Golden Gate University Law Review

Volume 6
Issue 2 *Ninth Circuit Survey*

Article 12

January 1976

Environmental Law

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ENVIRONMENTAL LAW

INTRODUCTION

American awareness of and concern for the quality of the human environment caused Congress to create the Environmental Protection Agency (EPA)[1] and to pass the National Environmental Policy Act of 1969 (NEPA),[2] and complementary environmental protection acts.[3] Subsequently, federal courts have reviewed the environmental laws to insure implementation of the national policies embodied in the acts.

NEPA sets forth environmental policy in relation to social and economic goals,[4] and in light of individual rights and responsibilities.[5] It discusses the interpretation and administration of environmental policies, regulations, and laws by federal agencies. Specifically, it provides for the development of procedures for evaluating environmental quality, requires an environmental impact statement (EIS) for major federal projects significantly affecting environmental quality, and declares that federal agencies must conform to the national environmental policy set by Congress.[6] Significantly, NEPA is silent on the subject of judicial review.

In reviewing NEPA, the Court of Appeals for the Ninth Circuit construes the Act narrowly. It concentrates on insuring that there is compliance with the procedural requirements of NEPA, but it does not adopt the controversial, broad substantive review approach taken by courts in the Second, Fourth, Fifth, Sixth,

1. The EPA was created by Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970).

2. 42 U.S.C. §§ 4321, 4331-47 (1970).

3. *E.g.*, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-376 (Supp. IV 1974); Clean Air Act, 42 U.S.C. §§ 1857-571 (1970).

4. 42 U.S.C. § 4331(b).

5. *Id.* § 4331(c).

6. *Id.* § 4332, which in part provides:

> 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 [NEPA].

Seventh, Eighth and District of Columbia Circuits.[7]

Questions considered during the survey period included those of standing,[8] scope of judicial review under NEPA and/or the Administrative Procedure Act,[9] EIS requirements,[10] and the equitable defense of laches.[11] Additionally, the court reviewed environmental issues arising under the Federal-Aid Highway Act,[12] the Clean Air Act[13] and the Federal Water Pollution Control

7. *Compare* Environmental Defense Fund, Inc. v. Armstrong, 487 F.2d 814 (9th Cir. 1973), *with* Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Conservatory Council of N.C. v. Froehlke, 473 F.2d 664 (4th Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); and Citizens to Preserve Overton Park, Inc. v. Volpe, 432 F.2d 1307 (6th Cir. 1970), *rev'd on other grounds*, 401 U.S. 402 (1971).

A major judicial controversy today concerns the question of the proper scope of review under NEPA. For a discussion of this issue see notes 53-57 *infra* and accompanying text; Deutsch, *The First Five Years of NEPA*, 4 ENVIRONMENTAL AFFAIRS 1, 62 (1975); 52 TEXAS L. REV. 527 (1974). The increasing willingness of courts to engage in "on the merits" review of substantive agency decision is noted in F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 258-65 (1973). However, some courts confine judicial review to an examination of whether NEPA's procedural requirements are complied with. *See, e.g.*, Lathan v. Brinegar, 506 F.2d 677 (9th Cir. Sept., 1974).

8. *See* Cady v. Morton, 527 F.2d 786 (9th Cir. June, 1975) (per Sneed, J.); City of Davis v. Coleman, 521 F.2d 661 (9th Cir. July, 1975) (per Duniway, J.); Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905 (9th Cir. Nov., 1974) (per Trask, J.).

9. *See* Brooks v. Coleman, 518 F.2d 17 (9th Cir. June, 1975) (per curiam); Lathan v. Brinegar, 506 F.2d 677 (9th Cir. Sept., 1974) (per Duniway, J.). The Administrative Procedure Act is codified at 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*, 3105, 3344, 5371, 7521 (1970).

10. For a discussion of the policy favoring public hearings see Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. Sept., 1974), *cert. denied*, 420 U.S. 908 (1975). For requirements of a public hearing and a major federal action see City of Davis v. Coleman, 521 F.2d 661 (9th Cir. July, 1975) (per Duniway, J.). For requirements of a major federal action and the number of EISs see Cady v. Morton, 527 F.2d 786 (9th Cir. June, 1975) (per Sneed, J.). For EIS adequacy requirements see Daly v. Volpe, 514 F.2d 1106 (9th Cir. Mar., 1975) (per Goodwin, J.); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. Dec., 1974) (per Sneed, J.).

11. *See* City of Davis v. Coleman, 521 F.2d 661 (9th Cir. July, 1975) (per Duniway, J.); Cady v. Morton, 527 F.2d 786 (9th Cir. June, 1975) (per Sneed, J.).

12. *See* Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. Sept., 1974) (per Duniway, J.), *cert. denied*, 420 U.S. 908 (1975); Lathan v. Brinegar, 506 F.2d 677 (9th Cir. Sept., 1974) (per Duniway, J.). The Federal-Aid Highway Act is codified at 23 U.S.C. §§ 101 *et seq.* (1970).

13. *See* Brown v. EPA, 521 F.2d 827 (9th Cir. Aug., 1975) (per Sneed, J.); Alaska v. EPA, 521 F.2d 842 (9th Cir. Aug., 1975) (per Sneed, J.); Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905 (9th Cir. Nov., 1974) (per Trask, J.). The Clean Air Act is codified at 42 U.S.C. §§ 1857 *et seq.* (1970).

