THE UNITED STATES NATIONAL ENVIRONMENTAL POLICY ACT OF 1969: SOME ASPECTS OF ITS IMPLEMENTATION

by

CHRISTIANNA STACHELRODT CROOK
B.Sc., Portland State University, 1972

A THESIS SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS
in the Department
of
Geography

ACCEPTED
FACULTY OF GRADUATE STUDIES
[redacted]
Assoc DEAN
DATE 7 May 1974

We accept this thesis as conforming
to the required standard

[redacted]

UNIVERSITY OF VICTORIA
MAY 1974

Supervisor: Dr. M.A. Micklewright

ABSTRACT

This study evaluates some aspects of the implementation and impacts of the U.S. National Environmental Policy Act (NEPA) of 1969. The objectives are pursued with special reference to the following: (i) the status of U.S. environmental legislation prior to the enactment of NEPA, (ii) statutory, and (iii) judicial interpretations of the requirements of the Act, (iv) federal agency response to these requirements and (v) the impact of more recently enacted legislation on the provisions of the Act.

The Act requires the preparation of environmental impact statements for all major federal project proposals. These assessments are to accompany the proposals through all stages of the decisionmaking process.

The Act passed Congress almost completely unnoticed by the majority of its members. Many took the language of the Act for legislative rhetoric. Most people have been surprised by the resultant considerable judicial support for citizen-initiated suits which seek the compliance of federal agencies with the requirements of the Act. The broad sweeping language of the Act is often vague and judicial interpretations have not been entirely consistent. In general, however, the courts have determined that federal agencies must assess the impact of proposed "major federal actions...significant[ly] affect[ing] the environment."

A major complaint of environmental groups has been that, once agencies have fulfilled the requirement of Section 102 (the action-forcing provision) by preparing an impact statement, they have been permitted to proceed with their proposed activities at their own discretion. The

courts have commonly maintained that NEPA contains no direct requirement that federal agencies should take heed of the impact statement findings and thus alter or abandon projects for which major adverse environmental impacts are anticipated. Many legal experts disagree with this interpretation of the Act. The question is not yet settled, but support is increasing for the view that the policy statement in Section 101, which defines a government responsibility to protect the environment, may legally require agencies to consider impact statement findings as part of their decisionmaking procedures.

Although variations exist in agency response to the directives of NEPA, a three-phase pattern of incremental compliance has emerged, which applies to the reactions of the agencies between 1970 and 1974. In phase one, agencies characteristically ignored the statute. This phase was summarily terminated by a proliferation of citizen-initiated suits. During phase two, agencies began reluctantly to prepare impact statements but many of these were of poor quality. Phase three, which is currently evident in many agencies, is characterized by an improvement in the quality of prepared statements. In the latter stages of this phase, impact assessment is being incorporated into the decisionmaking process. The improvement in the spirit of compliance of federal agencies with the provisions of this Act may be attributed in large part to the vigilance of environmental groups, public-interest law groups, the Council on Environmental Quality (CEQ),and the U.S. Environmental Protection Agency (EPA).

The 92nd Congress of 1971-1972 was swamped with bills which were designed to amend NEPA, either to strengthen or to debilitate its

effectiveness. By the end of the second session (1972), several major bills which directly concern environmental protection had been enacted but only two instigated any changes in NEPA procedures and neither of these directly amended the Act.

NEPA has initiated a period of environmental legislation which is significantly more responsive to the problems of environmental degradation than earlier legislation. However, while compliance with the mandate of Section 102 may result in less destructive dams and nuclear reactors, this is not an end in itself. The full potential of the Act will not be realized until the Act is effectively applied to broad agency and national programs.

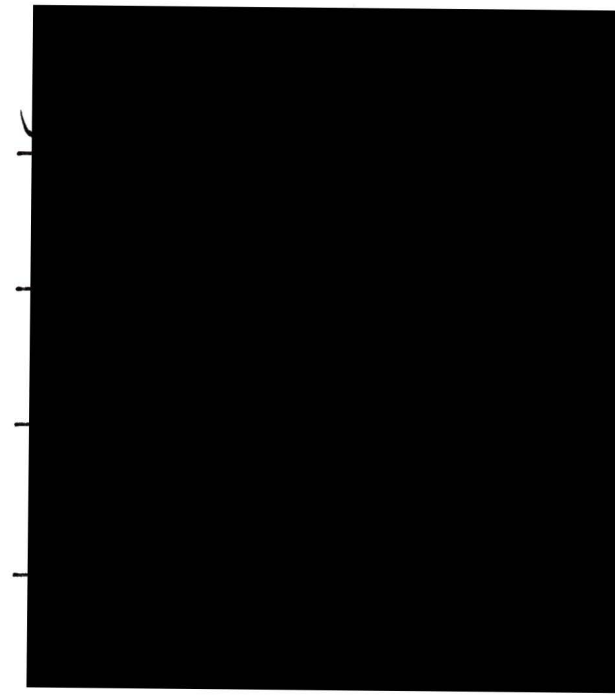

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

I would like to express my gratitude to the many people who have assisted me and provided encouragement at various stages during this study. In particular, I would like to thank my Supervisor, Dr. Malcolm A. Micklewright of the Department of Geography for his direction, patience, and constructive criticism of the research, compilation and writing stages of the thesis.

Considerable appreciation is also extended to the following: Dr. W.R. Derrick Sewell of the Departments of Geography and Economics for his guidance and inspiration throughout my graduate work; Dr. Bret Wallach of the Department of Geography whose direction at various stages of the research provided valuable clarification; Dr. Norman Ruff of the Department of Political Science for pertinent suggestions and assistance during the final writing stages; and Dr. Colin Wood and Ms. Lorna Barr of the Department of Geography for general assistance.

In addition, I would like to express my gratitude to Mr. Fred March, Assistant Regional Counsel of the Environmental Protection Agency, Region X, Seattle, for his technical assistance and critical review of the study, Dr. Daniel P. Beard of the Environmental Policy Division of the Congressional Research Service of the Library of Congress for supplying considerable pertinent materials and for his continued interest and reassurance, and Dr. William Byers of the Department of Geography of the University of Washington for facilitating my research at Condon Law Library.

The invaluable help of Mrs. Shirley Johnson, Miss Renee Stovold, Mrs. Gladys Howard, Mrs. Allison Griffith, and Mrs. Mary Burrows who

kindly typed the thesis and offered many helpful suggestions is greatly appreciated.

Special thanks go to Ms. Christine Derbyshire for patient assistance in proofreading. I would, furthermore, like to acknowledge the assistance of many librarians and research personnel both at the University of Victoria and the University of Washington libraries.

Finally, I wish to offer my sincere gratitude to my husband, Raymond, and to our children Jon and Heather, for their enduring patience, encouragement and assistance, without which this study would not have been completed.

PREFACE

The intent of Congress in passing the U.S. National Environmental Policy Act (NEPA) of 1969 was to ensure that federal agencies consider environmental values as part of their decisionmaking procedures. The purposes of the present study are to determine judicial interpretations of the duties which the Act imposes upon federal agencies, evaluate agency response to these requirements, and examine modification of NEPA's mandate by recent Congressional enactments. To this end, the following major questions are considered:

(i) The study examines the characteristics, scope and effectiveness of U.S. environmental legislation prior to the enactment of NEPA in 1969. This examination demonstrates that much of this earlier legislation was piecemeal and partially or totally ineffective in preventing environmental degradation. It was within such a context that the need for environmental legislation of greater scope and purpose was perceived during the nineteen-sixties.

(ii) Statutory interpretations of the Act are evaluated. The language of parts of the Act is rather ambiguous. In the present study, therefore, particular emphasis is placed upon the legislative history of the Act which facilitates a more complete understanding of Congressional intent in formulating the language of NEPA.

(iii) The study probes judicial interpretations of the legal obligations of federal agencies under the terms of the Act. This is based largely on a review of court decisions. The judiciary has had to cope with the ambiguities of the Act in the wake of a plethora of citizen-initiated suits, and its interpretations have tended to be varied and inconsistent. Undoubtedly the courts occupy a prominent position in the

efforts to improve environmental quality, and may be "...the most important factor in determining the scope, impact and duration of the conflict."[1]

(iv) The extent of compliance of federal agencies with the provisions of the legislation is discussed. It has been primarily the reluctance of agencies to comply with these provisions which has resulted in substantial citizen-initiated litigation. Some consideration is given to modifications of agency procedures which have resulted from the requirements of NEPA. It appears that the degree of agency compliance has varied through time from a grudging acquiescence with the 'letter' of the law to a sincere attempt to incorporate the 'spirit' of the law as an integral component of agency goals.

(v) The impact on NEPA of the environmental legislation which has been enacted since 1969 is considered. Some of the bills are expected to modify to some extent the scope, procedures and effectiveness of NEPA.

There are several interesting aspects of the implementation of NEPA which are beyond the scope of the present study but which offer important avenues for further research. These include such problems as the following:

(i) the need for improved techniques for the evaluation of environmental impact;

(ii) a detailed investigation of existing environmental impact statements (EIS) to determine their validity;

(iii) a general evaluation of the extent to which NEPA has resulted in a reduction in the pace of environmental degradation; and

(iv) the need to incorporate the findings of EIS within general national and regional planning goals.

The major relevance and interest of this study lies in its relationship to the major national and international issue of environmental degradation. In the past, development in North America has been characterized by a lack of constraints.[2] It has proceeded largely without regard for its impacts on either the physical environment or regional economics or local societies.[3] There are numerous documented examples of developments in the public sector which have caused widespread and unnecessary damage. For example, the oil industry was negligent in the case of the Santa Barbara Channel blow-out of 1969. In the face of tremendous public opposition, the U. S. Department of the Interior permitted drilling in a zone of highly incompetent sediments. The escape of oil which accompanied the blow-out resulted in several deleterious effects including devastation of the marine environment in the area and undermining of the local tourist industry.[4]

It is true that, before the enactment of NEPA, some government agencies commissioned impact statements, either for specific projects or as a matter of policy, but these were usually restrictive in scope and rarely concerned with economic and social impact.[5] Furthermore, the findings of these statements exerted little influence on decisionmaking. Mechanisms were not usually available to the public for the reviewing of developments during the early planning stages. Public reaction was confined to retrospective critiques of projects after 'irreversible' decisions which involved major commitments of resources had been taken.[6] Development also tended to be unrelated, in most instances, to any scheme

for national, regional or even local, planning.[7]

The enactment of NEPA has led to significant changes in the processes of development planning. Federal agencies which are engaged in development are now required to give some consideration to environmental questions. They are required to produce EIS for proposed developments which should alert decisionmakers to possible impacts on the physical, social and economic environments. These statements are available for public review and private citizens and groups now have access to the courts in cases of alleged non-compliance with the provisions of the Act. It is this legislative action as an instrument of change, its development and its implementation which are the particular concerns of this study.

Too frequently in the past, political influences have been ignored or subordinated to physical, economic, social, cultural and technological influences in studies which have attempted to interpret the morphologies and functionings of landscapes. The present study demonstrates the fundamental influences which government policies have begun to exert upon landscape evolution. The Act and similar legislation could potentially control the direction of future modifications of the environment such that the effects of random ('free') forces may be greatly reduced. The question of NEPA is but another aspect in the growth in planning and control of future development.

The thesis is composed of eight chapters. Chapter One provides a preliminary review of the Act together with some brief comments on its impact on the federal government, on the public and on the general status of environmental litigation. Chapters Two and Three present background information concerning the scope and effectiveness of environmental litigation prior to the enactment of NEPA in 1969. In Chapter Two, texts

and articles which discuss environmental law are reviewed. They reveal some of the tactical methods which were being employed at the time in environmental law suits. In Chapter Three, the case of U. S. water pollution legislation is discussed as an illustration of the situation prior to the enactment of NEPA. Data are obtained from an inspection of the statutes and published legal opinion relative to this legislation.

Chapter Four consists of three sections. In the first, the legislative history of NEPA is examined in order to comprehend with greater insight the mood of Congress and the impact of the many papers, government studies and legislative debates which together are responsible for the final form of the Act. In the second section, an analysis of the language of NEPA is undertaken. The statutes are subjected to close scrutiny with the aid of published legal analyses of the Act. In the third section, the relationships to NEPA of environmental provisions which were passed into law in 1970, the first effective year of the Act, are briefly examined. Congressional documents, particularly committee prints and hearing results which deal with environmental legislation, were utilized in this discussion.

The scope and meaning of the Act within the context of court decisions are reviewed in Chapter Five. The Environmental Law Reporter[8] (ELR), a private publication, and the 102 Monitor,[9] a government publication, both of which report monthly summaries and discussions of NEPA cases, were employed in determining judicial interpretation of the requirements imposed upon federal agencies by NEPA. Other sources which analyze cases and materials on environmental law were also consulted.

Chapter Six examines the nature and pattern of federal agency compliance with the NEPA mandate. The results of questionnaire and

personal interviews, both of which were largely administered to government personnel of the EPA, form the basis of this chapter. In addition, significant information was obtained from government studies and legal articles and reports.

Chapter Seven examines bills which were proposed to the 92nd Congress of 1971-1972. Some bills were supportive of the goals of NEPA while others sought to reduce its effectiveness. Particularly valuable insights into the mood of the 92nd Congress are obtained from reports of hearings which were held before two Senate Committees and one House Committee concerning newly-introduced environmental and resource-related legislation. These committees are the Senate Committees on Interior and Insular Affairs and on Public Works, and the House Committee on Merchant Marine and Fisheries.

A summary and conclusions of the study are contained in the final chapter (Chapter Eight). The effectiveness of the National Environmental Policy Act of 1969 in ensuring the inclusion of environmental values in the decisionmaking activities of federal agencies is evaluated. Some implications for the future of this legislation are also drawn from the activities and orientations of the 93rd Congress (1973) and some lines of further research are suggested.

FOOTNOTES TO PREFACE

[1]Harold P. Green, The National Environmental Policy Act in the Courts: January 1, 1970 - April 1, 1972, (Washington D. C.: The Conservation Foundation, 1972), p. 3.

[2]Clarence J. Davies, III, The Politics of Pollution, (New York: Pegasus, 1970), p. 17.

[3]J. H. Dales, Pollution, Property and Prices, An Essay in Policy-Making and Economics, (Toronto: University of Toronto Press, 1968), p. 12.

[4]Lee Dye, Blowout at Platform "A", the Crisis that Awakened a Nation, (Garden City, N.Y.: Doubleday, 1971); the entire text concerns these issues.

[5]Gilbert F. White, "Environmental Impact Statements," The Professional Geographer, Vol. 24, No. 4, (November, 1972), p. 308.

[6]Ibid., p. 302.

[7]John Rahenkamp, Walter Sacho and Roger Wells, "A Strategy for Watershed Development that Beats the Bulldozer by Using Land-Sale Profits to Preserve Green Space," Landscape Architecture, (April, 1971), p. 235.

[8]The Environmental Law Reporter (ELR) is published monthly by the Environmental Law Institute. This publication reports and comments upon suits enacted under NEPA and other environment-related statutes.

[9]The 102 Monitor is published monthly by the U. S. Council on Environmental Quality. It periodically reports upon NEPA court decisions, environmental impact statements and other matters pertaining to the Act.

CHAPTER ONE

THE NATIONAL ENVIRONMENTAL POLICY ACT: A PRELIMINARY REVIEW

1.1. THE NATIONAL ENVIRONMENTAL POLICY ACT

Mounting evidence of environmental deterioration, existing federal pollution control legislation which was inadequate to resolve the problem, and increasing concern in the public sector over this situation, encouraged Congress in 1969 to enact legislation which was designed to protect the environment of the United States. The National Environmental Policy Act (NEPA) was signed into law by President Nixon as his first presidential act in 1970. The Act declares it to be 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, ...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.[1]

The primary goal of Congress in formulating the Act was to institute as a major federal policy the protection and enhancement of the environment. Although the Act includes certain provisions which may be viewed as tools for the furtherance of this goal, the full potential effectiveness of these provisions has yet to be realized and there is much doubt concerning their ultimate scope, an issue which is discussed at greater length in Chapters Four and Five.

Five major provisions of the Act are worthy of note. The first is the broad statement of policy itself which, as noted above, directs that the government should seek to enhance the environment and that every citizen should contribute towards this goal.[2]

A second provision creates a three-man presidential advisory Council on Environmental Quality (CEQ) whose duties are to advise the President concerning "...conditions and trends in the quality of the environment," and to oversee agency compliance with NEPA. Members of this council are appointed by the President to "...serve at his pleasure."[3] A third provision directs the CEQ to prepare annually an Environmental Quality Report[4] which is to be transmitted to Congress.

A fourth provision requires government agencies to prepare detailed statements of the environmental effects of any major action which is proposed where the action may significantly affect the quality of the human environment. According to Section 102 of the Act, the statements are expected to consider:

> (i) The environmental impact of the proposed action,
> (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) Alternatives to the proposed action,
> (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[5]

The agencies are also bound to obtain the comments of other concerned federal agencies, the CEQ, the President and the public concerning any anticipated environmental impacts. This provision is an action-forcing provision which lends a measure of muscle to the lofty ideals of NEPA. A

fifth provision directs that investigations shall be conducted into environmental systems.[6]

1.2. THE INITIAL IMPACT OF NEPA

The important implications of the Act for development agencies are that they must now consider environmental factors and must expose their development plans and their environmental decisionmaking procedures to critical public review. The likely consequence of non-compliance is litigation, most often instigated by citizen groups.

When the NEPA legislation was first enacted, there was no indication that Congress had considered the possibility that the provisions of this rather vaguely-worded legislation would give rise to citizen suits or that NEPA would be regarded as creating judicially-enforceable rights or duties.[7] According to Senator Henry M. Jackson, NEPA's author, "...everybody thought it was rhetorical and meaningless...there was a gross lack of appreciation for the significance of that language.[8] Moreover, Daniel A. Dreyfus, a staff member of the Senate Interior and Insular Affairs Committee, who drafted much of Section 102, expected the environmental impact statements (EIS) of federal agencies to be brief general statements which would average approximately two pages in length.[9] Furthermore, while the creation of the CEQ was opposed by the Nixon administration, no objection was voiced concerning Section 102.[10] However, soon after the bill became law, environmental lawyers began to use it to stymie major developments, and the administration in turn began to re-evaluate the possible consequences of NEPA.

Vague as this legislation may have appeared, it has given environmental groups a substantial new access to the courts, and, in turn, their

litigation has given NEPA a power which it might never have possessed otherwise. In the first twenty-six months after NEPA had become law, there were more than seventy-five judicial decisions involving this legislation. The larger part of these decisions recognized that NEPA has created obligations on the part of the federal government which private litigants are entitled to enforce through court action. Without a doubt, court interpretation of the statute has extended the meaning of NEPA much further than had been anticipated.[11]

Federal agencies have found this new 'act of exposure' to be quite painful. One member of the Federal Power Commission (FPC) considers NEPA to be a "...paper monster...of great potential harm," and suggests that Congress should review this legislation.[12] Many federal agencies ranging from the Atomic Energy Commission (AEC) to the Department of Transport (DOT), are pressing for legislative exemption from NEPA's Section 102 requirements. The general feeling of the AEC is quite simply that "...[t]he job...of preparing detailed EIS ...required of the Atomic Energy Commission by NEPA, as interpreted by the courts, is one which the agency cannot perform."[13] The agencies fear the environmentalist drive to have the courts displace them as resource decisionmakers and are disturbed that some judges are also beginning to question the substance of their decisions.[14]

Congress intended that NEPA, through Section 102, should foster increased awareness of environmental considerations on the part of agency officials. It was hoped that increased environmental understanding would result in better resource decisionmaking.[15] Many environmentalists, however, contend that this alone does not provide satisfactory incentives for agencies to develop an environmental ethic. They argue that it is

essential that agency administrators be required by law to make decisions which are strongly influenced by EIS findings.[16]

There has been much serious debate of the notion that there should be a legal mandate for agencies to consider the EIS information during decisionmaking, but most courts have determined that no such mandate exists.[17] If that be so, this objective must be pursued by less direct means which provide a lesser guarantee of success. There are at least three such indirect courses of action through which developmental planning may be influenced by environmental questions, although these strategies are not often employed. Perhaps the most desirable course from the point of view of the environmentalists is that the licensing or funding agency may demand consideration of EIS findings by developers as a matter of policy.[18] As a second course of action, environmental groups may make trade-off deals with developers in which the latter agree to change their plans for a particular project while the former agree in return not to pursue massive court actions on this and/or other projects.[19] It is through such court action that developmental resources such as money, time and manpower are sidetracked. Furthermore, the public images of developers may be tarnished during such court proceedings. Agreements out of court, therefore, may prove quite fruitful, at least until agencies become proficient in the writing of satisfactory EIS. The third avenue of influence is an overriding presidential order. For example, on January 19, 1971, President Nixon, under pressure from CEQ, halted construction of the Cross-Florida Barge Canal "...to prevent serious environmental damages."[20]

While one can find instances in which NEPA studies have prompted

changes in a project, such examples are few. In fact, most critics agree that NEPA's main observable function has been to "...furnish a weapon of delay."[21]

1.3. CRITICISMS OF NEPA

NEPA has clearly established itself as one of the most controversial environmental measures of all time "...whose repercussions have rattled virtually every department and bureau of the federal government."[22] The ability of the Act to achieve its policy goals, however, is inhibited by the limited scope of its enforceable requirements. The most outstanding problem, according to environmental interests, is the fact that nothing in the law appears to give any group or person the power of veto over any project or decision, nor does there seem to be any provision which requires an agency to take cognizance of EIS findings in project proposals once the statement is completed.[23] An agency may adhere to the letter of the law by submitting an adequate EIS but it is not necessarily held to compliance with the spirit of the law which affirms a government responsibility to avoid environmental degradation. Therefore, while NEPA may exert substantial influence on agency procedures, it may in fact have little effect on the content of development plans.

Other major grievances against NEPA concern the many problems which the legislation has caused for federal agencies. As a direct result of this law, the federal government is forced to spend thousands of man hours and more than 20 million dollars per year on environmental assessment. These costs have had to be assimilated within the usual agency budgets.[24] Congress did not provide funds for an increase in manpower to staff the interdisciplinary consulting groups which are required

by the Act.[25] It is not unexpected that many administrators interpret the Act primarily as additional paperwork and as an opening wedge for harassment by environmental evangelists.[26] Furthermore, the requirements of the Act have compelled a sometimes agonizing reappraisal of the procedures with which the agencies conduct their business and the manner in which this business affects the environment and have imposed upon the agencies the unfamiliar and often uncomfortable burden of public exposure. Under the terms of the Act, an agency must only produce an adequate EIS to avoid litigation. However, since physical systems, particularly relating to complex pollution problems, are at best imperfectly understood, the fine art of EIS construction has been mastered by few. Hardly a major EIS exists which is free of flaw and is therefore able to avoid prosecution.

In view of agency difficulties and in as much as NEPA requires a new perspective and approach to environmental problems, one which "... goes beyond patching up and pasting up existing projects and proposals to prettify them in the name of environmental quality,"[27] it may be suggested that perhaps one should not expect such innovativeness of the agencies. If innovation and iconoclastic approaches are demanded, the place in which they are least likely to be found is the conventional sort of administrative agency. These federal regulatory agencies appear to be essentially unquestioning when considering the traditional goals of the industries which they regulate. They are suspicious, hostile and extremely defensive when faced with challenges concerning the basic issues which surround their own mission.[28] It has been suggested that "...even with the best of good will", they are poorly suited to be innovative. Either

they lack the legal and political strength to strive for change or their power is great but is built upon a very narrow constituency "...whose attitudes and outlook the agency already tends to reflect, for obvious reasons".[29] The agencies by design and practice have restrictive outlooks and the requisites of NEPA may prove to be beyond them.

It appears that the present Administration has itself come into conflict with NEPA. An example is provided by the case in which the Act conflicted with the Administration's elaborate pollution control program which involved the issuance of federal permits for industrial discharges into the nation's waters.[30] The Administration had been depending upon a questionable interpretation of the Act in assuming that the permit program would be exempt from NEPA.[31] In the case of Kalur v. Resor, the authority of the federal government to issue permits for the discharge of pollutants into non-navigable waters, was challenged by a Cleveland attorney, Jerome S. Kalur, under the Refuse Act of 1899.[32] Furthermore, the plaintiff maintained that the failure of the federal government to require Section 102 statements rendered the permit program invalid. The U. S. District Court for the District of Columbia upheld Kalur's standing and enjoined further issuance of permits.

1.4. MODIFICATION OF NEPA

In the face of such court decisions, the Administration and federal agencies may choose between three possible courses of action. They may (i) continue to prepare many thousands of EIS, (ii) try to overturn unfavorable court rulings on appeal, or (iii) seek to gain legislative exemption from the law.

Most perceive the first as an unacceptable burden on the bureaucracy, the second as a course which is being pursued with little optimism, and the third as a grave political risk.[33] From necessity, however, all three of these courses are being followed to some extent, but perhaps the most effective course of action in the view of embattled bureaucrats is the third, legislative relief.

Much pressure has been exerted and there have been many attempts to instigate such relief. This has been achieved in some instances by the inclusion of amendments to more recent environmental legislation which exempt certain activities from the NEPA requirements. An example of this is the Clean Water Bill which passed the House and Senate in September of 1972, after much debate and trade-off. A major provision of the final bill delegates authority to states for issuance of industrial water-use permits and at the same time strips the Environmental Protection Agency (EPA--the agency which administers nearly all U. S. environmental legislation) of its present permit-by-permit veto authority.[34] This may be viewed as a major success for the present Administration as it had been seeking such legislation since the Kalur decision of January, 1971.

FOOTNOTES TO CHAPTER ONE

[1]National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. Sec. 4321 et seq. Stat. 852, P.L. 91-190, Sec. 101(a); Hereafter cited as NEPA; See full text of the Act in Appendix A.

[2]NEPA, Sec. 101.

[3]NEPA, Sec. 202.

[4]NEPA, Sec. 201.

[5]NEPA, Sec. 102(2)(c).

[6]NEPA, Sec. 204(5).

[7]Harold P. Green, The National Environmental Policy Act in the Courts: January 1, 1970 - April 1, 1972, (Washington D.C.: the Conservation Foundation, 1972), p. 2.

[8]Claude E. Barfield and Richard Corrigan, "Environment Report/ White House Seeks to Restrict Scope of Environment Law," National Journal, (February 26, 1972), p. 338.

[9]Ibid., p. 340.

[10]Luther J. Carter, "Environmental Law (II): A Strategic Weapon Against Degradation?" Science, Vol. 179, (March 30, 1973), p. 1350.

[11]Barfield and Corrigan, "Environment," p. 340.

[12]Robert Gillette, "National Environmental Policy Act: Signs of Backlash Are Evident," Science, Vol. 176, (April 7, 1972), p. 30.

[13]Arthur W. Murphy, "The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup De Grâce?" Columbia Law Review, Vol. 72, No. 6, (October,1972), p. 965.

[14]Ibid., p. 1007.

[15]Fredrick R. Anderson, assisted by Robert H. Daniels, NEPA in the Courts; a Legal Analysis of the National Environmental Policy Act, Resources for the Future, Inc., (Baltimore: John Hopkins University Press, 1973), p. viii.

[16]Barfield and Corrigan, "Environment," p. 336.

[17]"Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline," Yale Law Journal, Vol. 81, No. 8, (July 1972), p. 1592.

[18]Green, "National Environmental Policy Act," p. 9.

[19]Carter, "Environmental Law, (II)," p. 1312.

[20]Walter A. Rosenbaum and Paul E. Roberts, "The Year of Spoiled Pork: Comments on the Courts' Emergence as an Environmental Defender," Law and Society Review, Vol. 7, No. 1, (Fall, 1972), p. 35.

[21]Robert Gillette, "National Environmental Policy Act: How Well is it Working?", Science, (April 14, 1972), p. 347.

[22]Ibid., p. 346.

[23]Frank Kreith, "Lack of Impact," Environment, Vol. 15, No. 1, (January - February, 1973), p. 26.

[24]Ibid., p. 28.

[25]Ibid.

[26]Joseph L. Sax, "New Direction in the Law," Environmental Law, Charles M. Hassett, (ed.), Ann Arbor, Mich: The Institute of Continuing Legal Education, (1971), p. 20.

[27]Ibid., p. 16.

[28]Rosenbaum and Roberts, "Spoiled Pork," p. 36.

[29]Sax, "New Direction," p. 17.

[30]Kalur v. Resor, 335 F. Supp. 1, 1 ELR 20637 (D.D.C. 1971).

[31]Barfield and Corrigan, "Environment," p. 340.

[32]Supra, note 28.

[33]Barfield and Corrigan, "Environment," p. 336.

[34]"A Flurry of Legislation on the Environment," Science News, Vol. 102, No. 13, (September 23, 1972), p. 198.

CHAPTER TWO

DOCTRINES OF CITIZEN RIGHTS

2.1. INTRODUCTION

During the last five years, environmental law in the United States has matured from an infant movement, which was supported by a few ecologically-conscious groups and individuals, and which lacked both proven legal strategies and favorable courtroom precedents, to the status of a widely practiced and highly respected veteran branch of the legal profession.

This development has occurred primarily because the recently-recognized problems of environmental degradation have been deemed subject to the ancient principles of equity jurisprudence and the various rights which are traditionally retained by citizens of the United States.[1] Private citizens have expressed increasing concern over the environmental degradation which has accompanied today's escalating technological developments and are exasperated by the apparent inability of governmental agencies to tackle this problem effectively. Citizens have initiated countless law suits which demand judicial recognition of their right to sue "...the very governmental agencies which are supposed to be protecting the public interest."[2]

These legal struggles have sought to gain judicial recognition of the basic principle that the public has an absolute right to a healthy environment. This right has been described as one of the

> ...fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them in either the national or state constitutions.... The inherent human freedoms with which mankind is endowed are antecedant to all earthly governments; rights that cannot be repeated or restrained by human laws; rights derived from the Great Legislator of the Universe.[3]

The legal theories which have been presented within this mass of litigation have been incredibly diverse and range from overall constitutional claims of an essential right to a decent environment[4] to specific claims such as the relatively simple assertion that an administrator has committed a procedural error.[5] Prior to 1970, however, the major tenets from which environmental law developed, were centred essentially upon four spheres of legal doctrine. These were (i) the public trust doctrine, (ii) the Ninth Amendment of the U. S. Constitution, (iii) the nuisance doctrine and, more recently, (iv) specific environmental legislation.

The purpose of this chapter is to review the basic doctrines of citizen rights, i.e. the public trust doctrine, the Ninth Amendment and the nuisance doctrine, and to consider their usage by lawyers prior to the enactment of the National Environmental Policy Act (NEPA) in 1970. Following this, Chapter Three considers specific environmental legislation.

2.2. THE PUBLIC TRUST DOCTRINE

The public trust doctrine underlies all claims by the citizenry to protection of the nation's environment. This has been expressed by Yannacone in the following words:

> All of our national natural resource treasures are held in trust for the full benefit, use and enjoyment of all the people of the United States, not only of this generation, but of those generations

> yet unborn, subject only to wise use by the current nominal titleholders.[6]

The reasoning upon which public trust law is founded has varied in detail according to the contexts within which it has been asserted. For example, one statement of the doctrine maintains that

> ...certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.[7]

Another account holds that certain interests are so particularly the "...gifts of nature's bounty" that they should be held in trust for the entire population.[8] Elsewhere, it has been argued that certain items exist which are not personal belongings in the same sense as a car or coat and that the individual's interest in such items must incorporate the needs of others. In fact, in some instances, "...certain resource uses have a peculiarly public nature that makes their adaptation to private use inappropriate."[9]

In the ensuing discussion particular emphasis is placed upon the public trust doctrine as it relates to water resources which, by their very nature, have always been logically subject to commonalty of ownership.

2.2.1. History

The public trust doctrine is the oldest of the doctrines of citizen rights, dating back to pre-Greek times, and its roots are firmly entrenched in the history of western civilization.[10] Historically, the political situation and the nature of pressures upon particular resources have determined the character of public trust assertions at any given period of the past. As a result, the doctrine is not a single, clearly

defined dictum, but may be viewed as an amalgam of related concepts which have developed empirically in order to apply to various forms of the question of public resources.

The earliest clear statements of 'common property' concepts were developed by the sea-dependent Greeks who were especially concerned with water resource usage. The Greeks held that, by the most basic 'natural law,' the "...air, running water, the sea and consequently the seashore were 'common to all'."[11]

Roman law, which developed from a Greek heritage, maintained that the sovereignty of the government extended over the sea, but that the use of it belonged universally to every subject of the Empire, "...for the unlimited exercise of fishing, navigating and taking water; and as this privilege was illimitable and unrestrainable, so, therefore, it was incapable of individual exclusive appropriation."[12] The law of the Emperor Justinian relates that,

> No one ...is forbidden access to the sea-shore...all rivers and harbours are public, so that all persons have a right to fish therein...everyone is entitled to bring his vessel to the bank...[of the river]... and fasten cables to the trees growing there and use it as a resting place for the cargo, as freely as he may navigate the river itself....Again the public use of the seashore, as of the sea itself, is part of the law of nations; consequently everyone is free to build a cottage upon it...as well as to try to dry his nets and haul them up from the sea. But they cannot be said to belong to anyone as private property, but rather are subject to the same laws as the sea itself, with the soil or sand which lies beneath it.[13]

Drayton argues that this imperial Roman law is the cornerstone from which public trust law developed.[14]

Public trust notions suffered serious erosion in Europe during the middle ages when feudal lords and kings laid claims of private owner-

ship to traditionally public trust resources, particularly to waterways and tidal areas.[15] In England, the signing of the Magna Carta in 1215 signalled the revival of notions of public ownership. It became accepted that there existed "...a great public right, to abolish the forest laws, the game laws...and to make them all free."[16] Gradually, over a period of centuries, royal fishing weirs were removed from the rivers and fishing and navigation rights were reclaimed by the people.[17]

With the increase of commerce in Europe, especially in Britain, during the Industrial Revolution, there occurred a parallel increase in the rate of development of the public trust doctrine. Private ownership had become an entrenched social force and, in response to this, it was necessary, for example, to assert that the public had certain rights at the foreshore "...which superceded any conflicting private rights, including those claimed by the King."[18] An important technique for protection of citizen rights in Britain was the setting aside of specific rights or easements on private property.[19] This concept indicates a significant departure from Roman assertions in that it presumes private ownership rather than common ownership by all of the citizenry.[20] Other public lands were held in trusteeship for the people by the king.

After the United States had become independent from Britain, this trusteeship of public resources passed to the citizens of each state commonly. Common ownership was subject only to "...rights since surrendered by the Constitution to the general government."[21] This was the situation for many decades until the recent impetus for further development of public trust law.[22] Thus,effective public trust case law in the United States has begun to mature only recently as awareness of an envir-

onmental crisis has grown. The evolution of such case law is examined in the following section with particular reference to water resources.

2.2.2. Public Trust Doctrine Applied to Water Resources

The beginnings of the major industrial and commercial developments of the Industrial Revolution are paralleled by a marked increase in pressures on public resources. The incidence of litigation began to rise in response to this situation during the Nineteenth Century, reaching its own peak at the present time. The earliest test cases involved land beneath navigable waters which are owned by the state and held in trust for the people.[23]

For some time there appears to have been some judicial confusion concerning the scope and applicability of the trust doctrine in such cases. Yannacone wrote:

> Some courts have stated that the imposition of the trust is so strict that the public lands may never be alienated. Others have stated that they may not be alienated to private persons for private use. Some have stated that they may not be alienated except in exceptional circumstances and in furtherance of the public interest.[24]

Very early cases appear to have recognized a common public ownership of all navigable waters, the land beneath, and fishery rights also.[25] However, by the late eighteen-hundreds, the courts were upholding the rights of riparian owners, and the hard line formerly maintained on the 'inalienability' of public trust began to weaken.[26] This change in judicial stance appears to have been the result of attempts to balance the conflict of interest which existed between the riparian owner and the public.

As commerce increased in the United States, production, navigation and merchandising became the overriding national priorities. The prevailing outlook was that public resources were inexhaustible. The principles of the trust doctrine, meanwhile, "...were either ignored or applied for the protection of the riparian owners."[27] In Yannacone's estimation,

> ...protection of the environment was relegated to a secondary role and those who protested the rape of the environment were classified as bird watchers, prophets of gloom and doom and socialists. Only in this light can the shift in emphasis from inalienability of the public trust to protection of riparian rights be understood.[28]

It is against this philosophy that environmentalists have struggled to regain a more 'public' interpretation of the trust doctrine.

One of the early attempts to reverse this philosophy occurred when the state of Illinois sued the City of Chicago for the illegal transfer of public resources to private concerns. In Chicago, the city fathers had bestowed the entire harbour area to the Illinois Central Railway Co. and the state sued to have this transfer declared null and void on the grounds that it was a breach of public trust.[29] The Supreme Court ruled that, while it was permissible to grant parcels of submerged lands to private interests, so long as public use of lands and water were not substantially impaired, the removal of an entire city harbour from public usage constituted a violation of the public trust.[30]

2.2.3. The Obligations of Governments

In Illinois Central, the courts ruled on a government decision which went against what was considered to be the obligation of that government. Governments are usually expected to act as a provider of

services to the general public. Government resources, however, may benefit individual groups of the citizenry where this will lead to general benefit. Such is the effect of taxing the more affluent to help to support the poor. In Illinois Central, the city fathers of Chicago appeared to have no such rationale for granting the entire city water front to a private railroad company. There was no justification for expecting the public to bear the burden of cost (through the loss of its port) in order to assist a large private enterprise in this manner. It seems unlikely that private ownership would stimulate further economic development as might have occurred with land grants in remote areas of the country.[31]

The court's decision in this case has become a central precedent in public trust litigation.

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any government conduct either to reallocate that resource to more restrictive uses or to subject public uses to the self-interest of private parties.[32]

The courts are increasingly opposed to such transfers, in spite of the fact that there exists no specific textural prohibition against the disposition of trust properties, even on a massive scale.[33] It should be stressed, however, that while an abundance of dicta exists which implies the existence of rigid restrictions on government disposal of trust properties, these are merely judicial opinions and are not legally binding.[34]

Few public trust cases involve either such dramatic instances of dubious government conduct or such emphatic judicial condemnation of a government decision as were contained in the case of Illinois Central.

While a particular government decision may rarely be actually corrupt, it often appears that the public interest has not been adequately served by that decision. This may, in part, be due to a communication imbalance between decisionmakers, the general public and powerful interest groups. Many of

> The acts in question represent a response to limited and self-interested proponents of public action. It is not difficult to perceive the reason for legislative and administrative actions which give rise to such cases, for public officials are frequently subjected to intensive representations on behalf of interests seeking official concessions to support proposed enterprises...the importance of the grants to those who seek them may lead to extraordinarily vigorous and persistent efforts.[35]

While the moneyed minorities have ample access to administrative and legislative authorities, the diffuse voice of environmental concern has rarely been considered in the decisionmaking process in the past.

2.2.4. The Dilemma of the Courts

Traditionally, the courts have been hesitant to reverse decisions of co-equal government agencies, even when the courts' sympathies obviously lie with the public interest. Some courts have denied the objections of conservationists simply on the grounds that "...protection of the public interest has been vested in...[the]...public agencies."[36]

This attitude exists in part because the courts are accustomed to dealing with the "...meaning of statutory and constitutional language rather than with data which help to identify and compare the benefits and costs at stake in the cases before them."[37] The courts may naturally feel lacking in the necessary expertise to advise agencies concerning the substance of their decisions. Nevertheless, they perceive the potential

for abuse which is present when an agency which is not directly responsible to the electorate has jurisdiction over public resources, and an unmistakable disenchantment with the agencies has been exhibited by many courts.[38]

In some states, the courts have begun to develop procedures through which to control the influence which private-interest groups may exercise over government agencies. The courts are also beginning to encourage the agencies and the legislatures to make policy decisions more openly. In Massachusetts, for example, effective case law developed over the case of Gould v. Greylock Reservation Commission.[39] The court recognized the existence of a breach of public trust but was unwilling to invalidate the legislative act which had allowed it merely because it involved a modification in the use of public trust land.

> Instead the court devised a legal rule which imposed a presumption that the state does not ordinarily intend to divert trust properties in such a manner as to lessen public uses. Such a rule would not require a court to perform the odious and judicially dangerous act of telling a legislature that it is not acting in the public interest, but rather would utilize the court's interpretive powers in accordance with the assumption that the legislature is acting to maintain broad public uses.[40]

Thus, any questionable administrative or legislative decisions may be sent back to the legislature for reconsideration. This compels a body which is directly responsible to the electorate to take a decision. Proponents of a project would have to submit their decisions to public scrutiny and concern in attempting to persuade a majority of elected representatives to give clear approval.

In a different approach to the problem, the Wisconsin Supreme Court has served notice to the legislature and state agencies that when

public benefits from a project, which involves trust property, are uncertain, the proponents of the project must bear the burden of proof. It must be demonstrated that the project benefits the public interest and does not "...rely on traditional assumptions of legislative propriety or administrative discretion."[41]

Not all of the states have adopted such procedures in relation to public trust litigation. During a case in Michigan, the court held that "...real and substantial relation to a paramount trust purpose" must be shown before the state may enjoin encroachments on navigable waters by riparian owners.[42]

In states where the courts have accepted the public right to question agency proceedings, it has been necessary to develop guidelines in order to determine which trust cases have not been considered adequately at the administrative level.[43] Guidelines which have been of great value to the courts include the following:

(i) Has the public property in question been granted at less than market value under circumstances which indicate that there is no real obvious reason for the grant of a subsidy?

(ii) Has the government granted to a private interest the authority to make resource-use decisions which may subordinate broad public resource uses to the said private interest?

(iii) Has there been an attempt to reallocate diffuse public uses either to private uses or to public uses which have less breadth?

(iv) Has an attempt been made to divert a resource from its natural use, such as by using lake-shore property for highway purposes rather than for water-related recreation uses?[44]

By assuming such a stance on the public trust question, a court neither solicits a confrontation with sister branches of the government nor tries to designate itself as a final judge of primary public policy. Rather, it tries to "...identify and correct those situations in which it is most likely that there has been an inequality of access to, and influence with, decision makers."[45] The courts are able to require a project re-examination without endangering the equilibrium of their traditional relationship with co-equal branches of government.

According to Joseph Sax, a recognition of these possibilities is important not so much because it

> ...demonstrates the scope of judicial cleverness, but because it indicates that public trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process.[46]

2.3 THE NINTH AMENDMENT TO THE BILL OF RIGHTS

The Ninth Amendment to the Constitution of the United States, a part of the 1791 Bill of Rights, is designed to protect those fundamental rights "...so basic and important to our society that it would be inconceivable that they are not protected from unwarranted interference," and those rights "...that...would be a natural subject of constitutional protection."[47] The Ninth Amendment declares:

> First that there be prefixed to the Constitution a declaration that all power is originally vested in and consequently derived from the people.
>
> That Government is instituted by, and ought to be executed for, the benefit of the people; which consists of the enjoyment of life and liberty and the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

> That the people have an indubitable, inalienable and indefeasible right to reform or change their government; whenever it be found adverse or inadequate to the purpose of its institution.[48]

The original aim of the 1791 Bill of Rights was to discourage abuse of fundamental personal liberties by federal power. The subsequently enacted Fourteenth Amendment inhibits state power in a like manner.

