 1972 CEQ Third Annual Report 246.

Despite the requirement of early preparation of an EIS, several courts have found that when the deficiency concerns matters of timing, if there is no prejudicial failure to comply with NEPA, courts need not require strict compliance and adjustments may be made in light of the public interest.

In *National Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir. 1973), the Court of Appeals for the Ninth Circuit reviewed a decision of the Forest Service to exchange certain government land for lands of Burlington Northern Railroad. A NEPA statement
Consideration of environmental factors should come in the early stages of program and project formulation. If the decision is delayed until the latter stages it “tends to serve as a post facto justification of decisions based on traditional and narrow grounds.” [Citation omitted.]

The court found that the EDA was not precluded from reconsidering the project, and that therefore the EDA had complied with the mandates of NEPA.

In a case where the agency has failed to comply with the timing requirement of NEPA, if environmental impacts are to be factored into the agency’s ultimate decision, it appears that a reconsideration of environmental factors deemed necessary by the court in SCRAP v. United States is imperative.

on the exchanges was not prepared until after the decision of the Regional Forester approving the exchanges. Stating that normally an impact statement must be prepared prior to the initial decision to commit resources, and noting that the “proper timing was not followed in this case,” the court declined to remand on this ground and concluded that there had been no prejudicial failure to comply with NEPA. “[T]he sterile exercise of having the Regional Forester consider the impact statement on an exchange which had already been approved by all levels of the administrative hierarchy would serve no useful purpose.” Id. at 412.

Another recent case dealing with the proper timing of NEPA review via the preparation of an impact statement is Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974). In Jones, the D.C. Circuit held that a lower court had not abused its discretion in deciding that something less than strict compliance with NEPA was sufficient to avoid a preliminary injunction. In reaching this decision the court was impressed with the value of the urban renewal projects involved and the fact that delay might prove “fatal.” Furthermore, the court was aware that the defendant had taken remedial action which “achieved the substance of NEPA’s requirements and purposes.” Id. at 514.

The propriety of an agency taking action prior to the drafting of an environmental impact statement was considered in City of N. Miami v. Train, 377 F. Supp. 1264 (S.D. Fla. 1974) and in Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973). In City of N. Miami, the plaintiffs argued that the acquisition of a site for a secondary sewage treatment facility prior to the preparation of an environmental impact statement was evidence that the federal agency was predisposed against land application and in favor of ocean disposal. The District Court for the Southern District of Florida determined that “[t]he site acquisition [did] not constitute a significant federal action before which” a § 102 NEPA statement had to be prepared. Id. at 1273. Stating that the site was “subject to adaptation to either advanced waste treatment or land application,” the court concluded that certain actions may be taken prior to drafting an EIS without proving to be a fatal error. Id.

In Gage the court considered the argument that site acquisition prior to the issuance of a permit for a nuclear power plant would affect the final cost-benefit balancing process when alternatives are considered. The court rejected this argument and stated that “if every decision which altered the ‘cost of change’ had to await an impact statement, we would soon be reduced to government by impasse.” Gage v. AEC, 479 F.2d 1214, 1219 n.17 (D.C. Cir. 1973).
IV. UNITED STATES v. SCRAP

In its analysis of the questions presented in the appeal from the three-judge court decision in SCRAP v. United States, the Supreme Court focused on whether the ICC had complied with the mandates of NEPA which related to impact-statement preparation and adequacy. Finding that the ICC complied fully with NEPA in its consideration of proposed rate increases, the Supreme Court, in a seven to one decision, reversed the three-judge court.73

In an opinion by Justice White, the Court rejected arguments by the railroads that the lower court lacked jurisdiction to review the decision of the ICC made in a general revenue proceeding. The railroads argued that the three-judge court reviewed an issue not yet finally decided by the ICC in violation of settled principles of finality of administrative remedies.74 The Court noted that the rule that decisions by the ICC in general revenue proceedings are unreviewable is supported by a long line of district court decisions.75 The Court, however, made a distinction between the interim nature of the general revenue proceedings for purposes of ratemaking as contrasted with the review of environmental considerations:76

Unlike the issue of the reasonableness of a particular rate . . . the issue addressed by the court below had already been finally decided by the Commission and the relief sought from and granted by the court below could not have been obtained from the ICC in a subsequent § 13 proceeding. The issue decided by the District Court was whether under NEPA the ICC had given adequate consideration to environmental factors in the general revenue proceeding. When the ICC terminated the general revenue proceeding, the one thing which it must certainly have finally decided was that it need give no further consideration to environmental factors in that proceeding . . . . [Footnote omitted.]


74. The railroads maintained that environmental groups could file complaints under Interstate Commerce Act § 13, 49 U.S.C. § 13 (1971), and challenge the justness and reasonableness of rates or groups of rates. Noting that the lower court had tentatively ruled otherwise, the Court decided not to rule on the issue. United States v. SCRAP, 95 S. Ct. 2336, 2354 (1975).

75. See cases cited in United States v. SCRAP, 95 S. Ct. 2336, 2351 (1975).

76. Id. at 2354-55 (emphasis in original).
The Court thus laid to rest the arguments of finality and exhaustion in general revenue proceedings "[w]hen agency or departmental consideration of environmental factors in connection with that federal action is complete . . . ."\(^77\)

The Court then considered the ICC's compliance with the decisionmaking process mandated by NEPA. It focused upon the district court's holding that the oral hearing which the ICC chose to convene prior to its October 4, 1972 order was an "existing agency review process" during which a final draft environmental impact statement should have been available, and that the ICC should have "started over again" after it decided to prepare a final impact statement.\(^78\) In holding that the district court erred in these determinations, the Supreme Court interpreted the language in NEPA which states that "such statement . . . shall accompany the proposal through the existing agency review processes."

This sentence does not, contrary to the District Court opinion, affect the time when the "statement" must be prepared. It simply says what must be done with the "statement" once prepared—it must accompany the "proposal."\(^79\)

To determine when a final statement must be prepared, the Court looked to the language in NEPA requiring all federal agencies to include a detailed statement "in every recommendation or report on proposals for . . . major Federal actions, significantly affecting the quality of the human environment."

Under this sentence of the statute, the time at which the agency must prepare the final "statement" is the time at which it makes a recommendation or report on a proposal for federal action. Where an agency initiates federal actions by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, however, until the October 4, 1972 report, the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the statute required a statement was the time of the ICC's report of October 4, 1972—sometime after the oral hearing. [Footnotes omitted.]\(^80\)
The Court thus determined that there was no ICC "proposal" for which an impact statement should have been prepared until issuance of the October 4, 1972 report and therefore the earliest time at which NEPA required an impact statement was at the time of the October report—after the hearing. At this point, the Court reasoned, it was necessary for an EIS to accompany the proposal through the "existing agency review processes." Any existing agency review process, however, wherein environmental factors disclosed by the EIS could be considered, ended when the general revenue proceeding terminated on October 4th. The Court, in considering the jurisdictional issues, had clearly indicated that the general revenue proceeding was the proper forum for the consideration of environmental factors:81

All parties now agree that a general revenue proceeding is itself a "major federal action," independent from any later adjudication of the reasonableness of particular rates, requiring its own final environmental impact statement . . . . This conclusion is clearly correct. Thus whatever consideration of environmental matters is necessary or proper at the general revenue proceeding is over and done with when that proceeding terminates.

How the Court decided that environmental factors could be integrated into the decisionmaking process at a point when the ICC renders a final decision terminating the general revenue proceeding, is unclear. It appears that the Supreme Court has determined that in order to comply with NEPA, the ICC need not prepare an impact statement until the date of their final decision on the proposed rate increase.

