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Environmental Law: Strict Compliance with Procedural Requirements of NEPA--The Agencies Must Play by the Rules

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ENVIRONMENTAL LAW: STRICT COMPLIANCE WITH PROCEDURAL REQUIREMENTS OF NEPA – THE AGENCIES MUST PLAY BY THE RULES

Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971)

Petitioners, members of an environmental protection group, brought suit challenging defendant Atomic Energy Commission's (AEC) approval of a construction permit for two nuclear power plants pending a complete review of requirements imposed by the National Environmental Policy Act of 1969[1] (NEPA). Petitioners in a second action sought review of AEC permit granting procedures[2] to determine compliance with the NEPA. Upon consolidation for argument the United States Court of Appeals for the District of Columbia remanded and HELD, that defendant's procedures were inadequate[3] and ordered defendant to revise its rules for strict adherence to each procedural step mandated by the NEPA.[4]

Prior to the NEPA, Congress had enacted environmental protection laws aimed at particular federal programs.[5] Such legislation, however, had limited remedial effects because of its failure to reach all areas of environmental impact. This failure was manifest in provisions of pre-NEPA legislation, which restricted environmental considerations to a narrow range of agency actions.[6] When such considerations were required the agencies needed to consider environmental effects to only a limited extent. For example, in *New Hampshire v. AEC*[7] the state, anticipating thermal pollution, sought to enjoin construction of a nuclear power reactor on one of its rivers. The AEC claimed that consideration of thermal pollution was outside its regulatory jurisdiction and granted a construction permit without considering the environmental consequences.[8] On appeal, the First Circuit

1. 42 U.S.C. §§4321-47 (1970).

2. *Compare* 10 C.F.R. §50, app. D 246 (1971) (AEC rules attacked by plaintiff), *with* 10 C.F.R. §50, app. D. 259 (1972) (AEC rules issued in compliance with the instant decision).

3. Specifically, the court ruled that defendant's regulations violated the Act's requirements by: (1) failing to consider sufficiently the environmental values in agency review processes; (2) failing to adopt within an appropriate time rules requiring consideration of environmental impact; (3) declining to conduct independent environmental impact evaluations when action had been certified by another state or federal agency; and (4) refusing to apply the NEPA to AEC-regulated projects begun before its enactment.

4. 449 F.2d 1109, 1129 (D.C. Cir. 1971).

5. *See* COUNCIL ON ENVIRONMENTAL QUALITY, SECOND ANNUAL REPORT: ENVIRONMENTAL QUALITY 180-87 (1971) [hereinafter cited as ENVIRONMENTAL QUALITY REPORT]. *See, e.g.,* Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970) (interpreting the Wilderness Act, 16 U.S.C. §1131 (1970)).

6. *See, e.g.,* National Park Service Act, 16 U.S.C. §§1, 20 (1970).

7. 406 F.2d 170 (1st Cir.), *cert. denied,* 395 U.S. 962 (1969). *But see* Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *aff'g* 302 F. Supp. 1083 (S.D.N.Y. 1969) (Corps of Engineers must consider a highway project as a whole and not their actions alone).

8. New Hampshire v. AEC, 406 F.2d 170, 171 (1st Cir. 1969).

Court of Appeals held the AEC, under its pre-NEPA statutory mandate,[9] need consider only specific radiological hazards and not broader environmental impacts[10] such as thermal pollution.

Furthermore, policies and conduct of federal agencies have occasionally conflicted with environmental protection and the public interest.[11] The NEPA was developed and instituted amid rising public concern about such conflicts,[12] and the Act is currently the major statutory tool for insuring environmental quality in federal activities.[13] Designed as an agency regulating statute,[14] the NEPA applies to all federal agency actions having potential impact upon the environment.[15] Through the NEPA, Congress has equipped all agencies with environmental regulatory authority and the responsibility to exercise it. [16]

This policy was declared to insure that federal action did not contribute to environmental problems.[17] The Act's substantive policy requires the federal government to "use all practicable means and measures"[18] to protect environmental values, and demands that certain procedural requirements[19] be followed "to the fullest extent possible."[20] The objective was to build into the agency decisionmaking process a systematic and careful consideration of the environmental impact of any proposed action[21] and to codify a continuing federal responsibility to restore and preserve the environment.[22]

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9. 42 U.S.C. §2011 (1970).