From the text of the Ninth Amendment, it may be ascertained that not all of the liberties which are to be protected by the Bill of Rights are specifically mentioned in the first eight amendments.[49] From its position at the end of the Bill of Rights, therefore, it serves as a reminder of this fact. The Ninth Amendment is concerned in a general way with the fundamental rights of a free society and could be described as a reservoir of those personal rights which are required to preserve the "...dignity and existence" of man in such a society and which are held in trust until the needs of the society demand their emergence.[50]

Environmental rights are among those rights which do not have a specific textural reference in the Constitution. Yet these rights, as a basis to the preservation of all species, surely fulfill the requirements of being so "...important to our society that it would be inconceivable that they are not protected."[51]

The broad sweeping phrases of the Ninth Amendment must be interpreted within the framework of judicial precedent before they are able to assume the status of concrete legal mandates with respect to environmental rights.[52] Yannacone points out that it is the solemn responsibility of the judiciary to "...fashion a remedy" where a truly 'inalienable' right is violated in the event that no remedy has been provided by legislative enactment. Indeed, judiciary interference is mandatory when it

is established that any freedom has been subverted.[53]

Individual state courts have upheld the application of the Ninth Amendment to the protection of rights which are not precisely mentioned in the Bill of Rights. In Griswald v. Connecticut, for example, the court nullified a Connecticut anti-birth control statute as being incompatible with a constitutionally-protected right of privacy.[54] Judicial argument in this case held that "...specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees, that help to give them life and substance."[55] Concurring dicta have relied strongly on the Ninth Amendment as proof of the existence of "... basic and fundamental rights which the constitution guarantees to the people" beyond those enumerated in the first eight amendments.[56] For example, the question of the upholding of unspecified Ninth Amendment rights in the courts has been further tested in Colorado Anti-Discrimination Commission v. Case.[57]

These cases and others, although not dealing with environmental rights, have set a precedent for the employment of the Ninth Amendment in the courts to secure unenumerated inherent citizen rights. As this doctrine has been held applicable to the rights of privacy, so it could be held applicable to the right to a decent environment.[58] This notion is widely supported by legal scholars yet there has been little support for it from the judiciary. Nonetheless, the Ninth Amendment to the Bill of Rights not only provides a substantial part of the conceptual background of environmental rights but also bestows on the courts the authority to define and secure these rights; and it offers a challenge to the environmental lawyer to undertake work in this field, as conditions of

the contemporary situation may require it.[59]

In conclusion, just as the trust doctrine imposes trustee obligations on resource managers when dealing with public trust lands, so the Ninth Amendment provides "...ample jurisdictional basis for application of the trust doctrine in the appropriate case by the...courts."[60]

2.4 THE NUISANCE DOCTRINE

2.4.1. Implications of the Doctrine

Of all the common law remedies, nuisance has been applied most frequently to environmental law.[61] The word 'nuisance' is derived from the French 'nuire' meaning to injure, hurt or harm. Everything which "...endangers life or health, gives offense to senses, violates the laws of decency, or obstructs reasonable and comfortable use of property is a nuisance."[62]

Nuisance encompasses that class of wrongs which arises from the

> ...unreasonable, unwarranted or unlawful use by a person of his own property, either real or personal, or from his improper, indecent or unlawful personal conduct, working an obstruction of or injury to the right of another or of the public and producing such material annoyance, inconvenience, discomfort, or hurt, that the law will presume resulting damage.[63]

Nuisance may include "...doing a thing...or neglecting to do a thing" on a person's own property which causes injury or annoyance to others.[64]

Nuisance actions are ordinarily classed as public, private, or mixed. The public or 'common' nuisance is one which affects an indefinite number of people. It could affect all the residents of a particular locality, or all people coming within the extent of its range.[65] Private nuisance actions encompass those situations in which

> ...any wrongful act...destroys or deteriorates the property of an individual or of a few persons or interferes with their lawful use or enjoyment thereof, or any act which unlawfully hinders them in the enjoyment of a common or public right and causes them a special injury different than that sustained by the general public.[66]

It is evident that since an injury (pollution or other environmental degradation in this situation) could logically affect both the community at large and an individual as well (beyond the extent of the public injury), this injury may constitute grounds for a mixed nuisance action.[67]

There is no difference between a public and private nuisance in the nature of the offence itself. The number of individuals affected and the remedies available for each class of nuisance are the only significant differences which exist. A public nuisance, as an offense against the state, is indictable while a private nuisance is grounds for a civil suit only and thus is actionable for abatement or damages or both.[68]

Statutes which declare certain acts to be public nuisances are not to be interpreted as limiting nuisance to those acts enumerated. Specific textural reference is not a prerequisite for an action to be qualified as a nuisance.[69] Also it is not required that annoyance or injury should actually take place but it is enough that there exists a "...tendency to annoyance" by an invasion of rights.[70] Furthermore, the fact that an act may benefit the public in some degree does not prevent it from being a nuisance if some effects of this act fall within the definition of a nuisance.[71]

2.4.2. Air Pollution as a Nuisance

Incidences of air pollution have provided a substantial background of case law for the definition of air pollution as a nuisance. Some early nuisance cases established the right of every person to expect the air over his property to be maintained "...in its natural state and free from artificial impurities."[72] However, by air "...in its natural state and free from artificial impurities" is meant pure air consistent with the locality and character of the community.[73] Unfortunately, there is no fastidious test, applicable to all cases, with which to determine whether noxious fumes, smoke or soot are a nuisance. The question of nuisance must depend upon the circumstances of each situation. To constitute a nuisance, fumes or particles released into the air must be "...emitted in unreasonable amounts or in an unreasonable manner" in relation to the particular environment concerned.[74] The question of reasonableness must be determined in reference to the "...locality, the nature of the trade, the character of the machinery, and the manner of using the property" as these factors relate to the output of toxic fumes, etc.

> The degree of freedom from smoke to which one is entitled is relative, and depends upon the locality and prevailing use to which property there may be put. What might constitute a nuisance in one locality would be what reasonably might be expected in another.[75]

Decisions in some early cases, for example, have held that property owners in cities must endure without recourse, smoke "...ordinarily and necessarily incident to city life."[76]

The annoyance and inconvenience suffered from air pollution must be of substantial character and must produce "...actual, tangible, and substantial injury" to neighboring property itself, or such as to

"...interfere sensibly with its use and enjoyment by persons of ordinary sensibilities."

> To constitute smoke as a nuisance, it must be such as to render the occupancy of neighboring property physically uncomfortable to a person of ordinary sensibilities for the purpose to which it is devoted.[77]

Any business, although in itself lawful, which impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter, may be classified as a nuisance if it substantially impairs the comfort or enjoyment of adjacent property owners.[78] The fact that a business causing such a nuisance is carried on in a "...careful and prudent manner and that nothing is done by those managing it that is not...reasonable and necessary" does not constitute a defense.[79] In one such case the owner of an oil refinery was able to show that although his refinery emitted great quantities of noxious fumes, it was not operating in a negligent manner. In finding for the plaintiffs who owned a trailer park and restaurant on a nearby site, the court held that,

> One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions. He is not to do such things at all whether he is negligent or careful...The law of private nuisance rests on the concept embodied in the ancient legal maxim...that every person should so use his property as not to injure that of another...As a consequence, a private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporated right of one's neighbor.[80]

2.4.3. Further Implications of Nuisance

The nuisance concept is applicable in the courts to a great variety of environmental wrongs. It has been successfully employed in

cases which involve everything from noise[81] to water pollution,[82] and including cases which involve employees who work under adverse ventilation conditions, often being exposed to excessive amounts of carbon monoxide.[83]

The case of Yannacone v. Dennison was the first successful attack by a private citizen upon a public environmental toxicant. It was argued that DDT is an actionable public nuisance and that it violates the public's constitutional right to a healthful environment.[84] This case is recognized as a landmark in environmental nuisance litigation. In Yannacone v. Dennison, it was argued that the continued application of DDT, in attempts to control mosquitos in Suffold Co. N.Y., rendered

> ...serious injury to the animal resources of Suffolk County...so probable...as to be considered a certainty as far as modern science is able to ascertain.[85]

It was also asserted that there are

> ...permanent geological, biological, and chemical cycles affecting the environment of not only Suffolk County but the world...[and]...[t]hat the continued injection of DDT in any quantity will cause serious, permanent, and irreparable damages to natural resources.[86]

It was concluded that

> ...the continued use of DDT by these defendants, or by any user who injects the substance into the general environment...constitutes a nuisance, as a matter of law.[87]

While the major line of defense of the defendants was that "...[t]he relative pittance of the stuff that the commission uses is of no real moment in the overall conditions prevailing world-wide," the court held that "...it is no defense to an action to abate a nuisance, that the defendant may be one of many contributors to the nuisance."[88]

This and subsequent suits which have been filed by public interest groups[89] ultimately have resulted in the banning of this Jekyll-and-Hyde compound by the Environmental Protection Agency (EPA).[90]

While this action is recognized as a major victory in the field of environmental law, it is one of only a few such victories. It is true that nuisance actions have provided the basis for resolving many situations in which a few parties directly suffered the effects of pollution from a neighboring industrial plant,[91] but nuisance does not lend itself readily to coping with situations involving more diffuse and widespread effects. Yannacone v. Dennison notwithstanding, the nuisance doctrine has rarely been used to protect widespread public interests because it is usually inhibited by the requirement that public lawsuits may be initiated by the Attorney-General only, and not by private citizens.[92] Until such time as the legislators and the Courts see fit to amend this requirement, nuisance petitions will continue to afford respite to private suits but it may be that only under exceptional circumstances will it serve the needs of environmental groups especially in actions against government-approved or government-sponsored projects.

2.5. PUBLIC RIGHTS, LEGISLATION AND THE ENVIRONMENT

> The nuisance action, the Ninth Amendment and the trust doctrine are the ways the citizen can look to the law for the protection of the environment while awaiting ecologically sophisticated, environmentally responsible, socially relevant and politically feasible legislation.[93]

These three doctrines underlie the contemporary belief in, and struggle for, a decent environment. Public rights have long been recognized in the United States but the law has been tardy in applying these

established principles and traditional legal procedures directly to environmental problems.

Despite a lack of legal precedent, the case law which is reviewed above indicates instances in which the application of these tenets has resulted in successful litigation against environmental degradation. When the total picture is considered, however, it is obvious that such cases have barely scratched the surface of the problem. Only the keenest of legal minds have been even superficially successful in this endeavour. The severity of the legal handicaps under which public groups labor when initiating litigation which is based upon these doctrines, is all too apparent, particularly in those situations where the environmental degradation has resulted from government-approved or government-sponsored projects. All too often, suits of this nature require that one branch of the government, usually the Attorney General or the judiciary, find grievous fault with the basic precepts of another branch, usually an administrative agency or the legislature. Without the basis of more precise legislation, co-equal branches of the government are loath to do this.

Doctrine which must be manipulated by the environmental lawyer to serve the conservationist view obviously does not offer any substantial guarantee to citizens of a salubrious environment. Guarantees may, however, be facilitated by the instigation of a responsive environmental legislation. Insofar as legislators are able to determine the balance which ought to be struck in any given problem area, they should legislate those standards with the greatest precision possible. If such statute guarantees existed, which embodied standards of allowable emissions, the need for common law litigation would likely be greatly reduced, and the

traditional hesitancy of one branch of government to take another to task could thereby be significantly reduced.

The proliferation of pollution legislation which has been enacted by the U.S. Congress is sizeable but of doubtful utility. Chapter Three examines, as an example, the legislative history of U.S. federal water pollution laws through 1966, and offers a review of the effectiveness of these statutes.

FOOTNOTES TO CHAPTER TWO

[1]Victor J. Yannacone Jr., Bernard S. Cohen and Steven G.Davidson, Environmental Rights and Remedies, Vol.1, (San Francisco : the Bancroft-Whitney Co., 1972), p.8.

[2]Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention," Michigan Law Review, Vol.68, (January, 1970), p.473.

[3]Colorado Anti-Discrimination Committee v. Case, 151 Colo.235, 380 P 2d 34 (1962).

[4]Environmental Defence Fund v. Hoerner Waldorf Corp., Civil No. 1694 (D. Mont., Filed November 13, 1968).

[5]D.C. Federation of Civil Assns.Inc. v. Airis, 391 F. 2d 478 (D.C. Cir.1968) - failure to hold public hearings.

[6]Yannacone, Cohen and Davidson, Rights and Remedies, p.11.

[7]Martin v. Waddell, 41 U.S. (16 Ret.), 367, 414 (1842).

[8]Mass. Gen. Laws Ann. Ch.91 (1967), Ch.131 (Supp. 1968), Ch.140, 194-196 (1956).

[9]Sax, "Public Trust", p.485.

[10]William Drayton Jr., "The Public Trust in Tidal Areas : A Sometimes Submerged Traditional Doctrine," Yale Law Journal, Vol.79A, No.4, (March,1970), p.763.

[11]J.B. Moyle, The Institutes of Justinian, 5th ed., (Oxford : The Clarendon Press, 1889), p.3.

[12]William Warwick Buckland, A Textbook of Roman Law from Augustus to Justinian, 3rd ed.; (Cambridge : Cambridge University Press, 1963), p.183.

[13]Thomas Collett Sanders, The Institutes of Justinian, 5th ed.; (London : Longmans, Green and Co., 1874), p.7.

[14]Drayton, "Public Trust", p.763.

[15]S.Moore and H.Moore, The History and Law of Fisheries, (Oxford : The Clarendon Press, 1958), p.132.

[16]Commonwealth v. Alger, 161 Mass. (7 Cush.), 53, 68 (1851).

[17]J. C. Holt, Magna Carta, (Cambridge : Cambridge University Press, 1965), p.49.

[18]Drayton, "Public Trust", p.769.

[19] Ibid.

[20] Moore and Moore, Fisheries, p.16.

[21] Supra, note 7.

[22] Drayton, "Public Trust", p.772.

[23] Yannacone, Cohen and Davidson, Rights and Remedies, p.16.

[24] Ibid.

[25] See for example, Martin v. Waddell, 41 U.S. (16 Ret.) 367, 10 L.Ed 997 (1842); Home v. Richards, 8 Va. (4 Call.) 441; and Yannacone, Cohen and Davidson, Rights and Remedies, pp.16-23, passim.

[26] See for example, Norfolk City v. Cooke, 68 Va. (27 Gratt.) 430 (1876); French v. Bunkhead, 52 Va. (11 Gratt.) 136, 160 (1854); Groner v. Foster, 94 Va. 650, 27 SE 493 (1897).

[27] Yannacone, Cohen and Davidson, Rights and Remedies, p.23.

[28] Ibid., p.24.

[29] Illinois Central R. Co. v. Illinois, 146 U.S. 387 36 L.Ed 1018, 13 S. Ct. 110 (1892).

[30] Yannacone, Cohen and Davidson, Rights and Remedies, p.28.

[31] Sax, "Public Trust", p.491.

[32] Ibid., p.490.

[33] Ibid., p.486.

[34] Ibid.

[35] Ibid., p.495.

[36] Sax, "Public Trust", p.498; See also, Harrison-Halsted Community Group v. Housing and Home Finance Agency, 310 F. 2d 99, 105 (7th Cir. 1962), cert. denied, 373 U.S. 914 (1963).

[37] Sax, "Public Trust", p.513.

[38] See for example, Crawford County Levee and Drainage District No.1, 182 Wis. 404, 196 N.W. 874, cert. denied, 264, U.S. 598 (1924).

[39] 350 Mass. 410, 215, N.E. 2d 114 (1966).

[40] Sax, "Public Trust", pp.494-95.

[41]Sax, "Public Trust", p.514; See also, Crawford County Levee and Drainage, supra , note 38; and Trempealeau Drainage District : Merwin v. Houghton, 146 Wis. 398, 131, N.W. 838 (1911).

[42]Hilt v. Weber, 252 Mich.198, 233 N.W. 159, (1930).

[43]Sax, "Public Trust", pp.562-64.

[44]Ibid.

[45]Ibid., p.514

[46]Ibid.

[47]Yannacone, Cohen and Davidson, Rights and Remedies, p.61.

[48]Ibid., p.63.

[49]Ibid., p.69.

[50]B.Patterson, The Forgotten Ninth Amendment, (Mineola, N.Y. : The Foundation Press, 1955), p.34.

[51]Yannacone, Cohen and Davidson, Rights and Remedies, pp.69-70.

[52]Ibid., p.70.

[53]Patterson, Ninth Amendment, p.45.

[54]381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed. 2d 510 (1965).

[55]Ibid.

[56]Ibid.; See also, Oscar S. Gray, Cases and Materials on Environmental Law, (Washington D.C. : the Bureau of National Affairs, Inc., 1970) pp.1198-99.

[57]151 Colo. 235, 380 P. 2d 34 (1962).

[58]Patterson, Ninth Amendment, p.50.

[59]Roscoe Pound; introduction to The Forgotten Ninth Amendment, B.Patterson.

[60]Yannacone, Cohen and Davidson, Rights and Remedies, p.75.

[61]Ibid., p.77.

[62]Hall v. Putney, 291 Ill. App.508, 10 NE 2d 204, 207 (1937).

[63]District of Columbia v. Totten, 55 App.D.C.312, 5 F 2d 374, 380, 40 ALR 1461 (1925), cert. den. 269 U.S. 562, 70 L. Ed. 412, 46 S.Ct.21.

[64]Kinney v. Koopman, 116 Ala. 310, 22 So. 593 (1896); See also Wylie v. Elwood, 134 Ill. 281, 25 NE 570 (1890); State v. Everhardt, 203 N.C. 610, 166 S.E. 738 (1932).

[65]Burham v. Hotchkiss, 14 Conn. 311, 317, C1840, in Yannacone, Cohen and Davidson, Rights and Remedies, p.78.

[66]Ibid.

[67]Heeg v. Licht, 80 N.Y. 579, 582 (1880); Baltzeger v. Carolina Midland R.Co., 54 S.C. 242, 32 SE 358 (1899); Harris v. Poulton, 99 W.Va. 20, 127 SE 647, 40 ALR 334 (1925).

[68]Kinney v. Koopman, 116 Ala. 310, 22 SO 503 (1896).

[69]Yannacone, Cohen and Davidson, Rights and Remedies, p.80.

[70]Ibid., p.81; See also, Chicago v. Gunning System, 214 Ill. 628, 73 NE 1035 (1905); "That the occupiers of neighboring property may not have sustained injury to property or health is not a defense to a prosecution for a public nuisance"; Moses v. United States, 16 App. D.C. 428, 532 (1900).

[71]Republica v. Caldwell, 1 Dall. 150, 1 L Ed 77 (1785, Pa.), in Yannacone, Cohen and Davidson, Rights and Remedies, p.81.

[72]McGill v. Pintsch Compressing Co., 140 Iowa 429, 118 NW 786 (1908); See also, Matthias v. Minneapolis, St.P. & Ste. M.R. Co., 125 Minn.224, 146 NW 353 (1914).

[73]Ibid.

[74]McGill v. Pintsch Compressing Co., 140 Iowa 429, 118, NW 786 (1908).

[75]Ibid.; See also, Euley v. Sullivan, 75 Md.616, 23 A 845 (1892); Reber v. Illinois C.R.Co., 161 Miss. 885, 138 So.574 (1931).

[76]Higgins v. Decorah Produce Co., 214 Iowa 276, 242 NW 109, 81 ALR 119 (1932).

[77]Supra , note 74; See also Holman v. Athens Empire Laundry Co., 149 Ca.345, 100 SE 207, 6 ALR 1564 (1919).

[78]Prico v. Oakfield Highland Creamery Co., 87 Wis.536, 58 NW 1039 (1894).

[79]Yannacone, Cohen and Davidson, Rights and Remedies, p.87; See also, People v. Detroit White Lead Works, 82 Mich. 471, 46 NW 735 (1890).

[80]Morgan v. High Penn.Oil Co., 238 N.C. 185, 77 SE 2d 682 (1953).

[81]"A noise to amount to a nuisance must be harmful to the health or comfort of ordinary people; it is not enough that a person of peculiar temperament, unusual sensibilities or weakened physical condition may be weakened thereby; the fact that those of exceptional strength or robustness, or whose faculties have become benumbed by close business or other experience therewith, are not disturbed does not prevent it from constituting a nuisance"; Stevens v. Rockpork Granite Co., 216 Mass. 486, 104 NE 371 (1914).

[82]See, for example, Vermont v. New York and International Paper Co., in the Supreme Court of the United States, October term, 1970, in which the court found the defendents culpable of "... discharging pulp and paper plant waste and sanitary sewage into Lake Champlain...in such volumes and of such a degrading nature ... [as] ... constitutes a public nuisance", and ordered "... that such nuisance be abated ... and ... to remove ... the sludge bed that has accumulated therein and to take such other necessary and proper steps as determined by the court to restore the navigability and the quality of waters in Lake Champlain"; formal complaint of this case was reprinted in Yannacone, Cohen and Davidson, Rights and Remedies, pp.123-128.

[83]Yannacone, Cohen and Davidson, Rights and Remedies, p.91.

[84]Yannacone v. Dennison, 55 Misc. 2d, 468, 285 NYS 2d 476 (1967).

[85]Ibid.

[86]Ibid.

[87]Ibid.

[88]Ibid.

[89]Such groups as the Environmental Defense Fund (EDF), the Sierra Club's Legal Defense Fund (LDF), The Citizens Natural Resources Association, and the Izaak Walton League, subsequently joined the legal battle to enjoin the use of DDT.

[90]Luther J. Carter, "Environmental Law (II) : a Strategic Weapon Against Degradation?" Science, Vol.179 (March 30, 1973), p.1310.

[91]See for example, Vowinckel v. N.Clarke & Sons, 216 Cal.156, 13 P 2d 733 (1932); Beach v. Sterling Iron Zink Co., 54 N.J. Eq 65, 33 A 286 (1895); Hurlbut v. Mckone, 55 Conn. 31 10 A 164 (1887); Dennis v. Eckhardt, 3 Grant Cas. 390, 392 (1861, Pa.).

[92]Luther J. Carter, "Environmental Law (I) : Maturing Field for Lawyers and Scientists", Science, Vol.179 (March 23, 1973), p.1206; Nuisance also has an unfortunate historical association with the abatement of brothels, gambling dens, and similar institutions, and the case law is therefore not easily transferable to natural resource problems; in Sax, "Public Trust", p.485.

[93]Yannacone, Cohen and Davidson, Rights and Remedies, p.46.

CHAPTER THREE

THE CASE OF U.S. WATER POLLUTION LEGISLATION

3.1. CONGRESSIONAL RESPONSE - 1888 TO 1966

3.1.1. Some Early Legislation

Shortly after the end of World War II, the U.S. Congress was faced with a rapidly increasing problem concerning the pollution of the nation's waterways.

> The question arose out of public awareness that the quality of water in U.S. rivers and streams was deteriorating noticeably. Industry, after nearly a decade of depression doldrums, had experienced 5 years of war and post-war boom, and an expanding population required new housing and urban facilities; both of these developments increased the extent of use of the Nation's waterways, and virtually every such use increased the level of impurities they carried. In addition, during a decade of depression, the Government had undertaken many civil works, to dredge channels and impound streams behind dams; these had the combined effect of slowing streamflow and decreasing the rate at which impurities were carried away. Moreover, a lively technology had created new pesticides, new detergents, new fertilizers, and many other new chemicals for use in home, industry or farm, that poured into the Nation's drainage system.[1]

The problems were old ones but they now possessed a new alarming intensity. Political reaction to the problems of water pollution had already taken the form of legislative enactments in several instances before the turn of the century. Notable among such legislative acts were the Harbor Pollution Act of 1888 and the Rivers and Harbors Act, or 'Refuse Act,' of 1899.

The Harbor Pollution Act was primarily concerned with preventing the dumping of refuse of any sort, other than normal sewer and street runoff, into the waters of the nation's harbors. It declared such dumping, without a permit issued by the harbor master, to be a misdemeanor punishable by fine or imprisonment or both.[2]

Similarly, the Refuse Act, enacted a full decade later, applies the same restrictions to the use of the nation's navigable waterways.[3] The Army Corps of Engineers administers the permit program for this Act because it also relates to dredging and the construction of bridges, canals, dams, dikes, and other water-related structures. The Refuse Act, like the Harbor Pollution Act, is a criminal statute. Both laws are litigable by private citizens. Moreover, Congress encouraged citizen participation, by allowing, at judicial discretion, "...one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor."[4]

While these statutes are significantly different in character from the water pollution legislation enacted after World War II they, and in particular the Refuse Act, have been used in contemporary situations to deal with pollution problems.[5]

3.1.2. Contemporary Legislation

Since the end of World War II, Congressional response to the problem of water pollution has usually proceeded through combined state-federal pollution abatement schemes, rather than through the use of individual criminal statutes such as mentioned above. Citizen participation in such matters has been practically eliminated and government agencies have exercised a virtual monopoly over the problem of pollution abatement. The development of U.S. water pollution legislation in this

situation has been described as "...a story of delayed and inadequate response to the increasing problems of water pollution."[6]

The aim of this chapter is to examine this legislation as it has developed from 1948 to 1966 in order to set the scene for the enactment of the National Environmental Policy Act in 1970 and in order that the provisions of this Act may be examined in relation to the pollution control scene of the time.

3.2. THE FEDERAL WATER POLLUTION CONTROL ACT OF 1948

The Federal Water Pollution Control Act of 1948[7] (P.L. 80-845, herafter referred to as FWPCA or the 1948 Act) is recognized as this nation's first major water pollution legislation in the U.S.[8] This Act was extended in 1952, revised in 1956 and 1961, altered in 1965 by the Federal Water Quality Act (FWQA) and in 1966 by the Clean Water Restoration Act.[9]

The 1948 Act was an experimental Act which outlined the general framework of subsequent legislation and held it to be the primary responsibility and right of the States to control water pollution.[10] The major responsibility of the federal government was seen to be the provision of aid and support to the states through research and technical and financial assistance.[11]

3.2.1. Provisions of FWPCA

Several provisions of the Act are worthy of note. The federal government was directed to:

(i) Authorize the Surgeon General to assist in and encourage state studies and plans, inter-state compacts, and the

development of consistent state water pollution laws.

(ii) Support research.

(iii) Authorize the judiciary to instigate suits to compel individuals or firms to discontinue practices leading to pollution -- (suits could be brought only after the completion of the lengthy procedures which were required and with the consent of the state).

(iv) Establish the Federal Water Pollution Control Advisory Board.

(v) Provide authorization for the following funding in the Fiscal Years 1949-53:

(a) 22.5 million dollars per year were provided for low interest (2%) loans for construction of sewage and waste treatment plants.

(b) 1 million dollars per year for grants to states for pollution studies.

(c) 800,000 dollars per year for grants to aid in the drafting of construction plans for water pollution control projects.[12]

It should be noted that to qualify for federal financial assistance, each project had to be approved by the state's water pollution control agency and was required to be part of a comprehensive state program for water pollution abatement.[13]

3.2.2. Abatement Procedures

The Act proclaims that the pollution of interstate waterways by one state so as to endanger the health and welfare of residents of another

state is a public nuisance subject to federal abatement proceedings.[14] Whenever the Surgeon General of the Public Health Service (PHS) (at that time a part of the Federal Security Administration which in turn became the Department of Health, Education and Welfare [HEW] in 1954) found such a situation, he was authorized to give notice to the polluters to recommend remedial measures and to set a reasonable time for compliance with his recommendations.[15] He was required to give notice of his actions to the water pollution control agency of the state in which the pollution originated.[16] If abatement procedures were not initiated within the prescribed time, the Surgeon General could give second notices to the polluter and to the agency. He was authorized to include in the second notice to the state water pollution control agency a recommendation that it proceed through court action to abate the pollution.[17] If, within a 'reasonable time' after the second notice, no abatement action had been taken and no suit filed, the Federal Security Administrator might appoint a board and call for a public hearing before that board.[18] A majority of the board must not be members of the Federal Security Administration and there must be at least one representative from the water pollution control agency of the state in which the pollution originated and from the Department of Commerce.[19] The Act further directed that, after presentation of the evidence, the board should recommend to the Federal Security Administrator any 'reasonable and equitable' measures which should be taken for the abatement of pollution.[20] If the polluter did not comply "...within a reasonable time," the Administrator could "...with the consent of the water pollution agency of the State ...in which...the pollution is discharged...," request that the

Attorney-General bring suit on behalf of the United States to secure abatement of the pollution.[21] The Court in such a case was to consider board recommendations, hear any evidence which it deemed necessary, and give "...due consideration to the practicability and to the physical and economic feasibility" of securing abatement of any pollution which was proven.

The 1948 Act made a small beginning in helping state and local governments to build sewage treatment facilities, but it resolved only a few of the pressing problems of water pollution.

3.2.3. Review of FWPCA of 1948

As the foregoing discussion indicates, the enforcement procedures of the 1948 Act left much to be desired. Under the Act a case was litigable only if a polluter was discharging pollutants which were actually endangering the health and welfare of persons in another state. Intrastate streams could suffer heinous degradation and not be eligible for protection under the Act. Furthermore, cases in which pollution originated in intrastate streams which flowed directly into the ocean or where pollution flowed directly into the coastal waters, would not likely be disputable in the courts, in spite of the fact that coastal waters are considered to be interstate waters under the terms of the Act. This is simply because pollution flowing into the coastal waters of one State are not likely to grossly pollute the coastal waters of another state because of the dissipating effect of tides and currents.

A polluter could avoid court action altogether if he could persuade the officials of his own state, who may have a higher concern for commerce than for the healthy environment of an adjoining state, to

refuse to consent to the bringing of an abatement action. He could also avoid court action if he could persuade a majority of the hearing board to recommend abatement measures which appeared to be 'reasonable and equitable' to himself as well as to the hearing board, Prospects of success for the alleged polluter in these measures were enhanced by the fact that those endangered by the pollution were not constituents of the board's officials.[22] Even if the case was tried in the courts, and the pollution were proven, the polluter could still manage to avoid adverse ruling if he could convince the court that abatement would be impractical or physically or economically unfeasible.

3.3. THE FEDERAL WATER POLLUTION CONTROL ACT IN THE 1950'S

3.3.1. The Early 1950's

In 1952, the duration of the FWPCA was extended for three more years. The new law, P.L. 82-579, was amended from "...each of the five Fiscal Years during the period beginning July 1, 1948 and ending June 30, 1953" to read "...each of the eight Fiscal Years during the period beginning July 1, 1948 and ending June 30, 1956."[23]

3.3.2. The 1956 Amendments

FWPCA became the first permanent national pollution control measure in 1956 with the enactment of P.L. 84-660.[24] The 1956 Amendment was intended to "...extend and strengthen" the Federal Water Pollution Control Act.[25] Authority over water pollution control remained with the Surgeon General but the Public Health Service had become a part of the Department of Health, Education and Welfare in 1954.[26]

a. Project Financing

Some major amendments were undertaken in project financing:

(i) Sewage construction loans were discarded in favor of grants.

(ii) Grants of 50 million dollars per year were authorized by Congress, with a limit of 500 million dollars as the maximum which could be spent. The federal contribution was limited to 30% of total cost or 250,000 dollars, whichever was the less, for any one project.[27]

(iii) The Surgeon General was directed to allot portions of a 3 million dollar grant per year to the states on the basis of population, state financial needs and severity of water pollution.[28] This grant was to help establish water pollution control programs.[29] The PHS required that all states have a state-wide prevention and control plan. These plans were to be approved by the PHS.[30]

b. Definition of Interstate Waters

Under the 1948 Act, pollution of any boundary waters was subject to abatement,[31] but the 1956 Act changed the terminology slightly and 'interstate waters' was now defined as "...all rivers, lakes and other waters that flow across, or form a part of, boundaries between two or more states."[32] Neither the Administration nor the Senate Committee had requested such a change but the House version of the bill contained the new definition and ultimately this revised bill became the 1956 amendments.[33]

c. Abatement Procedures

The abatement procedures were also somewhat modified with this amendment. The Secretary of HEW asked Congress for specific amendments.

She suggested that the only purpose which the second notice (as required by the 1948 Act) served was that of delay. She also pointed out that the provision which required the consent of officials of the state in which the pollution originated may be an unwise provision as it gave veto power to the state of origin.[34]

Congress complied with her requests by instigating certain changes in the abatement process. Under the amended version, when the Surgeon General discovered hazardous inter-state pollution, he was directed to notify existing state and interstate water pollution control agencies and then to immediately call an abatement conference.[35] The abatement conference was to be attended by members of water pollution control agencies from all states in which the pollution originated and from those affected by the pollution.[36] These agencies were allowed to bring "...such persons as they desire" to the conference.[37]

The Surgeon General was to prepare and forward to all agencies attending the conference a summary of conference discussions and conclusions.[38] If the Surgeon General determined that the remedial actions recommended by this group were not instigated, after "...at least six months" he was to recommend to the appropriate state agency that abatement action be taken.[39] If neither the recommended remedial measures nor the abatement actions had been taken after a second period of six months, the Secretary of HEW was directed to call a public hearing (as provided for in the 1948 Act--and similarly composed). This board was directed to determine whether, in fact, pollution was occurring and, if so, whether effective progress towards abatement was being made.[40] If they determined that pollution was ongoing, they were to make remedial

recommendations to the Secretary of HEW, who was to forward such findings and a notice to abate within a period of not less than six months, to both the alleged polluter and to concerned state water pollution control agencies.[41] If abatement was not undertaken in the time allowed, the Secretary, with the consent of the water pollution control agency of the state where the pollution originated, or at the request of similar officials in the state affected, might request the Attorney General to file suit to compel pollution abatement.[42] Court procedures and considerations were essentially the same as in the 1948 Act.

3.3.3. Review of the 1956 Amendments to FWPCA

The major improvements which the 1956 amendments afforded to the Federal Water Pollution Control Act included:

(i) The removal of absolute veto power of litigation from the state in which the pollution originated, and

(ii) The change in federal financial assistance for research and construction of sewage facilities from loans to grants.

The maintenance of veto power by the state in which pollution originated had been "...inherently inconsistent with the idea of federal abatement power in the first place."[43] Barry suggests that, if the states had had the political power and desire to challenge the economically influential polluters, they could have enacted and enforced their own anti-pollution laws and federal legislation would have been unnecessary.[44] This may have been part of the reason that no court action was ever brought under the 1948 Act.[45]

With the adoption of federal grants instead of the loan system of the 1948 Act, the FWPCA took on a more permanent character itself

and this may have afforded some small measure of encouragement for the future stability of state water pollution control agencies.

One important aspect of the legislative history of the 1956 Act was a proposal by the House Committee on Public Works that water quality standards be established so that pollution could be defined in advance of any abatement action.[46] Had this proposal been accepted, much time and deliberation in the abatement process could likely have been eliminated. However, both the House and the Senate Committees rejected this version of the bill and the Courts were left to determine in a case-by-case fashion whether an instance of alleged pollution was in fact harmful to the health and welfare of residents.[47] While this proposed amandment was not accepted by Congress as part of the 1956 Act, it at least sowed the idea in the minds of legislators.

A major restriction resulted from the new narrow interpretation of the term 'interstate waters.' Under the 1948 Act, all boundary waters were considered to be interstate in character; however, the 1956 amendment restricted this to mean "...waters that...form...boundaries between two or more states."[48] In this interpretation, all coastal waters, the greater part of the Great Lakes, all rivers, lakes and streams of the states of Florida, Hawaii and Alaska and many other waterways of the nation were excluded from enforcement jurisdiction of the Act. In fact, of the estimated 26,000 water bodies in the U.S., there are only an estimated 4,000 of an 'interstate' nature under the jurisdiction of the 1956 amendments to FWPCA.[49]

Although Congress complied with the 1955 request by the Secretary of HEW to eliminate the second notification from the abatement procedure

in order to eliminate delay, other amendments which were incorporated, modified the procedure in a manner which introduced more delay into the process. Barry contends that the calling of a conference which required giving conferees not less than three weeks notice after the first notice, and the preparing and sending to all agencies of a summary report of all conference discussions including those relating to "...the adequacy of abatement measures and the nature of any delays in effective abatement," took even more time than the practice of a second notice under the 1948 Act.[50] Furthermore, if "...effective progress toward abatement" was not being made at the conclusion of this conference, the Surgeon General could call a public meeting to consider the problem but he was expected to wait "...at least six months" before he began.[51] At the end of this period, an abatement suit could be instigated.

Whereas the 1948 Act gave polluters a reasonable opportunity to comply with an order to abate, the 1956 Act allowed at least six months after the conference recommendations had been received and another period of at least six months after the public hearing, so that the polluter was assured of at least one year of reprieve from an abatement suit. Moreover, when the internal workings of the Act are investigated, it becomes quite obvious that far more than one year will be occupied in this process. The Secretary has to allow time for nominations and appointment of board members, two three-week notice periods before meetings, the time taken in possibly lengthy hearings and additional time to compile meeting discussions and conclusions. When this is all completed, the written consent required from officials in the state of origin of the pollution or a written request from the affected state or states could be expected to take further time as officials would have

to review board recommendations.

Thus, it is clear that substantial delay was still built into every part of the Act. If the 1956 Act took one step forward, it surely took two steps backwards.

3.4. THE FEDERAL WATER POLLUTION CONTROL ACT IN THE EARLY 1960'S

3.4.1. 1961 Amendments

By 1961, Congress was beginning to appreciate the nation's need for the acceleration of its water pollution control program. After numerous hearings the Public Works Committee recommended to Congress the bill H.R. 6441, which became the 1961 amendments to the FWPCA as P.L. 87-88.[52]

a. Provisions of the 1961 Amendments

(i) The administration of the program was vested in the secretary of HEW (formerly the Surgeon General under HEW). Congress apparently hoped that the Secretary would "... establish a new water pollution control agency which would pursue a more aggressive course against water pollution than the [PHS] had."[53]

(ii) For the building of sewage treatment plants, grants were authorized to local communities of:

(a) 80 million dollars in Fiscal 1962,

(b) 90 million dollars in Fiscal 1963,

(c) 100 million dollars in Fiscal Years 1964-67.[54]

(iii) The federal contribution was raised to 30% or 600,000 dollars, whichever was less, for a single project (formerly 30% or 250,000 dollars).[55]

(iv) Federal grants as high as 2.4 million dollars were permitted where communities united to build one project.[56]

(v) Seven regional laboratories were authorized for research and demonstration in improved methods of sewage treatment and control.[57]

b. Abatement Procedures

The Secretary of HEW was permitted to initiate abatement proceedings of pollution in interstate waters through the Department of Justice without the consent of the state officials.[58] The abatement conference and hearing process was left essentially unaltered.

Pollution abatement jurisdiction was extended beyond 'boundary waters between two states' to include navigable interstate and coastal waters but, in these waters, permission was required from the state officials before a federal enforcement suit could be brought.[59]

Although the term 'navigable waters' is not defined by the Act itself, the definition put forward in the case of The Daniel Ball, provides an adequate interpretation.[60] In this case, the Supreme Court in 1871 stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used...as highways for commerce, over which trade and travel are or may be conducted.

This is consistent with the definition of the term 'navigable waters' as used in the 1966 Amendment of the Oil Pollution Act of 1924:

> ...all portions of the sea within the territorial jurisdiction of the U.S. and all inland waters navigable in fact.[61]

As this revised definition includes all navigable water, interstate waters are subject to the terms of the Act. Pollution which is caused by emissions in the same state in which the 'health and welfare' of residents were endangered are now abateable but only upon the request of the governor of the state. Municipalities are also empowered to request federal action but only with the concurrence of the governor and the state water pollution control agency.

3.4.2 Review of the 1961 Amendments to FWPCA

Obvious improvements in the 1961 Amendments to the Act include the expansion of the jurisdiction of federal abatement powers to include all navigable U. S. waters. The Act also gives municipalities greater power over local pollution problems by allowing them to request federal abatement proceedings. Much which appears to be gained by these measures, however, is lost due to the requirement of obtaining the permission of state officials in the expanded areas. This greatly limits the application of the Act. Barry says:

> The fact that the state has not proceeded against the polluter under its police power probably indicates a lack of conviction to proceed at all, since police power measures can be more swift and effective than those available under federal law.[62]

If the state has not already brought proceedings against the corporations which are responsible for the existing pollution, the chances are quite good that they also will not give the federal government consent to do so.

3.5. THE WATER QUALITY ACT OF 1965

Although concrete proposals to legislate water quality standards were rejected by the 1961 amendment proceedings, both the House and the

Senate showed continued interest in the problem, and, by 1965, had proposed new provisions.[63] A compromise version of these proposals became law on October 2, 1965.[64] This measure, the Water Quality Act of 1965 (P.L. 89-234) amended the FWPCA in a variety of ways.[65]

3.5.1. Financial Incentives for Research

Financial incentives were offered by the federal government to states and municipalities for the purpose of improving water control methods.

(i) 20 million dollars per year was authorized from 1966-70.[66]

(ii) 75% of this was for grants to state and local governments to develop better methods of controlling the discharge of sewage.[67]

(iii) 25% was authorized for use by the EPA for research on sewage treatment and disposal.[68]

(iv) Restrictions were placed on the appropriations of funds. The federal contribution to any single project was limited to 50% of total cost.[69] Each project required the approval of the HEW Secretary,[70] who had to determine if a project would usefully demonstrate a new or improved water pollution control technique.[71]

(v) 150 million dollars each year for 1966 and 1967 were approved for sewage treatment works construction.[72]

3.5.2. Federal Water Pollution Control Administration

The WQA established a federal agency originally known as the Federal Water Pollution Control Administration (FWPCA) within the de-

partment of HEW.[73] (Since 1965 the authority of the FWPCA has been transferred twice--first, to the Secretary of the Interior in May, 1966 and later, to the Administrator of EPA in December, 1970).

3.5.3 Water Quality Standards Criteria

The Act required states to adopt and enforce water quality standards that HEW (EPA after December, 1970) considered adequate to halt pollution of the nation's waters.[74] The governor or state water pollution control agency was given one year to file a letter of intent to adopt state water quality criteria.[75] After a review of these criteria and enforcement plans by HEW (EPA after December, 1970), these recommendations were to become the state's water quality standards.[76]

The Act directed the states, in establishing the standards, and the Administrator, in reviewing them, to take into consideration the use and value of a state's water for public water supplies, livelihood of fish and wildlife, and agricultural, industrial and other purposes.[77] If a state failed to file a letter of intent or established standards inconsistent with the requirements of the Act, the Administrator might, after a 'reasonable' notice and a conference of pertinent private and public agencies, prepare criteria and enforcement plans which the state would be required to accept.[78] The state could obtain a respite from the implementation of these standards by requesting a public hearing up to 30 days after these standards had been promulgated.[79] The hearing board was authorized to determine whether federally-imposed standards should be approved or altered, and its findings were binding on both the Administrator and the state.[80]

3.5.4. Abatement Procedures

If the Administrator discovered a source of pollution which reduced the quality of interstate waters below the established standards he was authorized to invoke abatement proceedings as outlined in the 1961 FWPCA Amendments.[81] This provision applied only to interstate waters, however. Thus when pollution reduces the quality of interstate waters below established standards, the consent of the governor of that state is required before abatement action can be taken.[82]

The violators, state, interstate and municipal authorities concerned must be notified at least six months prior to invoking this abatement procedure.[83] In an abatement action, the court shall consider not only the recommendations of the abatement conference, the hearing board and the Administrator, but also the "...practicability and...the physical and economic feasibility of complying" with the standards.[84]

3.5.5. Shellfish Industry Protection

The Administrator of WQA was given the authority to call an abatement conference and request the Attorney General to file an abatement action if pollution is discovered which has done substantial injury to the shellfish industry.[85]

3.5.6. Review of the WQA of 1965

The major improvement of WQA over previous acts was the inclusion of water quality standards. Prior to the 1965 Act, it was necessary to prove that pollution existed which endangered the 'health and welfare' of individuals. Federal enforcement action could be taken only following a lengthy conference and hearing procedure. The adoption of water quality standards, however, provided a relatively simple

basis for showing that pollution existed, so that the extended conference and hearing procedures were eliminated. Unfortunately, however, in adopting this more effective standards-enforcement procedure, Congress also restricted its application. The pre-1965 procedure was applicable to all navigable waters, whereas the WQA standards procedure was applicable to interstate waters only. Jurisdiction over waters which are other than 'interstate' in nature still comes under the more lengthy pre-1965 'ad hoc' procedures. Although the earlier versions of this bill which had been introduced by Senator Edmund Muskie and other legislators, would have made standards applicable to all interstate or navigable waters, the Senate Committee revised the final bill which became the Act so as to provide that standards be applicable to interstate waters only.[86] No explanation was offered concerning the Committee's apparent belief that the states were sufficiently concerned with their intrastate waters to establish their own water quality standards.[87]

An additional enforcement problem concerns the scope of judicial review. As before, the court was directed to give "...due consideration to the practicability and to the physical and economic feasibility" of compliance. Furthermore, under the 1965 Act, in an enforcement proceeding for violation of a standard, the standard itself is subject to 'complete review' by the court.[88] Thus, if a standard is challenged, the court may become involved in a very lengthy redefinition of criteria.

There also exists a serious problem in the abatement of pollution to commercial shellfish grounds, as an abatement suit may be instigated only after 'substantial injury'has been suffered by the industry.

Significant problems also exist with reference to the Interior Department's policy guidelines for the development of state water quality standards. While all of the states have adopted water quality standards criteria and enforcement plans, and most of these have been approved by the Administrator, over half contain 'exceptions' to certain provisions that are still subject to discussions between the Secretary (EPA Administrator after 1970) and state authorities.[89]

Most of these exceptions to general acceptance have been based upon state opposition to two rather controversial criteria. The first is a provision which has been taken as a requirement that state standards include secondary treatment of effluent.[90] This requirement has been contested on the grounds that it exceeds the authority of Section 10(c)(5) of the Act for the Abatement of the "...discharge of matters into such interstate waters which reduces the quality of the waters below the water quality standards established under the Act."[91] Dunkelberger maintains that Congress, in passing the 1956 Amendments, provided for standards of quality that are applicable to the interstate waters themselves--rather than to the effluent or discharge going into those waters.[92]

The second contested criterion requires that the state standards contain a non-degradation provision under which streams which are presently cleaner than required by state standards must not be allowed to be reduced in quality without both state and federal approval.[93]

It has been argued that this lacks consistency with the concept that the use and value of a stream should be taken into consideration in connection with the establishment of standards.[94] Thus under this

doctrine a state should be allowed to permit some reduction in the present quality of a body of water for 'uses considered valuable.'[95] This argument is far from conclusive as the terms 'use' and 'value' of a stream could receive a great variety of definitions from varying segments of the population.