This interpretation of what constitutes a "proposal" differs entirely from the view expressed by the district court. The district court viewed the ICC proposal as a "consideration of the proposed rate increase."82 The ICC’s consideration of the proposed rate increase commenced after the railroads proposed to file tariffs increasing rates. At the point when the ICC commenced consideration of the proposed rate increase, presumably prior to its rendering a final decision in the matter, the requirement of the preparation of an environmental impact statement matured. Because one of the steps in the existing agency review process is the public hearing, the district court reasoned that the environmental im-

81. Id. at 2355.
The National Environmental Policy Act statement must be prepared for inclusion at those hearings.

By requiring that in considering the proposed rate increase, the ICC balance environment costs against the revenue needs of the railroads prior to reaching its final decision in the general revenue proceeding, the district court provided for the integration of environmental factors into the decisionmaking process. The reasoning of the district court appears to be in accord with the decisions rendered in such notable cases as Calvert Cliffs' Coordinating Committee v. AEC, Greene County Planning Board v. FPC and Harlem Valley Transportation Association v. Stafford. The Supreme Court has cast the strength of these cases as precedent supporting this view into doubt by stating:

To the extent to which [the cases cited above] read the requirement that the statement accompany the proposal through the existing agency review process differently they would appear to conflict with the statute.

The Court next focused on the requirement in NEPA that agencies consult with other environmentally expert agencies “prior to making any detailed statement” and the CEQ guidelines which provide:

To the fullest extent possible, all . . . hearings [on proposed agency action] shall include consideration of the environmental aspects of the proposed action . . . . Agencies should make any draft environmental [impact] statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings.

Finding that all draft impact statements in existence were circulated before the hearings and that environmental issues pervaded the hearings when they were held, the Court reasoned that the consultation required under the Act and CEQ guidelines occurred from the outset. The Court concluded “[p]rocedurally, NEPA was thus thoroughly complied with through October 4, 1972.”

In assessing what the ICC should have done, assuming that

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83. 449 F.2d 1109 (D.C. Cir. 1971).
84. 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).
85. 500 F.2d 328 (2d Cir. 1974).
86. 95 S. Ct. 2336, 2356 n.20 (1975).
87. 40 C.F.R. § 1500.7(d) (1974), as quoted in United States v. SCRAP, 95 S. Ct. 2336, 2356 (1975).
88. 95 S. Ct. 2336, 2356 (1975) (emphasis in original).
a separate EIS should have been prepared to accompany its October 4 report, or assuming its consideration of environmental factors in the report was inadequate, the Court disagreed with the district court's holding that the ICC should have "started over again." The Court stated:

To the extent that the District Court's conclusion to the contrary is based on its belief that the draft statement of March 1972, had to be considered at a hearing, it is incorrect for the reasons stated above [i.e., definition of the "proposal"]: To the extent that it is based on the District Court's belief that the ICC did not in good faith reconsider its October 4, 1972, order in light of the impact statement, the District Court's decision is without support in the record.

In its rejection of the first rationale that could be advanced to support the district court's determination that the ICC should have "started over again," the Court presumably means that given its interpretation of the term "proposal," no ICC proposal was in existence prior to the October 4, 1972 report, and therefore, any environmental impact statement which had been prepared need not receive consideration at the hearing stage of the ICC review process. In rejecting the second rationale the Court reasoned:

The ICC was in as good a position to correct a statutory error by integrating environmental factors into its reopened Ex parte 281 and into its decision in May 1973, as it would have been if the October 4, 1972, report had never been written; this it proceeded to do and we perceive no basis for affirming the District Court's decision in this respect.

The Court thus focused on the irrelevance of the October 4, 1972 report for purposes of determining whether the ICC had properly reconsidered its October 4, 1972 order in light of the impact statement. Finding "no basis" to decide otherwise, the Court concluded that the ICC had properly integrated environmental factors into its reopened Ex parte No. 281.

The Supreme Court's failure to find any basis in the record indicating a failure by the ICC to reconsider its October 4, 1972

89. Id.
90. Id. at 2356-57.
91. See text accompanying notes 79-81 supra.
92. 95 S. Ct. 2336, 2357 (1975).
93. Id.
order in light of the environmental factors exposed in the EIS is clearly in conflict with the district court's determination on that issue. The district court found that the ICC had already made its decision regarding the rate increases and all that remained was to determine if the environmental effects of that decision could be "justified." Furthermore, the lower court found evidence supporting the conclusion that the ICC "neither intended to give nor actually gave full reconsideration to the question of the recyclable rate increase"94 by looking to the Commission's May 2, 1973 order discontinuing Ex parte No. 281. The one-sentence order merely adopted the entire staff-prepared impact statement and made no attempt to integrate considerations of national transportation policy justifying the rate increase in light of the environmental impacts disclosed in the impact statement. "Nor does it confront or even acknowledge the critical comments of other concerned agencies and environmental groups appended to the statement."95

Such a failure to integrate environmental considerations into considerations of national transportation policy is clearly contrary to the balancing analysis mandated by NEPA. In Calvert Cliffs' Coordinating Committee v. AEC96 the court reasoned that in order to properly consider environmental factors a balancing process must be conducted wherein environmental costs of a project are compared to its economic and technical benefits.97 If a court determined that an agency had not undertaken the balancing process in good faith an agency action could be reversed—since courts may exact strict compliance with NEPA's procedures.98

The district court in SCRAP v. United States found an obvious failure by the ICC to reconsider the recyclable rate increases in light of environmental consequences. This failure was highlighted by a total disregard of adverse comments of other agencies and environmental groups. The Supreme Court found no basis99 in the record for supporting the district court's decision on this issue.

One might question how one court's view of the evidence in

95. Id.
96. 449 F.2d 1109 (D.C. Cir. 1971).
97. Id. at 1113.
98. Id. at 1115.
the record could vary so drastically with that of another court. Alternatively, in the absence of such an apparent disparity, one might question the validity of the precedent requiring a "rather finely tuned and 'systematic'" balancing process to be engaged in by the agencies and the finding that courts may exact strict compliance with NEPA's procedures.\textsuperscript{100}

On the face of the decision, the Supreme Court has left intact the requirement that an agency, failing to timely submit an EIS to accompany its proposal through the review process, must reconsider its decision in light of the environmental consequences exposed. The strength and enforceability of that requirement, however, is questionable when such marginal "integration" as carried out by the ICC suffices to substantiate the necessary reconsideration.

The Supreme Court reviewed the decision of the district court that the impact statement was deficient in that it did not sufficiently analyze the underlying rate structure. SCRAP and other appellees argued that the underlying rate structure discriminates against recyclables with serious environmental consequences. Given this fact, the environmental consequences flowing from a facially neutral increase must be explored in an impact statement and can only be explored by analyzing the underlying rate structure. For this and other reasons,\textsuperscript{101} they argued, the ICC should not have been permitted to terminate \textit{Ex parte No. 281} without having completed this analysis.

In rejecting this argument the Supreme Court cited \textit{United States v. Louisiana},\textsuperscript{102} which gave the ICC wide discretion in deciding which issues to address in a general revenue proceeding and permitted the ICC to postpone comprehensive consideration of claims of discrimination. The Court further noted that prior to the initiation of \textit{Ex parte No. 281}, the ICC had commenced the investigation of the underlying rate structure in \textit{Ex parte No. 270} in which specific attention was being focused on environmental issues. Given the wide discretion of the ICC in determining which issues to address in general revenue proceedings and the ongoing

\textsuperscript{100} See note 52 \textit{supra} and accompanying text.

\textsuperscript{101} Appellees argued that the ICC was tardy in complying with NEPA, that the ICC was required to analyze the underlying rate structure only once with a view toward environmental consequences; that it had plenty of time and cause to do so before \textit{Ex parte 281}; and that it should, therefore, not have been permitted to terminate \textit{Ex parte 281} without having done so.

\textit{Id.} at 2358.