Act.[14]

I. ACCESS TO THE COURTS

A. STANDING

During the survey period, the Ninth Circuit considered the issue of standing to sue in the context of environmental legislation. In reviewing the cases before it, the court relied on the Supreme Court test announced in *Association of Data Processing Services Organization, Inc. v. Camp*.[15] The standard enunciated by the Court has two requirements. First, the parties suing must make a prior showing of injury in fact, economic or otherwise.[16] Second, they must make a showing that the injury is arguably within the zone of interests protected by the statute at issue in the suit.[17] With regard to the first requirement, the Supreme Court has declared, in *Sierra Club v. Morton*,[18] that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[19]

The Tests for Standing

In *Natural Resources Defense Council (NRDC) v. EPA*,[20] two non-profit organizations, the National Resources Defense Council and the Arizona Nurses' Association, and an Arizona physician challenged the EPA's approval of an air quality implementation plan submitted by the state of Arizona as required by the Clean Air Act. Initially, the court considered whether the plaintiffs in the suit had standing to test the adequacy of the state implementation plan approved by the EPA. Applying the *Data Processing* and *Sierra Club* tests, the court held that the two non-profit corporations had no standing to sue in their own behalf or in their representative capacities because, in fact, air pollution could not injure their corporate health.[21] However, since the physician, as a

14. *See* California *ex rel.* State Water Resources Control Bd. v. EPA, 511 F.2d 963 (9th Cir. Feb., 1975) (per Wright, J.), *cert. granted*, 422 U.S. 1041 (1975) (No. 1435). The Federal Water Pollution Control act is codified at 33 U.S.C. §§ 1251-376 (Supp. IV 1974).

15. 397 U.S. 150 (1970).

16. *Id.* at 152.

17. *Id.* at 153.

18. 405 U.S. 727 (1972).

19. *Id.* at 739.

20. 507 F.2d 905 (9th Cir. Nov., 1974) (per Trask, J.).

21. *Id.* at 910-11.

resident of the state, was capable of suffering actual physical injury by breathing polluted air, and since the injury was within the zone of interests protected by NEPA, the court held that he had standing to sue.[22]

The *Data Processing* standing test was also applied in *City of Davis v. Coleman*.[23] In that case, the City of Davis sought to enjoin the California Department of Public Works, Division of Highways (CDHW), from building a proposed freeway interchange partially funded through the Federal-Aid Highway Act (FAHA).[24] Specifically, the city contended that the Federal Highway Administration and the CDHW failed to hold public hearings required by FAHA,[25] and failed to prepare and file an EIS and an environmental impact report (EIR), as required by NEPA[26] and the California Environmental Quality Act of 1970 (CEQA),[27] respectively. Before considering the merits for the purpose of granting injunctive relief, the court faced the issue of the city's standing. It found that the City of Davis could suffer environmental consequences from the project because it was sufficiently near the site of the proposed interchange.[28] Additionally, the court declared that the deprivation of the opportunity to participate in the administrative decision-making process that resulted from a failure to prepare an EIS constituted an injury in fact.[29]

The *City of Davis* court then examined whether the injury to the city was within the zone of interests protected by NEPA. The court reasoned that the language of NEPA and the municipality's statutory duty to protect environmental interests brought the City of Davis within the scope of NEPA's protections. It explained that section 102(2)(C) of NEPA expressly provides for local govern-

22. *Id.*

23. 521 F.2d 661 (9th Cir. July, 1975) (per Duniway, J.).

24. 23 U.S.C. §§ 101 *et seq.* (1970), *as amended, id* §§ 101 *et seq.* (Supp. III, 1973).

25. *Id.* § 128 (1970).

26. 42 U.S.C. § 4332(2)(C) (1970).

27. CAL. PUB. RES. CODE §§ 21000 *et seq.* (West Supp. 1976). CEQA is environmental legislation promulgated by the state of California. Its purpose and design are similar to that of NEPA. For example, the act requires preparation of an EIR whenever a proposed project "may have a significant effect on the environment," and opportunity for public review of the EIR and a Design Study Report. Since the purposes of both CEQA and NEPA are substantially the same, and since the CEQA and NEPA issues raised on appeal in *City of Davis* bore a close relationship, the court decided to hear the issues in tandem. 521 F.2d at 673.

28. 521 F.2d at 670.

29. *Id.* at 672.

ment participation in EIS review.[30] Further, it stated that California law provides for city protection of the environmental interests of its citizens.[31] Based on these federal and state statutes, the court found that the local government of Davis was an intended beneficiary within the zone of interests protected by NEPA.[32] This finding, in conjunction with the finding that the city could sustain an injury in fact, brought the court to the conclusion that the City of Davis met the *Data Processing* test for standing to seek an injunction to prevent the construction of the proposed highway.[33]

At first view, the implementation of the *Data Processing* test in *NRDC* and in *City of Davis* appears inconsistent becuase the corporations which sued in *NRDC* and the City of Davis are all inanimate bodies incapable of personally breathing polluted air or suffering from the environmental effects of a freeway project. However, an important distinction exists. The City of Davis has statutorily imposed duties to provide protection and services to its inhabitants. The corporations have statutory duties, but they are of a different nature. Their duties do not mandate the direct protection of citizens within the jurisdictions where the companies do business. Thus, based on the express statutory duty to protect its citizens from environmental harm, the City of Davis alone had standing to sue to insure that the CDHW complied with the requirements of NEPA and CEQA. Lacking such statutory authorization to protect citizens and failing to show injury, the corporations had no standing to sue with regard to the adequacy of the Arizona air quality implementation plan required under the Clean Air Act.

What Constitutes "Injury"?