3.6. THE CLEAN WATER RESTORATION ACT OF 1966

3.6.1. Financial Provisions

(i) After requiring the states to establish and enforce water quality standards in 1965 with the passage of the Water Quality Act, Congress in 1966 authorized a quantum increase in federal financial assistance for sewage treatment to aid the states in upholding these standards. The Clean Water Restoration Act of 1966 (P.L. 89-753) authorized more than 5.7 billion dollars for federal participation in the sewage treatment construction program for the Fiscal Years 1967-1972.[96]

(ii) The 30% ceiling on federal grants for construction was maintained in the 1966 Act but the restriction on the amount allowed for a single project was removed.[97]

(iii) Financial incentives were offered to the states to use more state funds for the construction of sewage treatment facilities[98] and to develop and enforce water quality standards for intrastate waters.[99]

(iv) The Act greatly expanded the authorization for planning and research. Existing programs in this area were increased[100]

and additional programs were authorized. Grants covering up to one-half the total costs to develop river basin water quality programs were authorized for states and interstate planning agencies.[101]

(v) More than 300 million dollars was authorized for research in the three year period 1967-1969. The authorization of grants for research and demonstration of methods to reduce pollution was raised from 5 million dollars per year to 60 million dollars in 1968 and 65 million dollars in 1969.[102] Furthermore, over a period of three years, 60 million dollars was authorized to develop new and improved pollution control techniques.[103] The maximum federal contribution to a single project was raised from 50% to 75%.[104]

(vi) 60 million dollars was authorized over three years for advanced waste treatment and water purification grants.[105] The same amount was made available for demonstration grants on the control of industrial water pollution.[106] Industrial pollution grants were set at 75% of the projects' total costs. A limit of one million dollars per project was set for this.[107]

(vii) EPA was directed to conduct a study to determine the feasibility of giving tax incentives to encourage industry to install water pollution control equipment.[108] The Act directed EPA to conduct a three-year study on national estuarine pollution and the need for corrective legislation.[109] EPA was also directed to make studies on water pollution caused by boat discharges and the need for protective legislation.[110]

3.6.2. Abatement Procedures

The 1966 Amendments made many changes in the federal abatement procedures. Anyone affected by, or contributing to, water pollution which was undergoing the abatement procedure, was allowed to appear before the hearing and conference proceedings.[111] An alleged polluter must produce a list of the quantity and character of suspect emissions and show what use of facilities is being made to reduce such discharges, if requested to do so by a majority of the conferees at an abatement conference, or by the Administrator at a hearing.[112] If the alleged polluter is requested to file such a report, he is not required to divulge secret processes or trade secrets. If he refuses to file a requested report, he could be fined up to 100 dollars per day.[113] When water pollution originating in the U. S. endangers the health and welfare of individuals in a foreign country, an abatement conference may be called at the request of the Secretary of State.[114] Countries thus affected are entitled to all the rights and privileges of a state water pollution control agency.[115] Only foreign countries which grant reciprocal rights to the U. S. have access to the abatement procedure.[116]

The Oil Pollution Act of 1924 was also amended by the 1966 Act. This amendment broadened its jurisdiction to include all of the nation's navigable waters,[117] where formerly only coastal waters were specified.[118] The immediate removal of oil spilled by carriers was required.[119] If owners or operators of ships were found to be grossly negligent, a fine of 10,000 dollars could be imposed on the vessel,[120] in addition to the 2,500 dollars already prescribed for individuals violating the Act.[121]

3.6.3. Review of the CWRA of 1966

The major aim of the Clean Water Restoration Act of 1966 was to provide funds to states to assist in the development of water quality standards as required by the 1965 Water Quality Act.[122] Public Law 89-753 authorized more than 5.7 billion dollars in federal funds to help cleanse the nation's waters but only slightly more than one-half of these funds were appropriated.[123] The continued deterioration of the nation's waters clearly indicates that this level of expenditure is less than adequate.[124]

The 1966 Act approved many worthwhile provisions and programs. The lifting of the dollar ceiling on individual projects, the incentives offered to states, (i) to carry more of the total costs of the construction of sewage treatment facilities, (ii) to develop standards applicable to intrastate waters, and (iii) to develop river basin planning, were all commendable provisions. However, the subsequent failure of much of the approved funds to reach state coffers greatly reduced the bill's effectiveness.

Loss of funds notwithstanding, the provisions of the Act did provide some small advances over previous legislation. It may be seen as an improvement in Congressional workings that an awareness of the role of the industrial polluter was finally recognized. Both the scope and the authority of the Oil Pollution Act of 1924 were increased. The inclusion of protection for foreign countries from water pollution which originates in the United States (if reciprocal) was encouragingly realistic.

The requirement that an alleged polluter should file a report

concerning the character, kind and quantity of discharges and facilities employed to reduce pollution, may have been the most forward-looking provision of the Act. Prior to this time, the law provided no vehicle for the state to obtain specific evidence of pollution. This legislation afforded a means to gather data for use in framing specific recommendations.[125] It is quite unfortunate, however, that such a report could not be requested until the abatement procedure was well underway, since this information is of essential importance when the decision to instigate abatement proceedings is being made.[126] Furthermore, the Act requires that the report be based on existing data.[127] Barry suggests that this provision unduly penalizes those industries which have taken the initiative to conduct pollution studies; thus a premium is put on inaction.[128]

The provision which allows any individual who is affected by, or contributing to, pollution which is undergoing abatement, to appear before the hearing and conference boards at last affords the affected public some small voice in the abatement procedure.

3.7 INADEQUACIES OF WATER POLLUTION LEGISLATION

> Although the Federal Water Pollution Control Act was amended four times between 1948 and 1966 each amendment contained only partial solutions and in some cases created new problems. Moreover, some of the basic problems with the enforcement provisions of the Act were never remedied by amendment.[129]

One basic problem with the Act was that the division of authority which it created was far from realistic. The primary aim of the Act had always been to encourage state efforts in pollution abatement. The result of this policy has been to discourage any organized

mobilization of national effort,[130] primarily because it has allowed the overlap of state and federal jurisdictions. Duplication of effort and the waste of valuable resources were the common result.[131] It has been suggested that if legislation specified which aspects of water pollution were more susceptible to the federal regulatory authority, and which to the state and local authority, then each level of government could function at a higher level of efficiency and the overall result would be improved water pollution control.[132] In this way, the optimum use could be made of both federal power and funds and state and local immediacy and initiative.

A second major problem stems from the fact that the Act is not part of any comprehensive pollution control scheme. While the 1966 amendments to the Oil Pollution Act may be establishing a trend in this direction, this is not enough. Part of the reason that only one abatement action was brought under the Act in 22 years was because of the chronic problem of delay which was built into the act.[133] In situations where immediate measures against pollution were required, it has been necessary to use other laws such as nuisance, public trust or the 1899 'Refuse Act'. It is suggested by Barry that Congress should consider incorporating other federal laws such as the Refuse Act into FWPCA making it "...the basis of a comprehensive scheme providing for a full panoply of remedies for all types of pollution."[134]

The requirement, in an abatement suit, that the court consider the 'practicability' and physical and economic feasibility of abatement action remained as great a stumbling block in 1966 as it had formerly been. As a guide to judicial standard, it is not only imprecise but

also provides polluters with a major means of avoiding abatement orders. The result is that the Attorney General is required to prove both that the plaintiff is causing a pollution problem and that a 'reasonable' method of abatement is available. This means that manufacturers will either cause their discharges to be reasonably abateable or that abatement becomes infeasable.[135]

The fact that the social and economic costs of pollution do not accrue to the polluter, constitutes a major failing of the legislation which has been analyzed thus far. Since the Act provides no penalty for previous acts of pollution (except oil pollution), it is economically advantageous to the polluter to institute delays as long as possible. The Act does not forbid actions which lead to pollution, it only offers the future threat of abatement which may only be initiated after lengthy proceedings. If the threat of tangible economic penalties was implemented, the incentive to the polluter to act would increase.

In spite of the CWRA provision permitting hearing and conference boards to call for 'reports' from polluters, the problem of the availability of reliable statistics relating to pollution levels still remains.

As mentioned earlier, these reports must be developed from existing data and cannot be called for until somewhat late in the procedure. Although the legislation imposes a fine on polluters who refuse to file a requested report, the limit of 100 dollars per day placed on the fine reduces the gesture to one of tokenism. Moreover, it is maintained that the wording of the Act suggests that a person could not be fined for not filing a requested report unless he had previously volunteered to file one.[136]

In addition, it was alleged that the whole construction program was self-defeating from the start because no local community could afford to pay the required 40% of a project's costs.[137] Congress finally appropriated more than 5.7 billion dollars but Kitzmiller points out that it will cost 12.5 billion dollars to clean up the Hudson River alone; how can local communities provide 40% of this?[138] It is further suggested that the appropriated sum would have been a sop even if the federal government had appropriated their share of the money, which they failed to do.[139]

Inadequate sums of money spent on water pollution control and abatement is one of the major drawbacks of the pollution program, despite the fact that billions of dollars have been authorized for this purpose by Congress. FWQA figures from 1969 indicate that unless the present rate of spending increases considerably, it will never be possible to catch up on the backlog in waste treatment needs which require funding in order to achieve compliance with established water quality standards. In 1969, that back-log was evaluated at 4.4 billion dollars.[140] FWQA predicted that this would rise to 10 billion dollars by 1975 due to the dynamic effects of growth, the need for recapitalization of existing facilities, and the cost escalations due to inflation.[141]

The deficit in 1970 for industrial waste treatment was more than 8 billion dollars, including the back-log for control of thermal pollution and acid mine pollution.[142]

This problem of insufficient funds was compounded by inefficient utilization of the funds which were available. A 1969 government investigation reveals that:

> Benefits have not been as great as they could have been because many waste treatment facilities have been constructed on waterways where major polluters -- industrial or municipal -- located nearby and continued to discharge untreated or inadequately treated wastes into the water ways.[143]

While the requirement for water quality standards by the 1966 Water Quality Act was hailed by many as the panacea which would clean up the nation's rivers by 1970, many others felt that this alone was not adequate. Since an industry on a clean stream could discharge noxious effluents in greater quantities than it could on an already polluted stream, the net effect of having water quality standards without effluent and degradation standards was to encourage industries to locate on the cleaner streams rather than to install pollution control equipment in existing facilities on polluted streams.[144]

A further reason that the federal water pollution control program has failed to clean up the nation's waters lies with the program's lack of provision for citizen participation. Residents suffering from the effects of pollution are the focal point of protest. They bring pressure to bear on legislators who in turn pressure agencies to pressure the industries to cease and desist. It is probable that a significant portion of the original concern is lost at each exchange. Certainly citizen suits which have been initiated under other statutes such as nuisance have contained sufficient zeal to cause the most hardened industrialist considerable concern.

The nation's Water Pollution Control Act has been much criticized and not without reason. The question remains as to whether the major provisions which many now feel are necessary to clean up the nation's

environment could have been implemented in 1948 even if these provisions had been part of the law. The incremental nature of agency adaptation to change is well known.[145] If the provisions which today seem logical and imperative had been passed suddenly into law in 1948, it is possible that the agencies which would have been responsible for their implementation would have been unable to deal effectively with such major changes in policy and procedures. Furthermore, had such policy been unsuccessful because of institutional restraints, it would undoubtedly have been significantly more difficult to pass corrective pollution-control legislation at a later date. While it is true that the incremental changes which took place with the various amendments to FWPCA could often be seen as two steps backwards for every one step forward, many of these provisions may nevertheless have contributed to the eventual development of some important provisions of the National Environmental Policy Act of 1969.

As the rules which governed participation in the conference and hearing procedures expanded from the 1948 Act (in this, no provision existed for the participation of any representatives of the state whose residents had suffered from the effects of pollution), to the 1966 Act (in this, anyone affected by, or contributing to, pollution could address the board), the way was prepared for court acceptance of citizens' suits against polluters under NEPA. Pressure on the agencies and courts to increase citizen participation in resource decision-making mounted steadily in the late 1960's because of the wide publicity which was being afforded to such environmental disasters as the Torrey Canyon incident and the Santa Barbara Channel blow-out.

Congress became increasingly aware of existing data-gathering problems in connection with the proving of both the existence and causes of pollution. The provisions in the 1966 Act, which required polluters to file reports on emissions, are probably best viewed as an early Congressional version of what later became the environmental impact statement as required of developers under NEPA.

Finally, the idea of the need for a more centralized authority to administer pollution problems may be seen in the process of development with the inclusion of oil pollution legislation within the 1966 Clean Water Restoration Act. Such consolidation was the forerunner to the overviewing environmental protection legilsation of NEPA and to the eventual transfering of such pollution control legislation as the FWPCA to the control of the Environmental Protection Agency by Reorganization Plan No. 3 in 1970.

FOOTNOTES TO CHAPTER THREE

[1]U.S. House of Representatives, Subcommittee on Science Research and Development of the Committee on Science and Astronautics, "Water Pollution Control Act of 1948 : The Dilemma of Economic Compulsion versus Social Restraint," Technical Information for Congress, 92nd. Cong. 1st Sess., Serial A, (April 25, 1969, revised April 15, 1971), p.337.

[2]Harbor Pollution Act of 1888, 33 U.S.C., 441.

[3]Rivers and Harbors Act of 1899, 33 U.S.C., 407-413.

[4]Supra, notes 2 and 3.

[5]See especially Kalur v. Resor, 335 F. Supp. 1, 3 ERC, 1458, 1 ELR 20637 (D.D.C. 12/21/71).

[6]Frank J. Barry, "The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act : A Study of the Difficulty in Developing Effective Legislation," Michigan Law Review, Vol.68, (May, 1970), p.1130.

[7]Act of June 30, 1948, ch.758, 62 Stat.1155(hereinafter 1948 Act).

[8]Ibid., p.1104; U.S. Congress,House Committee on Public Works, Laws Relating to U.S. Water Pollution Legislation, Comm.Prnt. 93-1, (March, 1971), pp.2, 271; S.William Becker and David E. Gushee, "Water Pollution", Congress and the Nations' Environment : Environmental and Natural Resources Affairs of the 92nd Congress, prepared for the U.S. Senate Committee on Interior and Insular Affairs, (January 20, 1963), p.567; House Subcommittee on Science, Research and Development, Technical, p.337; William D. Hurley, Environmental Legislation, (Springfield, Ill., Charles C. Thomas, publisher, 1971), p.5.

[9]House Committee on Public Works, Water Pollution Legislation, pp.1, 271-279 passim.; Hurley, Environmental Legislation, p.5.

[10]House Committee on Public Works, Water Pollution Legislation, p.352.

[11]1948 Act, Sec. 8 (c); See also, Hurley, Environmental Legislation, p.6.

[12]1948 Act, Sec.7 and Sec.8(a),(b),(c).

[13]1948 Act, Sec. 5(a).

[14]1948 Act, Sec.2(d) (1).

[15]1948 Act, Sec.2(d) (2).

[16]Ibid.

[17] Ibid.

[18] 1948 Act, Sec.2(d) (3).

[19] Ibid.

[20] Ibid.

[21] 1948 Act, Sec.2(d) (4).

[22] Barry, "Enforcement Provisions", p.1106.

[23] P.L. 82-579, (1952), Sec.7(a), (b), (c), (d) and Sec.8(e).

[24] House Subcommittee on Science, Research and Development, Technical Information, p.352.

[25] Ch.518, 70 Stat.498; 1956 Act, Introduction, (hereinafter 1956 Act).

[26] 1956 Act, Sec.1(a).

[27] 1956 Act, Sec.6(b) (2).

[28] 1956 Act, Sec.6(c), (d) (2); Hurley, Environmental Legislation, p.8.

[29] 1956 Act, Sec.6(a).

[30] 1956 Act, Sec.6(b) (1).

[31] 1948 Act, Sec.10(e).

[32] 1956 Act, Sec.11(e).

[33] Barry, "Enforcement Provisions", p.1110.

[34] Letter from Mrs.Oveta Culp Hobby to Sam Rayburn, Speaker of the House, January 31, 1955, in Staff of House Comm. on Public Works, 84th Cong., 1st Sess., Comparative Print of Changes Proposed to be Made in the Water Pollution Control Act, p.11 (Comm.Print No.2, 1955), in Barry, p.1107.

[35] 1956 Act, Sec.8(c) (1).

[36] Ibid.

[37] 1956 Act, Sec.8(c) (2).

[38] 1956 Act, Sec.8(c) (3).

[39] 1956 Act, Sec.8(d).

[40] 1956 Act, Sec.8(e).

[41] Ibid.

[42] 1956 Act, Sec.8(f).

[43] Barry, "Enforcement Provisions", p.1112.

[44] Ibid.

[45] Ibid.

[46] U.S. Congress, House Committee on Public Works, Comparative Changes Proposed to be Made in the Water Pollution Control Act (Comm. Print No.2, 1955), p.6.

[47] Barry, "Enforcement Provisions", p.1111.

[48] 1956 Act, Sec.11(e).

[49] H.R. Rep. No.306, 87th Cong., 1st Sess., p.8, (1961).

[50] Barry, "Enforcement Provisions", p.1108.

[51] Supra , note 40.

[52] 75 Stat. 204 (hereinafter 1961 Act); House Committee on Public Works, Water Pollution Legislation, p.2.

[53] Hurley, Environmental Legislation, p.10.

[54] 1961 Act, Sec.5(d).

[55] 1961 Act, Sec.5(a).

[56] Ibid.

[57] 1961 Act, Sec.3(b).

[58] 1961 Act, Sec.8(f) (1).

[59] 1961 Act, Sec.8(f) (2).

[60] 77 U.S. (10 Wall.) 577 (1871), in Barry, p.1114.

[61] Oil Pollution Act of 1924, Ch.316, Sec.2(4), 43 Stat. 604 as amended, 33 U.S.C. Sec. 432 (4) (Supp.IV 1965-1968).

[62] Barry, "Enforcement Provisions", p.1114.

[63] Sec.111 Cong.Rec. 1545 (1965); HR Rep.No.215, 89th Cong., 1st Sess. 18 (1965).

[64] Act of October 2, 1965, P.L. 89-234, 79 Stat. 903, amending 33 U.S.C. Sec.466 (1964) (hereinafter 1965 Act).

[65]Barry, "Enforcement Provisions," p.1114.

[66]1965 Act, Sec.6(c).

[67]1965 Act, Sec.6(a).

[68]Ibid.

[69]1965 Act, Sec.6(b) (2).

[70]1965 Act, Sec.6(b) (1).

[71]1965 Act, Sec.6(b) (3).

[72]1965 Act, Sec.4(f).

[73]1965 Act, Sec.2(a).

[74]1965 Act, Sec.5.

[75]1965 Act. Sec.5(c) (1).

[76]Ibid.

[77]1965 Act, Sec.5(c) (3).

[78]1965 Act, Sec.5(c) (2).

[79]1965 Act, Sec.5(c) (4).

[80]Ibid.

[81]1965 Act, Sec.5(c) (5).

[82]Barry, "Enforcement Provisions", p.1115.

[83]Supra , note 81.

[84]Ibid.

[85]1965 Act, Sec.5(c) (7).

[86]H.Edward Dunkelburger Jr., "The Federal Government's Role in Regulating Water Pollution Under the Federal Water Quality Act of 1965," Natural Resources Lawyer, Vol.3 (1970), p.13.

[87]Ibid.

[88]1965 Act, Sec. 5(c)(5).

[89]U.S. Department of the Interior Release, "Water Quality Standards Approved Under the Federal Water Pollution Control Act, as Amended", (January 28, 1969).

[90]Oscar S. Gray, Cases and Materials on Environmental Law, (Washington, D.C. : Bureau of National Affairs, Inc., 1970), p.472; Dunkelburger, "Regulating Water Pollution", p.6.

[91]Gray, Cases and Materials, p.472.

[92]Dunkelburger, "Regulating Water Pollution", p.6.

[93]Ibid., p.7.

[94]Ibid., p.8.

[95]Gray, Cases and Materials, p.472.

[96]P.L. 89-753, 80 Stat. 1246, (hereinafter 1966 Act).

[97]1966 Act, Sec.203 (b) (2).

[98]1966 Act, Sec.203 (b) (6).

[99]1966 Act, Sec.203 (b) (7).

[100]1966 Act, Sec.6 (a) (1).

[101]1966 Act, Sec.101(c) (1).

[102]1966 Act, Sec.5(h).

[103]1966 Act, Sec.6(e) (1), (2), (3).

[104]1966 Act, Sec.6(c) (1).

[105]1966 Act, Sec.6(e) (1).

[106]1966 Act, Sec.6(e) (2).

[107]1966 Act, Sec.6(b) (2).

[108]1966 Act, Sec.18.

[109]1966 Act, Sec.5(g) (3).

[110]1966 Act, Sec.17.

[111]1966 Act, Sec.10(d) (3).

[112]1966 Act, Sec.10(k) (1).

[113]1966 Act, Sec.10(k) (1), (2).

[114]1966 Act, Sec.10(d) (2).

[115]Ibid.

[116] Ibid.

[117] 1966 Act, Sec.2, and Sec.3.

[118] Oil Pollution Act of 1924, Ch.316, 43 Stat.604; Sec.2(c), (hereinafter 1924 Act).

[119] 1966 Act, Sec.3(b).

[120] 1966 Act, Sec.4(b).

[121] 1924 Act, Sec.4.

[122] Hurley, Environmental Legislation, p.14.

[123] Becker and Gushee, "Water Pollution", p.567.

[124] Ibid.

[125] Barry, "Enforcement Provisions", p.1116.

[126] Ibid., p.1120.

[127] Supra , Note 112.

[128] Barry, "Enforcement Provisions", p.1121.

[129] Ibid., p.1128.

[130] Ibid., p.1117.

[131] Ibid.

[132] Ibid., p.1118.

[133] U.S. Senate Subcommittee on Air and Water Quality Pollution of the Committee on Public Works, Hearings on Activities of the Federal Water Pollution Control Administration : Water Quality Standards, 90th Cong., 1st Sess. 674 (1967).

[134] Barry, "Enforcement Provisions", p.1120.

[135] Ibid., p.1121.

[136] Hurley, Environmental Legislation, p.15; See 1966 Act, Sec. 10 (k) (1), (2).

[137] William M. Kitzmiller, "Federal Legislation : What's Happening on Capitol Hill," Environmental Law, Charles M.Hassett ed. (Ann Arbor, Michigan : The Institute of Continuing Legal Education, 1971), p.65.

[138] Ibid.

[139]Ibid.

[140]Hurley, Environmental Legislation, p.21.

[141]Ibid.

[142]Ibid.

[143]U.S. Comptroller General, Examination into the Effectiveness of the Construction Grant Program for Abating,Controlling and Preventing Water Pollution, No.B-166506 (November 3, 1969), p.4.

[144]Barry, "Enforcement Provisions", p.1122.

[145]Charles E. Lindbloom, The Intelligence of Democracy : Decision Making Through Mutual Adjustment, (New York : The Free Press, 1965), p.144.

CHAPTER FOUR

THE NATIONAL ENVIRONMENTAL POLICY ACT: HISTORY AND PROVISIONS

4.1. LEGISLATIVE HISTORY OF THE ACT

Congress has been dealing with pollution legislation since before the turn of the century.[1] The pace at which legislation in this field has been produced has increased geometrically since the nineteen-fifties and by 1969, it had become a major national attack on the processes of environmental degradation. Congressional committees and their federal agency counterparts have jealously guarded established claims to specific sections of the 'pollution resolution pie'. Not surprisingly, the laws enacted under these imperatives, such as the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act, the Clean Air Act and the Solid Waste Disposal Act have lacked overall coordination of effort and aim. The result has been confusion and frustration because of "...conflicting operational policies of different Agencies."[2] In some areas, jurisdictional overlap has occurred while in other areas, there has been a complete lack of protective legislation.

Some agencies, notably the Atomic Energy Commission (AEC), the Army Corps of Engineers (Corps), and the Department of Transport (DOT), have avoided considering the environmental impact of proposed projects on the grounds that there was no legislative mandate which required such consideration. The nation, despite decades of pollution control legislation, possessed no overall federal statement of policy regarding protection of

the environment.

By the late nineteen-sixties, many Americans were coming to the realization that their environment was deteriorating. They were surprised to discover that, as citizens, they rarely had legal standing to sue polluters in the nation's courts. As the environmental movement grew, pressure to permit citizens access to the courts increased.

As a result of this unsatisfactory situation, Congress felt it necessary to enact legislation which would provide a statement of policy on environmental preservation, a central control to coordinate this policy and greater public input to environmental management.

Congress had in fact, considered the need for a national environmental policy as early as 1959. In that year, Senator James E. Murray (D-Mont.) introduced 'The Resources and Conservation Bill'.[3] This proposal recognized the fragmented nature of the nation's pollution legislation in requesting a "...unified statement of conservation, resource and environmental policy."[4] The creation of a high-level council of environmental advisors was also demanded.[5] The need for a re-organization of agency structure concerning environmental jurisdiction was thoroughly discussed the preceeding year in an article by Gilbert F. White in "Broader Base for Choice: The Next Key Move,"[6] but the article seems to have received little notice. Senator Murray's bill failed to advance beyond committee hearings primarily because it was perceived to be in conflict with a national policy of economic growth but also because to many, it was seen as a rather obscure overreaction to an acknowledged though hardly critical problem.[7]

A second bill was introduced by Senator Gaylor Nelson (D-Wisc.) in 1965,[8] whose purpose was primarily to authorize environmental research.[9] In its original form (the initial legislation was conceived by the Interior Task Force on Ecological Research and Surveys), the bill contained a provision for the Department of the Interior to review and approve the environmental impact of public and private actions. This section was eventually deleted by Nelson's staff because it was felt to be "...politically unfeasible at the time."[10] The bill received support from the Department of the Interior and from many ecologists. The Secretary of the Interior, Stewart Udall, and the President of the Conservation Foundation, Russell E. Train were among those who testified for the bill although Train (among others) felt that the bill was "...unclear and inadequate."[11]

Although S.2282 did not advance significantly beyond the hearing stage, it helped to establish the political credibility of the ecological movement and encouraged more legislators to begin to think in terms of the interdependence of man with the other components of the natural environment.[12]

Legislation similar to these bills was introduced in the mid-sixties with similar success.[13] Other documents which were published in the late nineteen-sixties also appear to have greatly influenced the subsequent development of NEPA. Two papers in particular which influenced the development of this legislation were published in 1968. In June a report entitled Managing the Environment was prepared by Richard A. Carpenter, a senior specialist in science and technology of the Science Policy Research Division within the Legislative Reference Service of the Library of Congress.[14] While this paper was billed as a summary report of the 1968 hearing held on environmental quality by the House Subcommittee on Science, Research and Development, it went far beyond the hearing record to include a complete discussion of environ-

mental issues.[15] Particular attention was focused on the problems of effective organization and implementation of a national policy. Carpenter strongly endorsed the need for a national policy statement, but did not favor the superimposition of an overview council or 'environmental czar' on existing institutions.[16]

> A new organization which might merely increase the conflict would complicate the achievement of other goals, and quite probably would decrease the overall effect of government.[17]

The report suggested that government should

> ...generate an information base and provide a policy to all operational programs (government and private) which will cause individual decision makers to act in harmony with the entire system.[18]

'Technological assessment' was emphasized as an integral component in the attaining of environmental goals.[19] This concept was the forerunner to the now elementary principle that the environmental impact of a project should be assessed at or before the decisionmaking stage.

The second paper of special import to the legislative history of NEPA, written by Dr. Lynton K. Caldwell, Professor of Government at the University of Indiana and special consultant to the Senate Interior Committee, was published in July of 1968. This paper, A Natural Policy for the Environment, also recognized the need for a national environmental policy to serve as a guideline for federal agencies and as a means to measure agency performance.[20] Caldwell, described as the "...leading thinker in bio-politics,"[21] did not feel that a policy statement by itself was sufficient and emphasized the need for back-up legislation with an action-forcing provision.[22]

A National Policy for the Environment discussed the question of Congressional reorganization and spoke favorably of "...some form of high-

level agency in the executive branch, but made no specific commitment to the reorganization of the Legislative Branch.[23] Caldwell seemed to favor 'policy-facilitating bodies' called 'environmental councils' which would assume the responsibility for having issues dealing with a national policy "...laid before the proper decisionmakers."[24]

The system of values upon which a national environmental policy would be based were considered at length in this report. Caldwell said that life should

> ...be lived with the fullest possible measures of personal freedom, health, and esthetic satisfaction that can be found...[and that]...Environmental Policy is a point at which scientific, humanistic, political, and economic considerations must be weighed, evaluated, and hopefully reconciled.[25]

Environmental legislation which was pending in 1968 did not succeed in passing through Congress largely because environmental quality was still not a priority item. The Caldwell and Carpenter reports, however, helped to make it become so.[26]

In 1969 several bills were introduced, which proposed national policy for the protection of the environment but most of these did not emerge from committee.[27] The immediate forebears of NEPA were H.R. 6750, introduced to the House by Congressman Dingell on February 17, 1969, and S.1075, introduced to the Senate by Senator Jackson on February 18.[28] Both bills were modeled after the Employment Act of 1946,[29] which declares a responsibility in the federal government to maintain a prosperous and stable national economy,[30] and which created a three-man Council of Economic Advisors to advise the President and to prepare an Annual Report on the Economy.[31] Dingell's bill included a provision for the creation of a Council on Environmental Quality (CEQ) and contained a succinct statement of policy.[32] Senator Jackson's bill likewise called for the creation of the CEQ and authorized the Secretary of the

Interior to conduct environmental research.[33] At this time, neither bill contained the controversial action-forcing requirement for the development of environmental impact statements by federal agencies.[34]

Most authorities agree that H.R.6750 and S.1075 were probably introduced in this 'naked' form to ensure that the bills, once introduced, would be referred to Congressman Dingell's and Senator Jackson's respective committees (the Merchant Marine and Fisheries, and Interior and Insular Affairs Committees).[35]...Jackson's actions may have been motivated by an attempt to avoid a conflict with the Senate Subcommittee on Air and Water Pollution, chaired by Senator Muskie.[36] Dingell was probably trying to avoid such a jurisdictional dispute, particularly with Congressman Wayne Aspinall's House Interior and Insular Affairs Committee.[37] If the bills had contained the impact statement requirement at this point, Muskie and Aspinall may have been able to have them referred to their committees by claiming greater jurisdictional priority.[38]

After S.1075 was referred to Senator Jackson's committee, a hearing was conducted on April 16, 1969.[39] An amendment was introduced which contained a statement on environmental policy which was essentially the same as Section 101 in the final bill.[40] However, there were two provisions in this amendment which were eventually modified. Jackson's amendment which provided that "...each person has a fundamental and inalienable right to a healthful environment," was changed in conference to "...each person should enjoy a healthful environment." This was apparently done to avoid creating an obviously court-enforceable right.[41]

Jackson's bill also required that a 'finding' be made of the environmental impact of proposed agency actions. This was the forerunner of the Section 102 action-forcing provision of the Act. It was the inspiration of Dr. Lynton Caldwell.[42] Caldwell was Jackson's principal witness at the April

16 Senate hearing.[43] Dr. Caldwell's testimony at the hearings stressed the merits of including such a provision, thereby ensuring that the legislation could fulfill its purpose.[44] Other witnesses, in stressing the need for some means of guaranteeing compliance by Federal Agencies, made repeated references to the Santa Barbara Channel blow-out which occurred earlier in the year despite the government's assurance earlier that all possible precautions for environmental protection were being taken.[45] "...Events showed that the Government's assurances has been more thorough than its precautions."[46]

Rather than overhauling the operating statutes of each agency within the jurisdiction of a variety of committees, as so much legislation had done in the past, it was felt best to "...lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment."[47]

Although Section 102 had no direct legislative model, it was similar to sections of four earlier laws, in which individual agencies had mandates to consider particular environmental impacts:[48]

(i) Section 10(a) of The Federal Power Act[49] requires the Federal Power Commission to consider the interests of commerce, water power and "...other beneficial public uses including recreational purposes";

(ii) Section 4(f) of the 1966 Department of Transport Act, required the Department of Transport to consider alternatives to proposals which affect the environment;[50]

(iii) The Fish and Wildlife Coordination Act[51] requires federal agencies to consult with the Federal Fish and Wildlife Service in planning water resource projects; and

(iv) the National Historic Preservation Act[52] similarly requires a consultation between federal agencies to protect historic buildings and sites from injury or destruction by federally-funded projects.[53]

There was little dispute in the committee over the proposed Section 102 and the staff had little success in trying to generate public interest in the amendment. According to one staff member,

> We tried our dammdest to get people's attention, but everyone thought it was rhetorical and meaningless...there was a gross lack of appreciation for the significance of that language.[54]

On July 10, Jackson brought the bill to the floor of the Senate and it was approved without extended debate and with only a few members on the floor.[55]

Senator Muskie had sponsored a bill (S.7) similar to S.1075 and he became concerned with the language of some provisions of S.1075, particularly Section 102, after the bill was approved. He felt that Jackson's bill had the potential for permitting federal agencies, whose actions might do environmental damage, to justify their own decisions by publishing their own 'findings' on environmental impact. In a Jackson-Muskie compromise on Section 102, the requirement for a 'finding' was changed to a requirement that agencies prepare 'detailed statements' on proposed federal actions.[56] The compromise also contained a requirement that other agencies whose interests might be involved be consulted, and that the resulting environmental impact statements (EIS) be made available to the President, the CEQ and the public.[57]

In order to ensure that the Jackson bill would not adversely affect the air and water standards set by his sub-committee, Muskie

engineered a second amendment. This became Section 104 of the Act which directs that "...nothing in Sections 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency."[58]

Congressman Dingell's bill was brought to the floor of the House on September 23 and an attempt to add Section 102 in a floor amendment was blocked by Representative Aspinall, who had become one of the Act's major opponents.[59] Dingell's bill passed the House on September 23.

With the Muskie amendments, S.1075 went to the House-Senate Conference. In conference, two modifications to the bill were approved. In a measure seen as a compromise between Senator Jackson and Congressman Aspinall, a qualifying phrase was included in Section 102.[60] Agencies were thereby required to comply with the action-forcing provision only "...to the fullest extent possible."[61] Although the conference report states that Aspinall's addition 'qualified' the powers of NEPA,[62] a later House statement said that Section 102 duties were to be complied with fully by every agency "...unless existing statutory law expressly prohibited full compliance or made it impossible."[63]

The second modification was preceeded by remarks by Senator Muskie that Section 102 was designed to "...apply strong pressures on those agencies that have an impact on the environment...[but]...with regard to the environmental improvement agencies...it is clearly understood that those agencies will...not...[be]...modified in anyway by S.1075."[64] Three days later, Dingell stated that Section 102 was not designed to "...result in any change in the manner in which...[environmental-control agencies]...carry out their environmental protection authority."[65]

Only a relatively few Congressional members perceived the importance of bill S.1075.[66] One member of the House who appeared to have

some inkling of the bill's consequences, Rep. William Harsha said

> ...The impact of S.1075, if it becomes law, I am convinced would be so wide-sweeping as to involve every branch of the government, every committee of Congress, every Agency and every program of the nation...I regret that so important a matter is being handled in so light a manner. I realize the Members desire to adjourn for Christmas...[67]

The Conference, the House and the Senate approved the bill before Christmas and the legislation was sent to San Clemente for the President's approval. The bill, S.1075, was signed into law on January 1, 1970, by President Nixon as the National Environmental Policy Act of 1969.

4.2. THE SUBSTANTIVE CONTENT OF THE ACT

The National Environmental Policy Act of 1969 required that all government agencies give full consideration to the environmental consequences of their actions.[68] Congress had definite goals in mind when it passed this legislation. It wanted to:

(i) add environmental considerations to federal agency decision-making priorities through the initiation of a national environmental policy;

(ii) to institute an action-forcing provision which would compel agency compliance with this policy;

(iii) to create the advisory Council on Environmental Quality (CEQ);

(iv) to increase research on environmental systems; and

(v) to establish an annual 'state of the environment' message.[69]

Section 101 under Title I, contains the declaration of the national environmental policy. Man's potential impact on the natural

environment is recognized in Section 101(a), as is the need to minimize this impact for man's own welfare. It states that it shall be a government policy to "...use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony." In Section 101(b), the Act sets out the national environmental policy in six specific points, which are direct mandates to the federal agencies; this section declares it to be the "...continuing policy of the Federal Government...to ensure 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 or 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.

In Section 101(c), it is recognized that "...each person should enjoy a healthful environment...and...has a responsibility to contribute to the preservation and enhancement of the environment."

Section 102 contains the action-forcing provision of the bill. Congress states, in Section 102(1) that "...to the fullest extent possible ...the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth

in this Act." To ensure that the new federal policy on environmental quality did not become another example of meaningless legislative rhetoric, Congress addressed itself in Section 102(2) to the problem of agency compliance. The eight action-forcing provisions, which are contained in this section, were designed to ensure that the agencies consider the environmental consequences of those projects which they propose, at the decisionmaking level. This section also requires compliance "...to the fullest extent possible." Agencies are directed

(i) to utilize an inter-disciplinary approach to planning,

(ii) to develop methods by which presently non-quantifiable environmental amenities and values may be considered "...in decisionmaking along with economic and technical considerations";

(iii) to include environmental impact statements with every "...major Federal action significantly affecting the...environment";

(iv) to report alternatives to proposals which involve "...unresolved conflicts concerning alternative uses of available resources;

(v) to support international cooperation in the prevention of environmental deterioration;

(vi) to make available information on methods of improving environmental quality;

(vii) to make use of ecological information in resource-oriented decisionmaking;

(viii) to assist the Council on Environmental Quality (CEQ) (created

by Title II of the Act).

The provisions of Section 102(2)(c) are recognized as the main action-forcing requirements of the Act.[70] This section requires that all federal agencies must prepare, in detail, written statements concerning the environmental impacts which proposed major actions including legislative proposals may cause. These statements are required to consider

(i) any adverse effects which could not be avoided;

(ii) alternatives to the proposal and their impacts;

(iii) the relationship between local short-term uses and long-term productivity;

(iv) any "...irreversible and irretrievable commitments of resources."

The statements must be circulated to local, state and federal agencies for comment and must accompany the proposed action through the decisionmaking channels. Copies of these statements must be made available to the President, to the Council on Environmental Quality and to the public.

Section 102(2)(c) provides the mechanism which directs the implementation by federal agencies of national environmental goals, as set out in Sections 101 and 102(1). The remaining provisions of Section 102(2) further strengthen this directive mechanism.

Section 103 directs agencies to review their existing policies and practices and to align them with the provisions of the Act.

The rather ambiguously worded Section 104 was an amendment won by Senator Muskie which was intended to ensure that air and water quality standards, which were set by his Senate Subcommittee on Public Works, would not be affected by the Act. It maintains that "...nothing in Sections 102

or 103 shall in any way affect" the specific statutory obligations of any federal agency to comply with environmental quality criteria, to interact with other agencies or to 'act or refrain from acting' on the recommendations of other agencies.

Section 105 states that the policies and goals of the Act are 'supplementary' to the existing policies and goals of federal agencies.

The Council on Environmental Quality was created under Section 202 of Title II of NEPA. It consists of three members who are appointed by the President. It is the duty of the Council (as directed in Sections 202, 203 and 204) to

(i) assist the President in the preparation of the Annual Environmental Quality Report (as required by Section 201);

(ii) to advise the President concerning the quality of the nation's environment;

(iii) to ensure the compatability of federal programs with the aims of the Act,

(iv) to suggest improvements in national policies which would help to further these goals; and

(v) to conduct research on environmental systems.

The Council is directed in Section 205(1) to consult with the Citizens Advisory Committee on Environmental Quality,[71] and with representatives of science, industry, agriculture, labor, conservation organizations, state and local governments and any other groups which it feels necessary. Section 205(2) further directs the Council to utilize the services, facilities and information of both public and private organizations and of individuals to the fullest extent possible, to avoid duplication of effort and expense.

By 1969, then, Congress recognized the need for a national environmental policy which would serve as a directive to agencies which had heretofor avoided impact evaluation.

The problem which existed was to produce a bill which had an action-forcing provision which did not force excessively. The intent, in designing NEPA with a requirement to assess the environmental impact of a project rather than a direct requirement to prevent pollution, may have been to encourage non-hostile cooperation between the several agencies and the branches of government. It was apparently hoped that the impact statement would (i) enlighten even the most dyed-in-the-wool highway engineer, and thereby result in improved decisionmaking, and/or (ii) inform and alert the public concerning situations which involve adverse impacts on the environment.

4.3. FURTHER ENVIRONMENTAL PROTECTION PROVISIONS IN 1970

The provisions of the National Environmental Policy Act must not be read in isolation from other environmental protection statutes. Rather, this legislation must be viewed in the context of the other resource-oriented provisions which surround it. During 1970, the year following the passage of NEPA through Congress, several measures which were designed to modify the bill came into being. These provisions took the form both of Congressional enactments and Presidential orders.

The Environmental Quality Improvement Act of 1970 (EQIA) was a legislative provision which supplements the provisions of NEPA.[72] The EQIA, sponsored by Senator Edmund Muskie, passed Congress in April of 1970.[73] It was a separate Title of the Water Quality Improvement Act,[74] and was intended to complement NEPA in the developing of a national

policy for the environment. The purpose of this bill was to ensure that the public works activities of all federal agencies would be conducted pursuant to the policies established under NEPA,[75] and to establish an Office of Environmental Quality to assist the Council on Environmental Quality.[76]

The Chairman of the Environmental Quality Council is also the Director of the Office of Environmental Quality.[77] The functions of both offices are almost identical, being to 'advise the President' on environmental affairs.[78] The Office of Environmental Quality has a much larger staff and a higher budget than the Council and provides much of the 'input' which is necessary for the Council to carry on its duties. Both NEPA and EQIA anticipate vigorous involvement by state and local governments in the improving of environmental quality.[79]

An administrative action of major import in the area of environmental control was the implementation of Reorganization Plan No. 3 of 1970. The plan was prepared by the President, transmitted to the Senate on July 9, and became effective on December 2, 1970.[80] The President's scheme shifted most of the environmental control functions previously scattered among the various agencies to the new Environmental Protection Agency (EPA).[81] The EPA was to house a variety of research, monitoring, standard-setting and enforcement activities which pertained to ecological systems.[82]

In introducing the plan to Congress, the President commented that while "...the environment must be perceived as a single, interrelated system...present assignments of departmental responsibilities do not reflect this interrelatedness.[83]

The following pollution control operations which had previously been scattered throughout various federal departments were consolidated under the newly-formed EPA:

(i) The administration of the FWPCA, formerly under the Department of the Interior, came under EPA control.

(ii) The National Air Pollution Control Administration, which had formerly been part of HEW, was transferred to the EPA.

(iii) The functions of the Bureau of Solid Waste Management and the Bureau of Radiological Health were taken over from HEW.

(iv) Pesticide regulation was also removed from HEW and the Department of Agriculture.

(v) Pesticide research was taken over from the Department of the Interior and HEW.

(vi) Radiation emissions standards setting was removed from the AEC.

(vii) All functions of the Federal Radiation Council were transferred.

(viii) Environmental research functions previously assigned to the CEQ were transferred.[84]

The principal functions of the EPA are:

(i) to establish and enforce environmental protection standards consistent with national environmental goals;

(ii) to conduct research on the effects of pollution and on methods and equipment for controlling the pollution;

(iii) to gather information on pollution levels and to use these data in improving environmental protection programs and in setting

national policy;

(iv) to help others, through grants, technical assistance and other means, to control pollution;

(v) to assist the CEQ to develop improved federal environmental policy.[85]

The President indicated that the relationship between the EPA and the CEQ should be one of 'close harmony'.[86] The program was designed so that the two agencies would reinforce each other's missions. The Council is a top-level advisory group. Its role in the Executive Office of the President is that of an advisor on federal programs which relate to environmental quality. All aspects of environmental quality--landuse, parklands, population growth, as well as pollution--are the concerns of the Council.[87] The EPA, on the other hand, is an operating 'line' agency charged with protecting the environment by abating pollution.

Other resource-oriented statutes, enacted by Congress in 1970, contain provisions requiring the consideration of the environmental impacts of agency actions. Two such provisions include Section 309 of the Clean Air Act and Section 109(h) and (i) of the Federal Highway Act.

Section 309 of the Clean Air Act requires the EPA to

> ...review and comment in writing on the environmental impact of any matter, relating to duties and responsibilities granted pursuant to the Act or other provisions of the authority of the Administrator, contained in any: (1) legislation proposed by a federal department or agency; (2) newly authorized federal projects for construction and any major federal action other than a project for construction to which Section 102(2)(c) of Public Law 91-190 applies; and (3) proposed regulations published by any department or agency of the federal government. Such written comment may be made public at the conclusion of any such review.[88]

If the proposed action is determined by the EPA to be unsatisfactory from the point of view of public health, welfare, or environmental quality, this determination is published in the Federal Register and the matter is referred to the CEQ.[89] Among other things, the provisions of Section 309 considerably expand the EPA's authority to monitor the impact of agency proposals as these relate to the environment. Formerly, the EPA had the authority to comment on proposals in six designated areas only.[90] The CEQ was not similarly restricted in its authority.[91] Section 309(a) has expanded EPA's powers to complement the authority of the CEQ by giving the EPA the responsibility for commenting on "...any matter relating to" EPA's duties, responsibilities, or authority, as they are involved in federal proposals. This provision "...lays the groundwork for a formidable administrative team fully capable of ensuring compliance with NEPA in government decisionmaking."[92]

The 1970 amendments to the Federal Aid Highway Act (FAHA) also require consideration of environmental impacts. Section 109 (h) and (i) of this Act make approval of highway plans and specifications conditional on determination that noise and economic and social and environmental quality standards are met.[93] The Federal Highways Department was directed to promulgate standards for highway noise levels which are applicable for various types of adjacent land uses.[94]

Additional provisions concerning environmental quality, which were formulated in 1970 include five Executive Orders which were issued by the President. The first of these, Executive Order 11507, concerned the "Prevention, Control and Abatement of Air and Water Pollution at Federal Facilities."[95] It was issued on February 4, under the authority granted to the President by the amended Clean Air Act,[96] the amended FWPCA,[97] and

NEPA.[98] The order directs all agencies and departments of the federal government to comply with the quality standards for air and water which may be set by the states. The authority to oversee compliance was given to the Council on Environmental Quality.[99] Each agency was directed to bring the federal facilities under its jurisdiction in compliance with state-established air and water standards by December of 1972.[100] Extensions of this deadline could be granted if it was determined that compliance by 1972 was not technically feasible.[101]

The second Executive Order, entitled "Protection and Enhancement of Environmental Quality," was issued one month later on March 5. Executive Order 11514, issued under the authority of NEPA, was designed to establish the relationship between federal agencies and the CEQ in appraising the environmental impact of federal programs.[102]

> The Federal Government shall provide leadership in protecting and enhancing the quality of the nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.[103]

On April 9, Executive Order 11523, establishing the National Industrial Pollution Control Council (NIPCC), was issued. The chairman, vice-chairman, and other representatives of business and industry on the NIPCC are appointed by the Secretary of Commerce.[104] The functions of the Council are to advise the President and the chairman of the CEQ on industrial programs or projects which may exert deleterious impacts on the environment.[105]

The fourth Executive Order,[106] which was issued on July 20, concerned the various responsibilities of the Secretaries of the Interior and Transportation, Federal Maritime Commission, and the Coast Guard under the

FWPCA, as amended by the WQIA of 1970.[107] Section 9 of Executive Order 11548 provided for the transfer of responsibility and authority which had been conferred upon the Secretary of the Interior to the Administrator of the EPA as soon as Reorganization Plan No. 3 took effect.[108] This included the authority to oversee the "...preparation, publication, revision or amendment" of a national Contingency Plan for the removal of oil.[109]

The final Executive Order concerning environmental quality, which the President issued in 1970, dealt with the "administration of the Refuse Act Permit Program." Executive Order 11574, issued on December 23, 1970, provided for the implementation, by the executive branch, of a permit program for the disposal of refuse (mostly industrial waste) under Section 13 of the Refuse Act of 1899.[110] The Order directs that the Secretary of the Army shall be responsible for authorizing the issuance of Refuse Act permits.[111] It further directs that he shall accept the "...findings, determinations and interpretations" which the Administrator of EPA shall make concerning compliance with applicable water quality standards. The aim of these provisions is apparently to avoid the NEPA 102 requirement that an EIS be produced for each permit application.[112]

In the years 1969 and 1970, the Congressional and Executive branches of the federal government enacted several provisions concerning environmental quality. However, no statute is self-enacting. In the early months after NEPA became law, many agencies chose to either ignore the Section 102 requirements or to pay only passing lip service to them.[113] The third branch of the government, the judiciary, was now called upon to interpret the language of the act. Concerned citizen groups took the agencies to court and, in an unexpected development, were granted standing to sue.