\textsuperscript{102} 290 U.S. 70 (1933).
nature of *Ex parte No. 270*, the Court concluded that even if NEPA were read to require that an analysis of the underlying rate structure be done at least once prior to approving a facially neutral general rate increase,103

no purpose could have been served by ordering it to thoroughly explore the question in the confined and inappropriate context of a railroad proposal for a general rate increase when it was already doing so in a more appropriate proceeding.

The Court further remarked in this regard that:104

In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the "federal action" being taken. The action taken here was a decision—entirely nonfinal with respect to particular rates—not to declare unlawful a percentage increase which on its face applied equally to virgin and some recyclable materials and which on its face limited the increase permitted on other recyclables. [Footnote omitted.]

This being a general revenue proceeding, the action taken was in response to the claim made by the railroads that they were undergoing a financial crisis. The inquiry made at such a proceeding is primarily whether such a crisis exists, and leaves to future proceedings the task of assessing challenges to rates on individual commodities. "The point is that it is the latter question—usually involved in a general revenue proceeding only to a limited extent—which may raise the most serious environmental issues."105

The Court determined that the district court finding of an implicit approval of the underlying rate structure in the ICC's decision in *Ex parte No. 281* was inaccurate and precipitated an "unwarranted intrusion into an apparently sensible decision by the ICC to take much more limited 'action' in that proceeding and to undertake the larger action in a separate proceeding better suited to the task." [Footnote omitted.]106

Having defined the scope of the "federal action" taken by the ICC in the instant proceeding as not implicitly approving the underlying rate structure, the Court concluded that the impact statement was adequate. The Court indicated, however, that

103. 95 S. Ct. 2336, 2358 (1975).
104. *Id.* at 2357 (emphasis in original).
105. *Id.*
106. *Id.* at 2359.
their determination as to adequacy might have been different if the ICC had been approving the entire rate structure.\footnote{107}

In his dissent Mr. Justice Douglas highlighted the inadequacies of the environmental impact statement prepared by the ICC, and characterized the statement as presenting a "melange of statistics" purporting to prove that an increase in the transportation rates of recyclable materials would not create any adverse impact on the environment.\footnote{108} Douglas indicated that the ICC's analysis had been "thoroughly discredited" by the comments of a host of agencies, including not only such environment-oriented agencies as the Environmental Protection Agency and the Council on Environmental Quality, but also the Department of Commerce and the General Services Administration.\footnote{109}

In response to appellees' argument that the rate increases for recyclables exacerbated an existing discrimination against these materials in the rate structure and that an analysis of the underlying rate structure in the EIS is necessary in order to assess the environmental consequences flowing from the rate increases, Mr. Justice Douglas noted the Court's implicit concession of the shortcomings in the Commission's analysis. Both the Commission and the Court relied heavily on the prospect that the environmental issues would receive further study in \textit{Ex parte No. 270}, a proceeding designed to investigate the entire freight rate structure.\footnote{108} Rejecting the validity of such a reliance on the potential findings of \textit{Ex parte No. 270} Justice Douglas stated: \footnote{111}

> But NEPA commands an agency to consider environmental effect before it takes a "major federal action," not to relegate consideration to further proceedings after action is taken, particularly where there is no assurance that a prompt conclusion will be forthcoming.

> It was pointed out that \textit{Ex parte No. 270} had been in progress for more than two years when \textit{Ex parte No. 281} was terminated by the Commission. Not only had the scope of the investigation not been fully defined at that time, but the Commission took no steps to expedite completion of that part of the investigation

\footnote{107. "Whatever the result would have been if the ICC had been approving the entire rate structure in \textit{Ex parte 281}, [footnote omitted] given the nature of the actions taken by the ICC, the lower court was plainly incorrect." \textit{Id.}}

\footnote{108. \textit{Id.} at 2360.}

\footnote{109. \textit{Id.}}

\footnote{110. \textit{Id.} at 2361.}

\footnote{111. \textit{Id.}}
embracing the environmental issues controverted in *Ex parte No. 281*. At the time of the decision by the Supreme Court Mr. Justice Douglas noted that the Court did not even know if a completion date was in sight for *Ex parte No. 270*. "Meanwhile, environmental damage—*irreversible* damage . . . may be continuing, with its magnitude unknown."112

Finding that the district court was correct in rejecting the Commission's representations that a complete treatment of the environmental issues was beyond its capability and therefore should not be required, Douglas indicated that one of the purposes of NEPA "was to force agencies to *acquire* expertise in environmental matters, even if attention to parochial matters in the past had not demanded this capability." [Footnote omitted.]113

Concluding that the lower court's reasoning followed the spirit of NEPA by telling the Commission to improve its performance, Mr. Justice Douglas noted:114

NEPA is more than a technical statute of administrative procedure. It is a commitment to the preservation of our natural environment. The statute's language conveys the urgency of that task.

V. UNITED STATES V. SCRAP: IMPLICATIONS

One might question what effect the Supreme Court's decision in *United States v. SCRAP* will have on future cases. Can it be limited to the unique factual situation presented to the Court in this challenge to the ICC's compliance with NEPA, or have the oft-quoted phrases of *Calvert Cliffs* and *Greene County* interpreting the language of NEPA met an alien successor?

*United States v. SCRAP* can be viewed as interpreting the mandate of NEPA to require the preparation of an EIS to "accompany the proposal through the existing agency review processes"115 only when an agency proceeding has reached the stage

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112. Id. (emphasis in original).
113. Id. (emphasis in original). In support of this proposition Mr. Justice Douglas quoted the language of NEPA section 102(2)(A) which requires all agencies to:
"utilize a systematic, *interdisciplinary* approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment."

114. 95 S. Ct. 2336, 2361 (1975).
where an applicant’s request for agency action has resulted in a
final decision by the agency. This interpretation of the Supreme
Court’s holding would appear to affect only those classes of cases
in which the agency action consists of an approval or denial of an
applicant’s request for permission to do a given act. It is clear that
when an agency initiates federal action, for instance proposed
construction of federal facilities, this constitutes a proposal and
an environmental impact statement must be prepared for inclu-
sion in the proposal. The proposal as constituted must then be
subjected to the agency review process. In the case where an
agency reviews a request by an applicant for permission to do a
given act, however, no agency proposal exists until the time the
agency either grants or denies the requested permission. If this be
the ultimate interpretation of the Court’s language in United
States v. SCRAP, it is difficult to determine how future courts
may insist on a thorough consideration of environmental factors
prior to an agency reaching a final decision either granting or
denying a request. Under this interpretation of the Supreme
Court’s decision, what is the current effect of the frequently-
quoted language in Calvert Cliffs’ which states that:¹¹⁶

[If the decision was reached procedurally without individual-
ized consideration and balancing of environmental factors—
conducted fully and in good faith—it is the responsibility of
the courts to reverse.

It is to be recalled that to the extent that Calvert Cliffs’, Greene
County, and Harlem Valley Transportation Association read the
requirement that the statement accompany the proposal through
the existing agency review process differently, the Supreme Court
stated that they would appear to be in conflict with the statute.¹¹⁷

If it be deemed that consideration of environmental factors
sufficient to comply with NEPA may be undertaken so late in the
decisionmaking process, it is difficult to perceive how the fear
expressed by the Court in Environmental Defense Fund, Inc. v.
Corps of Engineers¹¹⁸ will not become a reality:¹¹⁹

The unequivocal intent of NEPA is to require agencies to
consider and give effect to the environmental goals set forth in

¹¹⁶. 449 F.2d 1109, 1115 (D.C. Cir. 1971).
¹¹⁷. 95 S. Ct. 2336, 2356 n.20 (1975). See notes 83-86 supra and accompanying text.
¹¹⁸. 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973).
¹¹⁹. Id. at 298.
the Act, not just to file detailed impact studies which will fill governmental archives.