The type of injury recognized under the test for standing is an issue which has come before many federal courts.[34] In *Cady v. Morton*,[35] a suit to enjoin strip mining operations, the Ninth Circuit followed the decisions in *Sierra Club v. Morton* and *United*

30. *Id.* For other provisions regarding local government participation in effecting national environmental policy see 42 U.S.C. §§ 4331(a), 4332(2)(F), 4341(4), 4345(1) (1970).

31. 521 F.2d at 672, *citing* CAL. GOV'T CODE §§ 65302-03 (West Supp. 1975).

32. *Id.* at 672.

33. *Id.*

34. *See, e.g.*, West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Kalur v. Resor, 355 F. Supp. 1 (D.D.C. 1971); Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971); Izaak Walton League v. Macchia, 329 F. Supp. 504 (D.N.J. 1971).

35. 527 F.2d 786 (9th Cir. June, 1975) (per Sneed, J.).

States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)[36] in holding that injuries of a non-economic nature to aesthetic and environmental interests may be an injury in fact sufficient for standing to sue under NEPA.[37] This follows those federal courts which have extended standing in such circumstances,[38] and which have also granted standing in situations where there is a denial of public access to information or a failure to recognize the necessity of public participation in environmental planning under NEPA.[39]

B. Defense of Laches

The defense of laches, like standing, is a method for determining who may have access to the courts. Laches is an equitable doctrine concerned with the timeliness of the request for judicial review. The Supreme Court enunciated a bipartite test under this doctrine in *Costello v. United States*.[40] Lack of diligence by the party against whom the defense is asserted is the first element required for the invocation of laches. A showing of prejudice to the party asserting the defense is the second required component.[41]

In *City of Davis v. Coleman*,[42] the Ninth Circuit considered the issue of laches. The problem arose because the City of Davis delayed in filing its suit to enjoin construction on a proposed freeway project. The city had received a copy of a negative declaration which the CDHW had prepared after it concluded that there was no need to file either an EIR or EIS.[43] At the time of receipt, no comments were solicited from the city concerning the negative

36. 412 U.S. 669, 689 (1973).

37. 527 F.2d at 791-92.

38. *See* authorities cited at note 34 *supra*.

39. *See, e.g.*, Hanly v. Kleindienst, 471 F.2d 823, 835 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), which discusses the judicially created advisory role of the public under NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1970).

40. 365 U.S. 265 (1961).

41. *Id.* at 282; Lathan v. Brinegar, 506 F.2d 677, 691-92 (9th Cir. Sept., 1974).

42. 521 F.2d 661 (9th Cir. July, 1975).

43. *Id.* at 677. A negative declaration is a requirement imposed by the judiciary on parties proposing projects which may have environmental consequences. *See* Deutsch, *supra* note 7, at 36-37. It is not a statutory requirement under NEPA. The courts required that federal and state agencies planning projects prepare a declaration for the purpose of justifying a decision not to prepare an EIS for the proposed project. *Id.*

The factors considered for purposes of the negative declaration parallel those assessed in detailed impact statements. The environmental appraisal in the negative declarations and in the EISs can be distinguished by the amount of detail they contain. The EIS as required by NEPA must include a more comprehensive report than the negative declaration required by the courts. *Id.*

declaration, nor was it made clear in the declaration to the city that under either CEQA or NEPA such a decision was open to challenge in the courts. The court indicated that a reason for this lack of clarity was that both NEPA and CEQA were relatively new and thus had not undergone a great deal of judicial review on this issue.

The court in *City of Davis* followed the test expressed in *Costello*. Based on the facts, it concluded that a lack of diligence did not exist because the city had no knowledge or reason to know of the legal right to challenge the declaration at the time of receipt.[44] Therefore, since a lack of diligence on the part of the city did not exist, the suit was not barred on that ground.[45] Since the first element of the *Costello* test was not established, the court did not reach the second *Costello* question of whether there was a showing of prejudice to the party asserting the defense.

Another consideration in the *City of Davis* case was a balancing of interests. The court balanced NEPA's goal of protecting the environmental interests of all citizens and the concomitant need to have assurances of compliance with NEPA against the interests of those involved in the freeway project. It suggested that the invocation of laches would not be appropriate because the importance of considering the project's environmental consequences was greater than the need for immediate construction of the freeway interchange.[46]

In *Cady v. Morton*,[47] the court also applied the *Costello* standard. After considering both requirements of the test, the *Cady* court held that neither one was present.[48] Significantly, the court indicated that it would not be a lack of diligence to refrain from commencing an action challenging the adequacy of an EIS until after its contents are ascertained.[49] Additionally, in a noteworthy

44. *Id.* at 678.

45. *Id.* at 677.

46. *Id.* at 678.

47. 527 F.2d 786 (9th Cir. June, 1975).

48. *Id.* at 792-93. The court concluded by simply stating that "the defense of laches . . . is not favored in environmental litigation." *Id.* at 793, *citing* Minnesota PIRG v. Butz, 498 F.2d 1314 (8th Cir. 1974).