The judiciary, which has traditionally avoided tampering with the substance of agency decisions, now had a clear mandate on a government environmental policy, while the agencies had a clear directive to implement this policy. The interpretation of NEPA in the context of court decisions is the subject of Chapter Five.

FOOTNOTES TO CHAPTER FOUR

[1]See Chapters Two and Three.

[2]Victor J. Yannacone, Jr., "National Environmental Policy Act of 1969," Environmental Law, (Spring 1970), p.19.

[3]S.2549, 86th Cong., 1st Sess., 1959.

[4]Fredrick R. Anderson and Robert H. Daniels, NEPA in the Courts : a Legal Analysis of the National Environmental Policy Act, (Baltimore : Resources for the Future : The Johns Hopkins University Press, 1973), p.4.

[5]Ibid.

[6]Perspectives on Conservation : Essays on America's Natural Resources, edited by H.Jarrett (Baltimore : The Johns Hopkins Press, 1958), pp.205-226.

[7]Terence T. Finn, "Conflict and Compromise : Congress Makes a Law : The Passage of the National Environmental Policy Act", (unpublished Ph.D. dissertation Georgetown University, Washington, D.C., 1972), p.48.

[8]S.2282, 89th Cong., 1st Sess., 1965.

[9]Finn, "Conflict and Compromise", pp.137-145, passim.

[10]Ibid., p.144.

[11]Ibid., p.145.

[12]Ibid., p.172.

[13]An excellent analysis of the complete legislative history of NEPA may be found in, Finn, "Conflict and Compromise".

[14]Richard A. Carpenter, U.S. Congress, House Subcommittee on Science, Research and Development of the Committee on Science and Astronautics, Managing The Environment, 90th Cong., 2nd Sess., (1968).

[15]Finn, "Conflict and Compromise", p.120.

[16]Carpenter, Managing, p.29.

[17]Ibid., p.30.

[18]Ibid., p.29.

[19]Ibid., pp.6-7.

[20]Lynton K. Caldwell, U.S. Congress, Senate, Committee on Interior and Insular Affairs, A National Policy for the Environment, 90th Cong., 2d Sess., (1968).

[21]Remark by F.Fraser Darling in Finn, "Conflict and Compromise", p.245.

[22]Ibid., p.94.

[23]Caldwell, National Policy, p.105.

[24]Ibid., pp.104-105.

[25]Ibid., p.109.

[26]Finn, "Conflict and Compromise', p.259.

[27]U.S. Senate Committee on Interior and Insular Affairs, National Environmental Policy Act of 1969, S. Rep.No.91-296, 91st Cong., 1st Sess. (July 9, 1969), p.1.

[28]Claude E. Barfield, and Richard Corrigan, "Environment Report/ White House Seeks to Restrict Scope of Environmental Law," National Journal, (February 26, 1972), p.337.

[29]P.L. 304, Ch.33, 60 Stat.23 (February 20, 1945), as amended, 15 U.S.C. Sec.1021-24.

[30]15 U.S.C. Sec.1021.

[31]15 U.S.C. Sec.1022, 1023.

[32]Anderson and Daniels, NEPA in the Courts, p.4.

[33]Ibid., p.5.

[34]Barfield and Corrigan, "Environment Report", p.337; Anderson and Daniels, NEPA in the Courts, p.5.

[35]Barfield and Corrigan, "Environment Report", p.338; Anderson and Daniels, NEPA in the Courts, p.5.

[36]Anderson and Daniels, NEPA in the Courts, p.5.

[37]Ibid.

[38]Ibid.

[39]U.S. Senate Committee on Interior and Insular Affairs, Environmental Policy Act, No.91-219, p.9.

[40]Ibid., p.207

[41]115 Cong.Rec. at 39701-04 (December 17, 1969).

[42]Author of the 1968 Senate paper, "A National Policy for the Environment".

[43]U.S. Senate Committee on Interior and Insular Affairs , "Hearings on S.1075, S.237 and S.1752," 91st Cong., 1st Sess. (April 1969), at 166.

[44]Ibid.

[45]Joseph L. Sax, Defending the Environment : A Strategy for Citizen Action(New York : Alfred A. Knopf, 1971), p.240.

[46]Council on Environmental Quality, "NEPA-Reform in Government Decisionmaking," Environmental Quality : The Third Annual Report of the Council on Environmental Quality, (Washington, D.C. : U.S. Govt.Print. Off., 1972), p.222.

[47]U.S. Senate Committee on Interior and Insular Affairs, "Hearings on S.1075,"(Remarks of Senator Jackson), p.116.

[48]CEQ, "NEPA-Reform," p.223.

[49]16 U.S.C. Sec.803(a).

[50]49 U.S.C. Sec.1653(f).

[51]16 U.S.C. Sec.61 et.seq.

[52]16 U.S.C. Sec.407 et.seq.

[53]CEQ, "NEPA - Reform", p.224.

[54]Barfield and Corrigan, "Environment Report", p.338.

[55]115 Cong.Rec. 29008-13 (1969).

[56]115 Cong.Rec. S.12117-18 (December 8, 1969).

[57]115 Cong.Rec. S.12146-47 (October 8, 1969).

[58]National Environmental Policy Act of 1969, P.L.91-190, 83 Stat. 852; Sec.104 (hereinafter, NEPA).

[59]Anderson and Daniels, NEPA in the Courts, p.5.

[60]Ibid., p.9.

[61]NEPA, Sec.102.

[62]U.S. House Committee on Merchant Marine and Fisheries, Conference Report on S.1075, H.R.Rep.No.91-765, 91st Cong.,1st Sess., (December, 1969), p.3.

[63]115 Cong.Rec.39703 (December 17, 1969).

[64]115 Cong.Rec. 40415-47 (December 20, 1969) (Senate).

[65]115 Cong.Rec. S.40923-28 (December 23, 1969) (House).

[66]Anderson and Daniels, NEPA in the Courts, p.9; Barfield and Corrigan, "Environment Report", p.340.

[67]Barfield and Corrigan, "Environment Report", (citing Representative Harsha), p.340.

[68]The full text of the Act appears in Appendix A.

[69]U.S. Senate Committee on Interior and Insular Affairs, Environmental Policy Act, No.91-219, pp.2-15, passim.

[70]Anderson and Daniels, NEPA in the Courts, p.2.

[71]As established by Executive Order 11472 on May 29, 1969.

[72]P.L. 91-224, 42 U.S.C.A. (Pocket Part 1973) 4371 et.seq. (hereinafter the EQIA).

[73]U.S. Congress, House Committee on Public Works, Laws Relating to U.S. Water Pollution Legislation, Committee Print 93-1, (March 1973), p.469.

[74]Over which Senator Muskie's Senate Subcommittee on Public Works had jurisdiction.

[75]EQIA, Sec.202(c) (1).

[76]EQIA, Sec.202(c) (2).

[77]EQIA, Sec.203(a).

[78]EQIA, Sec.203(d).

[79]Fred March, "Federal Environmental Legislation : The Federal-State Partnership", (a paper presented to the State of Washington Chapter of the American Public Works Assoc., October 4, 1973, in Bellingham, Wash.), p.25.

[80]William D. Hurley, Environmental Legislation, (Springfield, Ill., Charles C. Thomas, publisher, 1971), p.79; House Committee on Public Works, Water Pollution Legislation, Comm.Print.93-1, p.307.

[81]Reorganization Plan No.3 of 1970, Sec.2(1)-(9).

[82]Ibid.

[83]Hurley, Environmental Legislation, p.79.

[84] Supra , note 81.

[85] Ibid.

[86] James E. Krier, Environmental Law and Policy : Reading Materials and Notes on Air Pollution and Related Problems, (New York : The Bobbs-Merrill Co.Inc., 1971), p.465.

[87] Ibid., p.446.

[88] Section 309 was enacted in the Clean Air Act Amendments of 1970, P.L. 91-604, 42, U.S.C. Sec.1857 et.seq., as amended (hereinafter, P.L. 91-604).

[89] P.L. 91-604, Sec.309(b).

[90] See Reorganization Plan No.3, 1970.

[91] 42 U.S.C. Sec.4344(3); ELR 41011 (January 1, 1970).

[92] Martin Healy, "The Environmental Protection Agency's Duty to Oversee NEPA's Implementation : Section 309 of the Clean Air Act," 3 ELR 50071.

[93] FAHA, Title 23.

[94] FAHA, Sec.109(i); the standards may now be found in 23 D.F.R. Part 772 (38 F.R. 15953) in Highway Research Circular, No.150,(November 1973), p.8.

[95] House Committee on Public Works, Water Pollution Legislation, 93-1, pp.327-331, passim.

[96] P.L. 91-604.

[97] 33 U.S.C. 466.

[98] P.L. 91-190.

[99] Executive Order 11507, 1970, Sec.3,(a) (1) and (c).

[100] Executive Order 11507, Sec.5(a).

[101] Executive Order 11507, Sec.5(d).

[102] Executive Order 11514, 1970, Sec.1.

[103] Ibid.

[104] Executive Order 11523, 1970, Sec.1.

[105] Executive Order 11523, Sec.2.

[106] Executive Order 11548, 1970.

[107]P.L. 91-224, Approved April 3, 1970.

[108]Which established the EPA.

[109]Executive Order 11548, Sec.4(a).

[110]Executive Order 11574, 1970, Sec.1.

[111]Executive Order 11574, Sec.2(a) (2).

[112]Barfield and Corrigan, "Environment Report", p.338.

[113]Mr.Roger Mochnick, private interview at Environmental Impact Office, EPA, Region X, Seattle, Wash., December 1973.

CHAPTER FIVE

JUDICIAL INTERPRETATION OF NEPA

Congress, in passing the National Environmental Policy Act, proclaimed a general environmental policy and set out basic statute guidelines for implementing this policy but interpretation of these provisions has been left to the courts. This chapter addresses itself to the judicial interpretation of the terms of the Act. Section 5.1. considers the general rationale which underlies court enforcement of the Act. Sections 5.2. and 5.3. deal primarily with the court's reading of the action-forcing provision, Sec. 102(2) (c), which, because of its nature, has always received most attention. Section 5.4. considers the existence of an enforceable right under the policy statement of Section 101; that is whether, in fact, after the terms of Section 102 have been met, the courts are empowered to enforce the declarations of Section 101 by rejecting agency decisions which violate the stated objectives of the policy statement.

5.1. RATIONALE FOR COURT INVOLEMENT

The role of the courts in determining the scope and context of the provisions of the National Environmental Policy Act is now, four years after enactment, accepted as one of paramount importance.[1] However, diligent judicial implementation such as in the case of the Calvert Cliffs decision, was not widely anticipated when the legislation was first enacted.[2] During this case, Judge Wright observed:-

> Of course, all of these Section 102 duties were qualified by the phrase 'to the fullest extent possible.' 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 the agencies, a standard which must be vigorously enforced by the reviewing courts.[3]

It has also been noted elsewhere that

> Congressional enactments such as NEPA, even combined with interpretive guidelines promulgated by an agency charged with overseeing the policies of the Act,do not necessarily ensure bureaucratic compliance with the letter and spirit of the law.[4]

That is to say, no law is self-enforcing, and many environmentalists, such as Rosenbaum[5] maintain that the growing federal commitment to environmental protection must be supported by court procedures which facilitate this objective.

Sax enumerates some special contributions which the judiciary may make towards the resolution of environmental disputes.[6] He contends for example, that judges possess some virtues which those who commonly deal with problems of policy decisions do not.[7] One of these outstanding virtues is that the judiciary is an 'outsider' in the agency decision-making process and is therefore not bound by the usual 'insider perspective'.[8] An 'insider perspective' develops primarily through constant contacts that are exclusively concerned with agency priorities and points of view, and from political pressures which may be intense. These two factors lead to a 'tunnel vision'.[9] Judges, however, spend only a small portion of their time in dealing with environmental mismanagement disputes. he latitude of their work extends far beyond environmental questions or

agency developments. Furthermore, judges are not normally perceived of as being subject to political pressures. Thus, they maintain an 'outsider perspective'.[10]

In addition, the courts are more likely to be directly responsive to citizen suits because they exhibit a natural inclination to extract and weigh the full implications of the environmental issue in a deliberate manner. The decisionmaking atmosphere of self-perpetuating agencies does not encourage such objectivity.[11] Sax maintains further that the enforcement of environmental protection through the courts shifts the 'center of gravity' away from private economic interests and political calculations among administrators and towards a concern for the environment.[12] Because a basic distrust of politicians permeates much of the environmental movement, the judiciary is preferred by many conservationists as a more dependable focus of environmental concern.[13] Rosenbaum argues that since elected officials must bargain and compromise to maintain their position, they may not reasonably be expected to maintain "...unwavering stands on environmental issues."[14] He illustrates this point by suggesting that although the President permanently enjoined construction on the Cross-Florida Barge Canal[15] his aversion to canals was "...acute rather than chronic."[16] This view received support a few months after the canal decision was taken, when he enthusiastically supervised the official opening of the Arkansas River Project.[17] This project far outweighed the Cross-Florida Barge Canal both in cost and environmental impact.[18]

Despite the advantages which the judicial process seems to offer in the mediation of environmental disputes, it was not at first fully realized that the judges would accept the responsibility as fully as they

have; as Justice Holmes once remarked, the "...law is what judges will do."[19] Had a larger portion of the judiciary decided that the Act "...would not seem to create any rights or duties of which a court can take cognizance,[20] NEPA would have been rendered substantially less effective. Since, however, more courts have decided instead that "...it is hard to imagine a clearer or stronger mandate to the courts" than NEPA,[21] the Act has enjoyed a more thorough application of its provisions than might have otherwise occurred.

Anderson contends that the willingness of the courts to require strict procedural compliance with NEPA's 102 mandate is linked to the willingness which they have shown recently to review agency action in general,[22] and also to a growing liberalization of the public's standing to sue.[23] The mood among the judiciary has been tending towards the showing of greater sympathy for 'public interest' lawsuits.[24] For whatever reason, the courts have found increasingly in favour of the public interest in relation to many of the crucial legal issues which surround the initiation and pursuance of a law suit. Several of these issues are reviewed in Section 5.2.[25]

5.2. SOME CRUCIAL LEGAL ISSUES

5.2.1. Standing to Sue

Standing to sue has traditionally been defined as a question of "...whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[26] Prior to 1970, the doctrine of standing was a major obstacle which frustrated the attempts of many private citizens or public interest groups who were seeking, through litigation, to protect non-economic interests, including environmental interests, against the poor decisions which were being taken by federal administrative agencies. It was usually necessary to demonstrate

personal economic injury before standing was granted.[27] Furthermore, the plaintiff was usually required to show that he was eligible under one of four means of acquiring standing:

> (1) a legal right created under common law; or (2) an express provision within a statute for judicial review; or (3) Section 10(a) of the Administrative Procedure Act,[28] commonly referred to as the 'standing' provision; or (4) in the absence of a statutory provision for express review, proof of an implied congressional grant of review based on a legislative purpose to protect the plaintiff's interest.[29]

As mentioned in Chapter Two, p. 32, only the keenest of legal minds were thus able to acquire standing for environmental suits. Two notable exceptions were the cases of Yannacone v. Dennison,[30] concerning the use of DDT, and Scenic Hudson 1.[31] In the latter, the Federal Power Commission's assertion that 'personal economic injury' be shown in order to achieve standing to sue was rejected by Judge Hays in the Second Circuit Court. Aware of the precedent it was setting, however, the court 'hedged' by finding that the plaintiffs had a sufficient economic stake to establish standing.[32] Both of these cases may be viewed as part of the recent trend toward an easing of the requirements for standing to accommodate those who "...by their activities and conduct" have exhibited a special interest in "...aesthetic, conservational and recreational concerns."[33]

The controversy which has arisen over the question of standing under NEPA would have been largely eliminated had Section 101 (b) of S.1075 not been changed in Conference from "...each person has a fundamental and inalienable right to a healthful environment"[34] to "...each person should enjoy a healthy environment."[35] This change was reportedly enacted to avoid the creation of a clear court-enforceable right.[36]

While the clear court-enforceable right of Section 101 (b) of S. 1075 has not yet been established, the question of standing to sue federal agencies under the provisions of NEPA has been significantly broadened in regard to the category of litigatable injuries. This has caused a significant increase in court reviews of agency decisions in two respects especially,[37] particularly in view of the supporting provisions of the Clean Air Act of 1970.[38] Firstly, it creates for agencies new legal responsibilities towards the public, so that "...harm to the public's right to know, to participate and to have the interests of future generations protected" may constitute injury in fact.[39] In this respect, citizen suits may be facilitated by the Act's declaration that "...each person has a responsibility to contribute to the preservation and enhancement of the environment."[40] Secondly, the broad scope of the Act has encouraged industry to enter into litigation. Industry has often been granted standing to sue agencies for lack of preparation of impact statements in resource decisions which directly affect it.[41] While the quantity of litigation which has been undertaken by the public has increased, however, it is still unlikely to turn into a flood; according to Judge Hays, "...Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken."[42]

Under the Administrative Procedure Act[43] the individual or group instigating a public interest suit must show both interest and injury. The Court in the Mineral King Controversy of Sierra Club v. Morton determined that a "...mere 'interest in a problem', no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem," does not necessarily mean that injury in fact follows.[44] The

Sierra Club's mistake in this altercation was simply that it failed to claim "...that it or its members would be affected in any of their activities or pastimes by the ... proposed ...development."[45] According to Anderson,[46] the Mineral King decision applies only when the proposed action would harm some citizens but not others, thus the standing requirement may change in the case of generalized public injury.[47] Furthermore, it was held in this case that when a party claims standing as a 'representative of the public interest,' injury to the general public could be argued after "...standing to seek review has been established," even where this could not establish standing initially.[48]

In one case in which the plaintiff was not granted standing, it was held that NEPA did not create a public right to raise a question concerning the environment in relation to the storage of biochemical and radiological agents in the Rocky Mountains.[49] Such a decision is exceptional, however, and in most of the few cases in which standing was denied, the lines of reasoning were more similar to those in Sierra Club v. Morton. Either the plaintiff claimed no individualized harm or the court found no valid environmental interest at stake.[50]

Despite the examples which are cited above, it appears that, in the majority of cases brought by private plaintiffs, which allege non-compliance with NEPA, there has been little or no discussion of the standing of the plaintiffs to bring the action.[51] It apparently has usually been assumed that there was standing, since it is held that the plaintiffs were asserting an interest within the scope of interests protected by NEPA.[52]

In particular, there are several cases in which plaintiffs pleaded cause for standing similar to that in Sierra Club v. Morton.[53] In these

cases the court's decision on standing was the reverse of that against Mineral King. In West Virginia Highlands Conservancy v. Island Creek Coal Co.,[54] for example, the plaintiffs successfully claimed injury in the category of 'aesthetic, conservational or recreational interests.' This became an especially delicate situation as Sierra Club v. Morton was at that time pending in the Supreme Court. In finding for the plaintiffs, the court distinguished a major difference between the two cases, since the:

> ...Conservancy and its members have a special interest in the Otter Creek area. The area is one of the objects of their principal activities; they use it extensively, and they have studied it in detail. Their interest and the injury they would suffer are much more particularized and specific than those of the Sierra Club and its members.[55]

Other cases with perhaps more concrete legal bases include those suits brought by plaintiffs who presented a combined plea of "...use with neighborhood proximity."[56] These cases also dealt with 'aesthetic, recreational or conservational interests'.[57] In Nolop v. Volpe,[58] the court upheld the standing of minor students to sue as a class[59] to prevent the construction of a federally-funded highway. Preliminary injunction was granted against further construction until the completion of an impact statement.[60] The complaint concerned increased noise pollution and dangerous traffic-pedestrian conflicts.[61]

A similar conflict is found in the case of Izaak Walton League v. Macchia,[62] where the court again upheld the plaintiff's standing to sue private developers and the Army Corps of Engineers in order to enjoin a dredge-and-fill operation in navigable waters. This suit was important because it challenged the validity of the Corps of Engineers' permit

program under NEPA and other federal laws.[63]

Another dredge-and-fill operation was challenged in Sierra Club v. Mason.[64] The Sierra Club represented members who used New Haven Harbor and Long Island Sound for recreational and commercial purposes and it challenged a Corps of Engineers project to dredge the harbor and dump the spoil into the Sound.[65] Dicta from the court indicate that the amount of detail which plaintiffs' allegations must incorporate in claiming harm resulting from failure to comply with NEPA will necessarily vary from case to case.[66]

The foregoing cases relate to the right of the public to participate in agency decisionmaking in general. One particular aspect of this issue is the public's right to be informed and to take part in the process of identifying environmental risks by commenting on the environmental impact statement. The protection of environmental quality is said to be "... the continuing policy of the federal government, in cooperation with...concerned public and private organizations."[67] Agencies are directed to make available to "...institutions and individuals"[68] information which will be useful in maintaining and improving environmental quality. Furthermore, it is claimed that individuals have the "...responsibility to contribute to the preservation and enhancement of the environment."[69]

These provisions are firmly reinforced by Executive Order 11514 which directs agencies to "...develop procedures to ensure the fullest practicable provision of timely public information...in order to obtain the views of interested parties."[70] The 1971 CEQ guidelines direct agencies to submit both the draft statements and accompanying comments, from private organizations and individuals among others, to the CEQ.[71] Both the CEQ guidelines[72] and Executive Order 11514[73] direct that there should be provisions for public hearings.

The outcome of the case of Hanly v. Kleindienst is recognized as upholding these directives.[74] Here the General Services Administration (GSA) was held to have failed to consider all relevant factors in making its determination that an impact statement was not necessary.[75] The case dealt with the proposed construction of the Metropolitan Correction Centre (MCC) and the court directed that the statement must consider the effects of the jail's possible use as a drug treatment centre on the crime rate of the surrounding area.[76] GSA was also required to specify the manner in which the public received notice of, and participated in, the decision.[77]

Anderson reports that the refusal to compile a statement "...denies the public the basic information that NEPA attempts to provide and the opportunity to influence the final decision through the impact statement."[78] This view is also reflected in a court comment that "...to satisfy the direct injury requirement...plaintiffs in NEPA cases need only allege injury to their right to know and participate."[79]

Industry has been especially active in suing the federal agencies, particularly the EPA, under the provisions of NEPA, to compel preparation of impact statements.[80] In National Helium Corp. v. Morton,[81] the court upheld a preliminary injunction against the cancellation by the Department of the Interior of contracts to buy helium, on the basis that a NEPA study had not been conducted concerning the effect which termination would have on resource conservation.[82] The plaintiffs were allegedly concerned that the helium would be irretrievably lost to the atmosphere.[83] Standing to sue was granted to the plaintiffs under the jurisdictional basis provided by NEPA in spite of the fact that their suit was motivated primarily by their own economic interests.[84]

In a similar case, Zlotnick v. District of Columbia Redevelopment Land Agency, plaintiffs' plea was dismissed on the grounds that they were seeking to protect only their own financial interests, which were not within the 'zone of interests' protected by the Act.[85] In the case, property owners in downtown Washington, D.C. challenged the condemnation of their land in readiness for an urban renewal project to be funded by HUD.[86] The court said in rebuttal that care must be taken to ensure that NEPA is not "...misused by private commercial interests to obfuscate and delay essential federal projects to the real detriment of the very environmental and community interests the Act was designed to protect.[87]

Indeed, the courts often appear to be unconvinced that the provisions of NEPA can conceivably encompass alleged corporate interests in environmental problems.[88] On this issue, Anderson says:

> Underlying the courts' unease is the distinct possibility that industry's new found interest in NEPA may be traced, not so much to its desire to see the federal government engage in environmentally sound decisionmaking, but to a desire to see NEPA used to delay federal initiatives intended to protect the environment.[89]

In conclusion, it may be seen that despite the committee compromise on S.1075 which replaced a person's 'right' to a healthful environment with the phrase, "...that each person should enjoy a healthy environment," there have been relatively few problems in the establishment of standing to sue in most legitimate cases. Hanks et al., in evaluating the meaning of a statutory 'right' to a healthful environment, report that the legal implications of this provision could extend far beyond the present accepted interpretations.[90] Not only could suits constitute private rather than public actions, but private rights could, in some situations,

"...preclude any balancing or weighing of interests during the governmental decision making process."[91] A situation could develop where no vested interest was so great that the scales of justice would tip in favour of persons or organizations engaged in activities which result in environmental degradation.[92]

Perhaps the 'right' to a healthful environment, therefore, which is the subject of speculation, may in fact exist, but remain untested in court.[93] If so, the right of private individuals to sue the federal government may be viewed as a powerful tool for the prevention of pollution. However, the inception of the provisions of NEPA in 1970 could conceivably have initiated grave economic problems. For the present, nonetheless, the liberalization of the rule of standing is seen by many as being "...the single most important development in our environmental jurisprudence."[94] It is recognized that the "...environmental movement would be a much less visible force in the shaping of our national environmental policy if it were not for its access to the courts."[95]

5.2.2. Sovereign Immunity

The doctrine of sovereign immunity declares that the government may not be sued without its consent. Described by Professor Sax as one of the foremost "...mind-forged manacles of law,"[96] this doctrine rests on an axiom of Anglo-American jurisprudence[97] that "the King can do no wrong."[98] Senator George McGovern (D-N.Dak) reported a revealing statement concerning sovereign immunity, which was made in 1882:

> It... [sovereign immunity] ... seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime.[99]

It was the express opinion of Chief Justice John Jay, the first Chief Justice of the United States that:

> The state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.[100]

Despite several statutory provisions created for the purposes of improving citizen claims against the government since that time,[101] the situation was little improved by 1970, according to Crampton.[102] Gray reports that, while there has been a general trend towards judicial review of administrative actions which affect the environment, the Department of Justice continued in 1970 to plead sovereign-immunity defenses to environmental law suits.[103]

Anderson maintains that while federal agencies must comply with the NEPA mandate, there is 'lingering doubt' concerning whether or not agencies may be sued for non-compliance, because of the sovereign-immunity doctrine.[104] He goes on to say that the doctrine is historically out of phase with the present situation. Elsewhere, the doctrine has been described as "...lacking persuasion when gauged against the paramount natural interest as expressed in the National Environmental Policy Act".[105] The doctrine was further characterized as 'frivolous' in the suit of Ragland v. Mueller.[106] Also in, National Helium Corporation v. Morton where the

Department of the Interior claimed sovereign immunity against a suit concerning the Department's proposal to terminate helium purchase contracts, the court barred this defense because "...the conservation and environmental issue" was of overriding importance.[107]

In reality, the doctrine poses little impediment to NEPA lawsuits against federal agencies, since it can be easily circumvented through a legal fiction,[108] which involves bringing suit against the responsible agency officials in an allegation that they have either exceeded their statutory authority[109] or else, although supposedly within their authority, "...the powers themselves or the manner in which they are exercised are constitutionally void."[110]

In the light of the continued failure of sovereign immunity as a federal government defense against NEPA suits, the government's repeated reliance on this doctrine seems rather surprising.[111]

Anderson points out that a somewhat more complicated problem has arisen when state officials or state agencies are also named as defendents in a NEPA case. In Pennsylvania Environmental Council v. Bartlett, the district court decided that relief could only realistically be granted against the state itself.[112] Plaintiffs were thus precluded from maintaining this action against Bartlett, a state highways official. In addition, the suit was not permitted to proceed against the state since the state had not waived its rights to sovereign immunity.[113] There appears to exist a great deal of variance of this rule from state to state, since in several similar cases the sovereign immunity defense for state officials has not been upheld.[114] In many cases, the courts have decided that the state agency had waived its sovereign immunity by accepting federal funds.[115]

5.2.3. Retroactivity

The question of applicability of the Section 102(2)(c) requirements to actions which were ongoing at the time of enactment has caused considerable controversy.[116] This application, often depicted somewhat incorrectly as a problem of 'retroactivity,'[117] usually concerns cases in which the implementation of a project involves successive steps over a period of many years where some major federal action had been taken before January 1, 1970.[118] 'Retroactivity' would imply that the Act could be held applicable even to those ongoing projects in an extremely advanced stage of completion or to projects completed.[119]

Government projects which take several years to complete and which consist of several implemental decisionmaking stages are not uncommon and are the target of this procedure.[120] Peterson maintains that the assessment of the environmental impact of ongoing projects was a part of the Congressional intent because the traditional 'grandfather clause' which normally precludes such application of a statute was omitted from NEPA.[121] He further maintains that the phrase 'to the fullest extent possible'[122] upholds this interpretation of the intent of the Act since it is still 'possible' to alter even ongoing projects.[123] Moreover, guidelines published by the CEQ for the preparation of EIS require agencies to consider the environmental impact of ongoing activities.

> Section 102(2)(c) procedures should be applied to further major federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970.[124]

Environmentalists are strongly in favour of having the environmental damage from ongoing projects liable to the courts' discretion[125] and Anderson

reports that, by 1973, the question of 'retroactive' application of NEPA had figured in more than fifty cases thus far decided.[126] It is felt by environmental interests that, if the courts take a narrow view of the CEQ provision by confining suits to projects which were authorized but not underway by 1970, the 'scope and impact' of environmental litigation will be greatly reduced.[127]

Federal agencies, not surprisingly, have opposed the 'retroactive' application of NEPA. They maintain that this procedure would interfere excessively with the orderly conduct of administrative proceedings.[128] The attempt to use the Act in this way was said to be "...disruptive of existing programs" and the task of retroactive assessment is "...one which the agencie[s] cannot perform."[129] Government lawyers argue that a "... balancing of interests"[130] and a "...respect for political decision" should guide the courts' decisions.[131]

> The 'balancing of interests' is likely to rest upon an assertion that ongoing projects represent a major investment of public funds whose wisdom had already been decided by Congress and administrative agencies. Even if there may be environmental damage, so this argument might run, the courts must balance the benefits allegedly flowing from the project and the heavy investment already made against this potential harm and decide in favor of the project.[136]

Rosenbaum also suggests that the argument that an on going project represents an agency policy decision is clearly a strong one for the agencies in view of the traditional hesitancy of the courts to overturn the decisions of sister branches of the government.[133]

Agency operations which overlap the effective date of NEPA and thus may be liable to the 102 mandate include both formal administrative decisions such as the granting of a license or the signing of a contract

and also the concrete physical construction of a project.[134]

Anderson, in the major definitive work on the topic, has identified three classes of suits which have developed through the 'retroactive' application of NEPA.[135] The first is the 'critical action' approach in which the federal government performs only one critical act, such as the issuing of a permit and there is then no subsequent federal involvement.[136]

The second class concerns federal projects in which there is 'substantial action remaining' to be taken after January 1, 1970. Since federal projects are involved, work may be halted without endangering the rights of others and the work which remains is viewed as a new major action.[137]

The third class of suits, the 'hybrid' type, consists of those suits in which substance exists for both the 'critical action' and the 'substantial action remaining' approach.[138] In cases of this nature, formal federal action had taken place prior to NEPA's enactment, but further federal action remained to be completed after this time.[139] Examples of this type are furnished both by the Federal-Aid Highway (FHWA) Program[140] and the nuclear power plant licensing provisions of the Atomic Energy Commission (AEC).[141]

a. 'Critical Action'

The courts have determined that, when a single federal action, such as the granting of a license to permit a non-federal developer to proceed with a project, can be identified as occurring before the enactment of NEPA with no subsequent federal involvement, although there may exist considerable remaining work, the NEPA 102 mandate does not apply.[142]

In the case of Sierra Club v. Hardin, NEPA was held applicable.[143]

Although action had been taken on the investigation of a mill site prior to January 1, 1970, the federal government did not formally license the project until after this time.[144] In a similar case, Pennsylvania Environmental Council v. Bartlet[145], however, the court decided that NEPA did not apply to a state highway relocation project for which the planning and award of a contract preceeded the date of enactment. "...For all practical purposes...final federal action on the project took place prior to January 1, 1970, the effective date of NEPA."[146]

b. 'Substantial Action Remaining'

Section 11 of the CEQ guidelines substantiates the requirement for 102 statements to be prepared for federal projects which may have been initiated prior to January 1, 1970, but where substantial action still remains to be undertaken.[147] This applies even to those projects where substantial alterations may not be practicable:

> Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.[148]

Three early water-resource suits may serve as examples. The first case, the Environmental Defense Fund v. Corps of Engineers[149] concerns the Cross-Florida Barge Canal which was authorized by Congress in 1942, for which funds were approved in 1958 and on which construction began in 1964.[150] The EDF maintained that the Corps had violated a Congressional mandate in NEPA and other statutes which require the taking of adequate account of the environmental impact of the project.[151] They contended that even those projects which were ongoing at the time of the enactment of

NEPA and which were partially finished were liable to the 102 provisions.[152] The court decided that the facts of the case, the probable disastrous environmental damage, extensive remaining construction and construction time, and an express Congressional desire to protect the environment demanded that a preliminary injunction to halt further construction be issued.[153] The Court further held that an impact statement was required.[154] This controversy came to a summary end when the President, at the urging of the CEQ, enjoined further construction of the canal on January 19, 1971 to "...prevent potentially serious environmental damages."[155] Rosenbaum comments that,

> The canal, weighed by the President against the newly minted values expressed in the National Environmental Policy Act, had been judged a $50 million mistake.[156]

The second suit, also brought by the EDF against the Corps, sought to enjoin further construction of the Gillham Dam on the Cassatot River in Arkansas.[157] In terms of the total costs, it was estimated that approximately two-thirds of the dam was finished and the spillway and outlet works were 'substantially complete.'[158] The Corps had produced an impact statement while maintaining that less rigorous standards should be applied to ongoing projects.[159] The court rejected the argument, held the original EIS to be inadequate, enjoined further construction on the dam and required the Corps to produce a new impact statement.[160] In a later opinion, the injunction was dropped when the Corps produced an acceptable EIS.[161] An important aspect of this case concerns the court's rejections of the Corps' 'double-standard' argument. Rosenbaum maintains that this action exposed all incomplete Corps projects to the NEPA requirements.[162]

Anderson indicates that a substantially stronger position was

taken by the court in EDF v. TVA.[163] In this case, a dam project was, like Gillham Dam, about two-thirds completed.[164] Most of the required land was purchased and, by 1969, the concrete portion of the dam was completed.[165] The major action to be finalized was the relocation of roads.[166] The Court issued a temporary injunction on construction and directed that a statement be prepared on the ongoing project.[167] On appeal the court commented that,

> An agency must file an impact statement whenever the agency intends to take steps that will result in a significant environmental impact whether or not these steps were planned before January 1, 1970, and whether or not the proposed steps represent simply the last phase of an integrated operation most of which was completed before that date....Although this formulation might compel the preparation of impact statements for projects that are so nearly complete that there is no reasonable prospect that the decision to proceed as planned would be reversed, there is no reason to adopt a lesser standard and thereby encourage bureaucratic evasion of responsibility.[168]

Anderson reports that:

> The principle behind the 'substantial action remaining' rule is so well established that in seven cases of continuing federal involvement, the applicability of the Act was conceded by defendents.[169]

Indeed a review by the Comptroller General's Office indicates that all consulted agencies agreed that NEPA applied to ongoing actions but they varied significantly in their attitude to the problem.[170]

Other courts have pinpointed the stage of progress which a project must have reached in order that the provisions of NEPA no longer apply. The court in Ragland v. Mueller found that the NEPA 102 provisions did not apply to the remaining four miles of a twenty-mile stretch of Route I-295 in Florida, sixteen miles of which were completed by January 1, 1970.[171]

Another example of insubstantial remaining action, in Maddox v. Bradly, concerned the construction of a reservoir in Texas.[172] The plaintiff brought suit to enjoin the granting of a contract for the construction of a fence on the boundary between lands owned by him and lands owned by the United States.[173] In denying the injunction, the court ruled that the building of the fence was a small part of an otherwise completed project and that it was not subject to NEPA.[174]

c. 'Hybrid'

Anderson defines the key factor in the 'hybrid' cases as the existence of some formal federal action before January 1, 1970, with that federal involvement persisting in some manner after NEPA's enactment.[175] Such cases are commonly found in relation to the licensing of nuclear power plants of the Atomic Energy Commission (AEC) or to projects of the Federal-Aid Highway (FHWA) Program.[176] The operations of these two agencies are open to this particular kind of suit because of the nature of their procedures in relation to development projects.[177]

In both situations, formal decisionmaking is decidedly incremental in nature and numerous examples exist of these formal decisions which straddle the effective date of NEPA.[178] The case of Calvert Cliffs Coordinating Committee v. AEC[179] was early recognized as the most important decision to be handed down concerning the retroactive application of NEPA.[180] The AEC has a two-stage approval process for atomic energy plants in which it first licenses the construction of the plant, then it licenses the operation of the plant.[181] The Calvert Cliffs reactor was fully constructed by 1970 and was ready to operate but as it still required the issuance of an operating license, a formal federal action, the court held

it subject to the Section 102 requirements of NEPA.[182] Operation of the plant was temporarily enjoined by the court action, and the AEC was directed to produce an adequate EIS, and to revise its rules for implementing NEPA in the licensing of nuclear power plants.

Under the Federal-Aid Highway Program, highway construction is a joint state-federal undertaking. Projects are mainly planned by the individual states, but are usually funded through matching grants from FHWA.[183] Each project which obtains federal aid must be reviewed and approved at each of several stages by FHWA standards.[184] The stages at which approval is required include: program approval, approval of plans, specifications and estimates (PS&E); authorization to proceed with work;[185] and location approval and design control.

In Morningside-Lennox Park Assn. v. Volpe, both location and design approval had been given before 1970 but the final authorization of funds was not given until 1971.[187] The majority of the right-of-way was also purchased before 1970 but construction had yet to begin.[188] The court preliminarily enjoined further work on the project with the decision that a 102 statement was required even though location and design approval had been given prior to 1970.

In another case, Civic Improvement Committee v. Volpe, concerning a number of roads in the vicinity of Charlotte, a decision that NEPA was not applicable was handed down.[189] The court held that,

> The location of the road has been established and the construction contract has been let, and the beginnings of earth moving are taking place. Unless super highways are to be outlawed in Charlotte, it is unlikely that the route or the elevation of the road...will be changed by environmental studies.[190]

The Civic Improvement decision was similar to the balancing approach used in Arlington Coalition on Transportation v. Volpe:[191]

> Doubtless Congress did not intend that all projects ongoing at the effective date of the Act be subject to the requirements of Section 102. At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be possible to change the project in accordance with Section 102. At some stage federal action may be so 'complete' that applying the Act could be considered a 'retroactive' application not intended by the Congress. The Congressional command that the Act be complied with 'to the fullest extent possible' means, we believe, that an ongoing project was intended to be subject to Section 102 until it has reached that stage of completion.[192]

The court in Arlington found NEPA inapplicable to portions of the highway project which were completed prior to 1970 but required that an impact statement be completed on the remaining portions.[193]

Thus, as there is no clearly specified rule for such cases, Anderson concludes that

> ...hybrid cases have been decided according to the rule which the Court chooses to apply... [and that] ...There is a clear conflict among the Circuits and only the Supreme Court can establish uniformity.[194]

5.2.4. Financial Aspects

a. Who Pays Court Costs?

Contributions for financing environmental litigation are becoming more difficult to secure and more plaintiffs are seeking either court awards for attorneys and fees for expert witnesses or a portion of a fine levied on the defendent in a pollution suit.[195] In some cases, it has been possible to obtain costs from organizations such as the Ford Foundation,

which provide financial support for many public interest law groups.[196] Despite legislation which prohibits the awarding of fees against the federal government,[197] several courts in considering NEPA suits have addressed themselves to the situation.

The courts in Greene County Planning Board v. FPC[198] and Committee to Stop Route 7 v. Volpe[199] decided that attorneys' fees were not awardable against federal officials.[200] In Committee to Stop Route 7, it was further decided that such fees could not be awarded against state officials because NEPA is applicable to federal agencies only.[201]

In La Raza Unida v. Volpe, however, the court awarded fees against Highway Department officials because the suit helped to "...enforce a congressional policy in an environmental action".[202] This court ruled that three factors should be considered in deciding to award attorneys' fees:

> (a)... [the] ...strength of congressional policy, (b) the number of people benefitting from the litigant's efforts, and (c) the necessity and financial burden of private enforcement.[203]

b. Bonds

As indicated above, private individuals or groups are often the plaintiffs in NEPA suits and finances are therefore limited. If such plaintiffs were required to post large bonds, their suits would be dropped from financial necessity. Anderson views this possibility as "...one of the largest potential threats" to the Act.[204] While the courts, at the request of the defendent, could require plaintiffs to post a high bond, they have not done this because of the public interest character of NEPA suits.[205]

Natural Resources Defence Council v. Morton is the leading case in this issue.[206] A preliminary injunction enjoining the sale of oil and gas leases on the Outer Continental Shelf was handed down by the court, and

the government requested that the plaintiffs post a bond of 750,000 dollars during the first month and 2,500,000 dollars per month thereafter for the loss of revenue to the federal government.[207] The court denied this request and set the bond at 100 dollars. At least five other courts have set bonds of 100 dollars.[208]

In only one case to date has a substantial bond been imposed.[209] A 20,000 dollar bond was posted in Sierra Club v. Laird, where plaintiffs sued to enjoin a dredge-and-fill project by the Corps of Engineers.[210] In another suit against the Corps, EDF v. Corps of Engineers, a one dollar bond was imposed on plaintiffs; this is a clear statement of policy by the courts.[211]

5.3. SCOPE OF THE REQUIREMENTS OF SECTION 102

Congress through the National Environmental Policy Act, requires "...all agencies" to 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..." of the project's environmental impact.[212] Most of the litigation involving NEPA has been attempted to determine (i) under what circumstances a 102 statement is required, (ii) what information such statements must contain, and (iii) the degree of detail with which that information must be presented.[213] This section of Chapter Five will focus on these questions.

5.3.1. When is an Environmental Impact Statement Required?

There is no concrete statement concerning specific guidelines for the identification of federal projects which must be bound by the provisions of NEPA. If such a statement existed, it would control the applicability of the legislation in the most fundamental way. Since, however,

it has been left to the courts to examine the issue on a case-by-case basis, court interpretations of the phrases 'major federal actions' and 'significantly affecting the...environment'[214] will be reviewed.

In Natural Resources Defense Council v. Grant,[215] the court defined the phrase 'major federal action' as a federal action which "... requires substantial planning, time, resources, or expenditure."[216] The phrase 'significantly affecting the quality of the human environment' was interpreted as "...being an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment."[217]

Another court has considered the possibility of a further refinement of the definition process.[218] In Sierra Club v. Hardin, it was suggested that "...it may be possible in the future to develop some 'per se' categories of major federal actions," to which the 102 requirements will automatically apply.[219] Furthermore, the Second Circuit Court in Hanly v. Kleindienst, held that the term 'significantly' in 'significantly affecting the environment' could be more explicitly interpreted as a question of law.[220] Thus it would be possible to determine which actions exert significant impacts and which do not. Although the decision conceded that the term was 'amorphous', it suggested that the agencies could settle the question by applying tests of relative and absolute resultant damages.[221]

Conversely, Anderson feels that, in general, the "...courts have shied away from developing ready-to-use formulas for applying NEPA."[222] For example, the development of 'per se' categories was not considered to be a serious possibility in Transcontinental Gas Pipeline Co. v. Hackensack Meadowlands Development Commission.[223] The opinion was expressed that the question of "...whether a project is a 'major Federal action' is, of course,

a question which can only be resolved through a careful case-by-case analysis.[224] It was, furthermore, remarked in Citizens for Reid State Park v. Laird that, "...the statutory language 'significantly affecting the quality of the human environment...' is extremely broad and not susceptible to precise definition."[225] This opinion is reiterated in Goose Hollow Foothills League v. Romney.[226]

Still other courts have reacted differently to these issues by treating the phrases 'major federal action' and 'significantly affecting the environment' as one test.[227] The basic assumption in such a treatment is that "...satisfaction of one criterion automatically carries with it satisfaction of the second."[228] Fox implies that some courts which have employed the criterion as one test have determined that simply because an action is 'major,' it will necessarily have a "...significant impact on the environment."[229] However, it appears that most courts which have employed the 'one-test' theory have switched the order of priority of the standards and have determined that, if an action will result in significant effects, there is small reason to consider the project's overall size.[230] In Citizens for Clean Air v. Corps of Engineers, the court went directly to the problem of environmental degradation and did not discuss the size of the project.[231] Similarly, in the court proceedings in Pizitz, Inc. v. Volpe, environmental impact alone was considered and it was determined by a combined 'one-test' standard that no major adverse impact was apparent.[232]

Other courts have rejected this test and have decided that the terms are to be judged separately.[233] Thus in Scherr v. Volpe, the court held that the proposed project "...constitutes a major federal action."[234] The "...second step in the analysis is whether the project is one which will significantly affect the quality of the human environment."[235]

It may be expected that the complex variety exhibited among the various cases which have been tried under NEPA would indicate that any manner of classification for determining which projects require impact statements must be contrived and thus quite arbitrary and unwieldy. Some examples will serve to illustrate the ranges of scope, magnitude and complexity which are encountered in these cases.