Courts have consistently interpreted NEPA as requiring an agency to consider environmental effects before it undertakes a "major federal action." This is to be accomplished through the preparation and consideration of an adequate environmental impact statement. How an environmental statement can be viewed as adequate and constituting a proper basis for agency decisionmaking when a crucial analysis of environmental effects is postponed until after the action is taken, is difficult to determine. Yet this is what the Supreme Court held in its finding that the ICC's environmental impact statement was adequate.

Although this interpretation of the effect of the decision may sound an ominous ring for those seeking to assure that agency decisionmaking occurs after all the environmental consequences of a given action are exposed, it is submitted that United States v. SCRAP may be limited to the unique questions before the Court in this case, i.e., reviewing the ICC's compliance with NEPA in the context of general revenue proceedings. Where the basic issue presented to the ICC is whether to permit a substantially across-the-board rate increase, the scope of the agency's inquiry has historically been limited.

[Under the Louisiana case, the general rule has been that the ICC may confine its attention in general revenue proceedings almost entirely to the need for revenue and to any other factors that relate to the legality of the general increase as a whole; and it follows a fortiori that if attention is given to other issues, that attention may be of a limited nature.]

The Court noted that in certain instances circumstances arise, such as across-the-board cost increases, which dictate an increase in virtually all rates by a large number of railroads. Recognizing the "practical problems" confronting the ICC in such situations, the Court noted that the ICC has been permitted "to find the new rates lawful after taking proof relating not to any particular rate but to the reasonableness of the increases in general."  

The Court cited the case of Algoma Coal & Coke Co. v.

120. 95 S. Ct. 2336, 2353 (1975).
121. Id. at 2352. In support of this proposition the Court cited New England Divs. Case, 261 U.S. 184, 196-98 (1923).
United States as support for the proposition that the ICC in a general revenue proceeding may decline to declare proposed rate increases unlawful without assessing the merits of the increases on specific commodities. In Algoma, shippers of coal sought review of the ICC's decision not to declare the proposed increase unlawful insofar as it applied to coal. In declining to set aside the rate increases the court indicated that the ICC's order "prescribed no particular rates. It merely permitted the carriers to file new rates without suspension." The court further explained that the ICC had only decided that the railroad's revenue needs rendered the general increase reasonable and that the ICC had not yet determined whether the increased rates on coal specifically were just and reasonable. The court stated that the proper procedure for challenging the justness and reasonableness of a particular rate is by filing a complaint under section 13 of the Interstate Commerce Act, to seek a refund and a declaration of unjustness or unreasonableness from the ICC.

The Supreme Court noted that since the Algoma decision, attempts by shippers to undo a decision by the ICC in a general revenue proceeding not to declare rate increases unlawful when such challenge concerns a particular commodity "have been uniformly unsuccessful."

In those cases in which a shipper claimed only that the increase on a particular commodity was unjust or unreasonable—without addressing the question whether a general increase of some sort was justified—the courts have declined to rule on the issue posed for the reason that the ICC had not yet addressed it. In those cases in which shippers have attacked the ICC's decision that rate increases in general were justified, the courts, going beyond the Algoma decision, have declined review on the ground that the shipper had not exhausted his administrative remedies under §§ 13 and 15. [Citations omitted.]

In the instant case the Supreme Court was faced with ICC ratemaking procedures the validity and scope of which had been clearly defined by extensive precedent. United States v. Louisiana expressed the general rule that the ICC may confine

123. Id. at 494 (emphasis in original).
126. Id. at 2353-54 (emphasis in original).
127. 290 U.S. 70 (1933).
its attention in general revenue proceedings to issues related mainly to the need for revenue, while Algoma supports the proposition that the ICC need not assess the reasonableness of any particular rate in the context of a general revenue proceeding.

Given the "confined" decision rendered by the ICC in a general revenue proceeding and the existence of procedures whereby further consideration of particular rates may be undertaken, it may be argued that for purposes of compliance with the decision-making process mandated by NEPA, a distinction can be drawn between ratemaking proceedings, such as those involved in the instant case, and other agency action involving an approval or denial of an applicant's request for permission to do a given act. In the former case the agency action in a general revenue proceeding is not final with respect to given rates on specific commodities, whereas in other agency action involving the grant or denial of approval, a decision by the agency is generally final. For this reason it can be argued that environmental considerations must be factored into the decisionmaking process earlier in those actions where the agency's determination is final.

In reaching its decision pertaining to the adequacy of the impact statement prepared by the ICC, the Supreme Court in United States v. SCRAP referred to the nonfinal and "limited nature of the decision made in Ex parte 281,"\(^\text{128}\) and that the "federal action" involved in this case did not include an implicit approval of the underlying rate structure. "The decision of the lower court . . . to deem the federal action involved in Ex parte 281 to include an implicit approval of the underlying rate structure was inaccurate . . . ."\(^\text{129}\) In fact the Court implied that had the ICC approved the entire rate structure in Ex parte No. 281 the result may have been different.

As Mr. Justice Douglas noted, the Court conceded the shortcomings of the Commission's analysis and relied heavily on the fact that environmental issues would receive further study in the proceeding already in progress which was investigating the entire rate structure.\(^\text{130}\) Had such an investigation not been underway, it is probable that the Court's view of the adequacy of the impact statement would have been different. The Court was struck by the pointlessness of ordering the ICC to thoroughly explore the

\(^{128}\) United States v. SCRAP, 95 S. Ct. 2336, 2359 (1975).
\(^{129}\) Id. at 2358-59.
\(^{130}\) Id. at 2361.
question of the discriminatory effect of the underlying rate structure on recyclables in *Ex parte No. 281* when they were doing so in the more appropriate context of *Ex parte No. 270*.

Furthermore, the Court found that environmental issues pervaded the proceeding and in fact far outweighed the financial issues presumed to be controlling in general revenue proceedings. Given the fact that the railroads were experiencing a financial crisis, that environmental issues pervaded the general revenue proceeding, and the limited nature of the federal action being taken in *Ex parte No. 281*, the Court determined that the EIS prepared by the ICC was adequate. Thus, *United States v. SCRAP* may be viewed narrowly as interpreting the question of the ICC’s compliance with NEPA in the context of a general revenue proceeding with the question of the adequacy of the ICC’s environmental impact statement being determined in light of the ongoing investigation into the environmental effects of the ICC’s underlying rate structure.

Courts reviewing agency compliance with the decisionmaking process mandated by NEPA may find that while the procedural requirements have been met, the purpose of NEPA has been frustrated. In such cases courts may review substantive agency decisions on the merits.

**PART TWO**

**VI. SUBSTANTIVE REVIEW UNDER NEPA**

One of the “continuing responsibilities” of the federal government under NEPA is to use “all practicable means” to “enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.” Since the district court in *SCRAP* found the ICC’s efforts to comply with NEPA’s procedural commands to be “sorely deficient,” the issue of whether the Commission gave insufficient weight to this environmental value in reaching its conclusion that the general increase was justified, was not reached. Therefore, the appeal to the Supreme Court did not involve reviewability of the substantive issues decided by the ICC at the general revenue proceeding.

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131. *Id.* at 2359.
134. The Court in *United States v. SCRAP*, 95 S. Ct. 2336, 2354-55 n.18 (1975) noted that:
The principal focus of the courts in reviewing agency compliance with NEPA has been on the procedural requirements imposed under the Act, which directs federal agencies to prepare an environmental impact statement when they propose any major action which may have a significant effect on the environment.\textsuperscript{135} Courts have enjoined numerous federal projects pending completion of an adequate EIS.\textsuperscript{138} The Act has also been interpreted as imposing a new, broader decisionmaking process on federal agencies in that they are now obliged to consider environmental consequences.