49. 527 F.2d at 792. In *Cady* the EIS in controversy concerned Bureau of Indian Affairs (BIA) approval of prospecting permits and coal leases between an Indian tribe and a strip mining company. At the time of the BIA lease approval, the plaintiffs, successors in interest to the original homesteaders of the affected land, did not have information about the contents of the EIS submitted as a prerequisite to that approval. *Id.* at 789-91.

analysis the court concluded that there was no showing of prejudice against the strip mining company.[50] The court observed that during pre-EIS public hearings the plaintiff-land owners put the strip mining company on notice of their negative position with regard to the proposed strip mining operations. The EIS prepared by the company failed to deal with the criticisms voiced at the public hearings. Based on these facts, the court concluded that the expenditure of money and entrance into contracts by the company after the lease approval did not constitute detrimental reliance by the company sufficient for a finding of prejudice caused by any act or failure to act by the plaintiffs.[51] Therefore, failure to show a lack of diligence and prejudice under the *Costello* doctrine resulted in the *Cady* court's refusal to invoke laches.[52]

II. JUDICIAL INTERPRETATION OF NEPA

A. Scope of Review

Any discussion of judicial interpretation of NEPA must begin with an examination of the applicable scope of judicial review. Because NEPA itself is silent on the subject of judicial review,[53] federal courts have had to arrive at their own conclusions regarding scope of review. Predictably, various conclusions have been reached. In *Lathan v. Brinegar*,[54] for instance, the Ninth Circuit, sitting *en banc*, announced that it would only "set aside agency action if [it found such action] to be without observance of procedure required by law."[55] This differs significantly from the position of those courts which have declared that NEPA contains substantive mandates which can best be fulfilled if agency decisions are reviewed for substantive merit as well as for compliance with the procedural requirements set forth in section 102 of NEPA.[56] The *Lathan* decision is also at odds with a number of

50. *Id.* at 792-93.

51. *Id.*

52. *Id.* at 793.

53. This lack of statutory guidance is discussed in Environmental Defense Fund, Inc. v. Corps of Eng'rs (Gillham Dam), 470 F.2d 289, 299 (8th Cir. 1972); F. Anderson, *supra* note 7, at 16.

54. 506 F.2d 677 (9th Cir. Sept., 1974) (per Duniway, J.) (en banc).

55. *See id.* at 693. This basis for setting aside agency action may not be the exclusive ground available, but the court indicated that it would be relied upon because it actually provides the broadest possible scope of review within "the court's . . . necessarily limited role in enforcing NEPA . . . ." *Id.*

56. Several courts have accepted the proposition that NEPA contains substantive mandates which can best be implemented if agency decisions are reviewed for substantive merit. *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Eng'rs (Tennessee-

commentators who have advocated that agency decisions be reviewed for compliance with NEPA's substantive mandates.[57] These writers' views will not be presented here,[58] but examination of the *Lathan* rationale is in order.

The court began its analysis of the "scope of review"[59] issue with an examination of 5 U.S.C. section 706—a provision of the Administrative Procedure Act (APA).[60] Earlier Ninth Circuit decisions determined that section 706 defined the scope within which agency decisions could be reviewed for compliance with NEPA;[61] however, these decisions relied upon different subsections of section 706.[62] Section 706(2)(A), which permits agency actions to be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," was used in one case,[63] while section 706(2)(D), which allows reversal of agency actions taken "without observance of procedure required by law," was relied upon in another.[64] The court realized that subsection (2)(A) (capricious and arbitrary) permitted a very narrow scope of re-

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Tombigbee Project), 492 F.2d 1123 (5th Cir. 1974); cases cited at note 7 *supra*. The decisions of these courts, and several relevant articles, are discussed in Nolan, *The National Environmental Policy Act After United States v. SCRAP: The Timing Question and Substantive Review*, 4 HOFSTRA L. REV. 213, 246-53 (1976); Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735, 735-36 n.2 (1975) [hereinafter cited as *Substantive Review Under NEPA*].

57. *See e.g.*, Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act*, 3 E.L.R. 50028 (1973); Briggs, *NEPA as a Means to Preserve and Improve the Environment—The Substantive Review*, 15 B.C. IND. & COM. L. REV. 685 (1974); Nolan, *supra* note 56; Note, *Environmental Law: Judicial Review of Federal Agency Actions Under NEPA*, 28 OKLA. L. REV. 866 (1975).

58. For a comprehensive list of relevant articles see *Substantive Review Under NEPA*, *supra* note 56, at 735 n.2.

59. Although the court in *Lathan* expressly stated that it was resolving the question of "scope of review," *see* 506 F.2d at 692, subsequent references to the *Lathan* discussion by Ninth Circuit courts characterize the question as one of "standard of review." *See, e.g.*, Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. Dec., 1974); People of California *ex rel.* Younger v. Morton, 404 F. Supp. 26, 32 (C.D. Cal. 1975). Because there are significant differences between the scope of judicial review and the standards which must be applied once it is determined that review is appropriate, *see* 52 TEXAS L. REV. 527, 554-55 (1974), it will be assumed that *Lathan's* discussion of "scope of review" under the Administrative Procedure Act is actually intended to clarify the standard against which agency compliance with NEPA will be judged. This is the assumption which Judge Sneed apparently made in *Trout Unlimited v. Morton*. *See* 509 F.2d at 1282.

60. The Administrative Procedure Act is codified at 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*, 3105, 3344, 5371, 7521 (1970).

61. *See, e.g.*, Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973).

62. For a discussion of this disparity see 506 F.2d at 692-93.

63. *See* Life of the Land v. Brinegar, 485 F.2d 460, 469 (9th Cir. 1973).

64. *See* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280-81 (9th Cir. 1973).

view, and thus decided to stand on subsection (2)(D) (observance of procedure) in all future cases.[65] This decision was inspired in part by the court's view that:

> NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them.[66]

At first glance, the court's decision to only review agency actions for compliance with NEPA's procedural requirements seems to establish in the Ninth Circuit a narrow rule which will leave intact any unsound agency decisions which are arrived at by proper procedure. However, Judge Duniway's opinion in *Lathan* explained that the term "procedure" would be given a rather expansive interpretation,[67] and that "grudging, *pro forma* compliance will not do."[68]

Regarding interpretation of the term "procedure," the court stated that the question of whether an EIS complies with NEPA is a procedural question, and thus subject to review under subsection (2)(D).[69] As discussed below, the question of an EIS's adequacy can involve the court in a careful review of whether an agency decision is based on full information and "a good faith effort to take into account the values NEPA seeks to safeguard."[70] Accordingly, a complete assessment of an EIS's adequacy—*i.e.*, of

65. 506 F.2d at 693.