Projects which have been considered to be 'major federal actions significantly affecting' the environment include not only such obvious 'major actions' as the detonation of a 5-megaton nuclear war-head at Amchitka, Alaska,[236] and a multi-state project under the auspicies of the Department of Agriculture for the eradicate of fire ant colonies which involved the use of the pesticide Mirex,[237] but also such projects as the following where NEPA was also held to be applicable:

(i) a Corps of Engineers channel-clearing project on a 55-mile stretch of the Gila River;[238]

(ii) a HUD loan for the purpose of building a 16-storey university dormitory which may have an adverse effect on surrounding properties;[239]

(iii) a federal prison planned for a residential area of New York City;[240]

(iv) the construction of a Tri-service Incinerator at the Walter Reed Army Center Annex.[241]

Some courts have held that NEPA was not applicable and that EIS were not required in the following instances:

(i) the conduct of a mock amphibious training exercise by the USMC in an ocean front state park in Maine;[242]

(ii) the granting of a lease on Indian trust-fund lands by the Secretary of the Interior;[243]

(iii) a FPC permit to add a seven-acre addition to an existing natural gas facility.[244]

The variety of cases which is involved frustrates any attempt to establish a classification which may be used to determine the limits of 'major actions' which 'significantly' affect the environment. One notable complication in the establishing of classificatory criteria is that many decisions which reject the applicability of NEPA are coloured by extenuating circimstances.[245] For example, in Citizens for Reid State Park, the court was impressed with the fact that the U.S. Navy had taken elaborate precautions from the inception to minimize 'significant' adverse environmental impact during training exercises and ruled in addition that it was not a major federal action.[246] In Davis v. Morton, NEPA requirements were pre-empted by a BIA statute which called for "...enforcement of appropriate land use regulations, pollution control and health and safety standards."[247]

A further complication is that a project cannot be viewed in isolation. It has been stated that "...the cumulative impact with other projects must be considered" in determining the scope of a project's impact.[248] The CEQ guidelines direct that,

> The statutory clause 'major Federal actions significantly affecting the human environment' is to be construed by agencies with a view to the overall cumulative impact of the action proposed.[249]

In Texas Committee on Natural Resources v. United States, the court complied with this directive.[250] In this case, a project to develop a golf course complex had been approved by the FHA but the loan had not yet been

completed nor had construction begun by January 1, 1970.[251] The court held that the case involved "...not merely a loan, but an extensive federal project, the consequences of which will have substantial and detrimental environmental and ecological consequences."[252] In the Alaska pipeline case, Wilderness Society v. Hickel,[253] the Department of the Interior prepared an EIS which considered only the impact of constructing the road which was necessary in order to build the pipeline, but failed to consider the impact of the pipeline itself.[254] The court found the pipeline to be a 'major federal action' with 'significant' environmental effects and directed that the EIS be expanded to include the "...total undertaking."[255] Similarly, in United States v. 247.37 Acres, the court maintained that the reservoir with which the suit was concerned was merely a small part of a larger flood control project which had major environmental consequences.[256]

In summary, it may be said that there appears to be no possibility of a definitive statement which can determine when a project might be classified as a "...major federal action significantly affecting the human environment." These terms of reference are relative and lend themselves readily to a variety of interpretations. Nevertheless, according to Green, most judicial opinions have assumed that the challenged federal actions were 'major' and 'significantly' affected the quality of the human environment.[257] Similarly, Anderson maintains that many cases have resolved the problem by assuming that NEPA was intended by Congress to cover all pending federal actions that may cause significant environmental effects.[258]

5.3.2. Who Must Prepare the Environmental Impact Statement?

The Act directs that "...all agencies of the Federal Government shall...include...a...detailed statement by the responsible official" on the environmental impact of proposed actions.[259] Judge Oakes wonders whether "...the language of the act...[is]...so broad that Congress could be said to have abdicated its authority to set specific procedural guidelines by passing the buck to the courts?"[260] This language does leave several questions concerning EIS authorship unanswered and the courts have once again assumed responsibility for deliberating on this problem.

In Calvert Cliffs Coordinating Committee v. AEC, the court indicated that an agency itself must balance all "...economic and technical considerations."[261] The court ruled that an agency may neither rely on prior Congressional authorization nor the satisfying of certain standards as final determination that benefits exceed costs.[262]

In some cases, agencies permitted state or private interests, which had applied for licenses, grants or permits, to prepare statements.[263] The court ruled explicitly in Greene County Planning Board v. FPC, that the FPC staff must prepare the 102 statement itself.[264] The FPC was not permitted to rely on the environmental report which had been prepared by the applicant, or on the collection of information from others. Finally, the court ruled that the draft statement must be prepared before the staging of any public hearing on a proposed federal project.[265]

Implications from SIPI v. AEC suggest that draft statements may be required at an even earlier date under some circumstances.[266] In this case, plaintiffs expressed concern over the AEC's research and development program for the proposed liquid metal fast breeder reactors. The plaintiffs requested that a general impact statement be prepared to apply to

the whole program during the planning stages, arguing that statements to be produced for each individual facility at a later date, when the program was underway, would prove to be unsatisfactory.[267] Plaintiffs recognized that because of agency commitment, adverse findings at a later date would likely have less impact on program survival. The appeals court ruled in favor of the plaintiffs.[268]

It was suggested in Natural Resources Defense Council v. Morton, a case concerning the sale of off-shore oil leases, that the President might have requested that the Energy Subcommittee of the Domestic Council prepare the impact statement in question instead of the Department of the Interior because of the former's greater expertise.[269] The responsibility for the statement preparation had fallen to the Department of the Interior as no other assignment was made by the President.[270] The court held this to be the proper delegation of responsibility under the circumstances because the Department of the Interior had initiated the broad energy program responsible for the sale of the leases.[271]

Where more than one federal agency is involved in a project, the CEQ's 1971 impact statement guidelines state that,

> The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. 'Lead agency' refers to the Federal agency which has primary authority for committing the Federal Government to a course of action with significant environmental impact. As necessary, the Council on Environmental Quality will assist in resolving questions of lead agency determination.[272]

Thus, in Upper Pecos Association v. Stans, it was held that the Forest Service was the lead agency in the construction of a road.[273] Although the project was funded by the Economic Development Agency, the

Forest Service was the major sponsor.[274]

The legislative history of NEPA indicates that the 102 mandate was particularly directed toward the development-oriented agencies because of their gross lack of environmental concern.[275] Senator Muskie's remarks from the floor, before the bill's passage in the Senate, maintained, however, that the procedures of the 'environmental improvement' agencies would not be affected in any way by the provisions of the Act.[276] Congressman Dingell made a similar statement three days later in the House.[277] 'Environmental improvement' or 'environmental protection' agencies were described at the time of the bill's passage by Senator Muskie as those which administered the existing pollution control programs and by Senator Jackson as the Federal Water Pollution Control Administration, the Federal Air Pollution Control Administration and the Park Service.[278] Despite these last-minute attempts to clarify the applicability of NEPA, considerable debate has arisen over two questions, (i) whether or not environmental protection agencies are required to prepare impact statements and (ii) precisely which agencies these are.[279] Most environmental protection agencies besides the EPA have produced impact statements as a working rule, despite apparent Congressional intent to excuse them from compliance.[280] Anderson maintains that this is primarily because the agency programs which it was intended to exclude were the ones which later were moved to the EPA from other environmental protection agencies.[281]

In any event, two subsequent suits against the Corps of Engineers settled any question that other 'environmental improvement' agencies may be exempted from the 102 mandate.[282] In Kalur v. Resor, the Corps' regulations governing the Refuse Act permit program were found invalid because they failed to require 102 statements for the granting of permits to dump

refuse into the nation's waters.[283] This principle was also upheld in the subsequent action of Sierra Club v. Sargent where the court stated that the Corps of Engineers must prepare an impact statement on a Refuse Act permit issued to Atlantic Richfield Co.[284] In both cases the Corps maintained that it was exempt from compliance with NEPA because it was an 'environmental improvement' agency.[285] The courts rejected this view.[286]

The courts have read the act broadly so that nearly every agency has been found to be subject to the 102 mandate. The only agency whose required compliance remains in question is the EPA itself.[287]

5.3.3. The Content of Environmental Impact Statements

The National Environmental Policy Act directs all agencies to prepare 'detailed statements' on the 'environmental impact' of proposed actions.[288] Agencies are instructed to consider:

> (i) the environmental impact of the proposed action;
> (ii) any adverse environmental effects which cannot be avoided, should the proposal be implemented;
> (iii) alternatives to the proposed action;
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[289]

The CEQ Guidelines further clarify these requirements. An impact statement should consider:

> The probable impact of the proposed action on the environment, including impact on ecological systems such as wildlife, fish and marine life. Both primary and secondary significant consequences for the environment should be included in the analysis. For example, the implications,

> if any, of the action for population distribution or concentration should be estimated and an assessment made of the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question.[290]

While court decisions indicate a traditional reluctance to rule on the substance of agency findings, they have specified at least three major requirements to which agencies should adhere to in the preparation of impact statements.[291] One case which is recognized as a landmark decision concerning EIS content is EDF v. Corps of Engineers.[292] In this case the court identified the first major requirement of NEPA as 'full disclosure'.

> At the very least NEPA is an environmental full disclosure law...the detailed statement required by Section 102(2)(c) should, at a minimum contain such information as will alert the President, the Council on Environmental Quality, the public, and, indeed, the Congress, to all known possible environmental consequences of proposed agency actions.[293]

This requirement of 'full disclosure' has been adopted in several subsequent cases.[294]

Certainly the use of such relatively amorphous terminology as 'detailed' statement, 'significant consequences' and 'full disclosure' may complicate the preparation and judgment of impact statement contents. One may ask, for example: How detailed? How much is significant? When is disclosure full? In answer to such questions, the court in EDF v. Corps of Engineers maintained that,

> If perfection were the standard, compliance would necessitate the accumulation of the sum total of scientific knowledge of the environmental elements affected by a proposal. It is unreasonable to impute to the Congress such an edict...[But]...the phrase '...to the fullest

> extent possible' clearly imposes a standard of environmental management requiring nothing less than comprehensive and objective treatment by the responsible agency....Thus, an agency's consideration of environmental matters that is merely partial or performed in a superficial manner does not satisfy the requisite standard.[295]

Several courts have agreed simply that the 'full disclosure' impact statement must contain sufficient information in adequate detail concerning all phases of the proposal in order to allow the most 'optimally beneficial decision' to be made.[296]

A second major requirement which the impact statement must fulfill is that of a the balancing of environmental and other factors.[297] The leading court decision concerning this criteria is Calvert Cliffs:

> In each individual case, the particular economic and technical benefits of planned action must be stressed and then weighed against environmental cost.[298]

The court further declares that,

> If the decision was reached procedurally without individualized consideration and balancing of environmental factors...it is the responsibility of the courts to reverse.[299]

Similarly, the court in EDF v. Corps of Engineers maintained that cost-benefit analysis including claims of economic benefit should be included in the impact statement.[300]

The question which has arisen concerning the balancing of interests concerns whether the impact statement as a source of environmental information should serve as (i) a part of the balancing process or whether it should (ii) contain information itself concerning other aspects of the proposal, thus acting as a single 'decision document' which contains within itself the balancing of interests.[301] The courts have handed down

conflicting views on this point.[302] Anderson points out that a major advantage of one 'decision document' is that it "...creates a single written, reviewable, project justification."[303] However, he further maintains that a single all-inclusive report runs the risk of allowing "...project justifications and economic and technical considerations to swallow up environmental impact analysis."[304]

A third major area for examination within an impact statement is the consideration of alternatives.[305] Section 102(2)(c) of NEPA requires agencies to consider alternatives to the proposed action.[306] Further, Section 102(2)(d) requires the agencies to "...study, develop, and describe appropriate alternatives to recommended courses of action."[307]

A leading case concerning the subject of alternatives is Natural Resources Defense Council v. Morton.[308] This case concerned the adequacy of alternatives which were considered in a 102 statement for the proposed leasing of federal lands for oil drilling off the coast of Louisiana.[309] The Department of the Interior sought to justify the omission of a discussion of the major alternative course of action which was the increasing of oil imports. It was argued that (i) the project would cause no adverse impact, and (ii) the Department of the Interior had no power to implement the policy of increasing oil import quotas.[310] The court, however, pointed out that the Interior Department's own impact statement had earlier stated that the spillage from drilling would not approach in magnitude the pollution caused by the routine discharge from tankers.[311] The court thus held that the agency's dismissal of this alternative and others was unwarranted and ruled that further investigation of alternatives was necessary, regardless of the agency's power to implement them.[312]

In a corresponding decision, the court in EDF v. Corps of Engineers held that the agency must consider such non-structural alternatives to the Gillham Dam Project as flood plain management and subsidized insurance, which the agency again had no power to implement.[313]

Agencies have also been directed to consider the alternative of no action at all. In Calvert Cliffs, the court held that the consideration of alternatives must include that of total abandonment.[314]

Thus, the review of alternatives must be as complete as the consideration of environmental impacts.[315] As indicated by several courts, then, the failure to (i) adequately consider alternatives, (ii) balance environmental and other values, and (iii) make a full disclosure of the environmental impacts of a proposal may result in project delay in a NEPA suit. Such delay is readily apparent from a review of many of the above cases.

Peterson, in reviewing the scope of NEPA requirements, maintains that because of the limitations which NEPA imposes on agency resource decisionmaking, federal officials are now required to "...act in a manner which will restore and maintain environmental quality when conflicts between environmental values and other values occur."[316] This could be construed to mean that agencies may be expected, through the government's policy statement in Section 101, to instigate works in accordance with impact statement findings. Section 5.4. of this chapter will examine the judicial question of substantive right to environmental quality under the National Environmental Policy Act.

5.4. SUBSTANTIVE RIGHT TO ENVIRONMENTAL QUALITY UNDER SECTION 101

The policies of the National Environmental Policy Act, as stated

in Section 101(a), recognize "...the profound impact of man's activitie[s] ..." on the environment and the "...critical importance of restoring and maintaining environmental quality..." This Section "...declares that it is the continuing policy of the Federal Government...to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony..."[317]

Congress specified six objectives for the federal government to pursue through its departments and agencies in order to effect these policies. Section 101(b) states:

> In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--
>
> (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 and safety, or other undesirable or 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.[318]

The issue which the following discussion seeks to evaluate is whether or not an agency can be required to adhere to the policies set forth in Section 101 once it has complied with the procedural duties of Section 102. That is to say, once an impact statement has been prepared, can the courts enjoin agency proposals which are inconsistent with the declared policy of Section 101?

5.4.1. Statutory Construction

An approach which is favored by many experts in attempting to determine the legal scope of Section 101 is that of statutory construction, that is, a detailed examination of the language of the Act.[319] Such an examination seems to elicit a universal agreement that Section 101 does indeed impose judicially enforceable duties upon agency decisionmaking.[320]

Section 101(a) speaks of "...restoring...environmental quality... [and]...creat[ing] and maintain[ing] conditions under which man and nature can exist in productive harmony..."[321] This language suggests that Congress believes that the environmental 'quality' and conditions which were once in existence were changed by the 'impact of man's activities' and that they must be restored. Arnold maintains that this language "...implies a national desire to return to an earlier and better day when 'environmental quality' existed, and then to 'maintain' that quality."[322] Also he asserts that the use of the word 'critical' indicates that the directive is more than merely a request.[323]

In setting forth six enumerated national goals, Section 101(b) is considerably more specific than Section 101(a). This section states that "...all practicable means, consistent with other essential considerations of national policy...[must be used]...to improve and coordinate

Federal...programs."[324] The words 'essential' and 'improve' in this passage, are of the highest importance.[325] The word 'essential' indicates that NEPA is not merely a desirable or important policy, "...but occupies the highest rank in the hierarchy of governmental priorities."[326] Arnold contends that this also implies that:

> The policy of NEPA may not override other... [non-environmental]...policies; but that the policy of NEPA shall prevail, in the event of inconsistency, as against other national policies not important enought to be characterized as 'essential'.[327]

The word 'improve' reportedly carries through the thought, which was begun by the words 'restoring' and 'create' in Section 101(a), that the state of the nation's environment left much to be desired.[328]

Although Section 101(c) probably lost a great deal of enforceable impact when the wording was changed in committee from "...each person has a...right to a healthful environment..." to "...each person should enjoy a healthful environment," Arnold points out that, in another phrase from Section 101, ("...each person has a responsibility to contribute to the preservation...of the environment"), the words 'each person' presumably includes agency administrators and employees and "...the use of the word 'responsibility' indicates again, that something more than a request is involved."[329]

Despite the weighty implication that the language of Section 101 imposes judicial duties upon federal agencies, most authorities agree that the key language to the enforcement of the environmental policy set in Section 101 is found in Section 102.[330]

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States

> shall be interpreted and administered in accordance with the policies set forth in this Act...[331]

Neither 'directs' nor 'shall be interpreted and administered' are suggestive; they both command that the "...policies, regulations and public laws of the United States...[be implemented]...in accordance with the policies set forth in this Act..."[332] A further interpretation of this passage appears to be of the utmost importance. It is suggested that since the term 'policies' (of the Act) is not restrictive, it must refer to all of the policies of NEPA including those in Section 101.[333] The courts have held Section 102 to be applicable to agency action, thus under this interpretation, Section 101 must also be held applicable. Fox, similarly, argues that the goals listed in Section 101(b) are incorporated in the "...policies, regulations and public laws of the United States,"[334] so that it is legally incumbent upon federal agencies to incorporate these goals into agency duties.[335] He further maintains that the provisions of Section 103 substantiate this view.[336] Under this Section, all federal agencies are directed to determine whether their policies are inconsistent with NEPA policies and, if so, to modify them.[337] Furthermore, in reviewing the overall intent of the Act, one may argue that, since agencies are required in Section 102 to conduct in-depth analyses concerning potential environmental impact, it is illogical not to require that these studies be used in agency decisionmaking.[338] The impact statement supplies readily accessible data for this purpose and also for the purposes of a reviewing court.[339]

Finally, the Environmental Protection Agency has said that the objective of NEPA is "...to build into the agency decisionmaking process an appropriate and careful consideration of all environmental aspects of

proposed actions."[340] It may be, however, that merely to require federal agencies to disclose the effects of their acts on the environment is less likely to achieve this goal than if these agencies are required to incorporate such findings into their final plans.

There exist two other areas of dispute concerning the acceptance of the Section 101 environmental policy statement as being judicially reviewable. The first concerns the phrase 'to the fullest extent possible' in Section 102 which could have been construed as an agency escape hatch.[341] The legislative history of the Act, however, indicates that this was not intended.

> Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set forth in Section 102. It is intended to assure that all agencies of the Federal government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.[342]

Secondly, Fox suggests that the passage in Section 105 which notes that the "...policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies" could be held to mean that they are less important than agencies' 'primary duties' and therefore are not to be treated as legal duties.[343] Again the legislative history of the Act indicates that this is a misconception.[344] Agencies are required to "...conduct their activities in accordance with ...NEPA...unless to do so would violate their existing statutory authorizations."[345]

In summary, it may be seen that the language of Section 101 appears to create real legal obligations for federal agencies. However, without

the key language which occurs relatively unobtrusively in Section 102, the national environmental statement would probably carry far less potential force. Section 102(1) in short has the effect of imposing "...judicially enforceable duties with respect to the policy standards of Section 101."[346]

5.4.2. Court Enforcement of Section 101

Legal scholars agree that Section 101 does impose judicially-reviewable duties on the agencies.[347] Environmentalists appear eager to obtain the most complete judicial review of agency actions possible. The courts, on the other hand, may prefer to limit such a review as it could both open the gates to a flood of litigation and require that the judiciary review the substance of agency decisionmaking.[348]

It has been suggested that some of the most "...difficult and challenging case law of the next few years is going to be that dealing with the question" of judicially enforceable duties under Section 101.[349] Thus far the manner in which judges and courts have responded to this question has varied significantly. Arnold points out that one major difference exists between the decisions which have issued from trial courts and those of appellate courts.[350] Most trial courts have rejected the idea of the existence of a duty under NEPA to require any action of an agency other than compliance with Section 102.[351] These courts have not examined the question of whether agency proposals have given adequate consideration to the information in the prepared impact statement. In Howard v. EPA, plaintiffs challenged the construction of a regional sewage treatment plant and the court held:

> These are not issues which are proper for judicial review. They do not present legal problems, but rather mechanical, logistic, and engineering problems. This court will, therefore, not consider them.[352]

Arnold decries the position that courts are for 'legal' and not 'mechanical' or 'engineering' problems:

> Never mind that staggeringly complex factual issues of manufacturing, patentability, construction, and the like are the everyday fare of courts and lawyers in tort and contract cases.[353]

Arnold wonders how the court would have reacted if the suit had alleged a more traditional breach of contract than the above.[354] He suggests that the courts would have dealt differently with this case if, for example,

> EPA had contracted with the plaintiff...to build a sewage treatment plant 'in accordance with the best technology practicable at the time of construction'...[and]...that EPA was about to build a plant using only secondary treatment methods while...[the Plaintiff]...claimed...that tertiary treatment was both practicable and superior...[355]

This is the same type of material which is considered in the courts daily and it was not different from that dealt with in Howard v. EPA.[356]

> The courts...are not created to resolve 'legal problems'. Litigants are not interested in 'legal problems'. It is the business of the courts to resolve real disputes including difficult factual issues, even if judge and counsel must in the process become instant experts in some technical or scientific field.[357]

Many courts retain their historical distaste for challenging agency action. In EDF v. Corps of Engineers,[358] the court handed down decisions which appeared to constitute a sweeping victory for the plaintiffs except concerning requests for enforcement of Section 101.[359] The court upheld plaintiffs' standing, swept aside a defense of sovereign

immunity, and held that NEPA was applicable although (i) the project had been specifically authorized by Congress in 1958, (ii) construction had begun in 1963, and (iii) four-fifths of the total costs had been expended. The court held post-1970 Congressional appropriations to be no bar to judicial intervention, held the Corps of Engineers' impact statement to be insufficient, and enjoined construction on the project until compliance with NEPA was finalized. But, concerning Section 101, the court said:

> Plaintiffs contend that NEPA creates some 'substantive' rights in addition to its procedural requirements...the Court disagrees...It is true that the Act required the government to improve and coordinate Federal plans, functions, programs, and resources; but it does not purport to vest in the plaintiffs, or anyone else, a 'right' to the type of environment therein... In the instant case it is clear that the damming of the Cassatot will reduce 'diversity and variety of individual choice.' It is apparently plaintiffs' view that upon the basis of such a finding the Court will have the power, and duty, ultimately and finally to prohibit the construction of the dam across the Cassatot. No reasonable interpretation of the Act would permit this conclusion.[360]

Another example of a district court's refusal to acknowledge any substantive rights to Section 101 is found in Bucklein v. Volpe:[361]

> ...the Act is simply a declaration of Congressional policy; as such, it would seem not to create any right or impose any duties of which a court can take cognizance...It is unlikely that such a generality could serve as a source of court-enforceable duties.[362]

Arnold contends that the reasoning displayed in the suggestion that NEPA is 'only' or 'simply' a declaration of Congressional policy "...betrays a fundamental misconception of what a statute is" and points out that all statutes are declarations of Congressional policy which is,

'after all', law.[363] Despite the fact that a decision of this nature may be a misrepresentation of the normal relationship that exists between Congress and the Courts in law-making, the trial courts have often employed the tactic of allowing only procedural enforcement of Section 102.[364]

In general, the appellate courts have been more willing to favor the view that substantive review exists under Section 101 of NEPA.[365] The first case is from the Court of Appeals for the District of Columbia Circuit. Calvert Cliffs Coordinating Committee v. AEC held that agencies must balance 'environmental' and 'economic' considerations in their actions.[366] Judge Wright said that Section 101:

> ...leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances...(Ibid. at 1112). The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.[367]

In reviewing the language of this passage, Arnold points out that the fact that the Act's substantive provisions "...may not require particular substantive results...[in]...particular problematic instances" means that in other instances, particular results may be required, "...and the courts may enforce such a requirement if necessary."[368] It follows that if "...the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values," the courts may "...reverse a substantive decision on its merits, under Section 101."[369] Moreover, while the authority to reverse a decision is said to be 'probably' limited either to a situation in which an 'arbitrary' "...balance of costs and benefits" was struck or to cases of clearly giving "...insufficient

weight to environmental values," the insertion of the word 'probably' may indicate a desire on the part of the court to leave the possibility open.[370]

In a like response, the court in Natural Resources Defense Council Inc. v. Morton, said:

> So long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to inject itself within the area of discretion of the executive as to the choice of the action to be taken.[371]

This passage suggests that if, on the other hand, a "...hard look...at environmental consequences..." was not taken "...the court...[would]... seek...to inject itself within the area of discretion of the executive as to the choice of the action to be taken."[372]

While both passages are technically dicta, they nevertheless, indicate an inclination on the part of the Courts of Appeals to view Section 101 of NEPA as consisting of judicially reviewable policy.[373]

The wording of Sections 102(2)(a),(b) have been similarly interpreted in a few court decisions. These subsections of Section 102 direct that all agencies 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 Title II of this Act, which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.

It may be, therefore, that while a filed and forgotten EIS would satisfy the requirements of Section 102(2)(c), the above directives would not be satisfied. Some courts have determined that agencies must consider environmental information in their final decisions,[374] and that such 'considerations' are judicially reviewable. Calvert Cliffs was the first decision to place such an interpretation upon Sections 102(2)(a),(b). "...The requirements of Section 102(2) must not be read so narrowly as to erase the general import of Sections 102(2)(a) and (b)."[375]

A concurring decision was issued by the Fourth Circuit in Ely v. Velde. It was maintained that NEPA required the agencies to demonstrate that they have considered environmental factors.[376] Such interpretations carry the judiciary one step closer to the notion that Section 101 guarantees the 'right' to environmental quality.

A careful scrutiny of the language of Section 101 and selected subsections of Section 102, therefore, indicates that the policy declarations of the National Environmental Policy Act do indeed offer grounds for judicial review of agency actions. The records of several Appeals Courts indicate a tendency to uphold this finding but court decisions, particularly those of trial courts, still strongly favor a view of NEPA which requires compliance with Section 102(2)(c) only. The question to be considered at this point then appears to be not so much whether or not NEPA creates a court-enforceable right, but whether or not the courts will in the future choose to enforce this right.

FOOTNOTES TO CHAPTER FIVE

[1]Fredrick R. Anderson and Robert H. Daniels, NEPA in the Courts : A Legal Analysis of the National Environmental Policy Act, (Baltimore : Resources for the Future : Johns Hopkins University Press, 1973), p.29; Harold P. Green, The National Environmental Policy Act in the Courts : January 1, 1970 - April 1, 1972 (Washington, D.C. : The Conservation Foundation, 1972), p.5.

[2]Anderson and Daniels, NEPA in the Courts, p.15.

[3]Calvert Cliffs Coordinating Committee v. A.E.C., 499 F. 2d at 113-114, I ELR at 20348 (D.C. Cir. 7/23/71).

[4]Lloyd A. Fox, "Substance and Procedure in the Construction of the National Environmental Policy Act," Michigan Journal of Law Reform, Vol.6, No.2, (Winter, 1973), p.496.

[5]Walter A. Rosenbaum and Paul E. Roberts, "The Year of Spoiled Pork : Comments on the Courts' Emergence as an Environmental Defender," Law and Society Review, Vol.7, No.1, (fall, 1972), p.39.

[6]Joseph L. Sax, Defending the Environment : A Strategy for Citizen Action, (New York : Alfred A. Knopf, 1971), p.108.

[7]Ibid.

[8]Ibid., pp.108-9.

[9]Ibid.; Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention," Michigan Law Review, Vol.68, (January,1970), p.476.

[10]Sax, Defending the Environment, pp.108-10.

[11]Ibid., p.111.

[12]Ibid.

[13]Rosenbaum and Roberts, "Spoiled Pork," p.39.

[14]Ibid.

[15]Environmental Defense Fund v. Corps of Engineers, 324 F.Supp. 878, 1 ELR 20079, 20366 (D.D.C. 1/27/71, 7/27/71).

[16]Rosenbaum and Roberts, "Spoiled Pork," p.39.

[17]Ibid., p.40.

[18]Ibid.

[19]Richard S. Arnold, "The Substantive Right to Environmental Quality under the National Environmental Policy Act," 3 ELR, 50038.

[20]Bucklein v. Volpe, 1 ELR 20043, 20044 (N.D. Cal. 1970).

[21]Texas Comm. on Natural Resources v. U.S., 2 ELR 26574 (W.D. Tex. 1970).

[22]Anderson and Daniels, NEPA in the Courts, p.15.

[23]Ibid.; Eva H. Hanks and John L. Hanks, "An Environmental Bill of Rights : The Citizen Suit and the National Environmental Policy Act of 1969," Rutgers Law Review, Vol.24, (1970), p.231; Also see discussion of Yannacone v. Dennison in above, Chapter Two.

[24]Anderson and Daniels, NEPA in the Courts, p.16.

[25]Although the courts have handed down many recent decisions which favor the environmental cause, it is not accurate to envisage them as champions of a cause. They are ever fearful of setting reckless precedents. They would never have reached these decisions without the explicit NEPA mandate and, indeed, there has been much dissatisfaction with the rather restrictive scope of the interpretations of this mandate as over the question of the 'right' to a salubrious environment. Of course, agencies have expressed dissatisfaction for opposite reasons, claiming that some judicial decisions cannot be feasibly implemented.

[26]Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972), 2 ELR 20192-93.

[27]Judge James L. Oakes, "Developments in Environmental Law," 3 ELR 50001; "Judicial Review of Agency Action : The Unsettled Law of Standing," Michigan Law Review, Vol.69, (January, 1971), p.540.

[28]5 U.S.C. Sec.702 (Supp. V, 1965-1969) amending 5 U.S.C. Sec. 1009 (a) (1964).

[29]"The Unsettled Law of Standing," p.541.

[30]See Chapter 2, p. 30.

[31]Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608, 1 ELR 20292 (2d Cir.1965), cert. denied, 384 U.S. 941 (1966).

[32]Hanks and Hanks," Bill of Rights," p.234.

[33]Supra ,note 31 at 616 and 20294; See also Hanks and Hanks, "Bill of Rights," p.235.

[34]U.S. Senate, Committee on Interior and Insular Affairs, National Environmental Policy Act of 1969, S. Rep. No.21-296, 91st Cong., 1st Sess., (July 9, 1969), at 2.

[35]National Environmental Policy Act of 1969, P.L.91-190, 83 Stat. 852, Sec.101(c); See Appendix A (hereinafter, NEPA).

[36]U.S. House, Committee on Merchant Marine and Fisheries, Conference Report on S.1075, H.R. Rep. No.91-765, 91st Cong., 1st Sess., at 3 (December 1969); also at 115 Cong.Rec. at 39701-04 (December 17, 1969).

[37]Anderson and Daniels, NEPA in the Courts, p.26.

[38]Oakes, "Developments", p.50001.

[39]Anderson and Daniels, NEPA in the Courts, p.29; See also, NEPA, Sec.101(b).

[40]NEPA, Sec.101(c).

[41]Anderson and Daniels, NEPA in the Courts, p.26.

[42]Supra , note 31 at 617 and 20295.

[43]Sec.10, 5 U.S.C. Sec.702.

[44]Supra , note 26 at 739 and 20195.

[45]Supra , note 26 at 735 and 20194.

[46]Anderson and Daniels, NEPA in the Courts, p.28.

[47]Sierra Club v. Morton, supra , note 26.

[48]Anderson and Daniels, NEPA in the Courts, p.28.

[49]McQueary v. Laird, 449 F. 2d. 608, 1 ELR 20607 (10th Cir. 10/21/71).

[50]See, Maddox v. Bradley, 345 F. Supp. 1255, 2 ELR 20404 (N.D. Tex. 1972); Coalition for the Environment v. Linclay Development Corp., 347 F. Supp.634, 2 ELR 20555 (E.D. MO.1972); See also Anderson and Daniels, NEPA in the Courts, pp.35-36.

[51]Green, The National Environmental Policy Act, p.5.

[52]West Virgina Highland Conservancy v. Island Creek Coal Co., 441 F. 2d 232 (4th Cir., 1971), 1 ELR 20160; National Helium Corp. v. Morton, 326 F. Supp.151 (Kans., 1971), 1 ELR 20157.

[53] See, Environmental Defense Fund v. Corps of Engineers, 324 F. Supp.878, 1 ELR 20079 (D.D.C. 1971); Brooks v. Volpe, 319 F.Supp.90, 1 ELR 20045 (W.D. Wash.1970), 329 F. Supp.118, 1 ELR 20286 (W.D. Wash.1971), rev'd, 405F. 2d 1193, 2 ELR 20139 (9th Cir.), 350 F.Supp. 269, 2 ELR 20704 (W.D. Wash.), 350 F. Supp.287 (W.D. Wash.); and Kalur v. Resor, 335 F.Supp.1, 1 ELR (D.D.C. 1971), where plaintiffs were granted standing to sue to enjoin the entire Refuse Act Permit Program.

[54] 441 F. 2d 232, 1 ELR 20160 (4th Cir. 1971).

[55] Ibid., at 232 and 20161.

[56] Anderson and Daniels, NEPA in the Courts, p.36.

[57] Ibid.

[58] 333 F. Supp.1364, 1 ELR 20617, (D.S.D. 11/11/71).

[59] Through a guardian appointed by the court.

[60] Supra , note 58.

[61] Anderson and Daniels, NEPA in the Courts, p.31.

[62] Izaak Walton League v. Macchia, 329 F.Supp.504, 1 ELR 20300 (D.N.J. 6/16/71).

[63] Ibid.

[64] 351 F.Supp. 419, 2 ELR 20694 (D.Conn. 3/26/73).

[65] Ibid.

[66] Anderson and Daniels, NEPA in the Courts, p.33.

[67] NEPA, Sec.101(a).

[68] NEPA, Sec.102(2).

[69] NEPA, Sec.101(c).

[70] Executive Order 11514, Sec.2(b), ELR 45003 (March 5, 1970); See above, Chapter Three.

[71] 36 Fed. Reg. 7724-29 (April 23, 1971) Sec. 3 (a) (5); ELR 46049.

[72] Supra , note 71, Sec.10.

[73] Sec.3(d).

[74] refiled as Hanly v. Mitchell in appellate court, 2 ELR at 20717.

[75]2 ELR at 20717.

[76]Ibid.

[77]Ibid., at 20722-24.

[78]Anderson and Daniels, NEPA in the Courts, p.37.

[79]Association of the Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), 2 ELR at 10137.

[80]Oakes, "Developments", 50005.

[81]455F. 2d 650, 1 ELR 20478 (10th Cir. 10/4/71).

[82]Ibid.

[83]Anderson and Daniels, NEPA in the Courts, p.39.

[84]Supra , note 81; see also Green, National Environmental Policy Act, pp.5-6.

[85]Zlotnick v. Redevelopment Land Agency, 2 ELR at 20236 (D.D.C. 1972).

[86]Ibid.

[87]Ibid.

[88]See for example, National Helium Corp. v. Morton, supra. at note 81; Getty Oil v. Ruckelshaus, 342 F. Supp. 1006, 2 ELR 20392 (D. Del), rev'd., 467 F. 2d 349, 2 ELR 20683 (3rd Cir.1972), cert. denied, 41 U.S.L.W. 3389 (January 16, 1973); Zlotnick v. District of Colombia Redevelopment Land Agency, supra, at note 85.

[89]Anderson and Daniels, NEPA in the Courts, p.39.

[90]Hanks and Hanks, "Bill of Rights", p.251.

[91]Ibid.

[92]Ibid.

[93]Ibid.

[94]Jeffrey N. Shane,"Environmental Litigation in 1971," Highway Research Circular, No.135, (May 1972), p.2.

[95]Ibid.

[96]Sax, Defending the Environment, (after William Blake), p.xi.

[97]Anderson and Daniels, NEPA in the Courts, p.123.

[98]Sax, Defending the Environment, p.xi.

[99]Ibid., (remarks of Senator George McGovern - Introduction), p.xii.

[100]Roger C. Crampton "Nonstatutory Review of Federal Administrative Action : The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendent," Michigan Law Review, Vol. 68, (January, 1970),p.387

[101]The Court Claims Act of 1855 (10 Stat.612) empowered the Court to award damages against the U.S. in actions arising out of government contracts; the Tucker Act of 1887, (24 Stat.505), expanded the jurisdiction of the court of claims and conferred concurrent jurisdiction in some cases on the district courts; the Federal Tort Claims Act of 1946 (60 Stat.812, 842 and amended, 28 U.S.C. subsec. 1346 (b), 1402(b), 1504, 2110, 2401-02, 2411-12, 2671-80 (1964), as amended, 28, U.S.C. subsection 2401(b), 2671-75, 2679(b) (Supp.IV, 1965-68); for various common law remedies see Crampton, "Nonstatutory Review", p.395.

[102]Crampton, "Nonstatutory Review", p.394.

[103]Oscar S. Gray, Cases and Materials on Environmental Law, (Washington, D.C. : Bureau of National Affairs Inc., 1970), p.1193.

[104]Anderson and Daniels, NEPA in the Courts, p.122.

[105]Supra , note 62.

[106]460 F. 2d 1196, 2 ELR 20320 (5th Cir.1972) at 151-2.

[107]Supra , note 81.

[108]Anderson and Daniels, NEPA in the Courts, p.123.

[109]Green, National Environmental Policy Act, p.6.

[110]Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. at 733, 1 ELR at 20132 (D.D.C. 1971); in many of the cases cited in this chapter, it is an agency official who is being sued).

[111]Green, National Environmental Policy Act, p.6.

[112]315 F. Supp. at 246-47, 2 ELR at 20755 (M.D. Pa. 4/30/70).

[113]Anderson and Daniels, NEPA in the Courts, p.124.

[114]See, Named Official Members of the San Antonio Conservation Society v. Texas Highway Dept., 1 ELR 20379 (5th Cir.1971); Arlington Coalition on Transportation v. Volpe, 332 F.Supp.1218, 1 ELR 20486 (E.D. Va. 1971), rev'd, 458 F. 2d. 1323, 2 ELR 20162 (4th Cir.); La Raza Unida v. Volpe, 337 F.Supp.221, 1 ELR 20642 (N.D. Cal.1971).

[115]See, Ward v. Ackroyd, 344 F.Supp.1202, 2 ELR 20405 (D.Md.1972).

[116]Green, National Environmental Policy Act, p.8; Ronald C. Peterson, "An Analysis of Title I of the National Environmental Policy Act of 1969", 1 ELR 50048.

[117]See, Pennsylvania Council v. Bartlet, 1 ELR 20622 (3rd Cir. 1970); Arlington Coalition on Transportation v. Volpe, 2 ELR 20162 (4th Cir. 1971); Ragland v. Mueller, 2 ELR 20320 (5th Cir.1972).

[118]Moringside-Lennox Park Association v. Volpe, 334 F.Supp.132, 1 ELR 20629 (N.D. Gra. 1971); Sierra Club v. Hardin, 325 F.Supp.99, 1 ELR 20161 (D.Alas. 1971).

[119]Environmental Defense Fund v. Tennessee Valley Authority, 2 ELR 20726 (6th Cir. 1972).

[120]Anderson and Daniels, NEPA in the Courts, p.142.

[121]Peterson, "Analysis of Title I", p.50048; Green, National Environmental Policy Act, p.11.

[122]NEPA, Sec.102.

[123]Peterson, "Analysis of Title I", p.50048; Green, National Environmental Policy Act, p.11.

[124]CEQ Guidelines of April 1971, 36 Fed.Reg.7724-29, ELR 46049, Sec.11.

[125]Rosenbaum and Roberts, "Spoiled Pork", p.42.

[126]Anderson and Daniels, NEPA in the Courts, p.42.

[127]Rosenbaum and Roberts, "Spoiled Pork", p.42.

[128]Green, National Environmental Policy Act, p.8.

[129]Arthur W. Murphy, "The National Environmental Policy Act and the Licensing Process : Environmentalist Magna Carta or Agency Coup de Grâce," Colombia Law Review, Vol.72, No.6, (October, 1972), p.965.

[130]Anderson and Daniels, NEPA in the Courts, p.171.

[131]Rosenbaum and Roberts, "Spoiled Pork", p.42.

[132]Ibid.

[133]Ibid.

[134]Green, National Environmental Policy Act, pp.10-11.

[135]Anderson and Daniels, NEPA in the Courts, p.143.

[136]Ibid.

[137] Ibid., pp.143-44.

[138] Ibid., p.144.

[139] Ibid.

[140] Ibid.

[141] Green, National Environmental Policy Act, p.12.

[142] Anderson and Daniels, NEPA in the Courts, p.144.

[143] 325 F.Supp. at 126, note 52, 1 ELR at 20171 note 52.

[144] Ibid.

[145] 315 F. Supp. 238, 2 ELR 20752 (M.D. Pa.1970).

[146] Ibid.

[147] Supra., note 124.

[148] Ibid.

[149] 324 F. Supp.878, 1 ELR 20079, 20366 (D.D.C. 1/27/71, 7/27/71).

[150] Paul E. Roberts, "Cross-Florida Barge Canal : A Current Appraisal," Business and Economics Dimensions, (1971), p.2.

[151] Ibid., p.3.

[152] Ibid.

[153] Rosenbaum and Roberts, "Spoiled Pork", p.48.

[154] Supra , note 149.

[155] Rosenbaum and Roberts, "Spoiled Pork", p.33.

[156] Ibid.

[157] Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 749, 1 ELR 20130 (E.D. Ark. 2/19/71).

[158] Ibid.

[159] Ibid., at 20134.

[160] Ibid., at 20136.

[161] E.D.F. v. Corps of Engineers, 2 ELR 20740 (8th Cir.1972).

[162] Rosenbaum and Roberts, "Spoiled Pork", p.49.

[163]339 F. Supp.806, 2 ELR 20044 (E.D. Tenn., 12/11/72).

[164]Ibid.

[165]Ibid.

[166]Ibid.

[167]Ibid.

[168]Ibid.

[169]Sierra Club v. Froehlke, 3 ELR 20248 (S.D. Tex.1973); Conservation Council of N.Carolina v. Froehlke, 3 ELR 20132 (4th Cir. 1973); Allison v. Froehlke, 3 ELR 20011 (5th Cir.1972); Akers v. Resor, 339 F. Supp.1375, 2 ELR 20221, 3 ELR 20157 (W.D. Tenn.1972); EDF v. Armstrong, 3 ELR 20294 (N.D. Cal.1973); Save Our Ten Acres v. Kreger, 3 ELR 20041 (5th Cir.1973); Zlotnick v. D.C. Redevelopment Land Agency, 2 ELR 20235 (D.D.C. 1972).

[170]U.S. Comptroller General, Improvements Needed in Federal Efforts to Implement the National Environmental Policy Act of 1969, B - 170186, Report to the Subcommittee of Fisheries and Wildlife, Conservation Committee on Merchant Marine and Fisheries, House of Representatives, (Washington, D.C., May 18, 1972), p.25.

[171]460 F. 2d 1196, 2 ELR 20320 (5th Cir.1972).

[172]345 F. Supp.419, 2 ELR 20904 (N.D. Tex.1972).

[173]Ibid.

[174]Ibid.

[175]Anderson and Daniels, NEPA in the Courts, p.152.

[176]Green, National Environmental Policy Act, p.12; Anderson and Daniels, NEPA in the Courts, pp.156-158, passim.

[177]Ibid.

[178]Reid S. Alsop, "Recent Developments in Environmental Law," Highway Research Circular No.150, (November, 1973), p.3; Green, National Environmental Policy Act, p.12.

[179]449 F. 2d 1109, 1 ELR 20346 (D.C. Cir. 7/23/71).

[180]John E. Blodgett and Daniel P. Beard, "The AEC and the Congress," Newsletter for the Science and Public Policy Studies Group, Vol.3, No.1, (January, 1972), p.4.

[181]Murphy, "Licensing Process", p.969.

[182] Supra , at note 179.

[183] Alsop, "Recent Developments",pp.2-3.

[184] Ibid., p.3.; Anderson and Daniels, NEPA in the Courts, p.159.

[185] R.Peterson and R.Kennan, "The Federal-Aid Highway Program : Administrative Procedures and Judicial Interpretation," 2 ELR 50001.

[186] Shane, "Environmental Litigation," p.6.

[187] 334 F. Supp. 132, 1 ELR 20629 (N.D. Gra. 11/12/71).

[188] Anderson and Daniels, NEPA in the Courts, p.169.

[189] 2 ELR,20170 (W.D.N. Car. 3/24/72).

[190] Ibid.

[191] 458 F. 2d 1323, 2 ELR 20162 (4th Cir., 11/7/72).

[192] Ibid.