10. 406 F.2d at 175-76. *But see* Power Reactor Dev. Co. v. International Union of Elec. Workers, 367 U.S. 396 (1961); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965) (indicates that federal agencies should consider the public interest).

11. U.S. CODE CONG. & AD. NEWS 2751, 2753 (1969).

12. S. REP. No. 296, 91st Cong., 1st Sess. 8 (1969).

13. ENVIRONMENTAL QUALITY REPORT 156.

14. Note, *Retroactive Application of the National Environmental Policy Act of 1969,* 22 HASTINGS L.J. 805, 808 (1971).

15. Regulatory activities of federal environmental protection agencies are not deemed "actions" that require preparation of an environmental impact statement. Council on Environmental Quality Interim Guidelines, 35 Fed. Reg. 7390 (1970).

16. Note, *supra* note 14.

17. *See* Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969,* 1 ELR 50,036 (1971).

18. 42 U.S.C. §4331 (1970) is a congressional declaration of federal policy to use all practicable means and measures in a manner calculated to foster and promote the general welfare. It is also designated to create harmony between man and nature.

19. 42 U.S.C. §4332 (1970) provides that all agencies of the federal government shall use a systematic, interdisciplinary approach in planning and decisionmaking; shall develop methods to consider the environment in the decisionmaking process; include in all reports a detailed environmental impact statement; and shall study and develop alternatives to any proposed action.

20. *Id.*

21. Council on Environmental Quality Guidelines, 36 Fed. Reg. 7723 (1971).

22. *See* Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971).

Despite its recent enactment, specific issues concerning NEPA[23] have already been decided by the courts.[24] A wide range of individuals and groups have been granted standing to assert governmental non-compliance with the NEPA.[25] While the courts have declined to apply the NEPA retroactively[26] the Act has been applied to incompleted portions of projects begun before the passage of the NEPA.[27]

Prior interpretations of the NEPA involved federal agencies that had drawn up procedures in response to the NEPA's procedural requirements, but violated their own procedures in specific actions.[28] Although a few cases implied that agency procedures failed to conform with the NEPA the cases were decided on other grounds. For example, in *Texas Committee on Natural Resources v. Resor*[29] the district court, enjoining construction of a dam, stated "insofar as [those facts were] concerned" the agency procedures did not incorporate an interdisciplinary approach to environmental planning and evaluation.[30] Similar language is found in *Environmental Defense Fund, Inc. v. Corps of Engineers*[31] where plaintiffs sought to enjoin work on the Gillham Dam Project in Arkansas, alleging that the Corps' procedures had not complied with the NEPA. In issuing an injunction the district court noted that the procedures followed did not permit assignment of values to environmental factors in carrying out the NEPA's balancing of costs and benefits.[32]

The court's decisions in both cases were limited to the projects under consideration and did not challenge agency rules. In the instant case, however, the court challenged both the agency's rules and their application. The court objected to defendant's regulations on grounds that they failed

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23. For general interpretations of the NEPA *see* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971); Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969,* 24 RUTGERS L. REV. 230 (1970); Peterson, *supra* note 17; Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?,* 37 BROOKLYN L. REV. 139 (1970).

24. Partial lists of cases may be found for the period of Jan. 1, 1970 to Sept. 1970 and the period to Aug. 1971 in ENVIRONMENTAL QUALITY REPORT 156-70; Peterson, *supra* note 17.

25. *See* Sierra Club v. Morton, 405 U.S. 727 (1972); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), *cert. denied,* 400 U.S. 949 (1970); Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). *See also* ENVIRONMENTAL QUALITY REPORT 156-60, 167-68; Peterson, *supra* note 17.