66. *Id.*

67. For instance, the question of the adequacy of an EIS is a procedural question. *Id.* In Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. Dec., 1974), the court discussed the expansive notion of procedure which is implicit in *Lathan*:

> Neither NEPA nor the "Guidelines" of the Council on Environmental Quality set forth sufficiently comprehensive "procedures" to obviate the necessity to resort to . . . judicial responses. The consequence has been and, to a degree, is that the judicial review of the adequacy of an EIS employs standards fashioned to meet the needs of the particular case in which the standards are applied. In due course the presence of a large volume of case law and the principle of *stare decisis* will yield reasonably precise "procedural rules" by which the adequacy of an EIS can be measured.

Id. at 1283.

68. 506 F.2d at 693.

69. *Id.*

70. This language is found in Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973). For futher discussion see Coggins, *Some Suggestions for Future Plaintiffs on Extending the Scope of the National Environmental Policy Act*, 24 KAN. L. REV. 307 (1976). Deutsch, *supra* note 7, at 42-43.

whether procedure has been complied with—should include scrutiny of the substantive merits of agency decisions based on the EIS. If it is determined that a decision is environmentally unsound, there should be an assumption that the EIS did not adequately take into account the values NEPA represents.[71] This would constitute a procedural defect, and the decision could thus be set aside pursuant to subsection (2)(D) of the APA.

It must be conceded, however, that the Ninth Circuit's reliance on the APA will probably discourage the kind of "review [of] substantive agency decisions on the merits" described in such cases as *Environmental Defense Fund, Inc. v. Corps of Engineers (Gillham Dam)*.[72] While no court has sought to substitute its judgment for that of an agency, the *Gillham Dam* court was prepared to see that the agency in question fulfilled its "obligation to carry out the substantive requirements of the Act."[73] Under the Ninth Circuit view, however, NEPA places no restrictions on an agency's ultimate decision beyond the procedural mandates of section 102.[74] There is reason to believe that this view may not lead to adequate protection of the environment. For instance, full compliance with procedure may not result in a distortion-free EIS if the statement

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71. It is submitted that this view is supported by the following language from Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. Dec., 1974):

> [I]n determining whether the appellees prepared an adequate EIS we will be guided in large part by "procedural rules" rooted in case law. No synthesis of these rules will be attempted other than to point out that all such rules should be designed so as to assure that the EIS serves substantially the two basic purposes for which it was designed. That is, in our opinion an EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information.

Id. at 1283. Although the court will focus on the "form, content and preparation" of EISs, rather than agency decisions per se, it will do so with an eye toward whether a given EIS will properly aid the substantive decision-making process. This would seem to necessarily entail an insistence that an EIS not be read in a manner which fails to safeguard NEPA's substantive values.

72. 470 F.2d 289, 298 (8th Cir. 1972).

73. *Id.* Ironically, the *Gillham Dam* court cited as authority for its decision to engage in substantive review the same provisions of the Administrative Procedure Act which persuaded the Ninth Circuit that a limited review for compliance with procedural provisions was in order. *Id.* at 298 n.14.

74. *Cf. Substantive Review Under NEPA, supra* note 56, at 738.

is prepared by a private entity which has a financial stake in a project's approval.[75] Courts should therefore insist that an exacting good faith element be made a part of what constitutes compliance with NEPA procedures.[76]

B. Public Hearing

In 1970, Executive Order No. 11514, section 2(b),[77] strengthened NEPA by providing that, whenever appropriate, public hearings should be conducted in a timely manner and relevant information should be made available to the public. The Federal-Aid Highway Act (FAHA) statutorily requires that hearings as to the location of a planned highway be held in order to consider "the economic and social effects . . . [of the highway, and] its impact on the environment."[78]

Lathan v. Brinegar involved a challenge to the Secretary of Transportation's approval of an EIS concerning the construction of a segment of interstate freeway.[79] One question in *Lathan* was whether there had been compliance with FAHA's public hearing requirement[80] and NEPA's strong policy favoring public participation in agency decision-making processes affecting the environment. The court specifically considered whether a new public

75. This practice, approved in Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), has been severely criticized. *See* Deutsch, *supra* note 7, at 40-41; Comment, *The Writing and Review of Reports on California's Environment: Developer-Prepared EIR's?*, 10 U.S.F.L. Rev. 272 (1975).

76. For a discussion of the role of a good faith requirement in evaluating agency actions see Deutsch, *supra* note 7, at 45.

77. 3 C.F.R. 271 (1974).

78. 23 U.S.C. § 128(a) (1970). Section 128(a) was amended on August 23, 1968. Prior to that date the section did not refer to "incorporated" or "unincorporated" cities, nor did it require consideration of the social and environmental impacts of highways.

Additionally, section 128(b) only required certification to the Secretary of Transportation that hearings had been held and that the effects of highway locations had been considered. There was no requirement that a copy of the transcript of the hearings be submitted, together with the certification and report.

79. In *Lathan* construction of the freeway project at issue was typical of many state highway department projects. The project was divided into segments for purposes of applying for federal funds. Two segments of the highway were initiated prior to the enactment of NEPA. Public hearings required under the FAHA were held for the original highway segments; but the FAHA did not require consideration of environmental or social factors. Initiation and construction of the proposed highway segment at issue in *Lathan* began after NEPA became effective.