[193] Ibid.

[194] Anderson and Daniels, NEPA in the Courts, p.175.

[195] Oakes, "Developments", p.50004.

[196] Luther J. Carter, "Environmental Law (II) : A Strategic Weapon Against Degradation?," Science, Vol.179, (March 30, 1973), pp.1310-11.

[197] 28 U.S.C. Sec.2414 (Supp.1972).

[198] 455 F. 2d at 427, 2 ELR at 20024.

[199] 346 F.Supp.731, 2 ELR 20446 (D.Conn.).

[200] Ibid.

[201] Oakes, "Developments", p.50004.

[202] 337 F. Supp.221, 1 ELR 20642 (N.D. Cal.1971).

[203] Oakes, "Developments",(citing La Raza Unida v. Volpe), p.50004.

[204] Anderson and Daniels, NEPA in the Courts, p.47.

[205] Green, National Environmental Policy Act, p.7.

[206] 341 F. Supp.356, 2 ELR 20185 (D.D.C. 1971).

[207] Ibid.

[208]Natural Resources Defense Council v. Grant, 3 ELR 20176 (E.D.N. Car. 1973), West Virginia Highland Conservancy v. Island Creek Coal Co., 441 F. 2d 232, 1 ELR 20160 (4th Cir.1971); Wilderness Society v. Hickel, 3 ELR 20085 (D.C.Cir.1973); Stop H-3 Association v. Volpe, 3 ELR 20130 (D. Hawaii, 1972); Sierra Club v. Froehlke, 3 ELR 20248 (S.D. Tex. 1973).

[209]Anderson and Daniels, NEPA in the Courts, p.47.

[210]1 ELR 20085 (D. Ariz. 1970).

[211]331 F. Supp.925, 1 ELR 20466 (D.D.C. 1971); 348 F.Supp.916, 2 ELR 20536 (N.D. Miss. 1972).

[212]NEPA, Sec.102 (2) (c).

[213]Fox, "Substance and Procedure", p.500.

[214]NEPA, Sec.102 (2) (c).

[215]341 F. Supp. at 367 (E.D.N.C. 1972).

[216]See also, Hanly v. Mitchell, where 'major federal action' is similarly said to refer to such factors as project cost, amount of planning needed and time required to complete the project, 460 F. 2d, 640 (2d Cir.1972).

[217]Supra , note 215.

[218]Supra , note 143 at 99 and 20171.

[219]Ibid.

[220]3 ELR 20016 (S.D.N.Y.) rev'd (Hanly II), 2 ELR 20717 (2d Cir. 1972).

[221]Dicta reported in Anderson and Daniels, NEPA in the Courts, p.76.

[222]Anderson and Daniels, NEPA in the Courts, p.75.

[223]464 F. 2d 1358, 1366, 2 ELR 20495, 20499 (3rd. Cir.1972).

[224]Ibid.

[225]336 F.Supp. at 789, 2 ELR 20125 (D.Mc.1972).

[226]334 F.Supp.877, 1 ELR 20492 (D.Ore. 1971).

[227]Fox, "Substance and Procedure", p.500; See also supra , note 225 at 783, 789-90.

[228]Fox, "Substance and Procedure", p.500.

[229] Ibid.

[230] See,for example, Izaak Walton League of America v. Schlesinger, 337 F.Supp. 287, 2 ELR 20039 (D.D.C. 1971); Virginians for Dulles v. Volpe, 344 F. Supp.573, 2 ELR 20360 (E.D. Va. 1972); Conservation Society of Southern Vermont v. Volpe, 342 F. Supp.761, 2 ELR 20270 (D. Vt. 1972); City of New York v. United States, 337 F.Supp.150, 2 ELR 20275 (E.D.N.Y.), 344 F.Supp.929, 2 ELR 20688 (E.D.N.Y. 1972).

[231] 349 F.Supp.696, 2 ELR 20650 (S.D.N.Y. 1972).

[232] 2 ELR 20378 (M.D. Ala.), aff'd, 467 F. 2d 208, 2 ELR 20379 (5th Cir.), modified on rehearing, 467 F. 2d 208, 2 ELR 20635 (5th Cir. 1972).

[233] See,for example, Hanly v. Mitchell, 460 F. 2d 640 (2nd Cir. 1972); Sheer v. Volpe, 336 F.Supp.882, 886, 2 ELR 20068 (W.D.Wis. 12/7/71, 12/29/71); Natural Resources Defense Council v. Grant, 341 F.Supp.356, 2 ELR 20185 (E.D.N. Car. 1972), remanded, 2 ELR 20555 (4th Cir.), 2 ELR 20647, 3 ELR 20176 (E.D.N. Car. 1973); Jicarilla Apache Tribe of Indians v.Morton, 2 ELR 20287 (D.Ariz. 1972), 3 ELR 20045 (9th Cir. 1973); Sierra Club v. Mason, 351 F.Supp.419, 2 ELR 20694 (D. Conn.1972), 3 ELR 20321 (D.Conn. 1973).

[234] 336 F. Supp.882, 886, 2 ELR 20068 (W.D.Wis. 12/7/71, 12/29/71).

[235] NEPA, Sec.102 (2) (c).

[236] Committee for Nuclear Responsibility v. Seaberg, 463 F. 2d 783, 1 ELR 20469 (D.C. Cir.), 463 F. 2d 796, 1 ELR 20532 (D.C. Cir.).

[237] EDF. v. Hardin, 325 F. Supp.1401, 1 ELR 20207 (D.D.C. 1971).

[238] Sierra Club v. Laird, 1 ELR 20085 (D.Ariz. 6/23/70).

[239] Goose Hollow Foothills League v. Romney, 344 F. Supp.877, 1 ELR 20492 (D.Ore. 9/9/71).

[240] Hanly v. Mitchell, 2 ELR 20181 (S.D.N.Y. 3/22/72).

[241] Montgomery County v. Richardson, 2 ELR 26140 (D.D.C. 1/31/72).

[242] Citizens for Reid State Park v. Laird, 336 F. Supp.783, 2 ELR 20122 (D.Me. 1/21/72).

[243] Davis v. Morton, 335 F. Supp.1258, 2 ELR 20003 (D.N. Mex. 12/21/71).

[244] Transcontinental Gas Pipeline Co. v. HacKensack Meadowlands Development Commission, 464 F. 2d 1358, 2 ELR 20495 (3rd Cir.1972).

[245]David R. Tripp, "Origin, Legal History and Implementation of the National Environmental Policy Act of 1969", a paper presented at the Environmental Impact Conference in Kansas City, Missouri, November 8, 1972, pp.14-15.

[246]Supra , note 242.

[247]Supra , note 243; Tripp, "Origin", p.15.

[248]Natural Resources Defence Council v. Grant, 341 F. Supp. at 367 (E.D.N.C. 1972).

[249]CEQ Guidelines of April 1971, 36 Fed.Reg.7724-29, ELR 46049, Sec.5(b).

[250]2 ELR 20574 (W.D. Tex. 1970).

[251]Ibid.

[252]Ibid.

[253]325 F.Supp.422, 1 ELR 20042 (D.D.C. 1970).

[254]Ibid.

[255]Ibid.; Also see, Peterson and Kennan, "Federal-Aid Highway Program", p.50051.

[256]1 ELR 20513 (S.D. Ohio 9/9/71), 2 ELR 20154 (S.D. Ohio 1/24/71).

[257]Green, National Environmental Policy Act, p.8.

[258]Anderson and Daniels, NEPA in the Courts, p.78.

[259]NEPA, Sec.102 (2) (c).

[260]Oakes, "Developments", p.50005.

[261]499 F. 2nd 1109, 1 ELR 20346 (D.C. Cir. 7/23/71).

[262]Ibid.

[263]Daniel P. Beard, "The National Environmental Policy Act in the Courts and Congress : 1970-1972", The Professional Geographer, Vol.25, No.4, (November, 1973), p.377.

[264]455 F. 2d 412, 2 ELR 20017 (2d Cir. 1/17/72).

[265]Ibid.

[266]5 ERC 1418 (D.C. Cir. 6/12/73).

[267]Ibid.

[268]Ibid.

[269]337F. Supp.170, 2 ELR 20071 (D.D.C. 2/1/72).

[270]Ibid.

[271]Green, National Environmental Policy Act, p.13.

[272]CEQ Guidelines of April 1971, 36 Fed.Reg., 7724-29, ELR 46049, Sec.5(b).

[273]328 F. Supp.332, 1 ELR 20228 (D.N.M. 6/1/71).

[274]Ibid.

[275]115 Cong. Rec. S.17458 (daily ed. December 20, 1969).

[276]115 Cong. Rec. 4045-47 (December 20, 1969).

[277]115 Cong. Rec. S.40923-28 (December 23, 1969) (House).

[278]Anderson and Daniels, NEPA in the Courts, p.107.

[279]Tripp, "Origin", p.17.

[280]Anderson and Daniels, NEPA in the Courts, p.107.

[281]For example, the administration of the FWPCA was moved from the Department of the Interior to EPA in 1970.

[282]Tripp, "Origin", p.17.

[283]335 F.Supp.1, 1 ELR 20637 (D.D.C. 12/21/71).

[284]2 ELR 20131 (W.D. Wash. 3/16/72).

[285]335 F.Supp.1, 1 ELR 20637 (D.D.C. 12/21/71); 2 ELR 20131 (W.D. Wash. 3/16/72).

[286]Ibid.

[287]Anderson and Daniels, NEPA in the Courts, p.107.

[288]NEPA, Sec.102 (2)(c).

[289]Ibid.

[290]CEQ Guidelines of April 1971, 36 Fed.Reg.7724-29, ELR 46049, Sec.6(ii).

[291]Beard, "Courts and Congress", p.377.

[292]Gillham Dam; See Anderson and Daniels, NEPA in the Courts, p.201; Green, National Environmental Policy Act, p.14; Tripp, "Origin", p.20; Fox, "Substance and Procedure", p.501; and Beard, "Courts and Congress", p.501.

[293]EDF v. Corp of Engineers, 325 F.Supp. at 759, 1 ELR at 20141 (E.D. Ark. 1970-71).

[294]See Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir.1971); Committee for Nuclear Responsibility v. Seaborg, 1 ELR 20469 (D.C. Cir. 1971); EDF v. TVA, 2 ELR 20044 (E.D. Tenn. 1972); Natural Resources Defense Council v. Morton, 2 ELR 20029, (D.C. Cir. 1972); Conservation Council of North Carolina v. Froehlke, 3 ELR 20132 (4th Cir. 1973); Sierra Club v. Froehlke, 345 F. Supp.440, 2 ELR 20307 (W.D. Wis. 1972); Sierra Club v. Froehlke, 3 ELR 20248 (S.D. Tex. 1973); Allison v. Froehlke, 3 ELR 20011 (5th Cir.1972); Committee to Stop Route 7 v. Volpe, 346 F.Supp.731, 2 ELR 20446 (D.Conn.).

[295]EDF v. Corps of Engineers, 348 F.Supp. at 927, 2 ELR at 20540.

[296]Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109, 1 ELR 20346 (D.C. Cir.1971); See also, EDF v. TVA, 339 F. Supp.806, 2 ELR 20044 (E.D. Tenn. 1972).

[297]Beard, "Courts and Congress", p.378.

[298]449F. 2d at 1123, 1 ELR at 20353.

[299]Ibid., at 1115 and 20349.

[300]Supra , note 293 at 761 and 20142; See also, Lathan v. Volpe, 455 F. 2d 1111, 1 ELR 20602 (9th Cir. 1971).

[301]Anderson and Daniels, NEPA in the Courts, p.255.

[302]See for example, EDF v. Armstrong, 2 ELR 20604 (N.D. Cal.), 2 ELR 20735 (N.D. Cal. 1972) for an opposing view to EDF v. Corps of Engineers, above.

[303]Anderson v. Daniels, NEPA in the Courts, p.255.

[304]Ibid.

[305]Beard, "Courts and Congress", p.378.

[306]NEPA, Sec.102 (2)(c)(iii).

[307]NEPA, Sec.102 (2)(d).

[308]Supra , note 269; See also, Green, National Environmental Policy Act, p.15; Tripp, "Origin", p.20; Oakes, "Developments", p.50007; Nicholas C.Yost, "Utilization of Environmental Impact Statements", a paper presented to the Program of Continuing Education in Public Health, in Anchorage on October 10, 1973, p.5.

[309] Supra , note 269.

[310] Ibid.

[311] Ibid.

[312] Ibid.; Also considered were: (i) increased onshore exploration and development, (ii) development of oil shale, (iii) increased nuclear energy developments, (iv) increased use of low sulfur coal, (v) desulfurization of coal, (vi) development of coal liquification and gasification, (viii) development of geothermal resources and, (viii) development of tar sands.

[313] Supra , note 293 at 761.

[314] Supra , note 298 at 1109 and 20346.

[315] Peterson and Kennan, "Federal-Aid Highway Program", p.50039.

[316] Ibid.

[317] NEPA, Sec.101(a).

[318] NEPA, Sec.101(b)(1), (2), (3), (4), (5), (6).

[319] See, Fox, "Substance and Procedure", pp.504-9, passim.; "Judicial Review of Factual Issues Under the National Environmental Policy Act," Oregon Law Review, Vol.51, (1972), pp.413-16, passim.; Arnold, "Substantive Right", pp.50029-31, passim.

[320] Ibid.

[321] See above; complete text of the Act appears in Appendix A.

[322] Arnold, "Substantive Right", p.50029.

[323] Ibid., p.50030.

[324] See above; full text of the Act appears in Appendix A.

[325] Arnold, "Substantive Right", p.50030.

[326] Ibid.

[327] Ibid., p.50031.

[328] Ibid.

[329] Ibid.

[330] See, Anderson and Daniels, NEPA in the Courts, p.259; Arnold, "Substantive Right", p.50030; Fox, "Substance and Procedure", p.506; "Judicial Review of Factual Issues", OLR, p.413.

[331] NEPA, Sec.102(1).

[332]"Judicial Review of Factual Issues", OLR, p.413.

[333]Ibid.; See also, Anderson and Daniels, NEPA in the Courts, p.529.

[334]NEPA, Sec.102(1).

[335]Fox, "Substance and Procedures", p.506.

[336]Ibid.

[337]NEPA, Sec.103.

[338]Fox, "Substance and Procedures", p.507.

[339]Ibid.

[340]Interim Environmental Protection Agency Regulations on Preparations of Environmental Impact Statements at Sec.6.10(a) 3 Env. Rptr.1136 (January 19, 1973).

[341]Arnold, "Substantive Right", p.50030; "Judicial Review of Factual Issues", OLR, p.413.

[342]115 Cong.Rec.40417-40418 (1969) and 115 Cong.Rec.39702-39703 (1969); This passage was also quoted in Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d at 1114-15.

[343]Fox, "Substance and Procedure", p.508.

[344]Ibid., footnote 120.

[345]115 Con.Rec.40418(1969).

[346]"Judicial Review of Factual Issues", OLR, p.414.

[347]Fox, "Substance and Procedure", p.509; "Judicial Review of Factual Issues", p.415; Arnold, "Substantive Right", p.50031; Anderson and Daniels, NEPA in the Courts, p.258.

[348]"Judicial Review of Factual Issues", OLR p.415.

[349]Yost, "Utilization", p.12.

[350]Arnold, "Substantive Right", p.50032.

[351]Ibid.

[352]2 ELR 20745 (W.D. Va. 1972).

[353]Arnold, "Substantive Right", p.50032.

[354]Ibid.

[355] Ibid.

[356] Ibid.

[357] Ibid.

[358] Supra , note 293 at 749 and 20130.

[359] Ibid.

[360] Ibid., at 755.

[361] 1 ELR 20043 (N.D. Cal. 10/29/70).

[362] Ibid., at 20044.

[363] Arnold, "Substantive Right", p.50033.

[364] See EDF v. Corps of Engineers, 348 F.Supp.916, 923-25 (N.D. Miss. 1972), appeal pending, 5th Cir., No.72-2874; Conservation Council of N.C. v. Froehlke, 340 F. Supp.222, 225 (M.D.N.C. 1972)," ... the Court cannot substitute its opinion as to whether the project should be undertaken or not"; EDF v. Hardin, 325 F.Supp.1401, 1404 (D.D.C. 1971), "the Court will not substitute its judgment...".

[365] Arnold, "Substance and Procedure", p.50032.

[366] Supra , note 298 at 1109.

[367] Ibid., at 1115.

[368] Arnold, "Substance and Procedure", p.50034.

[369] "Judicial Review of Factual Issues", OLR, p.416.

[370] Arnold, "Substance and Procedures", p.50034.

[371] 458 F. 2d 827 (D.C. Cir.1972).

[372] "Judicial Review of Factual Issues", OLR p.417.

[373] See also, Scenic Hudson Preservation Conf. v. FPC, 453 F. 2d 463 (2d Cir.), 1 ELR 20496 (2d Cir.1971); Zabel v. Tabb, 430 F. 2d 119 (5th Cir.), 1 ELR 20023 (5th Cir. 7/16/70).

[374] Frederick R. Anderson, "NEPA and Federal Decisionmaking", 3 ELR 50099.

[375] Supra , note 298 at 1112 and 20340.

[376] 321 F.Supp.1088, 1 ELR 20082 (E.D. Va.), rev'd, 451 F. 2d 1130, 1 ELR 20612 (4th Cir. 1971); See also, Green County Planning Board v. FPC, 455 F.2d 412, 2 ELR 20017 (2d Cir.), cert. denied; Hanly v. Kleindienst, 2 ELR 20181 (S.D.N.Y.), rev'd (Hanly I) 460 F. 2d 640, 2 ELR 20216 (2d Cir.), cert. denied, 3247 (November 7, 1972).

CHAPTER SIX

FEDERAL AGENCY REACTION TO NEPA

6.1. AGENCY REACTION TO CHANGE

> ...[A]gencies are among the most imperfect creations ever devised by man. They are timid where they should be forceful but arrogant where they should listen; they act upon momentary political pressure from industry where they should stand on principle; they are frequently staffed by incompetents and led by knaves; they are secretive where they should be open; they treat new ideas as a threat to civilization; they resent citizens' activities and lawyers representing citizens' interests as a threat to their prerogatives.[1]

Federal agencies are administrative organizations which are the institutional framework of the government complex. They were originally devised to promote recognized goals or to solve particular problems and are organized around a particular specialization such as soil conservation, foreign policy or national security.[2]

As political goals or problems change, agencies have shown little capacity to adjust their own missions or procedures to accommodate the new situations.[3] Liroff argues that this lack of flexibility is due to an institutional bias formed as a result of continual association with particular problems and goals.[4] Similarly, Sax attributes this inertia or 'tunnel vision' to an 'insider perspective' and maintains that although environmentalists are demanding an innovative approach to environmental problems, they should not expect this of the federal agencies as a general rule.[5]

These agencies are said to be (i) essentially unquestioning about the goals of the industries which they regulate, (ii) suspicious of, and defensive towards, the questioning public, (iii) uncomprehending concerning evidence of environmental degradation and (iv) extremely hostile to challenges to the basic agency mission.[6]

In a rather less critical view, Senator Jackson once remarked that:

> This organization...[network of mission-oriented agencies]...reflects our earlier national goals of resources exploitation, economic development, and conquest. Our national goals have, however, changed a great deal in recent years. Today government organization does not reflect this change in objectives and the new demands which are being placed on the environment. New approaches are required if we are to be successful in the management of our future environment.[7]

Barr, in a recent study of British water management, demonstrates that governmental agencies characteristically respond to change in a series of small incremental steps.[8] Among the range of alternatives which are available to agency decisionmakers, only those which represent small (or incremental) changes from existing policies are seriously considered.[9] The advantage of incremental problem-solving for the decisionmaker is that it substantially reduces the range of investigations which must be pursued and, thereby, the cognitive exertion which such an undertaking would require.[10]

Agencies of long standing are less likely to adopt the type of rapid policy changes of considerable scope which a recently-organized agency may incorporate into its procedures.[11] This is primarily because the new organization is not yet encumbered with

an institutional bias and also because it is less likely to feel undermined by major changes of policy.

Experience also suggests that changes in agency policies or procedures are more likely to occur in response to pressure from an external source rather than being initiated by the agencies themselves.[12] In the field of environmental control, agencies are becoming increasingly subject to external stimuli for change which emanate from the courts, the Congress, the CEQ, the EPA and the public. According to Fisher:

> The most important job for the environmental[ist]... in dealing with governmental agencies is to use all available means to persuade, embarass, prod, and force those agencies to do the job they should be doing anyway.[13]

The 'outsider perspective' which is characteristic of these external sources is a principal force in the fight for environmental quality.[14]

The passage of the National Environmental Policy Act of 1969 was an attempt by Congress to impose a radical change in the policies and procedures of many federal agencies whose decisions exert an impact on the environment. It requires that they implement procedures to assess this impact and to reassess their policies in the light of the federal environmental policies set out by the Act. The following sections review the reaction of agencies to this specific law.

6.2. THE EPA QUESTIONNAIRE

In order to determine the extent of compliance with the Act by federal agencies, an open-ended questionnaire was administered to the CEQ and the ten regional offices of the Environmental Protection Agency during February and March of 1974.[15] The EPA

was chosen as the optimum source of this information for two reasons. Firstly, this agency has jurisdiction over a variety of research, monitoring, standard-setting and enforcement activities dealing with environmental pollution and would, therefore, be in an excellent position to determine the extent of agency compliance. Secondly, as a newly-formed agency, it would be less likely to harbour hostility towards public enquiry.[16]

A 46 per cent response to the questionnaire was received. The returned questionnaires are on file in the author's records. As this information is confidential, individual regional respondents will not be identified and quotations will not be footnoted. The questionnaire consists of four open-ended questions and space is allowed for additional comments by respondents. The questions were designed to determine the following:

(i) what effect, if any, which the Act has had on agency decisionmaking;

(ii) whether or not NEPA has been an effective environmental protection tool; and

(iii) what changes, if any, had taken place in agency response to the requirements of the Act between January, 1970 and January, 1974.

Respondents uniformly indicated that, despite such problems as an overall lack of adequately trained personnel, agencies have incorporated a new criterion into their decisionmaking. "....Now, in addition to considering economic, technical, legal, administrative and other traditional factors, agencies must also pay close attention to the environmental implications of their actions." This improvement in decisionmaking was felt to be largely due to the exposing of agency decisions to public scrutiny.

The primary value of the law as a tool for the protection of the environment was perceived to rest on the fact that decision-making by agencies now increasingly incorporates environmental considerations at a sufficiently early stage to permit changes to be made in development proposals which are necessary to alleviate or eliminate damage. EPA officials believe that this situation is facilitating project modification and reducing negative impacts.

Responses to the third question on which information was sought from the EPA, have revealed a consistent pattern of agency reaction to NEPA's requirements. In general, there has been a progressive trend towards greater compliance with the various provisions of NEPA. Although not explicitly suggested by any respondent, the pattern of response appears to be conveniently divisible into three phases. Agencies in the various EPA regions appear to be arriving at different phases at slightly different times.

6.2.1. Phase One

The first phase, which has now terminated for almost all agencies, was marked by 'panic' during which agencies were 'reluctant to comply'. They spent part of the first year (1970) in

> ...trying to avoid the...[Section 102]... issues,...[f]irst because no agency was willing to commit its resources and manpower to a requirement as yet undefined, and second because these agencies traditionally had been single-purpose-oriented and viewed NEPA as an obstruction to the carrying out of their missions.

a. Environmental Impact Statements

The impact statements produced during this phase were said to be little more than 'justification documents'. The language

of the Act and the CEQ guidelines which were supposed to clarify the Act, did not furnish a clear conception of either what an impact statement should contain or how it should be written. Furthermore, it is not unreasonable to anticipate that the introduction of radical changes in the procedures and priorities of highly structured organizations would encounter varying degrees of resistance.[17]

b. Retroactive Applicability

Questionnaire respondents noted that the imposition of the 'retroactive' applicability of NEPA upon federal agencies was particularly frustrating for them.

> Had NEPA been applied only to future programs, the adjustments could have been made relatively easily ...the effort to use NEPA 'retroactively', to enquire into decisions already acted upon, is disruptive to existing programs.[18]

Phase one is particularly well-illustrated by the reaction of the Atomic Energy Commission (AEC) when suddenly confronted by the NEPA requirements as in the case of the Calvert Cliffs suit.[19] Retroactivity was a primary issue because the licensing of a nuclear power plant consists of two steps: (i) the utility which hopes to construct a power plant must first apply to the AEC for a construction permit; (ii) when the plant is virtually complete, an operating permit must be issued before the plant may be fueled for nuclear processes.[20]

When NEPA was enacted, the construction of many power plants was arrested in varying stages of completion because an operating permit had yet to be issued. Through a revision of Appendix D of part 50 of its regulations,[21] the AEC attempted to exempt from NEPA review those projects for which the notice of hearing for

permits for either construction or operation had been issued prior to March 4, 1971.[22]

In Calvert Cliffs Coord. Comm. v. AEC, the AEC maintained that the NEPA requirements applied only to licenses which were issued after this date and therefore did not apply to the Calvert Cliffs nuclear power plant which had been licensed between January of 1970 and March of 1971.[23] In addition, the AEC rules did not require hearing boards to consider environmental factors unless raised by the regulatory staff or by outside persons. The rules also prohibited reconsideration of water quality impacts where a certification of compliance with state standards had been obtained.[24]

In rejecting the stand of the AEC, Judge Wright asserted the court's belief that the agencies were capable of conforming to the requirements of the Act. He commented that "...We do not impose a harsh burden on the Commission."[25] This decision caused considerable consternation at the AEC[26] since the belief that the legislation required far more than the AEC could achieve was widely maintained.[27]

It appears, then, that during the initial phase of reaction to NEPA, many agencies paid only 'lip-service' to its requirements while others were indifferent or actively hostile. However, the cumulative effect of "...court decisions, pressure from the public and the CEQ, and the threat of litigation" provided sufficient incentives to agencies to consider more seriously the issue of compliance with the letter if not the spirit of the law.

6.2.2. Phase Two

During phase two, which is still evident in some agencies, agency response entered a period of 'bare compliance' with the

requirements of Section 102. Little discernible change occurred in agency proposals[28] but it appears that during the later stages of phase two, the procedures which were used for the preparation of impact statements by some agencies matured significantly. The latter reflected the acquisition of an environmentally-oriented expertise which has hitherto non-existent or repressed in most agencies. During phase two, many of the contentious projects of agencies were still of the 'retroactive' type and, indeed, many will remain so for several years.

a. Procedural Change

Andrews describes the kind of changes in agency behaviour which have been witnessed during phase two as 'retroactive incrementalism', where modifications to existing procedures were minimized to the fullest extent possible, even at the upper levels of the administrative structure.[29]

> [T]he...response of the agencies to NEPA was to move only by small increments in the desired direction, if at all...beginning with purely procedural changes such as acceptance and systematizing of new paper work, then making token movements such as the adoption of new policy positions ...which might or might not be enforced in practice ...and waiting for further signals from the political environment before deciding whether to react further.[30]

The effects of NEPA remained restricted but were undoubtedly expanding. Andrews, for example, claims that less than twenty per cent of the projects of the Corps of Engineers and the Soil Conservation Service during 1970 and 1971 were influenced in any respect by the NEPA requirements and almost two-thirds of these projects were merely postponed.[31]

There is no doubt, however, that pressure from external sources began to exert a significant influence on the rate of change of agency procedures.[32] In particular, court decisions which were unfavourable to the agencies exerted a 'multiplier effect' both on the extent of modification of contentious projects and on the amount of care and effort which was expended in the preparation of environmental impact statements.

For example, after the President had permanently enjoined the Cross-Florida Barge Canal, and after the courts had halted construction of both the Gilham Dam[33] and the Tennessee-Tombigbee Canal,[34] the Corps of Engineers issued a new policy position to accommodate the requirements of NEPA. It advocated a new environmental objective for the agency.[35]

Anderson reveals that the AEC also instigated a radical policy change after the Calvert Cliffs decision had been handed down.[36] At first, the AEC had adopted the position that they would take the decision to the Court of Appeals.[37] This relatively typical agency reaction was superceded by a spirit of greater compliance, however, after a new chairman was appointed to the agency in August of 1971.[38] It is probable, therefore, that this exceptional change in agency policy was significantly related to a change in personnel which provided new inputs into the established decisionmaking process.

The limited evidence suggests that external pressures have been responsible for most instances of change or interference with agency procedures but that the changes thus effected have more often been in the nature of project postponements rather than significant project revisions.[39] Project or policy revision is more

likely to result from such internal stimuli as that which was experienced within the AEC after the Calvert Cliffs suit.

b. Environmental Impact Statements

In the spring of 1972, the Comptroller General's office released a study which was conducted between May of 1971 and May of 1972 and which had been undertaken to determine whether or not the provisions of Section 102 were being "...uniformly and systematically implemented" by federal agencies.[40]

A major area of concern of the report was the issue of the use of environmental impact statements as decisionmaking tools. It was reported that the regular procedures of federal agencies were beginning to include the careful considerations of the environmental impact of development projects.[41] It did not yet appear, however, that agencies were making profitable use of this information in their final decisionmaking.[42] Impact statements have rarely been completed in time either (i) to accompany proposals through all levels of agency review, or (ii) to be used in the early stages of decisionmaking.[43]

One of the agencies which was reviewed in the GAO report, the Corps of Engineers, reported that, as a rule, it has completed a preliminary evaluation of a project proposal before it prepares an impact statement.[44] As a result, the initial justification of a project may proceed without the benefit of qualification by an impact statement. This situation is crucial because such early decisions often exert greater impact on the environment than decisions which are taken in the later stages. Furthermore, although the environmental impact of a project can be reduced to some extent

in the later stages, it obviously becomes increasingly more difficult to permanently enjoin a project as the development advances.

In another study, which was undertaken to determine the extent to which NEPA has achieved its objectives, Kreith reached similar conclusions to those of the GAO report.[45] He comments that, by the time the impact statement was finally available, in

> ...many instances, the projects had reached a state of technological advancement that made it extremely difficult to change the plans.[46]

It is perhaps not surprising, therefore, that Andrews reached the conclusions based on the attitudes of the Corps of Engineers and other agencies that the preparation of impact statements was perceived as an additional paper-work burden rather than as a decision-making tool.[47] The GAO report recommended that agencies revise their procedures so as to make impact statements available at all levels of review, particularly at the earliest stages of project development.

The study of Andrews was especially concerned with the reactions to NEPA, during 1970 and 1971, of four federal agencies, the Army Corps of Engineers, the Soil Conservation Service, the Tennessee Valley Authority and the Atomic Energy Commission.[48] He criticized their environmental impact statements as, in general, consisting of haphazard unsystematic and unquantified information and containing only cursory mention of alternatives and uncertainties.[49] He described as 'unsatisfactory' the frequent interjection of unsupported judgements or undocumented data. He emphasized, however, that this is probably not due to the lack of a well-developed methodology for environmental impact assessment or to a lack of clarity

in the law because the statements which were prepared for controversial or contested projects often did not exhibit many of these deficiencies.[50]

6.2.3. Phase Three

Phase three, according to questionnaire respondents, is characterized by a basic attitudinal change of agencies towards the environmental consequences of their actions. For most agencies, phase three has arrived or is imminent.

> [A]t this point we are in the change over period from simply complying with the letter of the law ...[phase two]...to complying with the spirit of the law. Some agencies are now taking the law as a comprehensive environmental mandate.

It appears that agencies are beginning to consult impact statements at earlier stages of the planning process.

> [P]roject changes are made early enough so that they can be incorporated at a minimum of cost ...[As a result]...environmental considerations are being incorporated more and more into the normal administrative decisionmaking process of each agency. We see better planned projects as a result.

One EPA official replied that "...the response is not so much a reaction as it was in 1971 but a thoughtful approach to an accepted problem." Another respondent developed this line of reasoning further: "...More attention is being directed towards solving transportation problems (DOT-wide) as opposed to highway problems (FHWA) or aircraft problems (FAA)." Agency decisionmakers are adopting a more comprehensive approach to problem solving, based upon much wider perspectives. Moreover, in the later stages of phase three, federal agencies no longer promote the kinds of environmentally-unconcerned projects which were so typical of five or ten years ago.[51]

Several respondents note that the information which the impact statement has provided to the public concerning agency decision-making, has helped to make the law an effective tool for citizen participation. It is believed that the public is more aware of "...conservation and utilization of natural resources as a result of NEPA."

In phase three, therefore, the transformation in agency attitudes from a forced compliance with the 102 mandate to a true concern for the environmental consequences of proposed actions is viewed as "...the most valuable effect of the law so far." One government respondent commented that because of this evolution in agency response, NEPA

> ...has been one of the most effective tools available in the U. S. to protect the environment. It has in many cases prevented substantial damage to the environment from occurring...damage which no other currently available tools could have forestalled.

6.3. REVIEW OF AGENCY REACTION

The three phases of agency reaction to NEPA which were identified in the preceding statements were designed to facilitate the discussion of change. In fact, the phases are rather arbitrary and it is difficult to categorize an agency as belonging completely to one of other of the phases. While the EPA questionnaire respondents give the impression that each EPA region appears to be relatively homogeneous in the reactions of its agencies to NEPA, there are undoubtedly variations within regions. Although many agencies within a region, therefore, may appear to be implementing the spirit of the law, there are undoubtedly some which as yet comply grudgingly with the letter of the law.

To recapitulate, the response of federal agencies to the demands of the National Environmental Policy Act has taken the form of three incremental phases of adjustment. In the first phase, many agencies either over-reacted as a defensive mechanism or failed to respond at all. The latter may have hoped that NEPA would not interfere with their activities. The Act possessed the widest possible application, however, and this was strongly reinforced by citizen suits. External pressure gradually compelled the agencies to comply with the procedural requirements of the Act. At the beginning of phase two, techniques for the preparation of impact statements began to develop and towards the end of this phase, the quality of the statements has notably improved. Phase three is identified with a "...change over from simply complying with the letter of the law." Project planning is improving and the indications are that environmentally-damaging project proposals are declining significantly in number.

It may be seen, then, that the enactment of NEPA signalled an overwhelming assault on agency practices. Agencies typically evolve incrementally[52] and most past pollution legislation has required only incremental change.[53] With the enactment of NEPA however, agencies were required to adopt substantial changes rather quickly and were subjected to both an indignant public outcry and the threat of litigation in the event of non-compliance. The result was that a more rapid form of incremental change occurred. The agencies adapted the massive new NEPA directive to their own patterns of incremental response, but at a substantially accelerated rate because of the intense external pressures.

It is the conclusion of EPA questionnaire respondents that the federal agencies appear to be making substantial progress in developing an environmental ethic under the auspices of NEPA. The future, however, is not clear. Thus far, the law has been applied primarily to individual projects. Perhaps the scope of concern should be broadened if environmental upgrading is to be anything other than piecemeal. Furthermore, the goodwill of various agencies is not yet assured. While both the Corps of Engineers and the Atomic Energy Commission have declared a new policy of environmental protection, it is difficult to determine how extensive their implementation of these policies will be.[54]

The sincerity of the AEC, at least, is called into question in view of its steadfast refusal to prepare a general impact statement on the proposed liquid metal fast breeder reactor program although such a statement would seem a logical outcome of trends in environmental protection since 1970. In the current case of SIPI v. AEC, an alarmed scientific community is insisting that impact statements be prepared on both the general issue of widespread commercial use of these reactors and on each specific pilot plant.[55] If agencies such as the AEC are not willing to consider the environmental consequences of broad programs, their newly developed environmental ethic may achieve little more than a reduction in the rate of degradation of the environment.

A few examples exist which demonstrate that agencies may accommodate environmental factors without undue hindrance to their goals. One example concerns the endangered species of pupfish which survives in Death Valley. This extremely ancient species of

fish has adapted itself to a rather extreme ecological desert niche.[56] These fish are listed in the code of federal regulations as an endangered species.[57] Their habitat in Death Valley was being severely threatened by excessive removal of water from deep wells on surrounding farms, since this process was lowering the general water table in the area and thus reducing the meagre water supplies in the pupfish holes as a result. The Sierra Club began to harass an under secretary of the Interior and ultimately threatened to bring a 'mandamus' action against Secretary Hickel to compel him to take legal action to protect these fish.[58] Apparently the government acted very quickly at this point. It conducted hydrological and environmental studies and eventually forced the surrounding agricultural interests to scale down significantly their pumping operations.

It was indicated in a letter to the Sierra Club from the Department of the Interior, that the decision to save the pupfish was prompted at least in part by the threat of litigation. The letter also commented, however, that

> ...the filing of a mandamus action could be counterproductive to our mutual objective of saving the pupfish, because we would then be forced to divert our efforts to defend this litigation.[59]

A second example with possibly even greater implications concerns the case of Zabel v. Tabb.[60] This is the only instance known to the author in which a federal agency has relied upon NEPA to defend its own environmentally protective actions. In this case, the plaintiff, a riparian owner, had applied for a permit in 1966 to dredge and fill a portion of the Boca Ciega Bay in Florida in order to extend a commercial trailer court.[61] This application was denied by the Secretary of the Army in

1967.[62] In recommending denial, the District Engineer took into consideration the virtually unanimous opposition of the public, state and county authorities, and the U.S. Fish and Wildlife Service to the project. He also noted the environmental damage which the project would cause.[63] Furthermore, he said that issuance of the permit would be inconsistent with the purposes of the Fish and Wildlife Coordination Act.[64] The District Court reversed this decision in 1969 on the grounds that the Fish and Wildlife Coordination Act was not authority for denying the permit.[65] This decision was appealed by the Corps and reversed by the Fifth Circuit Court in 1970.[66] The decision essentially hinged on a determination of whether the Corps had the authority to deny a permit on environmental grounds. The court held that NEPA provided sufficient grounds for denial of the permit and noted:

> Although this Congressional Command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today...the Secretary of the Army is acting under a Congressional mandate ...to consider all...factors.[67]

There is little justification as yet for viewing either this case or that of the pupfish as syptomatic of a fourth phase of development in the future but at least they indicate that the potential for future improvements is virtually boundless, given sufficient motivation and encouragement.

6.4. CONCLUSIONS

Under pressure from the Council on Environmental Quality, the Environmental Protection Agency, environmental interest groups and the general public, the federal agencies have been seen to incorporate at least part of the requirements of the National Environmental Policy Act

into their policies and procedures. It has been shown that, while the agencies normally react sluggishly to a requirement for change, they are able, with sufficient motivation, to achieve decidedly positive results in favour of environmental interests. Whether or not the compliance of federal agencies with NEPA will exert a sufficiently beneficial effect on the environment in the future, without a thorough re-examination of broad agency policies and traditional goals remains to be seen. It may be that the latter process will become part of a naturally occurring 'phase four' of agency compliance. If phase four materializes, it will be in large measure due to the continued application of government and public pressure.

FOOTNOTES TO CHAPTER SIX

[1]Fredrick R. Fisher, "Environmental Lawyer in the Lion's Mouth : Litigation Before and Against Administrative Agencies", a paper presented at the National Conference on Environmental Law: Transcripts of the Speeches. (San Francisco : California Continuing Education of the Bar, 1971), p.89.

[2]Charles E. Lindbloom, The Intelligence of Democracy : Decision-making Through Mutual Adjustment, (New York : The Free Press, 1965), p.89.

[3]Lorna R. Barr, "Areal Reorganisation of Water Management in England and Wales," (Unpublished M.A. thesis, University of Victoria, B.C.), p.28.

[4]Alan Richard Liroff, "Administrative, Judicial and Natural Systems : Agency Response to the National Environmental Policy Act of 1969," Loyola University Law Journal, Vol.3, (1972), p.28.

[5]Joseph L. Sax, "New Direction in the Law," Environmental Law, Charles M. Hassett, ed., (Ann Arbor, Michigan : The Institute of Continuing Legal Education, 1971), p.17.

[6]Ibid.

[7]U.S. Congress, Senate Committee on Interior and Insular Affairs, National Environmental Policy, Hearing, April 16, 1969, pp.24-25.

[8]Barr, "Areal Reorganization", p.153.

[9]Lindbloom, Intelligence of Democracy, p.144.

[10]Ibid.

[11]Fisher, "Environmental Lawyer",p.69.

[12]Lindbloom, Intelligence of Democracy, p.48.

[13]Fisher , "Environmental Lawyer", p.63.

[14]Sax, "New Direction", p.17.

[15]See questionnaire sample in Appendix B.

[16]Reorganization Plan No.3, of 1970; See above, Chapter Four.

[17]D.Katz and R.Kahn, The Social Psychology of Organizations, (New York : The Free Press, 1967), p.225.

[18]Arthur W. Murphy, "The National Environmental Policy Act and the Licensing Process : Environmentalist Magna Carta or Agency Coup de Grâce?" Columbia Law Review, Vol.72, No.6 (October, 1972), p.865.

[19]Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109, 1 ELR 20346 (D.C. Cir.1971), 404 U.S. 942 (1972).

[20]U.S. Senate Committee on Interior and Insular Affairs, Effect of Calvert Cliffs and Other Decisions upon Nuclear Power in the United States, pursuant to S.Res.45, a National Fuels and Energy Policy Study, Serial No.92-28 (1972), p.12.

[21]35 F.R. 18469 (1970).

[22]Supra , note 19.

[23]Ibid.

[24]Ibid.

[25]Ibid.

[26]Fredrick R. Anderson and Robert H. Daniels, NEPA in the Courts : a Legal Analysis of the National Environmental Policy Act, (Baltimore : Resources for the Future : The Johns Hopkins University Press, 1973), p.249.

[27]Murphy,"Licensing Process", p.965.

[28]Frank Kreith, "Lack of Impact," Environment, Vol.15, No.1, (January-February, 1973), p.30.

[29]Richard N.L. Andrews, "Environmental Policy and Administrative Change : The National Environmental Policy Act of 1969, 70-71", (Unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill, 1972), p.456.

[30]Ibid., p.44.

[31]Ibid., p.452.

[32]Ibid., p.450.

[33]325 F.Supp. 749, 1 ELR 20130 (E.D. Ark. 2/19/71).

[34]331 F. Supp. 925, 3 ERC 1085 (D.O.C. 9/21/71).

[35]U.S. Comptroller General, Improvements Needed in Federal Efforts to Implement the National Environmental Policy Act of 1969, Report to the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, B-170186, (May 18, 1972),p 21.

[36]Anderson and Daniels, NEPA in the Courts, p.456; See also, Roger C.Crampton and Roger C. Berg, "Enforcing the National Environmental Policy Act in Federal Agencies," The Practical Lawyer, Vol.18, No.5 (May, 1972), p.80.

[37]Murphy, "Licensing Process", p.968, footnote 24.

[38]AEC News Release No.0-147, August 26, 1971.

[39]Andrews, "Environmental Policy", p.453.

[40]U.S. Comptroller General, Improvements Needed,B-170186.

[41]Ibid., p.13.

[42]Ibid., p.14.

[43]Ibid.

[44]Ibid., p.18.

[45]Kreith, "Lack of Impact", pp.26-33, passim.

[46]Ibid., p.30.

[47]Andrews,"Environmental Policy", p.450.

[48]Ibid.; the entire dissertation is concerned with this topic.

[49]Ibid., p.449.

[50]Ibid.

[51]Roger Mochnick, EPA, Environmental Impact Office, Region X, Seattle, Washington, private interview, December 5, 1973.

[52]Lindbloom, Intelligence of Democracy, p.90; Liroff, "Administrative, Judicial and Natural Systems", p.27.

[53]See for example, the discussion of water pollution legislation in Chapter Three, above.

[54]Crompton and Berg, "Enforcing", p.180.

[55]5 ERC 1418 (D.C. Cir. 6/12/73).

[56]Fisher, "Environmental Lawyer", pp.66-68.

[57]Ibid., p.66.

[58]Ibid., p.67.

[59]Reproduced in, Fisher, "Environmental Lawyer", p.68.

[60]430 F. 2d 199, 1 ELR 20023 (5th Cir.1970), cert.denied, 401, U.S.910 (1971).

[61]Ibid.

[62]Ibid.

[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Ibid.

CHAPTER SEVEN

ENVIRONMENTAL LEGISLATION IN THE 92ND CONGRESS (1971-1972)

7.1. INTRODUCTION

The 92nd Congress has been hailed as the "...most productive environmental session in history."[1] A total of 189 environmental and natural resources-oriented laws were enacted in the 1971 and 1972 sessions.[2] An analysis of the enactments shows that 141 of these dealt with natural resources, 40 concerned environmental management directly, and eight related to pollution control.[3] Environmental considerations may be identified in aspects of 79 of these laws.[4]

Perhaps the major environmental event of the first session was the defeat of the administration's Supersonic Transport (SST) appropriations bill.[5] Although the President stressed environmental protection as one of the "...Six Great Goals" of his domestic policy in his 1971 State of the Union address,[6] he nevertheless steadfastly defended and promoted the development of this apparently environmentally-damaging aircraft.[7] It is also arguable that the inclusion of "...increasing national economic prosperity" as another of the "...Six Great Goals"[8] constitutes an inconsistency of national priorities, since a major by-product of increasing economic prosperity could be increasing environmental degradation.[9]

Congress passed two major wildlife protection acts during the 1971

session. The amendments to the Fish and Wildlife Act of 1956 provided penalties for the shooting of wildlife from aircraft,[10] and the Wild Horses and Burros Act, provided for the protection of wild free-roaming horses and burros on public lands.[11]

No legislation enacted in 1971 directly amended NEPA but three major environmental bills on which action was not completed in the first (1971) session[12] were enacted toward the end of the second (1972) session.[13] These included (i) amendments to the FWPCA, (ii) a new pesticide control bill and (iii) a bill for protecting sea animals.