That NEPA contains a substantive mandate is clear from a reading of the Act. Yet judicial recognition of a substantive restraint on agency action has been slow. Decisions interpreting NEPA often have held that the Act does not create judicially enforceable substantive rights, and that only when an agency fails to comply with the procedural duties imposed by section 102 is their action subject to challenge. It has been held that if the agency considered environmental factors in good faith, NEPA imposes no restrictions on the agency's ultimate decision.\textsuperscript{137}

The text of the Act, however, clearly indicates that federal agencies must adhere to substantive constraints as well. Section

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Part of NEPA provides that "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); and one of the policies of the chapter is to "approach the maximum attainable recycling of depletable resources." The District Court expressly declined to review the question whether the ICC ultimately "gave insufficient weight to this environmental value" in reaching its conclusion that the general increase was justified. Therefore, this appeal does not involve reviewability of those substantive issues, including environmental issues, decided by the ICC at the general revenue proceedings.

\textsuperscript{135} The requirement that an EIS be prepared applies only to "major Federal actions significantly affecting the quality of the human environment." NEPA § 102(2)(C), 42 U.S.C. 4332(2)(C) (1971). The courts, however, have not held that a "minor" federal action, the environmental effects of which are significant, is immune from the requirement that an EIS be prepared. See F. ANDERSON, NEPA IN THE COURTS 74, 89-96 (1973), and cases cited therein.


101(a) of NEPA states a national policy:138

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, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Section 101(b) 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” and programs to achieve several enumerated environmental goals.139 Section 102 of NEPA, viewed as embracing the “action-forcing”140 procedures by which the na-

138. 42 U.S.C. § 4331(a) (1971). Section 101(a) provides in full:
The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id.

139. 42 U.S.C. § 4331(b) (1971). Section 101(b) provides in full:
In order to carry out the policy set forth in this chapter, 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—
(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(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;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id.

140. See Environmental Defense Fund, Inc. v. Corps of Eng’rs, 492 F.2d. 1123, 1132
tional policy expressed in section 101 may be implemented, requires the preparation of the environmental impact statement by federal agencies.\(^{141}\)

Declarations of legislative intent support the interpretation that the Act creates a substantive mandate. According to the Senate Report, the purpose of NEPA\(^{142}\) is to establish, by Congressional action, a national policy to guide Federal activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment.

Thus, conflicts between environmental goals and other national values were to be resolved in looking to the national policy enunciated in NEPA. "Federal action must rest upon a clear statement of values and goals which we seek; in short, a national environmental policy."\(^{143}\)

Recognizing the need for congressional supervision of agency decisionmaking, the Senate Report quoted from the Senate Committee on the Judiciary:\(^{144}\)

Policy making is not a function that can be performed properly by a small group of appointed officials, no matter how able or well intentioned. Only in Congress, where the members are directly answerable to the electorate, can compelling political interests be adequately represented and properly accommodated.

VII. JUDICIAL RECOGNITION OF SUBSTANTIVE REVIEW

The first judicial recognition of NEPA's substantive mandate was by the Court of Appeals for the District of Columbia in Calvert Cliffs' Coordinating Committee v. AEC,\(^{145}\) a case involv-
ing the adequacy of the AEC regulations implementing NEPA.

Judge Skelly Wright, writing for the court, stated that section 101 sets forth a "substantive mandate" requiring agencies to consider environmental factors. The court reasoned that to properly consider environmental factors a balancing process would have to be utilized wherein the environmental costs of a project would be compared to its economic and technical benefits. Holding that courts may exact strict compliance with NEPA's procedures, Judge Wright concluded that a reviewing court could reverse an agency decision on the merits, but, he stated it must be shown under section 101 "that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Thus Calvert Cliffs' makes a clear statement that NEPA creates a substantive mandate and that judicial supervision of that mandate is proper.

The reasoning expressed in Calvert Cliffs' was later adopted by the Court of Appeals for the Eighth Circuit in Environmental Defense Fund, Inc. v. Corps of Engineers. Applying the Calvert Cliffs' standard, the court determined that Section 101 of NEPA created a judicially enforceable substantive standard. By so deciding, the Eighth Circuit became the first federal court to squarely hold that NEPA embraced a substantive mandate to federal agencies which is enforceable through judicial review on the merits.

The dispute in Environmental Defense Fund, Inc. v. Corps of Engineers arose out of the proposed construction of Gillham Dam on the Cassatot River in Arkansas. Part of a massive flood control plan authorized by Congress in the Flood Control Act of 1958, work on the project commenced in 1963 and was nearly two-thirds complete at a cost of 9.8 million dollars at the commencement of litigation. However, the dam itself had not been started. The litigation extended over a period of two years during which six memorandum opinions were filed by the district

“NEPA’s substantive provisions may be enforced in court as well as its procedural requisites,” Sierra Club v. Morton, 514 F.2d 856, 874 (D.C. Cir. 1975).
146. 449 F.2d 1109, 1112-13 n.5.
147. Id. at 1115.
148. Id.
149. 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973).
150. Id. at 300. For a thorough discussion of the case, its history, and implications, see Substantive Review, supra note 141.
In its sixth memorandum opinion the court concluded that the amended impact statement submitted by the defendants met the full disclosure requirements of NEPA. Finding that the Corps had made a good faith effort to comply with NEPA, and also finding an absence of intentional misrepresentation in the withholding of pertinent facts, the district court determined that the defendant had discharged its statutory duty and dismissed the case.

In the appeal taken from the district court decision, the plaintiffs alleged bias, factual inaccuracies, a failure to develop appropriate alternatives, and that the decision of the Corps to build a dam should be reviewed on the merits. Although the court of appeals held that the EIS finally submitted by the Corps fully disclosed the information required by section 102(2)(C) (and the alternatives required by section 102(2)(D)), and that therefore the Corps had complied in good faith with NEPA's procedural commands, it upheld the contention raised by the EDF that the decision to construct the dam was reviewable on the merits. The district court had rejected plaintiff's claim that, based on section 101, NEPA creates a substantive standard. The court of appeals responded:

We disagree. The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking. Section 101(b) of the Act states that agencies have an obligation "to use all practical [sic] means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" to preserve and enhance the environment. To this end, § 101 sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment.

... ... ...

154. Id. at 1218.
155. 470 F.2d 289, 294-97 (8th Cir. 1972).
156. Id. at 295-97.
157. Id. at 297-98.
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.

Once it has been determined that the agency acted within the scope of its authority, the circuit court declared, the reviewing court must then establish "whether the decision reached was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." In making this assessment the court must ascertain if the agency considered all relevant factors or if the decision itself represented a clear error of judgment.

Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." [Citation omitted.]

The test laid down by the Eighth Circuit requires a reviewing court to scrutinize an agency's reasoning and value judgments to ascertain whether the ultimate decision rendered implements the substantive requirements of section 101.

The court then measured the Corps' decision to build the Gillham Dam against the arbitrary and capricious standard and concluded that even if all of the factual disputes were to be resolved in favor of the plaintiffs, the Corps' decision must be upheld. The court, in making its decision, relied on the statutory language of NEPA, the Administrative Procedure Act's presumption of reviewability, and the judicial authority of Calvert Cliffs'. While the Eighth Circuit's adoption of the cost-benefit analysis for substantive review has apparently been accepted by the Council on Environmental Quality, (the organization most

158. Id. at 300.
159. Id.
160. In reaching this conclusion the court, applying a cost-benefit analysis, relied heavily on the advanced stage of the project and the previous investment of nearly 10 million dollars. Id. at 301.
161. The court cited several other cases which failed to clearly advocate the scope of substantive review suggested by its decision. Id. at 299 n.15. The court also relied on Judge Oake's dissenting opinion in Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 482 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972).
162. See U.S. COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT 225, 244 (1972).
closely concerned with NEPA’s implementation\textsuperscript{163} and by courts in several circuits,\textsuperscript{164} the utilization of the cost-benefit analysis in the environmental arena is fraught with difficulties.