26. Sierra Club v. Hardin, 325 F. Supp. 99, 126-27 (D. Alaska 1971); Brooks v. Volpe, 319 F. Supp. 90 (W.D. Wash. 1970); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Orc. 1970). *See* Note, *supra* note 14.

27. *See* Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971).

28. West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971).

29. Civil Action No. 549, ELR 20,466 (E.D. Tex. June 29, 1971).

30. *Id.*

31. 325 F. Supp. 749 (E.D. Ark. 1971).

32. *Id.* at 757.

to sufficiently consider environmental values in agency review processes,[33] omitted independent AEC evaluation when a project had been certified as meeting the minimum standards of another state or federal agency,[34] failed to require consideration of environmental impact long after the NEPA's adoption,[35] and refused to apply the NEPA to projects begun before its adoption.[36] The court noted defendant's procedures were at issue and particularly emphasized the distinction between the substantive duties imposed by the NEPA,[37] which leave an agency room for discretion, and the procedural provisions of the NEPA,[38] which are "not highly flexible."[39]

The instant court dealt extensively with the first two issues and discussed the AEC's duty under the detailed statement section.[40] Defendant's procedures provided that although a detailed environmental statement would "accompany" an application through the AEC review process, it would not come before the reviewing board or influence the agency's decision unless a party to the proceeding affirmatively raised an environmental issue.[41] The court considered such an implementation of the NEPA to be a "mockery of the Act,"[42] and read the word "accompany" in the NEPA as displaying a legislative intent that the detailed environmental statement be considered at every stage of the agency review process.[43]

The court relied on the plain wording of the NEPA[44] in invalidating defendant's rule that omitted independent evaluation and balancing of proposed action that had been certified by the appropriate agency to meet minimal environmental standards.[45] Specifically, the defendant had accepted findings of state agencies, approved by the federal government under the Federal Water Pollution Control Act,[46] that supported the AEC project as meeting water quality standards.[47]

The court's construction of the intent of the Senate proponents of the NEPA is questionable.[48] On its face, the NEPA does not require an agency to act or refrain from acting when a project within its purview has been

33. 449 F.2d at 1117.
34. *Id.* at 1122.
35. *Id.* at 1119.
36. *Id.* at 1127.
37. 42 U.S.C. §4331 (1970).
38. 42 U.S.C. §§4332-34 (1970).
39. 449 F.2d at 1112.
40. 42 U.S.C. §4332(2)(C) (1970) (requires agencies to prepare a detailed statement analyzing the environmental impact of the proposed action, any adverse environmental effects, and any alternatives to the action).
41. 10 C.F.R. §50, app. D 246, 249-12, -13 (1971).
42. 449 F.2d at 1117.
43. *Id.* at 1117-18.
44. *Id.* at 1125-27.
45. 10 C.F.R. §50, app. D 246, 249-11 (b) (1971).
46. 33 U.S.C. §1171 (1970).
47. 449 F.2d at 1122.
48. 115 CONG. REC. 29,053, 29,056 (1969) (remarks of Senator Jackson indicating that licensing agencies, specifically the AEC, would not have to make a detailed statement on water quality if an appropriate agency had made a certification).

certified by any other state or federal agency.[49] The intent of the Act's proponents, at least their intent concerning certification of water quality standards,[50] was that when a project met the water quality standards of another state or federal agency the licensing agency would not have to make its own detailed statement on water quality.[51] Although the defendant's extension of such procedures beyond water quality to include any environmental effect certified by another agency could conceivably be justified in light of such statements, the court did not uphold that procedure even for water quality.[52] The rationale for rejecting this approach was that the NEPA requires the economic and technical benefits of a planned action to be assessed and weighed against environmental costs.[53] Only through individualized balancing analysis could the defendant or any other agency insure that the most beneficial action is taken. Moreover, an entirely different kind of judgment is used by a certifying agency. Instead of a balancing analysis, a certifying agency merely determines the magnitude of certain environmental costs and whether these costs exceed predetermined minimums.[54] Certifying agencies do not weigh environmental costs against opposing benefits. Therefore, defendant's collection of certificates did not meet the NEPA's balancing mandate.[55]