7.2. FWPCA - 1972

7.2.1. Legislative History of the FWPCA Amendments of 1972

A bill designed to (i) amend the Federal Water Pollution Control Act of 1970 and (ii) provide a four-year 6.8 billion dollar program to end water pollution in the United States by 1985 passed the Senate unanimously in 1971.[14] However, the House Public Works Committee did not order its version of the bill to be reported until December 15, by which time it was too late for a House vote in the first session. Meanwhile, the administration criticized the bill on the grounds that it increased federal power in water pollution control at the expense of state power.[15]

Both the houses of Congress approved the 1972 version of the bill on October 4.[16] The Administration, however, was still opposed to the legislation because it was felt to be 'budget wrecking'.[17] The bill authorized some 24.7 billion dollars over three years, including more than 18 billion dollars for state grants for water treatment plants.[18]

A presidential veto of the expensive program was not unexpected. On September 26, William E. Ruckelshaus, then EPA Administrator, commented that

"...[i]f it is not signed we will still go forward on water pollution clean up."[19] Ruckelshaus later put himself in a rather precarious position by circulating a letter on Capitol Hill which recommended the legislation to the Office of Management and Budget(OMB). He thereby assumed an openly-opposing stance to the White House position.[20]

Expecting that an outright veto would be both politically damaging and would offer Congress a ready opportunity to override this veto, the President attempted to employ the 'pocket veto' to hinder the bill by simply refusing to sign it.[21] The President has ten days within which to sign a bill into law (Sundays excepted)--in this case, until Sept. 17-- or the bill automatically becomes law providing that Congress is still in session.[22] If Congress is no longer in session ten days after a bill has been cleared for the President's signature, the latter's 'pocket veto' may be legitimately employed. The expected adjournment date of Congress had been October 14, three days before the deadline.[23]

On September 17th however, Congress had yet to adjourn. Shortly before midnight--when the bill would automatically have become law without his signature--the President vetoed the controversial measure.[24] On October 18, Congress firmly overrode the veto and the 'most comprehensive and expensive environmental legislation' in the nation's history, the Federal Water Pollution Control Act Amendments of 1972,[25] became law.[26]

The inclusion of several bold provisions within the Act seems to represent a fundamental change in the federal approach to dealing with water pollution problems.

7.2.2. Provisions of the Act

a. TITLE I--Research

The 1972 amendments outline two major goals for the United States:

(i) To eliminate the discharge of pollutants into the nation's waters by 1985,[27]

(ii) To achieve wherever attainable the interim goal of superior water quality, by July 1, 1983, that is, water quality, which is adequate for (a) the protection and propagation of fish, shellfish and wildlife, and (b) for swimming and recreation purposes.[28]

The Act proclaims national policy which:

(i) prohibits the discharge of toxic pollutants;[29]

(ii) provides financial assistance for the construction of publicly-owned waste treatment plants;[30]

(iii) directs that area-wide waste treatment planning processes be developed and implemented in each state;[31] and

(iv) provides for a major research and development effort to develop the technology to eliminate the discharge of pollutants into the nation's waters.[32]

The Act is to be administered by the Administrator of the EPA[33] who is authorized and directed to:

(i) promote and aid in the funding of comprehensive national,[34] state and local pollution control programs[35] and area-wide planning;[36]

(ii) provide research and development grants for a wide variety of pollution problems,[37] including such special pollution problems as oil spills,[38] thermal discharges,[39] and acid mine water

pollution;[40]

(iii) provide grants to universities for research[41] and finance pilot programs for manpower development;[42]

(iv) provide for training of personnel in waste treatment or water quality management; and

(v) to fund special studies of water pollution and quality in Alaskan Native Villages[43] and of pollution in both Lake Tahoe[44] and the Great Lakes.[45]

b. TITLE II--Construction Grants

The purposes of this title are to require, and to assist in, the development and implementation of waste treatment management plans and practices which attain the goals of the Act.[46] This is to be achieved through the application of the best practicable waste treatment technology[47] on an area-wide basis,[48] while recycling, reclamation and integrated facilities are to be encouraged.[49]

The EPA Administrator is directed to publish guidelines for area-wide waste-treatment management plans,[50] and the states are required to develop area-wide planning processes and agencies.[51] These agencies may be granted up to 100 per cent federal financing for three years and 75 per cent federal financing thereafter.[52]

The Administrator may make grants to state or local agencies for the construction of publicly-owned treatment works up to 75 per cent of total costs.[53] Grant applicants are required to submit plans, specifications and estimates to the EPA, which makes the final grant approval.[54] Treatment works projects are required to conform to state and area-wide plans and to adopt proportional cost-sharing systems for industrial and

other users.[55] Some reimbursements of states and municipalities for treatment work construction, which had begun prior to 1972, was authorized.[56]

c. TITLE III--Standards and Enforcements

Title III declared the discharges of any pollutants by any person to be unlawful.[57] The Administrator is directed:

(i) to develop detailed water quality information and guidelines for the limitation of effluent discharge;[58]

(ii) to list categories of industrial pollution sources and set national performance standards for each new source,[59]

(iii) to list toxic pollutants and prohibit their discharge and to set effluent limitations providing for "...an ample margin of safety";[60] and

(iv) to set effluent limitations for thermal discharges.[61]

Furthermore, the Act declares that:

(i) effluent-control processes for point sources (mostly factories) which utilize the "...best practicable control technology currently available" must be operational by July 1, 1977;[62]

(ii) publicly-owned treatment works require control procedures based upon secondary treatment processes by the same date;[63]

(iii) effluent limitations based on the "...best available technology economically achievable" are required for the publicly-owned treatment plants by July 1, 1983.[64]

In addition, the EPA was given the right of entry to operations which are sources of industrial pollution and the right to inspect records and monitoring equipment, and to make appropriate data available to the public.[65]

Significantly, the amendments provide for:

(i) criminal penalties of between 2,500 dollars and 25,000 dollars per day or one year in prison or both;

(ii) 50,000 dollars per day or two years in prison or both for second offenses; and

(iii) civil penalties of up to 10,000 dollars per day.[66]

The Act, furthermore, declares that the discharge of oil or hazardous substances into United States waters is illegal[67] and it sets civil penalties for such discharges.

d. TITLE IV--Permits and Licenses

Title IV establishes a new system of permits for discharges into the nation's waters. The permits replace the 1899 Refuse Act permit program. This portion of the Act requires that applicants for federal discharge licenses or permits must obtain state, interstate agency or EPA certification that the discharge will comply with the provisions of the Act.[68]

The Act authorizes that:

(i) the EPA administrator should issue permits for pollutant discharges under certain conditions and if other requirements of the Act are met;[69]

(ii) state water pollution control agencies should administer the permit program after they have developed plans which meet the guidelines to be issued by EPA;[70]

(iii) the Administrator should revoke a state's permit program if the state fails to implement the law adequately;[71]

(iv) the Corps of Engineers should issue permits for dumping dredged

or fill materials at specific sites.[72]

Title IV further declares permits previously issued under the 1899 Refuse Act to be valid, but asserts that no new permits may be issued under this statute after the enactment of the new Act.[73] The Act also sets procedures for granting EPA permits to dump materials into the oceans or coastal waters,[74] and permits for the disposal of sewage sludge.[75]

e. TITLE V-- General Provisions

The most significant provisions in Title V include:

(i) the granting of emergency powers to the EPA Administrator to bring suit in district court to stop pollution which presents an imminent health or welfare hazard;[76]

(ii) the authorization of citizen suits against the United States government, other federal agencies, or the EPA Administrator if the citizens have an interest which has been adversely affected;[77] and

(iii) the authorization of loans to small business for water pollution control facilities.[78]

7.2.3. Important Aspects of the Amendments to FWPCA

The FWPCA of 1972 exhibits three aspects of paramount interest:

(i) The Act is the most expensive environmental bill in U.S. history. The Clean Water Restoration Act of 1966, for example, provided only 5.7 billion dollars for six years and the FWPCA of 1970 provided only 7.8 billion dollars for three years, whereas the 1972 Act provided more than 24.7 billion dollars over three years.

(ii) The Act effects a series of major changes in water pollution

control:

(a) The "...change in the enforcement mechanism...from water quality standards to effluent limitations" is one major effect of the legislation.[79] The program of quality standards without effluent limitations had "...not succeeded brilliantly."[80]

(b) For the first time, the law attacks water pollution from all industrial sources and sets specific deadlines to eliminate pollution.

(c) Also for the first time, the law authorizes the federal government to seek an immediate court action against polluters when water pollution offers an immediate and substantial endangerment to the health and livelihood of the public. The frustratingly lengthy abatement procedures of earlier acts are no longer applicable.

(d) Any person whose interests may be adversely affected by pollution now has the right to take court action against anyone who violates an effluent standard or limitation, or an order issued by the EPA or a state. Should the EPA fail to carry out its mandatory requirements under the law, citizens also have the lawful right to sue this agency.

(iii) The Act provides exemptions to the impact statement requirements of NEPA.

(a) It exempts the EPA from the necessity of filing impact statements under NEPA, in some circumstances. The EPA is required to prepare impact statements only in connection with construction grants for publicly-owned waste treatment facilities

and when issuing permits for discharges of pollutants from new sources. Other agency actions and agency policies are exempted from the NEPA requirement.

(b) The Corps of Engineers is exempted from filing impact statements under NEPA for dredge-and-fill permits.

It appears then that the first two aspects discussed represent a significant reversal in the direction and impact of pollution legislation since the enactment of NEPA. The purpose of this aggressive Act is to clean up the nation's waters and although the EPA has experienced difficulty in meeting many of the deadlines established by the Act, they are "...making progress...that is heartening."[81]

7.2.4. The Question of Exemptions from NEPA

One is not dealing with a direct amendment to NEPA, but the provisions do provide the first instance of the granting of legislative relief from the NEPA requirement that an impact statement be prepared. This provision was an attempt to solve two problems: (i) the general problem of whether or not the EPA should be required to prepare impact statements on the great majority of its actions, and (ii) the more specific problem of the granting of an injunction against the issuance of the EPA permits for dumping under the Refuse Act of 1899.[82]

The legislative history of NEPA suggests that Congress has intended that environmental improvement agencies were to be exempted from this duty.[83] However, the court in Kalur v. Resor, enjoined the issuance of Refuse Act dumping permits primarily on the grounds that this represented a 'major government action' and yet, that no requirement for an impact statement existed in the commission's permit regulations.[84] The Refuse Act was

technically administered by the Corps of Engineers but in reality was controlled by the EPA.[85] The government's appeal of the decision was moving very slowly and thousands of requests for permits under the Refuse Act began to accumulate with the Corps of Engineers.[86]

The result was an EPA request for temporary legislative relief from the NEPA impact statement burden.[87] This problem was considered in the development of the 1972 Amendments to the Federal Water Pollution Control Act.

In response to possible NEPA amendments from this bill and others which were passing through Congress in 1972, a 'Save NEPA' coalition of environmental groups identified and opposed several bills which, if enacted, would reportedly "...whittle the Act down to a point where it would become absolutely toothless."[88] The coalition feared that the granting even of small concessions in the applicability of NEPA would encourage more substantial amendments to the Act.

Representative John D. Dingell, one of the authors of NEPA, maintains that such small relief measures as were requested by the EPA are necessary and are "...designed to ward off more substantive changes in the NEPA."[89] Congress, he says, "...is literally dripping with amendments and bills that would gut the Act."[90]

In general, environmental groups are apparently quite satisfied with the final outcome of the 1972 amendments to the FWPCA although reservations are still held concerning the precedent which was set.[91] The EPA administrators maintain that "...we are in a unique position and giving us an exemption will not serve as a precedent for other agencies to make the same demands."[92] Dingell argues that "...if the environmentalists are not prepared to accept this kind of carefully tailored legislation to get around legitimate

emergencies, the backlash against NEPA may produce broader and really odious amendments later."[93]

7.3. ATOMIC ENERGY ACT AMENDMENTS OF 1972

A second federal court decision precipitated an attempt to seek legislative authority to issue interim operating licenses for nuclear reactors without prior preparation of full-scale impact statements. The court in the case of Izaak Walton League v. Schlesinger held that approval of an operating license was a 'major federal action' and that an impact statement must be prepared.[94] Apprehensive that the decision would set a precedent for the additional plants scheduled for licensing late in 1973,[95] the AEC decided to request that the Congress approve a temporary licensing program.[96] Four House bills (H.R. 13731, H.R. 13732, H.R. 14056 and H.R. 13752) and one Senate bill were introduced, each of which was designed to grant the AEC the authority to issue interim licenses without a complete NEPA review.[97]

The particular aim of three of the House bills, which were introduced in March, was to amend the Atomic Energy Act of 1954[98] in order to allow the Commission to act on interim license applications with greater speed and efficiency.[99] The Senate bill, introduced by Senator Henry M. Jackson, was intended to directly amend NEPA by adding a new section (numbered 106) to authorize the President to exempt any project from the provisions of this Act for 180 days by declaring an emergency.[100] In May, following considerable debate in both the House and the Senate, agreement was finally reached on a new House version, H.R. 14655, which was approved and which amends the Atomic Energy Act as P.L. 92-307. Section 192(a) provides:

> ...that application for a temporary operating license may be made at any time after filing (1) the report of the advisory committee on Reactor Safeguards; (2) the AEC Regulatory Staff's safety analysis; and (3) in the case of an application for an operating license, filed on or before September 9, 1971, if the final detailed statement required Section 102(2)(c) is not completed, the Commission must satisfy the applicable requirements of NEPA prior to issuing any temporary operating license. Following submission of an application for a temporary license, the Commission must hold a hearing with expedited procedures...and full disclosure of natural facts."[101]

Through this amendment, the AEC is granted clear statutory authority to issue interim licenses, which undoubtedly eliminates some problems of administration. However, public hearings, which may be quite lengthy, are still required.[102] In addition, it appears that AEC is not forever exempted from the obligation to prepare impact statements since the bill does not directly amend NEPA.[103]

The fourth of the House bills, H.R. 13752, was introduced in April by Representative Dingell as a companion bill to H.R. 14655.[104] Its proposals exemplified the AEC strategy at the time and were intended to amend NEPA in order to allow the AEC interim licensing without full compliance with Section 102(2)(c).[105] A substantial controversy existed in Congress concerning the merits and necessity of this bill. It passed the House but met with considerable opposition from the environmental Lobby in the Senate and was still under review in the Senate Interior and Insular Affairs Committee at the session's end,[106] after the companion bill had been passed into law. This was an important defeat for the AEC strategy.

The final result of the AEC attempt to obtain temporary legislative relief from NEPA, then appears to be the procurement of the short-term right to accelerate some licensing procedures. Exemption from the necessity to

prepare impact statements, however, was not obtained. The exact meaning of the Act is not certain, however, as its language is ambiguous and the interpretations of individual senators and experts in environmental legislation vary widely.

7.4. OTHER MAJOR ENVIRONMENTAL MEASURES PASSED IN 1972

Congress enacted several environmentally-oriented measures in 1972 which did not attempt in any manner to amend NEPA. As these reflect a growing congressional concern for environmental protection which has surely been influenced in part by the 1969 Act, they deserve mention here. However, since they do not change the meaning of, or limit the application of, NEPA in any manner, they will be reviewed only briefly.

7.4.1. The Federal Environmental Pesticide Control Act of 1972

A House bill which strengthened federal pesticide laws was introduced in 1971 but was not enacted until 1972. The Federal Environmental Pesticide Control Act of 1972[107] replaces by amendment the Federal Insecticide, Fungicide and Rodenticide Act of 1947, which was primarily a labeling law.[108] The new law requires all pesticides to be registered with the EPA, which imposes controls on their use.

The Act states that:

(i) protection of the environment is the explicit criterion of the regulation of pesticides;

(ii) all pesticides must be registered in one of two classifications related to either general or restricted use. Restricted-use pesticides may only be applied under the direct supervision of a certified applicator of pesticides, and may sometimes be subject

to further restrictions;

(iii) applicators will be certified through state programs which are set up under federal jurisdiction;

(iv) manufacturing establishments must be registered, and information concerning labels, claims to be made, directions for use, the chemical formula and test results must be included in the registration application;

(v) a federal indemnity must be paid to manufacturers and owners of pesticides which are banned by the Act; and

(vi) the EPA is authorized to conduct research and to set up a national monitoring system for pesticide residues.[109]

Environmentalists and many members of Congress have directed considerable criticism towards the indemnity provision. They claim that this clause will cost the government millions of dollars and will tend to inhibit the EPA from utilization of the suspension mechanism.[110] House debate on the bill elicited the statement from Rep. Sidney R. Yates (D-Ill.) that the bill "...even with its good provisions, may still be inadequate to protect the environment. But one thing is certain: it will protect the pesticide manufacturers."[111]

In spite of this provision, the new pesticide measure is viewed by most environmentalists as a great improvement over the 1947 Federal Insecticide, Fungicide and Rodenticide Act.

7.4.2. Marine Protection, Research and Sanctuaries Act of 1972

During the 91st Congress, the CEQ proposed to the President a national policy on ocean dumping whereby the EPA would exercise regulatory authority over ocean disposal of all waste materials.[112] Several 'ocean

dumping' bills were introduced in this session which attacked the problem from several different approaches. The bill which eventually became the 'Ocean Dumping' Act (H.R. 9727) originated in the House Committee on Merchant Marine and Fisheries and cleared Congress October 13, 1972, after being held up in conference for most of a year.[113]

The new law, the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92-532), contains three titles on ocean dumping:

Title I concerns the regulation of dumping. The dumping of radiological, chemical or biological warfare agents and high-level radiological wastes is absolutely prohibited. Permits are required for the transporting and dumping of all materials (except fish wastes in some areas) into the oceans. The Corps of Engineers issues permits for dredge spoils and the EPA for all other materials. Dumping sites, usually beyond the continental shelf, are to be designated by the EPA. The Act also contains a provision which permits citizens to file suits.

Title II concerns research which would lead to feasible alternatives to all ocean dumping. The basic research objective of the law is to find ways to minimize or to end all ocean dumping within five years.

Title III deals with marine sanctuaries. The Secretary of Commerce is authorized to designate sanctuaries which should be preserved or restored for their resource, recreational, ecological or aesthetic values. Areas which have been designated as marine sanctuaries require special authorization from the Secretary of Commerce for dumping permits.[114]

7.4.3. Noise Control Act of 1972

The first federal legislation on noise pollution was enacted in 1968 when Congress directed the Federal Aviation Administration (FAA) to

establish rules and regulations to control the noise from aircraft.[115] Noise pollution has also been attacked in the courts as a public nuisance but enforcement is difficult and haphazard.[116] Recently, some localities have established local and state laws and ordinances concerning this problem.[117]

The 1970 Clean Air Act[118] directed the EPA to establish an Office of Noise Abatement and Control. The primary responsibility of this Office was research. Information supplied both from the Office of Noise Abatement and Control and from extensive congressional hearings formed the basis for the Noise Control Act of 1972 (P.L. 92-574).[119]

Major provisions of the Act include the following:

(i) EPA is directed to develop and publish information relating to permissible levels of noise for the protection of public health and welfare.

(ii) The EPA Administrator is then required to set noise-emission standards for products which have been identified as major sources of noise. These include products in the categories of construction equipment, transportation equipment (except aircraft), all motors and engines, and electrical and electronic equipment. The EPA has the authority to require the labeling of these products as to their noise-generating characteristics. Mislabelling of products is subject to fines of up to 25,000 dollars per day and to imprisonment for up to one year.

(iii) The Administrator is directed to conduct a comprehensive study of aircraft noise and the effects of cumulative exposure to aircraft noise. The study should result in regulation proposals

to the FAA on controlling aircraft noise and sonic booms. The FAA is not obligated to accept these proposals if it believes they are unsafe, technologically or economically infeasible, or not applicable to certain aircraft. The relationship of the EPA to the FAA will continue to be one of review and consultation.[120]

7.4.4. Marine Mammal Protection Act of 1972

Another environmental bill which failed to pass the 92nd Congress in the first session but which was approved in 1972 was a measure which proposed a federal permit program to restrict the killing of marine mammals. The bill encountered substantial opposition from the commercial fishing lobby and was returned to the House Merchant Marine and Fisheries Committee to be reintroduced into the second session.[121]

Major provisions of the Marine Mammal Protection Act of 1972 (P.L. 92-522) include the following:

(i) A permanent moratorium is set on the killing of most sea mamals and the import of their products. Mammals which are protected include seals, sea lions, whales, porpoises, dolphins, sea otters, manatees, walruses and polar bears.

(ii) There are exceptions to the ban. Permits will be issued to take mammals for scientific research and public display, and a two-year exemption was granted to the fishing industry to allow them to devise methods to reduce the accidental porpoise fatalities which accompany tuna netting. Native peoples who depend on these mammals for subsistence and for the production and merchandising of authentic native articles will be permitted to

continue their mammal-harvesting activities.

(iii) A Marine Mammal Commission is created by the Act. The federal government is directed to undertake research concerning these mammals and their interaction with their environment. A total sum of 32 million dollars was appropriated for administration and research.[122]

7.4.5. Coastal Zone Management Act of 1972

The 92nd Congress considered more than 200 land use policy and planning measures.[123] The most significant environmental land use measure which passed into law was the Coastal Zone Management Act of 1972 (P.L. 92-583).[124] This Act passed the Congress on October 12, and was signed into law by the President on October 27.

The Act provides for:

(i) the establishment of a national program for the use, protection and development of U.S. coastal zones. The program is to be administered through federal grants to the states to help them develop coastal management programs under federal guidelines. A total of 186 million dollars has been appropriated for operations.

(ii) The National Oceanic and Atmospheric Administration of the Department of Commerce will exercise administrative authority over the program and will be responsible for reviewing plans, controlling grants, and coordinating federal activities relating to coastal zone management.[125]

7.5 ADDITIONAL CONGRESSIONAL ACTIVITIES

Other activities of the 92nd Congress whuch concern NEPA included

hearings and debates on legislation which was intended to amend this Act but which were not enacted.

NEPA was the focus of four days of oversight hearings before a joint session on the Senate Committee on Public Works and the Committee on Interior and Insular Affairs.[126] Despite considerable criticism of NEPA by witnesses, no legislative action resulted.

Several bills which related to NEPA, or which were intended to amend that Act, underwent considerable debate in both sessions of Congress. There was significant support for the initiation of a federal environmental data storage system. A bill designed to develop such a system was enacted by Congress but vetoed by the President.[127] Other proposed measures which would have had the effect of reinforcing NEPA include

(i) a bill to fund and establish a nonprofit environmental policy institute designed for "...systematic environmental problem-solving and policy-oriented research..."; [128] and

(ii) a second bill which would establish state and regional environmental laboratories for the purposes of research, planning, management and education.[129]

In addition, several bills were introduced which would have effected both procedural and substantive changes in the Act. These included measures to:

(i) amplify the scope of NEPA to include the explicit consideration of social, economic and cultural factors in the definition of the 'human environment';[130]

(ii) to include in the Act the timetables for agency compliance with NEPA which are now found in the CEQ guidelines;[131]

(iii) to culminate the impact statement preparation process with a

mandatory hearing;[132] and

(iv) to broaden the scope of judicial review to include the situations where agency action constitutes an 'impairment or degradation' of the environment.[133]

Still other proposals were considered which concerned the siting of energy facilities,[134] national landuse policy, public works and regional development,[135] preparation procedures for impact statements accompanying legislative proposals,[136] the Alaska pipeline right-of-way,[137] prohibition of dumping in the New York bight,[138] and many others.

7.6 CONCLUSIONS

The 92nd Congress was surely the most environmentally aware and active Congress in United States history. This phenomenon stemmed both from the fact that the public and their legislators have acquired a more sophisticated understanding of natural systems and from the impact, both positive and negative, of NEPA and related measures on agency, executive and legislative processes.

The conflict which is developing between the energy and the environmental lobbies in Congress is probably indicative of a similar, more personal conflict within the American people, a struggle between the desire for a vital physical environment and what is often a conflicting desire for the luxury and material wealth of an industrial society.

Energy interests have provided the major impetus to many attempts to seek legislative relief from NEPA. The utilities lobby carries considerable weight in Congress, and is reportedly "...one of the best financed in the country and capable of unlimited distortion."[139] The environmental lobby, however, has grown rapidly and developed many strong allies in Congress where it has not been idle.

Moves to win 'temporary' or 'emergency' relief from the Act have been viewed variously as "...necessary to cope with emergency situations"[140] and "...designed to ward off more substantial changes,"[141] and conversely, as "...the next step in a battle by...federal agencies and the industries...to avoid the mandate of the Act."[142]

The effects of the activities of these two components of the legislative process have been the heightening of Congressional interest in environment-related problems and a flurry of legislation directed towards (i) obtaining relief from the requirements of NEPA, (ii) resource protection and (iii) clarification and enhancement of the Act.

FOOTNOTES TO CHAPTER SEVEN

[1]"Most Productive Environmental Session in History", Congressional Quarterly Almanac, 1972, 92nd Cong., 2nd Sess., 1972, Vol.XXVIII (Washington, D.C. : Congressional Quarterly Inc., 1972), p.115.

[2]U.S. Senate, Committee on Interior and Insular Affairs, Congress and the Nation's Environment : Environmental and Natural Resources Affairs of the 92nd Congress, 93rd Cong., 1st Sess. (January 20, 1973), p.1048.

[3]Ibid.

[4]Ibid.

[5]"Major Legislation Passed : Environment," Congressional Quarterly Almanac, 1971, 92nd Cong., 1st Sess., 1971, Vol.XXVII, (Washington, D.C. : Congressional Quarterly Inc., 1971), p.29.

[6]"Six Great Goals," Congressional Quarterly Almanac, 1971, 92nd Cong., 1st Sess., 1971, Vol.XXVII (Washington, D.C. : Congressional Quarterly Inc., 1971), p.23.

[7]"Major Legislation", p.29.

[8]"Six Great Goals", p.23.

[9]Donella H. Meadows, Dennis L. Meadows, Jorgen Randers and William W. Behrens, III, The Limits to Growth, (New York : Universe Books,1972), p.7.

[10]P.L. 92-159, 85 Stat., 480, HR 5060.

[11]P.L. 92-195, 85 Stat., 649, S.1116.

[12]"Major Legislation", p.29.

[13]"Most Productive", p.115.

[14]"Major Legislation", p.29.

[15]Ibid.

[16]"Water Pollution Control," C.Q. Weekly Report, (October 7, 1972), p.2626.

[17]"Clean Water : Congress Overrides Presidential Veto," C.Q. Weekly Report, (October 21, 1972), p.2754.

[18]"Congress Clears Major Water Pollution Control Bill," C.Q. Weekly Report, (October 14, 1972), p.2693.

[19]"Water Pollution Control", p.2627.

[20]John Walsh, "Environmental Legislation : Last Word from Congress," Science, Vol.178 (November 10, 1972), p.594.

[21]"Water Pollution Control", p.2627.

[22]"Clean Water", p.2754.

[23]"Water Pollution Control", p.2627.

[24]"Clean Water", p.2754.

[25]P.L. 92-500, 86 Stat. 816, S.2770 (hereinafter, FWPCA 1972).

[26]"Clean Water", p.2754.

[27]FWPCA 1972, Sec.101(a) (1).

[28]Ibid., Sec.101(a) (2).

[29]Ibid., Sec.101(a) (3).

[30]Ibid., Sec.101(a) (4).

[31]Ibid., Sec.101(a) (5).

[32]Ibid., Sec.101(a) (6).

[33]Ibid., Sec.101(d).

[34]Ibid., Sec.104(e).

[35]Ibid., Sec.101(f).

[36]Ibid., Sec.102(c) (1).

[37]Ibid., Sec.105(f) (2).

[38]Ibid., Sec.104(i).

[39]Ibid., Sec.104(t).

[40]Ibid., Sec.107(a).

[41]Ibid., Sec.109(a).

[42]Ibid., Sec.104(a) (1).

[43]Ibid., Sec.113(a).

[44]Ibid., Sec.114(a).

[45]Ibid., Sec.108(a).

[46]Ibid., Sec.201(a).

[47] Ibid., Sec.201(b).

[48] Ibid., Sec.201(c).

[49] Ibid., Sec.201(d) (1), (2), (3), (4).

[50] Ibid., Sec.208(a) (1).

[51] Ibid., Sec.208(a) (2).

[52] Ibid., Sec.208(f) (2).

[53] Ibid., Sec.202(a).

[54] Ibid., Sec.203(a).

[55] Ibid., Sec.209(a) (1).

[56] Ibid., Sec.206(a), (b).

[57] Ibid., Sec.301(a).

[58] Ibid., Sec.304(a), (b).

[59] Ibid., Sec.306(b) (1) (A).

[60] Ibid., Sec.307(a) (1), (2).

[61] Ibid., Sec.316(a).

[62] Ibid., Sec.301(b) (1) (A).

[63] Ibid., Sec.301(b) (1) (B).

[64] Ibid., Sec.301(b) (2) (B).

[65] Ibid., Sec.208(a) (4) (B) (i), (b) (2).

[66] Ibid., Sec.309(c) (1), (2).

[67] Ibid., Sec.311(b).

[68] Ibid., Sec.401(a) (1).

[69] Ibid., Sec.402(a) (1).

[70] Ibid., Sec.402(b).

[71] Ibid., Sec.402(c).

[72] Ibid., Sec.404(a).

[73] Ibid., Sec.402(a) (5).

[74]Ibid., Sec.403(c) (1).

[75]Ibid., Sec.405 (b).

[76]Ibid., Sec.504

[77]Ibid., Sec.505(a) (1), (2).

[78]Ibid., Sec.8(a).

[79]Walsh,"Last Word", p.593.

[80]Ibid.,; Also see Chapter Three, above.

[81]John R. Quarles Jr., "Expectations vs. Achievements : Some Reflections on the Water Act," Environmental News, (January, 1974),p.15.

[82]Kalur v. Resor, 335 F. Supp. 1, 1 ELR 29637 (D.D.C. 12/21/71).

[83]Fredrick R. Anderson and Robert H. Daniels, NEPA in the Courts : a Legal Analysis of the National Environmental Policy Act, (Baltimore : Resources for the Future : Johns Hopkins University Press, 1973), pp.107-08.

[84]Supra , note 82.

[85]See Executive Order 111574, issued December 23, 1970.

[86]Claude E. Barfield, "Environment Report/Exemptions from NEPA Requirements Sought for Nuclear Plants, Pollution Permits," National Journal, (June 17, 1972), p.1033.

[87]Ibid., p.1025.

[88]Ibid., p.1030.

[89]Ibid., p.1025.

[90]Ibid., p.1028.

[91]Walsh, "Last Word", p.593.

[92]Barfield, "Exemptions", p.1033.

[93]Ibid., p.1025.

[94]337 F. Supp. 287, 2 ELR 20038 (D.D.C. 12/17/71), known as the "Quad Cities" case after the name of the nuclear plant involved.

[95]More than thirty in number.

[96]Barfield, "Exemptions", p.1025.

[97]U.S. Senate, Committee on Interior and Insular Affairs, Congress and the Nation's Environment, p.1028.

[98]68 Stat. 919.

[99]Barfield, "Exemptions", p.1026.

[100]U.S. Senate, Committee on Interior and Insular Affairs, Congress and the Nation's Environment, p.1028.

[101]Ibid., ; P.L. 92-307, 86 Stat. 191, H.R. 14655.

[102]Barfield, "Exemptions", p.1027.

[103]"1969 Environmental Act Survives Broad-Scale Attacks", Congressional Quarterly Almanac 1972, (Washington, D.C. : Congressional Quarterly Inc., 1972), p.495; Barfield, "Exemptions", p.1028.

[104]Barfield, "Exemptions", p.1026.

[105]Ibid.

[106]"Environmental Act Survives", p.495.

[107]P.L.92-516, 86 Stat.973, H.R.10729.

[108]U.S. Senate, Committee on Interior and Insular Affairs, Congress and the Nation's Environment, p.1110.

[109]Supra , note 107.

[110]Walsh, "Last Word", p.594.

[111]"Most Productive", p.116.

[112]U.S. Senate, Committee on Interior and Insular Affairs, Congress and the Nation's Environment, p.1035.

[113]Ibid.; P.L. 92-532, 86 Stat. 1052, H.R.9727.

[114]"Highlights : An Environmental Law : The Marine Protection, Research and Sanctuaries Act of 1972 (Ocean Dumping)," (a pamphlet), (Washington, D.C. : U.S. EPA, December, 1972).

[115]See Federal Aviation Act of 1958, 72 Stat.737 49 U.S.C.1301.

[116]See Chapter Two, above.

[117]"Highlights : An Environmental Law : The Noise Control Act of 1972", (a pamphlet), (Washington, D.C. : U.S. EPA, 1972).

[118]P.L. 91-604, 42 U.S.C. 1857 et. seq.

[119]"Noise Control Act".

[120] Supra , note 118.

[121] "Major Legislation", p.29.

[122] P.L. 92-522, 86 Stat.1027, H.R.10420.

[123] U.S. Senate, Committee on Interior and Insular Affairs, Congress and the Nation's Environment, p.158.

[124] P.L. 92-583, 86 Stat. 1280, S.3507.

[125] Ibid.

[126] See U.S. Senate, Joint Hearings before the Committee on Public Works and the Committee on Interior and Insular Affairs, The Operation of the National Environmental Policy Act of 1969, Serial No.92-H32, 92nd Cong., 2nd Sess., (March 1, 7, 8 and 9, 1972).

[127] This bill would have amended NEPA by adding a new Title III, National Environmental Data Systems, H.R.56; See, U.S. Senate, Committee on Interior and Insular Affairs, Hearings on, Bills Amending or Related to the National Environmental Policy Act, 92nd Cong., 1st Sess. (November 19, 1971), pp.3-10, passim.

[128] The bill would have amended NEPA by adding a new Title III, Environmental Policy Institute, S.1216; See, U.S. Senate, Committee on Interior and Insular Affairs, Bills Amending, pp.11-17, passim.

[129] State Environmental Centers, S.681; See, U.S. Senate, Committee on Interior and Insular Affairs, Bills Amending, pp.18-28, passim.

[130] H.R. 8984; See, U.S. Senate, Committee on Interior and Insular Affairs, National Environmental Policy Act of 1969 : An Analysis of Proposed Legislative Modifications, 93rd Cong., 1st Sess. (June, 1973), pp.50-53.

[131] Ibid.

[132] H.R. 4087; See, U.S. Senate, Committee on Interior and Insular Affairs, An Analysis, pp.32-34.

[133] S.1032, H.R.49, H.R.290 and others; See, U.S. Senate, Committee on Interior and Insular Affairs, An Analysis, pp.10-18, passim.

[134] See, U.S. Senate, Committee on Interior and Insular Affairs, An Analysis, pp.5-9.

[135] Ibid., pp.24-27.

[136] Ibid., pp.45-48.

[137] Ibid., pp.64-71.

[138]Ibid., pp.72-73.

[139]Barfield, "Exemptions", (remarks of Representative Dingell), p.1028.

[140]U.S. Senate, Joint Hearings, Operation of the National Environmental Policy Act, (remarks of John N. Nassakas, Chairman of the FPC), p.350.

[141]Barfield, "Exemptions", (remarks of Representative Dingell), p.1025.

[142]U.S. Senate, Joint Hearings, Operation of the National Environmental Policy Act, (remarks of Anthony Roisman, lawyer for the plaintiff in Calvert Cliffs),p.474.

CHAPTER EIGHT

SUMMARY AND CONCLUSIONS

This study has set out to investigate the U. S. National Environmental Policy Act (NEPA) with respect to the following: its legislative formulation, judicial interpretations of the legal obligations of federal agencies under the provisions of the Act, the character of federal agency compliance, and the prospective influence of subsequent legislation upon the scope of its provisions. The following specific topics were considered:

(i) the status and effectiveness of environmental litigation prior to the enactment of NEPA;

(ii) the statutory meaning of the language of the Act;

(iii) judicial interpretations of the requirements of the Act;

(iv) the manner in which federal agencies have accomodated the legal obligations within their regular procedures; and

(v) the effects upon NEPA of legislation which was enacted during the 91st and 92nd Congresses (1970-1972).

8.1. SUMMARY

8.1.1. Modes of Environmental Protection before 1970.

It is demonstrated that the rights of private citizens and groups to initiate litigation in cases of environmental degradation rest somewhat tentatively upon three legal precepts, the public trust

doctrine, the Ninth Amendment to the U. S. Constitution and the nuisance doctrine. These three precepts were all utilized in environmental law suits prior to 1970. Usually, however, only the most facile of legal minds were able to achieve even superficial successes with these legal tools. The probability that such litigation would fail was especially great when suits were brought against governmental agencies. This was primarily because the judiciary has been traditionally unwilling to postpone or prevent entirely the implementation of decisions which have been taken by administrators and technical experts from co-equal branches of government, unless these decisions contravene a direct Congressional mandate.

Doctrines and legal strategies which require skillful tactical manipulations by environmental lawyers, if they are to assist the conservationist or ecological cause, do not offer a substantial guarantee to citizens of a satisfactory environment. Prior to 1970, private citizens and groups were unable to bring suit under the pre-existing legislation.The water pollution legislation which evolved between 1888 and 1970 was found to be characterized by half-measures and built-in delays. Successive amendments to the Federal Water Pollution Control Act (FWPCA) of 1948 seemed to be more retrogressive than progressive. Several on-going problems were noted in relation to this Act and later amendments:

(i) abatement procedures were lengthy, intricate and confusing, and favoured the alleged polluter in that they discouraged all but the most persistent pollution fighters.

(ii) Only the Attorney General was eligible to file suits against alleged polluters.

(iii) Neither the FWPCA nor later legislation was part of a comprehensive pollution control scheme so that much overlap and duplication of effort resulted.

(iv) Insufficient funds were allocated for the building of the waste-treatment control facilities which were advocated by the FWPCA.

(v) No authorized procedure existed prior to 1966 for the collection of proof of the existence of water pollution, and the 1966 provision required only that a report on emissions be filed after action had been initiated, so that it was not available for the filing of the initial charge.

(vi) The division of authority between the states and the federal government was unrealistic.

The FWPCA proved to be ineffective as pollution control legislation, especially since the rate of pollution of the nation's waters increased dramatically after 1948. Only one suit was ever prosecuted under this Act.

8.1.2. Statutory Provisions of NEPA

Partially to overcome some of these ongoing difficulties, Congress included five significant provisions within NEPA. These were:

(i) the declaration of a national policy of environmental protection and enhancement;

(ii) the institution of an action-forcing provision which would compel agency compliance with this policy;

(iii) the creation of the President's advisory Council on Environmental Quality (CEQ);

(iv) the establishment of an annual presentation from the CEQ, the Environmental Quality Report; and

(v) the augmentation of research on environmental systems.

Section 102 (2) (c) (the action-forcing provision of the Act) requires that federal agencies must prepare detailed written environmental impact statements (EIS) for all development proposals, including legislative proposals, where environmental impacts are anticipated. These EIS are required to consider:

(i) any unavoidable adverse impacts;

(ii) alternatives to the main proposal and impacts of the alternatives;

(iii) the relationship between the short-term gains and long-term productivity; and

(iv) any 'irreversible and irretrievable' commitments of resources.

The EIS are to be circulated to local, state and federal agencies for comment and must accompany the development proposal through the decisionmaking channels. Copies of the EIS are to be submitted to the President and the CEQ and are to be available for public scrutiny.

It was the intent of Congress that the exposure of agency decisionmakers to concrete reports of projected environmental damage would foster an environmental consciousness in future development planning.

8.1.3. NEPA in the Courts

When NEPA was formulated, many members of Congress viewed its language as meaningless rhetoric. The courts, however, approved the standing of private citizens to sue in cases of alleged 'violation' of

the Act. Furthermore, the courts discounted agency claims to sovereign immunity. In general, the courts acted in accord in interpreting the mandate of NEPA as a requirement that EIS should accompany proposals for 'all major actions significantly affecting the environment.'

A major conflict arose because the courts determined that the Act was 'retroactively' applicable, that is, that EIS were required for developments which were in the planning stages or partially completed by January 1st, 1970. Considerable delay of projects occurred while EIS were prepared, and if the quality of the latter were challenged in court, there was further delay.

Attempts to obtain judicial affirmation of legal obligations within NEPA's policy statement (Section 101) have so far been largely unsuccessful. Most court decisions, particularly earlier decisions, have not agreed that NEPA guarantees a 'right' to a healthful and salubrious environment. Agencies, therefore, have not been required to alter or abandon projects because of an EIS prediction of adverse environmental impacts. Many legal scholars, however, argue that the policy statement of Section 101 places a legal obligation upon federal agencies to incorporate environmental goals within planning decisions. Some recent court decisions have, in fact, required that agencies demonstrate that they have 'considered' environmental impact data during planning.

Although some projects have been altered and a few have been abandoned as a result of court actions, the most characteristic outcome of litigation has been a temporary project delay, with its attendant waste of resources, and frustration and embarrassment.

Such experiences have provided incentives to federal agencies to undertake more environmentally-conscious planning.

8.1.4. Agency Reaction to NEPA

The reactions of federal agencies to NEPA have followed a three-phase pattern of compliance:

(i) In phase one, most agencies ignored the Act.

(ii) In phase two, the considerable pressure from citizen-initiated law suits resulted in a grudging acceptance of the task of EIS preparation, although the EIS were of dubious quality.

(iii) In phase three, there were improvements in both the quality of EIS and in the attitudes of agencies towards environmental values.

Within the latter stages of phase three, agencies have begun to incorporate the findings of EIS into their decisionmaking and fewer instances of development proposals which are grossly insensitive to environmental values may be cited. The improvement in the spirit of compliance is linked in part to the dissipation of much of the early frustration as 'retroactive' projects finally proceed.

8.1.5. Environmental Provisions since 1970.

Of great importance in 1970 was the President's Reorganization Plan No. 3, which created the Environmental Protection Agency (EPA). The EPA was expected to implement and co-ordinate U. S. environmental protection programs and measures, including NEPA.

Important measures of the 1970 session of Congress included the Environmental Quality Improvement Act, which was designed to apply the NEPA provisions expressly to public works activities, Section 309 of the Clean Air Act, which gave to the EPA extensive powers to observe and

report on instances of environmental damage, and the Federal Aid Highway Act which was concerned with highway impacts, particularly noise, on adjacent landuses.

Many bills were introduced into the 92nd Congress in 1971 and 1972 which were designed to debilitate the Act but very few changes in the scope and procedures of NEPA were effected. The 1972 amendments of the FWPCA dealt with the controversial dumping permit program. This was originally conducted under the auspices of the Refuse Act of 1899, under which all permits were subject to the NEPA provisions. The revisions directed the EPA to prepare EIS only for new pollution sources.

The Atomic Energy Act (AEA) of 1954 was amended to permit the interim licencing of nuclear power plants which had been almost completed when NEPA was enacted. The impact of this legislation on NEPA was significantly reduced, however, when a companion bill, which was designed to exempt the AEC from the preparation of EIS during the limited interim licencing period, failed to pass Congress.

Several other bills which involved environmental questions were enacted by the 92nd Congress but none amended NEPA.

No major environmental bill cleared the first session of the 93rd Congress (1973), a situation which was in marked contrast to the activities and achievements in 1972. It appears that such issues as energy shortages have stalled the drive to improve environmental quality.

8.2. CONCLUSIONS

U. S. environmental protection legislation has undergone radical changes since 1969. The National Environmental Policy Act has been

largely responsible for the dramatic rate of improvement which has been witnessed in this field. In retrospect, it is now apparent that the Act abruptly overcame many of the obstacles to this progress. For example, it identified those areas of potential environmental degradation which could satisfactorily be protected through the courts. Private citizens were effectively granted the right to sue government agencies for alleged breach of NEPA's provisions. Moreover, the publicity which is now given to agency goals and proposals has meant that groups or individuals with vested interests such as agency officials, conservation groups and the public at large can be far better informed than formerly on environmental matters.

The establishment of the EPA immeasurably increased the ability of the government to consolidate its environmental programs so as to reduce duplication and overlapping jurisdictions. Furthermore, the EPA has shown itself to be sincerely dedicated to its mission.

The discomfiture of federal agencies and their early hostility to the provisions of NEPA are hopefully beginning to dissipate. The agencies have undoubtedly suffered grave harassment and frustration up to the present. Many federal development projects were involved in costly delays while attempting to accommodate the NEPA 102 requirements within existing administrative systems. There was a strong element of external force behind early agency attempts to comply with the Act for which the incredible volume of citizen-initiated litigation was largely responsible. By incremental adjustments, however, it now appears that agencies are becoming more willing to seek approaches to development which are consistent with environmental protection. One sign of this is that EIS are being produced earlier in the planning process and their findings are being considered in more projects. The

courts are also expanding, by small increments, the scope of their decisions in favour of more stringent protection of the environment.

While it has been shown that federal agencies are ill-suited to rapid procedural adjustments and that the judiciary is often fearful of setting reckless precedents, Section 102 (2) (c) of NEPA has nevertheless been successfully implemented in most cases. However, compliance with Section 102 should not be perceived as an end in itself. EIS may be produced 'en masse' and yet the rate of environmental degradation will not necessarily be substantially reduced. The federal government cannot claim to be employing "...all practicable means and measures to promote environmental quality until:

(i) the policy statement in Section 101 is recognized by the judiciary as creating an enforceable public 'right' to a salubrious environment and,

(ii) the newly-developing environmental ethic, now beginning to be applied on a project-by-project basis, permeates the highest level of decisionmaking and is applied to broad agency policies and national goals. The full potential of the Act will be realized when these measures are unequivocally adopted.

The history of the government's enforcement of, and compliance with, the NEPA requirements indicates that these measures could be implemented in time through incremental adjustments. This will depend, however on various important external forces.