VIII. COST-BENEFIT ANALYSIS

A major problem which arises in any attempt to use a cost-benefit approach to balance environmental harms against a project’s benefits is the difficulty of evaluating environmental costs. Since NEPA does not state what weight environmental factors should receive in the equation balancing harms against benefits, and given the fact that a satisfactory method for evaluating environmental costs has not been forthcoming from the scientific sector,\textsuperscript{165} a court reviewing agency action against NEPA’s substantive standard is presented with a weighty chore. When confronted with a choice between the preservation of a given environmental resource and the alleviation of an economic crisis such as widespread unemployment, in the absence of specific weight being assigned for such variables, how can a reviewing court determine if an agency in balancing the benefits and costs of a project “clearly gave insufficient weight to environmental values[?]” It appears that a judge must measure an agency’s compliance with the substantive mandate of NEPA by using his or her own judgment on whether the environmental costs of a given project are outweighed by its benefits.\textsuperscript{166}


\textsuperscript{164} See, e.g., Environmental Defense Fund, Inc. v. Corps of Eng’rs, 492 F.2d 1123 (6th Cir. 1974); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Conservation Council v. Froehlke, 473 F.2d 664 (4th Cir. 1973).


\textsuperscript{166} See Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. PA. L. REV. 509, 529 (1974); Substantive Review, supra note 141, at 203, 204.
Given the range that exists in calculating a project’s costs and benefits and the agency’s facility in altering the variables to guarantee a result supporting its project, it is incumbent upon a reviewing court to exercise the utmost care in analyzing agency calculations which evaluate and balance benefits against costs.

One variable which is highly flexible is the selection of an appropriate discount rate. The discount rate is the vehicle used to express society’s preference to consume in the present rather than in the future. Just as financial institutions use a discount rate to approximate the present worth of money to be received in the future, it is used in cost-benefit analysis to estimate the present significance of future effects of a project.

The government of a society must determine the manner of allocating its resources over time, choosing whether to invest in projects benefiting people of future generations rather than people in the near future. Since many of the taxpayers of today who bear the cost of an agency’s projects will be unable to enjoy the future benefits, the agency discounts the future costs and benefits to a present value. The lower the discount rate, the higher the present value of benefits in the distant future. By use of a low discount rate, an agency can inflate its benefit/cost ratios by placing a low priority on the needs of the present generations.167

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167. R. BERKMAN & W. VISCUSI, THE NADER REPORT, DAMMING THE WEST 83-84 (1973). An agency which has consistently used a low discount rate, thereby inflating its benefit-cost ratios, is the Bureau of Reclamation. The discount rates used by the Bureau between 1959 and 1969 varied between 2 1/2 and 3 1/4 percent.

* This increase was due to the Water Resources Council’s issuing of new procedures for setting discount rates.
Thus, minor changes in the discount rate may have dramatic effects in the resulting cost-benefit analysis. Other factors which are easily manipulated by an agency seeking to justify its project are the estimated life span of a project and overvaluing one factor or undervaluing another thereby creating inaccurate comparisons of project benefits and costs.

_Sierra Club v. Froehlke_\(^{168}\) represents the most extensive judicial examination to date of the Corps of Engineers' cost-benefit procedures under NEPA. Finding that the Corps failed to comply with the procedural requirements of NEPA in reviewing its proposed $29 million Wallisville reservoir project, the court did not have to rely on the deficiencies exposed in the Corps' cost-benefit analysis. Nevertheless, the court noted that a review of the record and the EIS indicated that "the balance struck was 'arbitrary' and 'clearly gave insufficient weight to environmental values,'" \(^{168}\)

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\(^{168}\) _Id._ at 229 (Appendix Table 4-A).

In 1962, Senate Document 97 . . . was approved . . . . This document revised the procedure for determining the discount rate. The new procedure called for the discount rate to be "based on the average rate of interest payable by the Treasury on interest bearing marketable securities of the United States outstanding at the end of the fiscal year preceding such computation which, upon original issue, had terms to maturity of 15 years or more." \(^{168}\) _Id._ at 85, _quoting Policies, Standards and Procedures in the Formulation, Evaluation, and Review of Plans for Use and Development of Water and Related Land Resources_, S. Doc. No. 97, 87th Cong., 2d Sess. 12 (1962). Completed studies and studies which had already begun were exempt from the provision. The discount rate arrived at under this method was still below the value it should have been since it required interest rates on all long-term government bonds with over 15 years to maturity from the date of issue to be averaged, thereby permitting rates on government bonds with merely one or two years before their due dates (with their typically low interest rates) to be included in the discount rate average. NADER REPORT at 86. The discount rate thus was too low to bear any reasonable relationship to the opportunity cost of capital. _Id._, _citing_ Interview by W. Kip Viscusi with David Flipse, Chief of the Bureau of Reclamation, Economics Branch, June 24, 1970.

This situation was sought to be rectified in 1968 when the Water Resources Council revised the discount rate procedures by including in the average for purposes of setting the discount rate all long-term Treasury Bonds that would fall due 15 years or more from today rather than from their date of issue. NADER REPORT at 87.

It has been maintained that the proper method for determining the discount rate would reflect the opportunity cost of private spending using a long-term private riskless interest rate. NADER REPORT at 87. In arriving at this conclusion, the Joint Economic Committee's Subcommittee on Economy in Government reasoned that such a discount rate would "preclude the displacement of private investments more profitable than Bureau projects." \(^{168}\) _Id._ at 88, _quoting_ SUBCOMM. ON ECONOMY IN GOVERNMENT OF THE JOINT ECONOMIC COMM., 90th CONG., 2D SESS., REPORT ON ECONOMIC ANALYSIS OF PUBLIC INVESTMENT DECISIONS: INTEREST RATE POLICY AND DISCOUNTING ANALYSIS 10 (1968). Used in this fashion, the discount rate would serve the purpose of eliminating those projects in which benefits do not exceed costs.

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quoting the *Calvert Cliffs* test as adopted by the Eighth Circuit. Although the Corps of Engineers usually uses a 50-year life span in its computations, during the early planning stage of the project the cost-benefit ratio was computed on a projected 100-year life span. When the estimated life span was halved, the benefit-to-cost ratio dropped below what was necessary to make the project environmentally acceptable. Furthermore, the court noted that the Corps had emphasized a per-year benefit of freshwater commercial fishing amounting to $29,000 while failing to take into account an estimated annual loss in salt-water commercial fishing of $500,000.07

Similar cost-benefit abuse in under-calculation of environmental costs and overestimation of project benefits was apparent in *Environmental Defense Fund, Inc. v. Corps of Engineers.* In arriving at the benefit-cost ratio the Corps referred to the future creation of outdoor recreational benefits as a result of the damming while making no effort to determine whether the dam might cause any recreational losses by destroying the stream recreation offered by the Cossatot as a free-flowing river. Thus, by failing to take into account the cost factor of losing stream recreation, the Corps had overstated the net recreational benefits with the result being a distorted benefit-cost ratio.171

Another significant shortcoming of the cost-benefit analysis in the environmental context is the difficulty inherent in determining precisely what environmental effects are likely to occur as a result of a given project. Such a controversy developed in the case of *Reserve Mining Co. v. United States.* At issue in *Reserve Mining* was the public health impact of the taconite tailings being discharged by Reserve's plant into the waters of Lake Superior and its dust emissions into the air surrounding the plant. The plaintiffs argued, and the district court found, that these discharges substantially endangered the health of the residents in several communities around Lake Superior. After 139 days of trial which included testimony from over 100 witnesses, over 1,621 exhibits, and over 18,000 pages of transcript, the district