80. 23 U.S.C. § 106(a) (1970) requires that plans, specifications and estimates approval must be obtained after the public hearing or opportunity for a public hearing. The Secretary of Transportation will not approve the project unless this prerequisite is fulfilled.

hearing on the location of the proposed highway segment must be held before the state of Washington could apply for federal approval of highway plans, specifications and estimates which had been drawn up as a result of prior public hearings on two other segments of the freeway project.

Before arriving at its decision, the *Lathan* court distinguished between the retroactive application of NEPA to projects which previously had met FAHA hearing requirements and the present application of NEPA to new segments of projects (ongoing projects)[81] which had not undergone public hearings. Although the highway project had been commenced prior to the enactment of NEPA, the court, following previous Ninth Circuit decisions,[82] held that the additional highway segment at issue in *Lathan* was within NEPA and the FAHA because it was an ongoing project which began construction after NEPA and the amended FAHA became effective.[83] The court declared that it must apply the law in effect at the time of the judgment (the amended version of the FAHA requiring consideration of environmental factors at public hearings), rather than the law in effect when the action was filed (the original version of the FAHA not requiring consideration of environmental factors at public hearings).[84] Since the new highway segment could have a significant effect on the environment, and since its plans, specifications and estimates had not been approved, the court held that NEPA and the FAHA must be construed together so that both the EIS requirement of the one, and the public hearing requirement of the other, had to be satisfied prior to approval of the project.[85]

C. Major Federal Actions Significantly Affecting the Environment

Section 102(2)(C) of NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environ-

81. 506 F.2d at 687. On-going projects are discussed in the eleventh paragraph of the CEQ guidelines. 36 Fed. Reg. 7724 (1971).

82. *See* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1282 (9th Cir. 1973); Lathan v. Volpe, 455 F.2d 1111, 1120-21 (9th Cir. 1971).

83. 506 F.2d at 688.

84. *Id.* at 687.

85. *Id.* at 688. In Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. Sept., 1974), the Ninth Circuit court conditioned the issuing of an injunction upon the holding of a "hearing" to determine the effect of a freeway on air and noise pollution.

ment . . . ."[86] During the early years of NEPA, a major source of NEPA litigation involved the interpretation of this EIS requirement.[87] Although the Council on Environmental Quality promulgated guidelines in 1971 which clarified the phrase,[88] it is still a source of controversy.

Major Federal Actions

In *Friends of the Earth, Inc. v. Coleman (Friends of the Earth II)*[89] the Ninth Circuit considered whether construction of an airport expansion and development plan was a major federal action within the meaning of NEPA section 102(2)(C). Specifically, the plan provided for the upgrading and addition of airport facilities at San Francisco International Airport. At the time of the suit, a new terminal and a parking garage were under construction.

86. 42 U.S.C. §4332(2)(C) (9170). Section 4332(2)(C) provides:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—
>
> . . . .
>
> (C)Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (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, and shall accompany the proposal through the existing agency review processes.

87. *See* F. ANDERSON, *supra* note 7, at 57.

88. CEQ Guidelines, 36 Fed. Reg. 7724, ¶ 5(a)(ii) (1971).

89. 518 F.2d 323 (9th Cir. May, 1975) (per Wright, J.). This case is cited as *Friends of the Earth (II)* to avoid confusion with *Friends of the Earth (I)*, discussed at notes 130-40 *infra* and accompanying text.

Neither project was eligible for direct federal funding.[90] Some portions of the expansion program, however, had been approved for federal assistance under the Airport Development Aid Program (ADAP) which had authority over airport design, layout, and alteration plans.[91] Other increments were still awaiting Federal Aviation Administration (FAA) approval of federal assistance under ADAP. Based on the facts, the *Friends of the Earth (II)* court decided that construction of the new terminal and the parking garage did not require an EIS under section 102(2)(C) because it was not federal action as to those aspects of the plan.[92]

The court then examined whether the need for FAA approval of other portions of the plan and the tentative allocation of federal funds to airport layout plans constituted major federal action sufficient to require an EIS under section 102(2)(C). The court explained that adopting federal standards for the purpose of receiving federal aid did not transform a state project into a federal one. A project does not constitute a federal action until federal aid is actually received. Therefore, since the airport layout projects at issue merely involved a tentative federal allocation of funds rather than actual federal allocations, the court held that no EIS would be required until such federal involvement occurred.[93]

Another question before the court in *Friends of the Earth (II)* was whether the degree of federal involvement in the total airport project vis-a-vis state involvement affected the need for an EIS.[94]

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90. Federal funds for airport and airway development are provided for under the Airport and Airway Development Act of 1970 § 16, 49 U.S.C. § 1716 (1970). Section 1716(c)(4) of the Act provides:

> It is declared to be national policy that airport development projects . . . shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary [of Transportation] shall authorize no . . . project found to have adverse effect [upon natural resources] unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

91. 518 F.2d at 326.

92. *Id.* at 328. For a decision reaching a similar result see City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).

93. 518 F.2d at 328.

94. *Id.* at 329. The facts indicated federal expenditures accounted for only an estimated ten percent of the funds expended on the airport. State expenditures constituted the remainder. Except for ADAP funded projects, local decision-makers ran all phases of the project and intended to proceed with the airport terminal and garage whether or not they would receive federal funds.