The climate of national opinion will significantly influence future trends. The importance of this factor has already become apparent in the four years since the enactment of NEPA. Until 1973, there was enthusiastic public support for environmental goals as evidenced by

the considerable environmental litigation and the mass of Congressional resource-related legislation. In 1973, however, not a single environmental bill was enacted. National attention was preoccupied with the energy crisis and this may be seen as a possible force weakening the drive for improved and stricter environmental legislation enforcement. Major bills, which were concerned with lowering the adverse environmental impact of strip mining and the disposal of acid-mine wastes were defeated by a Congress which was fearful of the rapid increase in energy costs.

The EPA and conservationists, however, argue that the effort to improve the environment is not responsible for, or related to, the energy crisis except insofar as they both stem from the same source. A move to control the rate of increase in energy costs through a diminishing of the proportion of total cost allocated to environmental protection may receive considerable support in a nation which sees its comfortable world position in danger. It is too early to discern whether or not a backlash towards NEPA will develop in the light of resource-supply problems.

The National Environmental Policy Act has been a powerful tool because of the intensity of its use by interested parties. It potentially could become an environmental 'Magna Carta'. This will depend entirely upon the future use to which it is put by the public, Congress, environmental lawyers, agencies and the courts. If present trends are extrapolated into the future, however, the existence of the Act could render the future environment of the nation significantly more desirable than it is at present.

Many problems have become apparent during the course of this study which offer potentially rewarding lines of future research. There is a grave need for improved techniques in the preparation of EIS. In this respect, a review of existing EIS would be most fruitful. Case studies are required to determine the effectiveness of NEPA in stemming the rate of environmental degradation in local situations, and also on a broader scale. The significance and scope of state legislation with provisions which resemble those of NEPA require investigation. Finally, the prospects for incorporating the objectives of NEPA within broad national and regional planning processes are worthy of consideration.

A P P E N D I C E S

APPENDIX A

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

TITLE I

Declaration of National Environmental Policy

Sec. 101. (a) 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.

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

(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.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall--

(A) 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;

(B) Identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, 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 irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has 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 made 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;

(D) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) Recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to iniatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) Initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) Assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes and procedures set forth in this Act.

Sec. 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

Council on Environmental Quality

Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is

exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

Sec. 204. It shall be the duty and function of the Council--

(1) To assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) To gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) To review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) To develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) To conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) To document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) To report at least once each year to the President on the state and condition of the environment; and

(8) To make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205. In exercising its powers, functions, and duties under this Act, the Council shall--

(1) Consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) Utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

Sec. 207. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1 million for each fiscal year thereafter.

Approved January 1, 1970.

APPENDIX B

DEPARTMENT OF GEOGRAPHY

UNIVERSITY OF VICTORIA

QUESTIONNAIRE - AGENCY RESPONSE TO NEPA

Dear Sir,

The following questionnaire is designed to help gather information for my M.A. thesis concerning the viability of the 1969 National Environmental Policy Act (NEPA). I would appreciate it very much if you would answer each question in the manner which you feel is most appropriate.

Thank you very much for your help.

Christianna Stachelrodt-Crook

1. What effect, in your opinion, has NEPA had on federal agency decision making in relation to resource management?

2. Could you describe any changes there have been in the manner in which federal agencies have responded to this legislation between the time it was enacted in December 1970 and today.

3. Do you feel that federal agency compliance with NEPA has been restricted to the production of environmental impact statements, or are agencies responding to this legislation as a comprehensive environmental protection mandate?

4. How effective do you think this law has been as a tool for the protection of the environment?

COMMENTS -

OFFICIAL TITLE OF RESPONDENT _____

APPENDIX C

ANNOTATED LIST OF SELECTED MAJOR COURT CASES CITED*

1. United States District Courts

Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878, 2 ERC 1173, 1797, 1 ELR 20079, 20366 (D. D.C. 1/27/71, 7/27/71). The court granted a preliminary injunction against further construction of the Cross-Florida Barge Canal. The court held that a 102 statement was required for further actions even though the project was begun before January 1, 1970. The case was later consolidated with others involving the canal and transferred to M.D. Fla. for pretrial proceedings.

Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 2 ERC 1260, 1 ELR 20130 (E.D. Ark. 2/19/71), 4 ERC 1097 (E.D. Ark. 5/5/72). Plaintiff environmental groups sued to enjoin further construction of the Gillham Dam, on which the Corps has prepared an environmental statement under Section 102 (2) (C). The court upheld plaintiffs' standing and held that NEPA was applicable even though the project was partially constructed prior to January 1, 1970. On the merits, the court rejected plaintiffs' argument that Section 101 creates an enforceable duty not to undertake environmentally damaging projects. However, it found the environmental statement legally inadequate and enjoined further construction until the Corps has complied with Sections 102 (2) (A), (B), (C), (D) of NEPA. In a later opinion, the court vacated the injunction because an amended 102 statement submitted by the Corps of Engineers met the full disclosure requirements of NEPA. The court found that although the amended 102 statement was not as fair and impartial and objective as if it had been compiled by a disinterested third person, it did present a record upon which a decisionmaker could arrive at an informed decision.

Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925, 3 ERC 1085, 1 ELR 20466 (D. D.C. 9/21/71). The court granted a preliminary injunction against construction of the Tennessee-Tombigbee Waterway. It ruled that the plaintiffs had made a sufficient showing of noncompliance with NEPA to warrant an injunction pending trial. The case has since been transferred to the N.D. Mississippi, without opinion.

Environmental Defense Fund v. Corps of Engineers, 4 ERC 1408 (N.D. Miss. 8/4/72). A class action suit was brought for the users of the Tombigbee River, seeking to halt construction of the Tennessee-Tombigbee Waterway for both substantive (Section 101) and procedural violation of NEPA. In dissolving the preliminary injunction the court ruled that NEPA does not create substantive rights which allow for the challenging of a project on its merits, and that the procedural requirements had been met in the impact statement.

---

* All of these case descriptions are verbatim quotations from "NEPA Court Decisions", 102 MONITOR, Vol. 3, No. 9 (October, 1973), pp. 2-62.

Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 2 ERC 1424, 1 ELR 20207 (D.C. 4/14/71). The court ruled that the Department of Agriculture's fire ant control program, involving dissemination of the pesticide Mirex, was a major action requiring an environmental statement under Section 102 (2) (C) of NEPA. However, it refused a preliminary injunction against the program, on the ground that the Department had performed adequate studies of the program's environmental effects and had prepared an environmental statement discussing those effects in sufficient detail to satisfy all procedural requirements of Section 102 (2) (C).

Getty Oil Co. v. Ruckelshaus, 4 ERC 1141 (D. Del. 5/10/72 and 5/12/72). The court held that the Environmental Protection Agency (EPA) is not required to prepare a 102 statement when it issues a compliance order pursuant to Section 113 of the Clean Air Act. The court denied plaintiff's motion for a preliminary injunction staying the effect of a compliance date set forth in an EPA compliance order in a proceeding involving the Delmarva Power Plant. The court found that a 102 statement was not required where an agency had prosectorial discretion but had no discretion to amend or grant a variance from the law.

Izaak Walton League v. Macchia, 2 ERC 1661 (D. N.J. 6/16/71). The court upheld the plaintiff's standing to sue private developers and the Corps of Engineers to stop the developers from dredging in navigable waters under a Corps permit. The court also rejected the defenses of sovereign immunity and laches, and continued the case for trial. The suit challenges the validity of the permit under NEPA and other federal laws.

Izaak Walton League v. Schlesinger, 337 F. Supp. 287, 3 ERC 1453, 2 ELR 20039 (D. D.C. 12/17/71). The court granted a preliminary injunction against the AEC's issuance of a partial operating license for the Quad Cities nuclear reactor pending completion of the NEPA review of the application for a full operating license. The court held that the partial license was itself a major action requiring a 102 statement. However, the court refused to consider the plaintiffs' claim that the AEC should have prepared a 102 statement on its rules implementing NEPA, holding that that question could be reviewed only in a U.S. court of appeals. The AEC appealed the decision. The appeal has since been mooted by an out of court settlement between the plaintiffs and the applicant.

Kalur v. Resor, 335 F. Supp. 1, 3 ERC 1458, 1 ELR 20637 (D. D.C. 12/21/71). In an action to review the Corps of Engineers' regulations governing the Refuse Act permit program, the court found the regulations invalid in two respects: (1) the regulations permitted the issuance of permits for discharges into non-navigable tributaries of navigable waters; and (2) they failed to require 102 statements for the issuance of permits. The court enjoined further issuance of permits under the program. The decision has been appealed.

Lathan v. Volpe, 4 ERC 1487 (W.D. Wash. 8/4/72). In a case involving I-90 crossing Lake Washington and entering Seattle, the defendants, having filed an impact statement, moved for the dissolution of an earlier preliminary injunction which had been ordered by the Court of Appeals (Lathan

v. Volpe, 3 ERC 1362 9th Cir. 1971). The court found the statement to be inadequate, however, in its assessment of several environmental impacts and ordered the defendants to prepare and circulate a new statement in compliance with NEPA, with the filed statement to be considered a draft.

Morningside-Lenox Park Assn. v. Volpe, 334 F. Supp. 132, 3 ERC 1327, 1 ELR 20629 (N.D. Ga. 11/12/71). The court preliminarily enjoined further work on Interstate 485 in Atlanta, holding that a 102 statement was required for further actions even though location approval was given before January 1, 1970.

National Helium Corp. v. Morton, 326 F. Supp. 151, 2 ERC 1372, 1 ELR 20157 (D. Kan. 3/27/71). The courts held that the Secretary of the Interior's cancellation of contracts for federal purchase of helium constituted a "major action" requiring an environmental impact statement under Section 102 (2) (C) of NEPA, and that the contractor had standing to seek compliance with this requirement. The court issued a preliminary injunction against termination of the contracts until the Secretary complied with NEPA. The injunction was subsequently affirmed by the 10th Circuit.

Natural Resources Defense Council v. Morton, 337 F. Supp. 165, 167, 3 ERC 1473, 2 ELR 20028 (D. D.C. 12/16/71, 12/17/71). The court preliminarily enjoined a proposed sale of leases for oil and gas extraction on the Outer Continental Shelf off eastern Louisiana. The court held that a substantial question had been raised about the legal sufficiency of Interior's 102 statement, particularly in the scope of alternative actions discussed. The decision was affirmed on appeal.

Natural Resources Defense Council v. Morton, 337 F. Supp. 170, 3 ERC 1623, 2 ELR 20071 (D. D.C. 2/1/72). The court was asked to dissolve its preliminary injunction against a proposed sale of leases on the Outer Continental Shelf, on the basis of an addendum to the Interior Department's 102 statement supplementing the discussion of alternative courses of action in the original statement. The court held that the statement as supplemented did not comply with Section 102 (2) (C), because the addendum had not been circulated to other agencies for additional comment.

Sierra Club v. Hardin, 325 F. Supp. 99, 2 ERC 1385, 1 ELR 20161 (D. Alaska 3/25/71). The courts upheld the standing of conservation groups to challenge the Forest Service's sale of timber in Tongass National Forest as violative of NEPA and other statutes. However, the court found that the Forest Service's reliance on the report of a panel of conservationists complied with NEPA "to the fullest extent possible" in view of the advanced stage of the transaction at the time of NEPA's passage. It found the claims under other statutes to be barred by laches. The decision has been appealed.

2. United States Courts of Appeal

Calvert Cliffs' Coordinating Comm. v. AEC, 449 F. 2d 1109, 2 ERC 1779, 1 ELR 20346 (D.C. Cir. 7/23/71). The court found the AEC's rules for implementing NEPA in licensing nuclear power plants invalid in four respects: (1) the rules failed to require hearing boards to consider environmental factors unless raised by the regulatory staff or outside persons; (2) they excluded nonradiological environmental issues in all cases where the notice of hearing was published before 3/4/71; (3) they prohibited reconsideration of water quality impacts where a certification of compliance with state standards had been obtained; and (4) they failed to provide for environmental review of cases in which a construction permit had been granted prior to NEPA's effective date but the time was not yet ripe for granting an operating license.

Committee for Nuclear Responsibility v. Seaborg, 3 ERC 1126, 1210, 1256, 1 ELR 20469 (D.C. Cir. 10/5/71, 10/28/71, 11/3/71). The court reversed a summary judgment for defendants, holding that plaintiffs had alleged a legally sufficient claim that the AEC's 102 statement on the underground nuclear test Cannikin was deficient under NEPA. The court later upheld the district judge's order requiring release of Government documents, which were not part of the 102 statement, discussing environmental aspects of the proposed test. However, the court refused to stay the test pendente lito. Finally, after release of the documents, the court refused on national security grounds to delay the test -- without deciding whether NEPA had been satisfied. (The Supreme Court later upheld this refusal.)

Environmental Defense Fund v. Corps of Engineers 4 ERC 1721 (8th Cir. 11/28/72). Plaintiffs had successfully enjoined the continuation of construction of Gillham Dam, subject to the preparation of an environmental impact statement. Defendant subsequently filed the required document with the district court, and simultaneously filed a motion for summary judgment, requesting the court to dissolve and set aside the injunction. Plaintiffs appealed from the court's granting of the judgment, arguing both the statement to be inadequate, and the defendant's administrative determination to have been arbitrary and capricious, in violation of Section 101 of NEPA. The court found the statement to have met the procedural requirements of the Act. Additionally it found the district court to have been in error in its ruling that NEPA does not create substantive rights, but found here that the defendant had not violated the substantive aspects of NEPA.

Greene County Planning Bd. v. FPC, 455 F. 2d 412, 3 ERC 1595, 2 ELR 20017 (2d Cir. 1/17/72). On a petition to review an FPC authorization for the Galboa-Leeds transmission line, the court found the FPC's procedures for implementing NEPA deficient. The court ruled that the FPC staff must itself prepare a draft 102 statement, prior to the public hearing, rather than treating as the draft statement the environmental report prepared by the applicant. However, the court refused to disturb the authorizations for two other transmission lines, despite noncompliance with NEPA, because the petitioners had failed to object to those authori-

zations or to seek court review of them within the time allowed by statute. Finally, the court declined to require the FPC or the applicant to pay the expenses incurred by the petitioners in challenging the authorizations. (The Government's petition for cert. is pending.)

Hanly v. Kleindienst, 4 ERC 1785 (2nd Cir. 12/5/72). The case refers to the proposed construction of the Metropolitan Correction Center (MCC), which would consist of an office building and a jail, in Manhattan. Earlier in the case, the appellate court, reversing in part a decision of the district court, granted a preliminary injunction against further construction, ruling that GSA had failed to consider all relevant factors in making its determination that a 102 statement was not required. (Hanly v. Mitchell, 460 F. 2d 640, 4 ERC 1153 (2nd Cir. 5/17/72), cert. denied 41 U.S. L.W. 3247, 4 ERC 1745 (U.S. Nov. 7, 1972))(Hanly I). Here, the plaintiffs renewed their application for a preliminary injunction, contending the negative declaration to be merely a rewrite of the earlier one. The district court denied the plaintiff's motion, and appeal was brought. The court found it to be necessary that the statement discuss the effects of the jail's possible use as a drug treatment center, and its impact upon the surrounding area's crime rate. It therefore remanded the case, with instructions that GSA address this issue, and certain other challenged findings of fact, and also provide for public notice and input. If from this further investigation GSA were to find a detailed statement necessary, a preliminary injunction would be granted. If GSA were to reaffirm its decision, the question of a preliminary injunction would go to the district court.

NRDC v. Morton, 3 ERC 1558, 2 ELR 20029 (D.C. Cir. 1/13/72). The court affirmed the district court's ruling that the Interior Department's 102 statement on a proposed sale of leases for oil and gas extraction on the Outer Continental Shelf was legally inadequate. The court held that the 102 statement was required to discuss the environmental effects of reasonable alternative courses of action, including courses of action not within the authority of the Department to adopt. The court stressed that the requirement of discussion of alternatives is subject to a construction of "reasonableness" and does not "impose unreasonable extremes".

Wilderness Society v. Morton, 4 ERC 1977 (D.C. Cir. 2/9/73). The plaintiffs sought to enjoin the Secretary of the Interior from granting rights-of-way and special land use permits necessary for construction of an oil pipeline from Prudhoe Bay to Valdez, Alaska. The contention of the plaintiffs as to NEPA was that the impact statement prepared by the Department of the Interior failed to adequately consider project alternatives. The district court, with the stated intention of facilitating the case's entry into the appellate process, found that the impact statement met the requirements of the Act. On appeal the court chose not to rule on the NEPA issues. Rather it found that granting of a right-of-way of the requisite width for the pipeline would be in violation of Section 28 of the Mineral Leasing Act of 1920, 30 U.S.C. 185 (1970). The appeals court therefore remanded the case to the district court with instructions that the Secretary of the Interior be enjoined from issuing a special land use right-of-way permit for pipeline purposes. The leases for airports,

rights-of-way for a highway, pumping stations, and communications facilities and free use gravel permits were ordered to be declared valid.

APPENDIX D

GLOSSARY

Action

A proceeding in court which, if completed, will result in a judgment.

Agency

Refers to federal agency; an organization which acts for, or represents, the federal government, e.g. the Federal Power Commission.

Appellate Court

Courts created to review appeals from inferior tribunals.

Certiorari, writ of

A command from a higher court requiring the record of a case in the court below to be sent up to itself for redetermination.

Circuit Court (of Appeals)

An Appellate Court in the federal judicial system for the particular circuit wherein it holds its sessions.

Common Law

As distinguished from law created by the enactment of legislators, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts, recognizing, affirming and enforcing such usages and customs.

Corps or Corps of Engineers

Refers to the U.S. Army Corps of Engineers.

District Courts

The name given to certain trial courts of general jurisdiction but limited in the issuance of process to a specific territory.

EIS or
Environmental Impact Statement

A written assessment of the anticipated impact of a development upon the physical, human and economic environment.

Equity

(i) Justice or fairness, (ii) the body of law, supplementing and correcting the common law.

Impact Statement

Refers to Environmental Impact Statement.

Jurisprudence

(i) Science of Law, (ii) collected decisions of a court.

Laches

Unreasonable delay in claiming a right or asserting a principle.

Mandamus

A command issued by a higher court directed to some official or some corporation carrying on official functions, to perform a public duty.

Nuisance

The tort committed by any act or the creation of any situation which interferes with the occupation or enjoyment of any tenement or residence or other landed property.

'Pendente lite'

While the suit is pending; a phrase which marks the period between the filing of an action and its determination in the trial court.

Public trust or
Public trust doctrine or Trust doctrine

Doctrine which maintains that the federal government holds the nation's natural resources in trust for the use and enjoyment of all of the people.

Sovereign immunity

The immunity of the State from liability.

Standing or
Standing to sue

Doctrine that in an action by a citizen against a government officer, complaining of alleged unlawful conduct, there is no judiciable controversy unless the citizen shows that such conduct invades or will invade a private, substantive, legally-protected, interest of plaintiff citizen.

Statute

A law duly passed by a legislature.

Tort

Wrong; an act or omission which causes injury, and which creates a claim for damages.

Writ

A formal legal document ordering or prohibiting the performance of some action.

APPENDIX E

LIST OF ABBREVIATIONS

AEC	Atomic Energy Commission
CEQ	Council on Environmental Quality
CWRA	Clean Water Restoration Act
DOT	Department of Transportation
EDF	Environmental Defense Fund
EIS	Environmental Impact Statement
ELR	Environmental Law Reporter
EPA	Environmental Protection Agency
EQIA	Environmental Quality Improvement Act
ERC	Environment Reporter (cases)
FAA	Federal Aviation Administration
FHA	Federal Housing Administration
FHWA	Federal Highway Administration
FPC	Federal Power Commission
FWPCA	Federal Water Pollution Control Act
GAO	General Accounting Office
GSA	General Services Administration
HUD	Housing and Urban Development
MCC	Metropolitan Correction Center
NEPA	National Environmental Policy Act
OMB	Office of Management and Budget
SIPI	Scientists' Institute for Public Information
SST	Super Sonic Transport
TVA	Tennessee Valley Authority
USLW	United States Law Week
WQA	Water Quality Act

SELECTED BIBLIOGRAPHY

1. ARTICLES, ADDRESSES AND PERIODICALS

Alsop, S. Reid. "Recent Developments in Environmental Law." Highway Research Circular. No.150 (November, 1973), 10 pgs.

Anderson, Fredrick R. "NEPA and Federal Decision Making". 3 ELR 50099-50107.

"Application of the National Environmental Policy Act to Highway Projects." Highway Research Circular. No.117 (January, 1971), 5 pgs.

Arnold, Richard S. "The Substantive Right to Environmental Quality Under the National Environmental Policy Act". 3 ELR 50028-43.

Barfield, Claude E. "Environment Report/Exemptions from NEPA Requirements Sought for Nuclear Plants, Pollution Permits." National Journal. (June 17, 1972), 1025-34.

_____ and Corrigan, Richard. "Environment Report/White House Seeks to Restrict Scope of Environmental Law." National Journal. (February 26, 1972), 336-49.

Barry, Frank J. "The Evolution of the Enforcement Provisions of the FWPCA : A Study of the Difficulty in Developing Effective Legislation." Michigan Law Review. Vol.68 (May, 1970), 1103-31.

Beard, Daniel P. "The National Environmental Policy Act in the Courts and Congress, 1970-1972." The Professional Geographer. Vol.25, No.4 (November, 1973), 377-81.

Blodgett, John E. and Beard, Daniel P. "The AEC and the Congress." Newsletter for the Science and Public Policy Studies Group. Vol.3, No.1 (January, 1972), 4-7.

Blood, Dwight M. "Techniques for Assessing Trade-Offs Among Social, Economic and Environmental Effects of Public Investments in Highways". Paper presented at the Highway Research Board Symposium on Environmental Considerations in Planning, Design and Construction. Special Report 138. Washington, D.C. : NRC-NAS, (1973), 35-43.

Brown, Jon T. and Duncan, Wallace L. "Legal Aspects of a Federal Water Quality Surveillance System." Michigan Law Review. Vol.68 (May, 1970), 1131-66.

Carlin, Alan "The Grand Canyon Controversy : Lessons for Federal Cost-Benefit Practices". Selected Legal and Economic Aspects of Environmental Protection. Edited by Charles J. Meyers and A. Don Tarlock. Mineola, N.Y. : The Foundation Press, 1971.

Carter, Luther J. "Alaska Oil : Court Receives Canada Pipeline Issue." Science. Vol.179 (March 9, 1973), 977-81.

_____, "Environmental Law (I) : Maturing Field for Lawyers and Scientists." Science. Vol.179 (March 23, 1973), 1205-09.

_____, "Environmental Law (II) : A Strategic Weapon Against Degradation?" Science. Vol.179 (March 30, 1973), 1310-12.

_____, "Alaska Pipeline : Congress Deaf to Environmentalists." Science. Vol.181 (July 27, 1973), 326.

Cicchetti, Charles J. "The Wrong Route." Environment. Vol.15, No.5 (June, 1973), 4-13.

"Clean Water : Congress Overrides Presidential Veto." Congressional Quarterly Weekly Report. (October 21, 1972), 2754.

"Confrontation : When Environmentalism Confronts Economics." Forbes. Vol.110 (November 15, 1972), 32-33+.

"Congress Clears Major Water Pollution Control Bill." Congressional Quarterly Weekly Report. (October 14, 1972), 2692-96.

"Congressional Backlash on NEPA? " National Journal. (June 17, 1972), 1030.

Crampton, Roger C. "Nonstatutory Review of Federal Administrative Action : The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendent." Michigan Law Review. Vol.68 (January, 1970), 387-470.

_____ and Berg, Richard K. "Enforcing the National Environmental Policy Act in Federal Agencies." The Practical Lawyer. Vol.18, No.5 (May, 1972), 79-98.

Drayton, William, Jr. "The Public Trust in Tidal Areas : A Sometimes Submerged Traditional Doctrine." Yale Law Journal. Vol.79A, No.4 (March, 1970),762-89.

Dunkelberger, H. Edward, Jr. "The Federal Government's Role in Regulating Water Pollution under the Federal Water Quality Act of 1965." Natural Resources Lawyer. Vol.3 (1970), 3-25.

"EPA Relaxes SO_x Standards." Science News. Vol.103, No.20 (May 19, 1973), 323.

"Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline." Yale Law Journal. Vol.81, No.8 (July 8, 1972), 1592-1639.

Fisher, Fredrick R. "Environmental Lawyer in the Lion's Mouth : Litigation Before and Against Administrative Agencies". Paper presented at the National Conference on Environmental Law : Transcripts of the Speeches.San Francisco(November,1970),63-112.

"Flurry of Legislation on the Environment," Science News. Vol.102, No.13 (September 23, 1972), 198-99.

Fox, Lloyd A. "Substance and Procedure in the Construction of the National Environmental Policy Act." Michigan Journal of Law Reform. Vol.6, No.2 (Winter, 1973), 491-510.

Gillette, Robert. "National Environmental Policy Act : Signs of Backlash are Evident." Science. Vol.176 (April 7, 1972), 30-33.

_____, "National Environmental Policy Act : How Well is it Working?."Science. Vol.176 (April 14, 1972), 346-50.

_____, "Environment." Science. Vol.179 (February 9, 1973), 550.

_____, "State of the Union Message : An Upbeat Message on Environment," Science. Vol.179 (March 2, 1973), 876.

Haggard, Joel E. "Public Works Management and the National Environmental Policy Act". Paper presented to the American Public Works Association Conference. San Diego (May, 1972).

Hanks, Eva H. and Hanks, John L. "An Environmental Bill of Rights : The Citizen Suit and the National Environmental Policy Act of 1969." Rutgers Law Review. Vol.24 (1970), 231-72.

"Impact of Energy Crisis, Environmental Slowdown." Congressional Quarterly Weekly Report. Vol.XXXII, No.7 (February 16, 1974),383.

Johnston, William K. "Environmental Litigation : Lessons from the Courts." Civil Engineering - ASCE. Vol.42, No.1 (January, 1972), 55-58.

"Judicial Review of Agency Action : The Unsettled Law of Standing." Michigan Law Review. Vol.69 (January, 1971), 540-68.

"Judicial Review of Factual Issues Under the National Environmental Policy Act." Oregon Law Review. Vol.51 (1972), 408-16.

Kitzmiller, William M. "Federal Legislation : What's Happening on Capitol Hill." Environmental Law. Edited by Charles M. Hassett. Ann Arbor, Michigan : The Institute of Continuing Legal Education (1971), 61-72.

Kreith, Frank. "Lack of Impact." Environment. Vol.15, No.1 (January-February, 1973), 26-33.

L'Amoreaux, Ray G. "What is a Good Environmental Statement?". Paper presented at the Highway Research Board Symposium on Environmental Considerations in Planning, Design and Construction. Special Report 138. Washington, D.C. : NRC-NAS (1973), 29-31.

Liroff, Alan Richard. "Administrative, Judicial and Natural Systems : Agency Response to the National Environmental Policy Act of 1969." Loyola University Law Journal. Vol.3 (1972), 19-48.

McCaull, Julian. "The Politics of Technology." Environment. Vol.14, No.2 (March, 1972), 2-10.

"Major Legislation Passed : Environment." 1971 Congressional Quarterly Almanac. Vol.XXVII. 92nd Cong., 1st Sess. Washington D.C. : Congressional Quarterly Inc. (1971), 29.

March, Fred S. "Federal Environmental Legislation : The Federal-State Partnership". Paper presented to the State of Washington Chapter of the American Public Works Association. Bellingham, Washington (October 4, 1973).

"Most Productive Environmental Session in History." 1972 Congressional Quarterly Almanac. Vol.XXVII, 92nd Cong., 2nd Sess. Washington D.C. : Congressional Quarterly Inc. (1972), 115-16.

Murphy, Arthur W. "The National Environmental Policy Act and the Licensing Process : Environmentalist Magna Carta or Agency Coup de Grâce? " Columbia Law Review. Vol.72, No.6 (October, 1972), 963-1007.

"National Environmental Policy Act of 1969 : A Mandate to the Corps of Engineers to Consider Ecological Factors, Zabel v. Tabb." Boston University Law Review. Vol.50 (1979), 616-27.

"NEPA, in Context, in Detail, in Court." Science. Vol.178 (October 27, 1972), 426-27.

"1969 National Environmental Policy Act Survives Broad-Scale Attacks." 1972 Congressional Quarterly Almanac. Vol.XXVII, 92nd Cong., 2nd Sess. Washington D.C. : Congressional Quarterly Inc. (1972), 495-501.

Oakes, Judge James L. "Developments in Environmental Law". 3 ELR 50001-50012.

Pearson, John Y., Jr. "Toward a Constitutionally Protected Environment." Virginia Law Review. Vol.56, No. 3 (April, 1970), 458-486.

Peterson, R. and Kennan, R. "The Federal-Aid Highway Program : Administrative Procedures and Judicial Interpretation". 2 ELR 50001.

Peterson, Ronald C. "An Analysis of Title I of The National Environmental Policy Act of 1969". 1 ELR 50035-50052.

"Private Remedies for Water Pollution." Columbia Law Review. Vol.70, No.4 (April, 1970), 734-56.

Quarles, John R. Jr. "Expectation Vs. Achievements : Some Reflections on the Water Act." Environmental News. (January, 1974), 8 pgs.

Rahenkamp, John; Sachs, Walter;and Wells, Roger. "A Strategy for Watershed Development that Beats the Bulldozer by Using Land-Sale Profits to Preserve Green Space." Landscape Architecture. (April, 1971), 227-34.

Rasmussen, Fredrick. "Environmental Law-Water Pollution-Conflict Between Refuse Act Permit Program and National Environmental Policy Act." Wisconsin Law Review. Vol.1973, No.1 (January, 1973), 280-91.

Reitz, Arnold and Reitz, Glen L. "Pollution Control and Puppets : All Strings Lead to Washington." Environment. Vol.15, No.4 (May, 1973), 26-27.

Roberts, Paul E. "Cross-Florida Barge Canal : A Current Appraisal." Business and Economics Dimensions. (May, 1971), 1-12.

Robinson, John. "Citizen Participation and Environmental Considerations in Transportation Planning". Paper presented to the Highway Research Board Symposium Environmental Considerations in Planning, Design and Construction. Special Report 138. Washington D.C. : NRC-NAS (1973), 32-34.

Rosenbaum, Walter A. and Roberts, Paul E. "The Year of Spoiled Pork : Comments on the Courts' Emergence as an Environmental Defender." Law and Society Review. Vol.7, No.1 (Fall, 1972), 33-59.

Sax, Joseph L. "The Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention." Michigan Law Review. Vol.68 (January, 1970), 471-563.

_____, "New Direction in the Law." Environmental Law. Edited by Charles M. Hassett. Ann Arbor, Michigan : The Institute of Continuing Legal Education (1971), 1-20.

Scalice, Antonin. "Soverign Immunity and Nonstatutory Review of Federal Administrative Act : Some Conclusions from the Public Lands Cases." Michigan Law Review. Vol.68 (April, 1970), 867-923.

Shane, Jeffrey N. "Environmental Litigation in 1971." Highway Research Circular. No.135 (May, 1972), 28 pgs.

Shapley, Deborah. "Auto Pollution Research Group Charged With Conflict of Interest." Science. Vol.181 (August 24, 1973), 732-34.

"Six Great Goals." 1971 Congressional Quarterly Almanac. Vol.XXVII, 92nd Cong., 1st Sess. Washington D.C. : Congressional Quarterly Inc. (1971), 23.

"Supreme Court Upholds Strict Air Standards." Science News. Vol.103, No.24 (June 16, 1973), 384.

Tripp, David R. "Origin, Legal History and Implementation of the National Environmental Policy Act of 1969". Paper presented at the Environmental Impact Conference. Kansas City, Missouri (November 8, 1972).

Vance, John C. "Environmental Impact Statements : Are They Worth the Effort?." Highway Research Circular. No.136 (June, 1972), 31 pgs.

Voigt, Harry H. "The National Environmental Policy Act and the Independent Regulatory Agency : Some Unresolved Conflicts," Natural Resources Lawyer. Vol.5, No.1 (January, 1972), 13-23.

Vollmer, Arnold. "The Environmental Impact Statement and Visual Quality". Paper presented at the Highway Research Board Symposium, Environmental Considerations in Planning, Design and Construction. Special Report 138. Washington D.C. : NRC-NAS (1973), 98-101.

Waller, R.A. "Environmental Quality, its Measurement and Control." Regional Studies. Vol.4 (1970), 177-91.

Walsh, John. "Environmental Legislation : Last Word from Congress." Science. Vol.178 (November 10, 1972), 593-94.

"Water Pollution Control." Congressional Quarterly Weekly Report. (October 7, 1972), 2626.

"Water Quality Standards in Private Nuisance Actions." The Yale Law Journal. Vol.79, No.1 (November, 1969), 102-10.

Wenner, Lettie M. "Enforcement of Water Pollution Control Law." Law and Society Review. Vol.6, No.4 (May, 1972), 481-507.

White, Gilbert F. "Broader Basis for Choice : The Next Key Move." Perspectives on Conservation. Resources for the Future. Edited by Henry Jarrett. Baltimore : The Johns Hopkins Press. (1961), 205-26.

_____, "Environmental Impact Statements." The Professional Geographer. Vol.24, No.4 (November, 1972), 304-09.

Yannacone, Victor J. "National Environmental Policy Act of 1969." Environmental Lawyer. (Spring, 1970), 8-32.

Yost, Nicholas C. "Utilization of Environmental Impact Statements". Paper presented to the Program of Continuing Education in Public Health. Anchorage (October 10, 1973).

Zimmerman, Art."Restoration of Quality Corridors". Paper presented to the Oregon Bureau of Land Management at the NNRC-FEB Environmental Workshop. Portland, Oregon. (November 2 and 3 , 1972), 7 pgs.

2. BOOKS

Anderson, Fredrick R., assisted by Daniels, Robert H. NEPA in the Courts : A Legal Analysis of the National Environmental Policy Act. Resources for the Future. Baltimore : Johns Hopkins University Press, 1973.

Buckland, William Warwick. A Textbook of Roman Law from Augustus to Justinian. 3rd ed. Cambridge : Cambridge University Press, 1963.

Dales, J.H. Pollution, Property and Prices : An Essay in Policy-Making and Economics. Toronto : University of Toronto Press,1968.

Davies, Clarence J., III. The Politics of Pollution. New York : Pegasus, 1970.

Dye, Lee. Blowout at Platform 'A' : The Crisis that Awakened a Nation. Garden City, N.Y. : Doubleday, 1971.

Franklin, Marc A. The Dynamics of American Law. Mineola, N.Y. : The Foundation Press, Inc., 1968.

Grad, Frank P.; Rathjens, George W.; and Rosenthal, Albert. Environmental Control : Priorities, Policies and the Law. New York : Columbia University Press, 1971.

Gray, Oscar S. Cases and Materials on Environmental Law. Washington D.C. : Bureau of National Affairs, Inc., 1970.

Green, Harold P. The National Environmental Policy Act in the Courts : January 1, 1970 - April 1, 1972. Washington D.C. : The Conservation Foundation, 1972.

Hassett, Charles M. ed. Environmental Law. Ann Arbor, Michigan : The Institute of Continuing Legal Education, 1971.

Henkin, Hermon; Merta, Martin; and Staples, James. The Environment, the Establishment and the Law. Boston : Houghton Mifflin Co., 1971.

Holt, J.C. Magna Carta. Cambridge : Cambridge University Press, 1965.

Hurley, William D. Environmental Legislation. Springfield, Illinois : Charles C. Thomas, 1971.

Katz, D. and Kahn, R. The Social Psychology of Organizations. New York : The Free Press, 1967.

Krier, James E. Environmental Law and Policy : Reading Materials and Notes on Air Pollution and Related Problems. New York : The Bobbs-Merrill Co.Inc., 1971.

Lindbloom, Charles E. The Intelligence of Democracy : Decision Making through Mutual Adjustment. New York : The Free Press, 1965.

Meadows, Donella H.; Meadows, Dennis L.; Randers, Jørgen; and Behrens, William W., III. The Limits of Growth. New York : Universe Books, 1972.

Meyers, Charles J. and Tarlock, Dan A., eds. Selected Legal and Economic Aspects of Environmental Protection. Mineola, N.Y. : The Foundation Press, Inc., 1971.

Moore, S. and Moore H. The History and Law of Fisheries. Oxford : The Clarendon Press, 1958.

Moyle, J.B. The Institutes of Justinian, 5th ed. Oxford : The Clarendon Press, 1897.

Patterson, B. The Forgotten Ninth Amendment. Mineola, N.Y. : The Foundation Press, 1955.

Sanders, Thomas Collett. The Institutes of Justinian, 5th ed. London : Longmore, Green and Co., 1874.

Schultz, Fritz. Classical Roman Law.Oxford : The Clarendon Press, 1961.

Sax, Joseph L. Defending the Environment : A Strategy for Citizen Action. New York : Alfred A.Knopf, 1971.

Yannacone, Victor J., Jr.; Cohen, Bernard S.; and Davidson, Steven G. Environmental Rights and Remedies. San Francisco : Bancroft-Whitney, 1971.

3. PUBLIC DOCUMENTS

a. House of Representatives

U.S. House of Representatives.Committee on Merchant Marine and Fisheries. Conference Report on S. 1075, H.R. Rep.No.91-765. 91st Cong., 1st Sess., December, 1969.

_____. Administration of the National Environmental Policy Act (P.L. 91-190). H.Rept. 92-316. 92nd Cong., 1st Sess., June 29, 1971.

_____. Improvements Needed in Federal Efforts to Implement the National Environmental Policy Act of 1969. Prepared by the Comptroller Generals Office. B-170186. May 18, 1972.

_____. Administration of the National Environmental Policy Act - 1972 : Appendix to Hearings. Serial No.92-25. 92nd Cong., 2nd Sess., February 1972.

U.S. House of Representatives. Committee on Public Works. Laws Relating to U.S. Water Pollution Legislation. Comm.Print 93-1. 93rd Cong., 1st Sess., March, 1973.

_____, Committee on Science and Astronautics. Subcommittee on Science, Research and Development. Managing the Environment, by Richard A. Carpenter. Research and Development Report. 90th Cong., 1st Sess., 1968.

_____, Technical Information for Congress. Serial A. 92nd Cong., 1st Sess., April 25, 1969. Revised April 15, 1971.

b. Senate

U.S. Senate. Committee on Interior and Insular Affairs. A National Policy for the Environment, by Lynton K. Caldwell. A Special Report. 90th Cong., 2nd Sess., 1968.

_____. Hearings on S.1075, S.257 and S.1752. 91st Cong., 1st Sess., April, 1969.

_____. National Environmental Policy Act of 1969. S.Report 91-296. 91st Cong., 1st Sess., July 9, 1969.

_____. Bills Amending or Related to the National Environmental Policy Act : Hearing. 92nd Cong., 1st Sess., November 19, 1971.

_____. Effect of Calvert Cliffs and Other Decisions upon Nuclear Power in the United States. Pursuant to S.Res.45, A National Fuels and Energy Policy Study. Serial No.92-28. 92nd Cong., 2nd Sess., 1972.

_____. Congress and the Nation's Environment : Environmental and Natural Resources Affairs of the 92nd Congress. 93rd Cong., 1st Sess., January 20, 1973.

_____. National Environmental Policy Act of 1969 : An Analysis of Proposed Legislative Modifications - 1st Session, 93rd Congress. 93rd Cong. 1st Sess., June, 1973.

_____. Joint Hearings before the Committee on Public Works and the Committee on Interior and Insular Affairs. The Operation of the National Environmental Policy Act of 1969. Serial No.92-H32. 92nd Cong., 2nd Sess., March, 1972.

c. Congressional and Executive Enactments

(i) U.S. Congress

U.S. Congress. Harbor Pollution Act of 1888. 33 U.S.C. 441.

U.S. Congress. Rivers and Harbors Act of 1899. (Refuse Act) 33 U.S.C. 407-413.

_____. Federal Water Pollution Control Act of 1948. Pub.L. 80-845, Ch.758, 62 Stat.1155.

_____. Federal Water Pollution Control Act, Amendments, 1952. Pub.L.82-579.

_____. Federal Water Pollution Control Act, Amendments, 1956. Pub.L.84-660, Ch.518, 70 Stat.498.

_____. Federal Water Pollution Control Act, Amendments, 1961. Pub.L.87-88, 75 Stat. 204.

_____. Federal Water Quality Standards Act of 1965. Pub.L.89-234, 79 Stat.

_____. Clean Water Restoration Act of 1966. Pub.L.89-753, 80 Stat.1246.

_____. National Environmental Policy Act of 1969. Pub.L.91-190, S.1075.

_____. Clean Air Act of 1970. Pub.L.91-604, 42 U.S.C. 1857.

_____. Federal Water Pollution Act, Amendments 1972. Pub.L.91-224, H.R.4148.

_____. Environmental Quality Improvement Act of 1970. Pub.L.91-224, 42 U.S.C. (Pocket Part) 4371 et.seq.

_____. Fish and Wildlife Act of 1956, 1972 Amendment, Shooting from Aircraft. Pub.L.92-159, 85 Stat.480, H.R.5060.

_____. Wild Horses and Burros, Protection Act of 1972. Pub.L. 92-195, 85 Stat.649, S.1116.

_____. Atomic Energy Act of 1954, 1972 Amendment, Temporary Operating Licenses. Pub.L.92-307, 86 Stat. 191, H.R.14655.

_____. Federal Water Pollution Control Act, 1972 Amendments. Pub.L.92-500, 86 Stat.816, S.2770.

_____. Federal Environmental Pesticide Control Act of 1972. Pub.L.92-516, 86 Stat. 973, H.R.10726.

_____. Marine Mammal Protection Act of 1972. Pub.L.92-522, 86 Stat. 1027, H.R.10420.

_____. Marine Protection, Research and Sanctuaries Act of 1972. Pub.L.92-532, 86 Stat. 1052, H.R.9727.

U.S. Congress. Noise Control Act of 1972. Pub.L.92-574, 86 Stat.1234, H.R.11021.

_____. Coastal Zone Management Act of 1972. Pub.L.92-583, 86 Stat.1280, S.3507.

(ii) Executive Enactments

U.S. Office of the President. Prevention Control and Abatement of Air and Water Pollution at Federal Facilities. Executive Order 11507. F.R.Doc.70-1566. February 4, 1970.

_____. Protection and Enhancement of Environmental Quality. Executive Order 11514. F.R.Doc.70-2861. March 5, 1970.

_____. Establishing the National Industrial Pollution Control Council. Executive Order 11523. F.R.Doc.70-4512. April 9, 1970.

_____. Delegating Functions of the President Under the Federal Water Pollution Control Act, as Amended. Executive Order 11548. 35 F.R.11677. July 20, 1970.

_____. Reorganization Plan No.3. of 1970. 35 F.R.15623, 85 Stat.

(iii) Miscellaneous

U.S. Council on Environmental Quality. "The Law and the Environment", Environmental Quality : The Second Annual Report of the Council on Environmental Quality. Ch.5. August, 1971.

_____. "NEPA - Reform in Government Decision-Making," Environmental Quality : The Third Annual Report of the Council on Environmental Quality. Ch.7. August, 1972.

_____. Proposed Federal Actions Affecting the Environment : Guidelines, Council on Environmental Quality. 36 F.R.7724-29. April 23, 1971.

U.S. Environmental Protection Agency. Environmental Impact Statement Guidelines. Water Quality Office. Environmental Protection Agency. Portland, Oregon. June, 1971.

_____. Highlights : An Environmental Law : The Marine Protection, Research and Sanctuaries Act of 1972 (Ocean Dumping). (pamphlet) 1972.

_____. Highlights : An Environmental Law : The Noise Control Act of 1972. (pamphlet) 1972.

_____. Reviewing Environmental Impact Statements at the Regional Level, Appraisals, Evaluations, Comments after Fifteen Months With NEPA, by Ray C.Hurlon, U.S.EPA. Region X. Seattle, Washington. 1972.

4. UNPUBLISHED MATERIALS

Andrews, Richard N.L. "Environmental Policy and Administrative Change : The National Environmental Policy Act of 1969, 70-71". Unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill, 1972.

Barr, Lorna R. "Areal Reorganisation of Water Management in England and Wales". Unpublished M.A. thesis. University of Victoria, Victoria, B.C., 1973.

Finn, Terence T. "Conflict and Compromise : Congress Makes a Law. The Passage of the National Environmental Policy Act". Unpublished Ph.D. dissertation, Georgetown University, Washington D.C., 1972.

VITA

Surname: CROOK Given Names: CHRISTIANNA STACHELRODT

Place of Birth: CAMAS, WASHINGTON, U.S.A. Date of Birth: JULY 28, 1942

Educational Institutions Attended, with Dates of Entering and Leaving:

PORTLAND STATE UNIVERSITY, PORTLAND, OREGON	1965 to 1972
PORTLAND COMMUNITY COLLEGE	1965

Degrees, Diplomas, Etc., Awarded, with Dates and Names of Institutions:

B.Sc.	1972	Portland State University, Portland, Ore

Honors and Awards:

N.D.E.A. Grants, 1965/66 and 1968/71

P.E.O. Scholarship Loan, 1972/74

University of Victoria Scholarship, 1972/73

University of Victoria Scholarship, 1973/74

Publications:

Stachelrodt, Christianna, "Vegetation Analysis" and "Resident Attitude Survey" in Environmental Geology of the Marquam Hill Area, L. Palmer and R. Redfern, Portland Planning Commission and State of Oregon Department of Geology and Mineral Industries, Portland, Oregon, pp. 23-26, 87-109 (1973).

Stachelrodt, Christianna, "A Geomorphic Study of Waterfalls in the Columbia River Gorge" (abstract), Proceedings: Oregon Academy of Science, 1971.