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169. Id. at 1364.
170. Id. at 1363-81.
171. 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973).
173. 498 F.2d 1073 (8th Cir. 1974).
court found that the fibers discharged by Reserve were either identical or similar to amosite asbestos, that exposure to these fibers can produce asbestosis, mesothelioma and cancer of the lung, gastrointestinal tract, and larynx, and hence substantially endangered the health of the people in the areas around the plant and those procuring their water from certain areas of Lake Superior. On the basis of this public health hazard the court found a common law nuisance and ordered that such discharges from Reserve be immediately enjoined.175

In reviewing whether Reserve’s discharges and emissions created a common law nuisance, the Court of Appeals for the Eighth Circuit determined that the evidence did not support a finding of a substantial health hazard and hence stayed the district court’s injunction.176 By permitting Reserve to continue discharging its tailings into the water and air, the court of appeals allowed what the district court found to be “[a] situation where a commercial industry is daily exposing thousands of people to substantial quantities of a known human carcinogen.”177

A court’s task of determining the exact nature of the environmental effects which are likely to occur is extremely difficult. Evaluating those effects in monetary terms, when coupled with the latitude that exists in identifying and measuring project costs and benefits and the ease with which agencies can manipulate the variables, renders judicial review of agency compliance with the substantive mandate of NEPA through analysis of the agency’s cost-benefit balancing nearly an impossibility. If sorting through this maze of variables in an effort to determine if “the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values” appears to be a responsibility difficult to discharge, a look at court action utilizing the Calvert Cliffs’-EDF formulation lends credence to the weightiness of this task. A review of the case law reveals that in those instances in which a court reviewed an agency decision on the merits under NEPA using the Calvert Cliffs’-EDF test, the action has been allowed to proceed.178

A recent law review note concluded that a close examination

175. Id. at 1449-53.
176. Reserve Mining Co. v. United States, 498 F.2d 1073, 1082-84 (8th Cir. 1974).
177. 6 E.R.C. 1449, 1450 (D. Minn. 1974).
178. See, e.g., Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Eng’rs, 470 F.2d 289, 301 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973).
of NEPA's section 101 indicates that the Calvert Cliffs'-EDF formulation fails to properly implement the intent of the statute.\(^{179}\) In searching for a coherent framework within which agencies and courts may more effectively discharge their responsibilities under NEPA, the note suggested "the least adverse alternative approach to substantive review under NEPA."\(^{180}\)

IX. THE LEAST ADVERSE ALTERNATIVE APPROACH TO SUBSTANTIVE REVIEW UNDER NEPA

In setting forth a framework for substantive review under NEPA, the note focused on the language of section 101(b) which declares that the federal government must "use all practicable means, consistent with other essential considerations of national policy,"\(^{181}\) to further a number of environmental goals. Stating that this command "directs agencies to do all they can to protect the environment within two constraints—that environmental protection be both 'consistent with other essential considerations of national policy' and 'practicable,'" the note concluded that the propriety of substantive review under NEPA will depend on whether "judicially manageable standards may be derived from these two terms . . . ."\(^{182}\)

Examining first the "consistency" element and finding that section 101 does not require that protection of the environment always be of paramount importance in reaching a decision on projects implementing essential national policies, the note reasoned:\(^{183}\)

\(^{179}\) The Least Adverse Alternative Approach, supra note 140, at 747. In justification of his adoption of a cost-benefit standard in Calvert Cliffs', Judge Wright relied upon NEPA's legislative history, focusing on one of Senator Jackson's statements which "specifically recognized the requirement of a balancing judgment." Id., quoting Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1113 n.9 (D.C. Cir. 1971). The author of the note argued that Senator Jackson's statement "does not necessarily [support] a cost-benefit approach. For example, adverse environmental effects might be justified by the satisfaction of other needs, such as national security, that are so fundamental that they must prevail without regard to environmental costs." Id.

The force of this legislative history is questionable given the fact that "after the Calvert Cliffs' decision Senator Jackson asked the Council on Environmental Quality whether it interpreted NEPA to require cost-benefit analysis." Id., at 747 n.77. See Hearings on the Calvert Cliffs' Court Decision Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., Ser. 92-14, pt. 1, at 37-38 (1971); id. pt. 2, at 389.

\(^{180}\) The Least Adverse Alternative Approach, supra note 140, at 735.

\(^{181}\) Id. at 748, quoting NEPA § 101(b); 42 U.S.C. § 4331(b) (1971).

\(^{182}\) The Least Adverse Alternative Approach, supra note 140, at 748.

\(^{183}\) Id. at 748-49.

The note cited as an example of the difference between the standard postulated and the cost-benefit approach, proposed construction of a dam for purposes of flood control.
Rather, it requires only that [environmental] measures be consistent with some means of implementing the broad policies . . . . Where the only means of implementing a national policy is a project that is environmentally unsound, NEPA does not preclude it. So long as environmentally preferable alternatives to a proposed project are available, however, section 101(b) requires that the least adverse alternative be selected.

The author explained that the basic difference between this standard and the cost-benefit approach is that the former may permit approval of a project whose environmental costs exceed its economic benefits. Furthermore, under cost-benefit analysis it is suggested that a project might be allowed despite the existence of less adverse alternatives.

Turning then to the NEPA requirement that environmental measures be "practicable," the author noted the difficulties involved in interpreting this provision. In support of the proposition that an alternative to a project proposal could be practicable even though environmental considerations might increase costs, the author quoted from the legislative history of the Act: "The costs of air and water pollution, poor land-use policies and urban decay can no longer be deferred for payment by future generations."

The note suggested application of a "cost-effectiveness" standard to each alternative. Under this approach, which the author indicates is cost-benefit analysis applied to individual alternatives, an alternative to a project would be practicable if "the environmental cost it alleviates is greater than or equal to the additional expenditures it demands." For situations other

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[A] suitable alternative to the construction of a flood-control dam might be the expansion of an existing facility. Although both projects might pass an environmental cost-benefit test, the least adverse alternative approach to NEPA would prohibit the new dam if the expansion project were environmentally superior. Id. at 749 (footnotes omitted).

184. Id.

185. Id. at 750-51. The author rejects the idea advanced in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), that an alternative might be practicable "so long as it is technologically feasible." The Least Adverse Alternative Approach, supra note 140, at 751. Rather, it is suggested that costs must be taken into account because to not do so "could sacrifice essential national needs to environmental concerns . . . ." Id. at 752.

186. S. REP., supra note 35, at 5, as quoted in The Least Adverse Alternative Approach, supra note 140, at 751.

187. The Least Adverse Alternative Approach, supra note 140, at 752.

188. Id.
than the obvious case of cost-effectiveness where an alternative adds no additional costs and is environmentally preferable, the author suggested adoption of a "reasonable increment approach" whereby "rules of thumb" might be developed by the courts to determine in which cases it is reasonable to require additional expenditure in order to alleviate environmental damage.\textsuperscript{189}

A question concerning NEPA's requirement that measures taken for environmental protection be "practicable," left unanswered by the least adverse alternative approach, is "whether an agency must defer to alternatives that are beyond its authority to implement."\textsuperscript{190} NEPA requires federal agencies to coordinate their programs in an effort to avoid environmental harm thereby suggesting "that the least adverse alternatives to which NEPA's substantive mandate requires an agency to defer are not limited to those that lie within its own authority."\textsuperscript{191} However, the author explains that NEPA mandates an actual choice of alternatives only on a showing of practicability.