The court in this case recognized that airports do involve concurrent federal and state involvement, but it said that if the federal and state projects were distinct with separate functions and independent justifications, then the state projects would not be eligible for federal funds and thus would not require an EIS.[95] Additional court considerations with regard to the "functional complementarity" between local and federal projects included an examination of the expenditures made by the respective political bodies and a determination whether the non-federal officials intended to proceed with the project if the local entity was not granted federal aid. In view of the circumstances which indicated local determination to proceed with the terminal and garage facilities, no prior federal commitment of funds to those facilities, and a lack of functional interdependence between the state and federal projects, the court found that federal involvement was insufficient to require an EIS.[96] Additionally, the court rejected the idea that once the federal government is involved in a project, the project forever remains federal for the purposes of NEPA section 102(2)(C).[97]

In *City of Davis v. Coleman*,[98] in deciding whether or not a proposed freeway interchange project involved federal action for the purposes of section 102(2)(C), the court interpreted the requirement more broadly than did the court in *Friends of the Earth (II)*. The *City of Davis* court rejected the defendant's argument that section 102(2)(C)'s federal involvement requirement was not satisfied because the proposed freeway, although a federal project, involved actions of a purely local and private nature. The court felt that the main purpose of the freeway interchange was to

95. *Id.*

96. *Id.*

97. *Id. citing* City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972). This notion of the court implies that federal involvement in projects is not static. For example, the federal government might decide to discontinue funding an on-going project or decline to fund an addition to a project. If either of these situations were to arise, the fact that the federal government previously allocated money to a project would not be determinative as to whether the project constituted a major federal action sufficient to necessitate compliance with NEPA's EIS requirement.

98. 521 F 2d 661 (9th Cir. July, 1975). At issue in *City of Davis* was a freeway interchange which was to be funded by the federal government. The purposes of the interchange included the replacement of a temporary access road in order to meet interstate system safety standards, the stimulation and serving of future industrial development in the affected rural area, and the reduction of costs to future tenants of the area. Substantial work had been completed on the project at the time this case was brought to trial to determine whether injunctive relief should be granted because an EIS and an EIR had not been prepared. *See* note 27 *supra*.

provide access to the area so that future industrial development could occur. Therefore, despite local and private involvement with the freeway interchange, the court found that the interchange project required an EIS because the project, its purposes, and its effects were federal in nature.[99] Significantly, the approach in *City of Davis* is broader than the approach in *Friends of the Earth (II)*, where the court considered the narrow question of whether there was a federal commitment to the proposed airport project. The *Friends of the Earth (II)* court did not deliberate on the larger question of whether the purpose of the airport project, like other such projects, was a federal one having environmental effects on areas outside the immediate vicinity of the project.

Significant Effects on the Environment

It has been argued that the statutory phrase "major federal action significantly affecting the quality of the human environment" creates a two-part test for determining when NEPA is applicable.[100] The first part, it is contended, is whether a federal action is major. The second, which is only invoked if the first threshold test is satisfied, is whether the major federal action in question significantly affects the environment.[101] Under this view, "it would be possible to speak of a 'minor federal action sigificantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action."[102] Some courts have accepted the two-tier approach,[103] but increasingly it is being rejected.[104] In *City of Davis*, a Ninth Circuit panel discussed this split of authority and declined to follow the two-tier approach.[105]

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99. 521 F.2d at 677.

100. *See, e.g.*, Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972); Julis v. City of Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972); F. ANDERSON, *supra* note 7, at 89-96; 16 B.C. IND. & COM. L. REV. 663, 668-69 (1975).

101. *See* Note, *The Requirement for an Impact Statement: A Suggested Framework for Analysis*, 49 WASH. L. REV. 939, 942 (1974).

102. Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1321-22 (8th Cir. 1974) (en banc).

103. *See* authorities cited at note 100 *supra*.

104. *See, e.g.*, Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1321-22 (8th Cir. 1974).

105. 521 F.2d at 673 n.15. Although the court's discussion is confined to a lengthy footnote, it is significant because the approach adopted by the court will simplify plaintiffs' task. Since the court will "confine [itself] . . . to determining whether the defendants reasonably [conclude] that . . . [a] project will have no significant environmental effects," *see id.*, plaintiffs need only "allege facts which, if true, show that the proposed project would materially degrade any aspect of environmental quality." *Id.* at 673. In other words, the focus is on a project's environmental consequences.

By refusing to read the "major federal action" provision as a separate threshold test, the *City of Davis* court gave notice that it views NEPA as applicable to any federal action which may significantly affect the environment.[106] Under this view, it has been argued that a major federal action is to be inferred from the presence of significant environmental effects,[107] thus obviating the need for a project to be "major" in an "economic or some other nonenvironmental sense to trigger the EIS requirement."[108]

D. EIS Scope

The proper scope of an environmental impact statement concerning a given project is another issue confronting the courts. This question arises in situations where a project is only a segment of a larger undertaking or an extension of a project already underway.[109] In such situations, courts are often asked to require the preparation of an EIS—sometimes called an "umbrella" EIS—which considers the impact of more than just a segment of a larger project.[110] The courts have responded by developing guidelines to determine when such comprehensive EISs are required. Factors to consider are whether: (1) One phase of a project will inevitably involve an "irreversible and irretrievable commitment of resources" to another;[111] (2) the segment has indepen-

106. *See* note 105 *supra*.

107. *See* 16 B.C. Ind. & Com. L. Rev. 663, 669 & n.41 (1975).

108. 521 F.2d at 673 n.15.

109. No attempt will be made here to explore the question of whether NEPA should be applied retroactively. The Ninth Circuit does not have a consistent position on this issue. *Compare* San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) (refusing retroactive application), *with* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973) (applying NEPA to a project initiated before the Act's effective date). For a discussion of this issue see F. Anderson, *supra* note 7, at 142-76.