While the defendant relied on statements of the Act's major proponents,[56] the use of the congressional "section-by-section analysis" and the statute's plain language leads to an opposite conclusion. The analysis of that section[57] stated its purpose was to insure that an agency did not substitute the procedures in the NEPA for more restrictive procedures established by any other law.[58] A lower court interpreted this section,[59] in dicta, to allow the Secretary of Transportation to rely on certificates submitted to him to approve a highway project.[60] As the instant court noted, however, certifying agencies establish only minimum conditions for a project's environmental effect and do not preclude the reviewing agency, here the AEC, from de-

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49. 42 U.S.C. §4334(3) (1970).
50. 33 U.S.C. §1171 (1970).
51. 115 CONG. REC. 29,052-56 (1969).
52. 449 F.2d at 1122-27.
53. *Id.* at 1123.
54. *Id.*
55. *Id.*
56. 115 CONG. REC. 29,052-56 (1969) (remarks of Senators Jackson and Muskie clarifying the compromise reached between the NEPA and the Federal Water Pollution Control Act, which would have dispensed with the need for licensing agencies to make detailed environmental impact statements on water quality if an appropriate agency had made a certification).
57. 42 U.S.C. §4334 (1970).
58. 115 CONG. REC. 40,420 (1969).
59. Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, 249 (M.D. Pa. 1970) (the Secretary was not required to make independent determination of environmental impact of the project because it would place a staggering burden on the Secretary and would only duplicate prior investigations and determinations).
60. *Id.*

manding stricter controls.[61] The remaining aspects of the defendant's discussion of legislative intent were dismissed by the court, which described the legislative history as "meager,"[62] and maintained that such history could not change the meaning of the clear and plain wording of the certifying section.[63]

The court's discussion of the final issues was brief. While holding that the AEC's delay in implementation was unacceptable, the court recognized that time was needed to provide an orderly period of transition from pre-NEPA conforming procedures.[64] The fourteen months taken by the AEC, however, was held excessive for two reasons. First, the agency was already organized to review health and safety impacts of its licensing decisions.[65] Second, the importance of the NEPA's requirement of any environmental consideration during the agency review process necessitated implementation "at a pace faster than a funeral procession."[66] Adding to the AEC's unfavorable position was its refusal to apply the NEPA to unlicensed projects granted construction permits prior to the NEPA's adoption.[67] The court's holding as to delay in implementation seems warranted in light of the decisions applying NEPA to ongoing projects.[68] Furthermore, delaying NEPA review until a project is actually considered for licensing imposes prohibitive modification cost, which thereby impairs the cost-benefit analysis required by the NEPA.[69]

The immediate effect of the instant decision will be to place federal agencies on notice that both the substantive and procedural requirements of the NEPA will be strictly enforced.[70] In particular, federal agencies must procedurally implement a systematic balancing analysis in each agency action affecting the environment. The results of such a balancing analysis must be included in a detailed statement of environmental impact.[71]

The instant court's conclusion that federal agencies must strictly adhere to the NEPA indicates that the courts will go beyond the letter of the NEPA in protecting the environment. A possible extension of this decision could be the enforcement of the duty to protect environmental values[72] to the same extent as procedural duties. Thus, procedural duties and arguably even discretionary duties imposed by the NEPA may be strictly construed.

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61. 449 F.2d at 1124.
62. *Id.* at 1126.
63. *Id.*
64. *Id.* at 1120.
65. Power Reactor Dev. Co. v. International Union of Elec. Workers, 367 U.S. 396 (1961).
66. 449 F.2d at 1122.
67. *Id.* at 1127.
68. Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971).
69. 449 F.2d at 1128.
70. *Id.* at 1114.
71. *Id.*
72. 42 U.S.C. §4331 (1970).