Where the least adverse alternative to an agency's proposed project may be implemented only by a second agency of the government, the practicability of the alternative is not solely a function of the additional cost it imposes. Instead, it will depend on the likelihood that the second agency will proceed with the alternative and the length of time the second agency will require to make its decision.\textsuperscript{192}

NEPA's requirement of coordination among agencies would seem to compel the first agency to encourage the second agency to adopt the least adverse alternative, and the second to implement the alternative in the absence of unusual administrative burdens or a disruption of agency planning processes. However, an indication by the second agency that a decision to implement the alternative is doubtful (or will not be forthcoming for a length of time) might well render a least adverse alternative impracticable even if it were clearly over-effective.\textsuperscript{193}

X. MITIGATION AND JUSTIFICATION

Whether the least adverse alternative approach adds more
than new terms to existing concepts relating to substantive review is questionable. The author concedes that a judicial analysis of NEPA was advanced in *Sierra Club v. Froehlke*,\(^{194}\) which differs little from the least adverse alternative approach.\(^{195}\) In that case, the court interpreted section 101(b) of NEPA and concluded that “under some circumstances federal agencies must mitigate some and possibly all of the environmental impacts arising from a proposed project.”\(^{196}\) The author states that while the court’s analysis is phrased in terms of mitigation, “an analysis of alternatives beyond modifications of the proposed project is necessary to the selection of the proper means of mitigating environmental harms.”\(^{197}\) The similarity between the analyses is apparent.

The court in *Sierra Club* noted, however, “[i]t may well be difficult as a practical matter for the courts to determine where mere consideration of an alternative is sufficient as contrasted with when actual mitigation is required.”\(^{198}\) To the extent that this determination is a function of the substantive requirement in NEPA that agency actions defer only to “practicable” alternatives, the analysis set forth in the note, assessing boundaries for determining “practicability,” may offer some guidance to the courts in defining the substantive mandate.\(^{199}\)

Using the mitigation approach, a court reviewing an EIS for a proposed agency action would look at whether there had been consideration of those “practicable” alternatives which would mitigate harm to the environment. Agency approval of a project, absent any attempt to implement mitigation measures disclosed in the EIS, should alert the court to a violation of the substantive mandate of section 101 of NEPA. By reviewing agency decisions requiring mitigation of environmental impacts arising from a proposed project via selection of the least adverse alternative, the courts would have gone far in breathing life into the substantive mandate of NEPA.

The court in *Silva v. Lynn*\(^{200}\) interpreted NEPA’s EIS requirement to necessitate justification for the agency’s decision. By holding that “the agency must go beyond mere assertions and

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\(^{195}\) *The Least Adverse Alternative Approach, supra* note 140, at 749-50.


\(^{197}\) *The Least Adverse Alternative Approach, supra* note 140, at 750.


\(^{199}\) *The Least Adverse Alternative Approach, supra* note 140, at 750-54.

\(^{200}\) 482 F.2d 1282 (1st Cir. 1973).
indicate its basis for them, the court appears to have reviewed the adequacy of the EIS in a manner which approximates substantive review. The court determined:

We think it is not too much to ask that the problem be fully depicted, that HUD describe the approach that was taken, and the reasons why the particular mode of control was chosen in preference to others.

By requiring an EIS to disclose alternatives and to justify the selection of its proposal over the alternatives noted, review of the EIS for adequacy blurs with a review of the agency’s decision on the merits. To the extent that the justification offered by an agency to support the adoption of its project is found inadequate in that it fails to conform to the court’s view of what is proper, substantive review of the agency’s decision on the merits has occurred.

XI. Conclusion

In reviewing agency decisions on the merits, the courts may adopt the cost-benefit approach set forth in Calvert Cliffs’ and Environmental Defense Fund, Inc. v. Corp of Engineers, reversing agency action on a showing that the actual balance of costs and benefits that was struck was arbitrary or “clearly gave insufficient weight to environmental values.” Assessing the accuracy of the agency’s cost-benefit analysis is an onerous task given the difficulty of determining the extent and value of environmental harms that an agency action will cause.

Section 102(2)(B), however, directs agencies to develop “methods and procedures” to “insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.” Accurate quantification of environmental data is essential if the cost-benefit analysis is to be an effective tool for comparing project costs and benefits. That the current state of the art does not lend itself to easy estimation of the type

201. Id. at 1287.
202. Id. at 1285.
203. The Least Adverse Alternative Approach, supra note 140, at 740 n.31.
206. See Note, Evolving Judicial Standards under the National Environmental Policy Act and the Challenge of the Alaska Pipeline, 81 Yale L.J. 1592, 1600 (1972).
and degree of environmental impacts or assigning monetary values to them, does not justify a laxity in progressing in this area. NEPA's section 102(2)(B) direction to develop methodologies for the quantification of environmental values demonstrates a full commitment to improving the state of the art in environmental appraisal. Perhaps the courts' task in reviewing an agency's cost-benefit analyses would be facilitated, pending perfection of environmental measuring techniques, if the Natural Resources Defense Council's (NRDC) suggestion were followed. The NRDC proposed that an agency using a cost-benefit analysis should "specify the premises on which the analysis is based, including theoretical assumptions, analytic techniques, and data sources, so that independent evaluation of such decisions can be made."

Given the facility with which agencies can alter the factors that enter into the cost-benefit analysis, the courts should closely scrutinize such factors as the choice of discount rates and the estimated lifespan of the project. The courts should also pay close attention to the characterization of specific recreational or commercial benefits and costs ascribed to a given project, for an overvaluing of one factor or an undervaluing of another may create inaccurate comparisons of costs and benefits.

Whether in reviewing agency decisions on the merits the courts utilize the cost-benefit approach, the least adverse alternative approach, or require the agency to justify its decision and mitigate the environmental impacts arising from a proposed project, it is imperative that agency action under NEPA is not entirely committed to agency discretion. It must be remembered that in general, agencies owe their existence to the need to accomplish a given end, and therefore, cannot always be impartial. If "important legislative purposes, heralded in the halls of Congress are not [to be] lost or misdirected in the vast hallways of the federal bureaucracy," independent review of agency imple-


209. See generally A. Downs, INSIDE BUREAUCRACY 237, 242 (1967) ("[n]o decision making procedure can meet the standard of 'full good faith consideration' if the ultimate deciding authority is committed in advance to one course of action"); Evolving Judicial Standards, supra note 206, at 1626-27.

momentation of NEPA is necessary.

It has been suggested by one commentator that if a court finds that an agency cannot comply with the NEPA standard of "full good faith consideration of environmental standards" in its preparation and consideration of an environmental impact statement relating to a given project, then the court should remand the decision to Congress. Such a situation could arise upon a court's finding that sufficiently definitive estimates of environmental cost are not possible or that a meaningful evaluation of the benefits and alternatives cannot be undertaken.

By passing the National Environmental Policy Act, Congress, inter alia, established a policy designed to rationalize environmental decision-making by requiring, without exception, that all "major Federal action significantly affecting the . . . environment" can only be taken after thorough consideration of their environmental consequences. Obviously, only Congress can authorize exceptions to its own inclusive policies.

This concept of a remand to the Congress as a remedy for environmental litigation would assure that the courts do not make public policy, but that public policy is made by the proper entity.

Since NEPA's inception nearly six years ago, courts have witnessed a reluctant bureaucracy learning to comply with the procedural requirements of NEPA. Time and trial by error have illuminated the path to procedural compliance with the Act. In order to assure that agencies comply with both the form and the substance of NEPA, courts must closely scrutinize agency decisionmaking and require strict compliance with the procedural commands of NEPA, as well as review agency decisions on the

211. Evolving Judicial Standards, supra note 206, at 1631.
212. Id. at 1631, (footnotes omitted) quoting NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1971). The following factors were listed as criteria for determining what federal actions might be subject to a remand disposition in NEPA litigation:
(1) The extent to which the project is committed to administrative discretion; (2) the magnitude of the environmental damage risked by the project; (3) the size of the project; (4) the sophistication of existing environmental and economic knowledge regarding the cost and benefit issues the project raises; (5) the quantum of agency time and money spent in attempting to comply with NEPA; (6) the number of insufficient impact statements issued and; (7) the extent of "bad faith" procedures used in evaluating the impact statement and the project.
merits. Otherwise the irrevocability of environmental degrada-
tion will serve as a permanent reminder of our failure to protect
our irreplaceable natural resources.