Of concern here is the scope of an EIS which is prepared pursuant to NEPA. Generalizations are difficult in this area of shifting fact patterns, but defendants normally adopt one of two common positions. They either assert that an existing EIS is broad enough in scope to encompass subsequent activity, *see* Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974), or that an existing EIS need not concern a subsequent project because the project is independent of the first activity, *see* Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. Dec., 1974). Under the second view, the need for a separate EIS for the subsequent activity would be clear, but preparation of the EIS would be delayed.

110. For a discussion of umbrella EISs see Daly v. Volpe, 514 F.2d 1106, 1109 (9th Cir. Mar., 1975). An umbrella EIS is not always the objective; under certain circumstances it would be appropriate to simply urge the preparation of a separate EIS for an extension of an on-going project. *See* Friends of the Earth v. Coleman, 518 F.2d 323, 324-25 (9th Cir. May, 1975).

111. *See* Friends of the Earth v. Coleman, 513 F.2d 295 (9th Cir. Mar., 1975).

dent utility;[112] (3) the segment is of such a size that a study of its impact alone will assure adequate opportunity for the consideration of alternatives;[113] and (4) an "umbrella" EIS will encompass so much territory that it would defeat clear understanding of the issues and frustrate an ordered community response.[114]

Independent Utility

In *Trout Unlimited v. Morton*,[115] the court considered whether an EIS had to be prepared for all aspects of the two-phase Teton Dam project, or whether the EIS which had been prepared for the first phase alone (the dam itself) was adequate to permit completion of the dam. The facts indicated that the first phase of the project was distinct from the second.[116] Based on this finding, the court held that the EIS was adequate because the two phases did not comprise a "series of interrelated steps constituting an integrated plan."[117] In other words, the first phase was independent from the second, and could proceed even if the second phase never materialized.

The court in *Daly v. Volpe*[118] discussed the independent utility concept in connection with a small segment of an interstate freeway system.[119] The plaintiffs contended that an EIS should be prepared for more than just the segment in order to ascertain the true impact of a substantial portion of the system. The court con-

112. *See* Daly v. Volpe, 514 F.2d 1106, 1110 (9th Cir. Mar., 1975), *citing* Indian Lookout Alliance v. Volpe, 484 F.2d 11, 19 (8th Cir. 1973).

113. *See* Daly v. Volpe, 514 F.2d 1106, 1110 (9th Cir. Mar., 1975).

114. *See id.*

115. 509 F.2d 1276 (9th Cir. Dec., 1974) (per Sneed, J.).

116. *Id.* at 1279. In *Trout Unlimited*, a suit was brought in district court to enjoin construction on the Teton Dam for failure to prepare an EIS for the second phase of the project. The project was to be built in two stages, but Congress had reserved final approval of the second stage and had not extended approval as of the date of decision. The first stage, which included construction of the dam and a reservoir, was for the purpose of flood control. The second phase, which included power and pumping plants, a pipeline, an open canal, and an electric transmission line, was for irrigation purposes. Construction of the first phase began after the preparation of an EIS, and was completed in December, 1975. The controversial events surrounding the project culminated on June 5, 1976, when the dam's collapse caused widespread flooding in eastern Idaho. L.A. Times, June 6, 1976, at 1, col. 6.

117. 509 F.2d at 1285.

118. 514 F.2d 1106 (9th Cir. Mar., 1975) (per Goodwin, J.).

119. Construction on the highway addition was enjoined by a district court pending the preparation and circulation of an EIS draft by the state and federal defendants responsible for construction of the highway system. The injunction was dissolved after circulation, Daly v. Volpe, 376 F. Supp. 987, 989 (W.D. Wash. 1974), and it was from that decision that this appeal was brought.

cluded, however, that the segment had independent utility, and thus that an EIS concerning it alone was adequate.[120] In reaching this conclusion, the *Daly* court relied on Federal Highway Administration regulations[121] which had been promulgated to effect the goals of NEPA. The regulations, which define when a highway segment is substantial enough to justify its own EIS,[122] indicated that the segment in question had independent utility. This indication was important to the court, but it should be noted that the court also relied on its own assessment of the segment's utility, as well as the three factors mentioned above, before deciding that an umbrella EIS was not required.

Of equal importance is the court's rejection of the plaintiffs' contention that "independent utility" had to be assessed in terms of a project's "primary," rather than some "secondary," purpose.[123] In *Daly*, the highway segment's primary purpose was to connect sections of an interstate freeway system, and, if viewed in that light, the segment had little independent utility.[124] However, as a secondary purpose, the segment served as a by-pass around a small town which had had its streets congested by interstate traffic. The court determined that this second purpose was sufficient to establish independent utility.[125]

A discussion of independent utility should include cases where special circumstances suggest that a comprehensive EIS is needed even though project segments are independent in nature. The court in *Cady v. Morton*[126] was confronted with such circumstances. In *Cady*, an EIS covering planned stripmining of 770 acres of coal on Indian land was challenged as inadequate in scope because the coal mining company had obtained rights to the coal in over 30,000 adjoining acres. In addition, the Secretary of the Interior had approved ultimate exploitation of all the coal reserves.

120. 514 F.2d at 1110.

121. The court cited these regulations as FHA Policy and Procedure Memorandum 90-1 (PPM), ¶ 6.

122. The regulations instruct that roadwork should be accomplished in "highway sections." These sections are intended to be large enough for meaningful impact assessment (multi-year projects between fixed termini), but not too large to be effectively executed. *See* 514 F.2d at 1109.

123. *Id.* at 1111.

124. *Id.* The segment is part of Interstate 90, which was planned to extend from Seattle, Washington, to Boston, Massachusetts.

125. *Id.*

126. 527 F.2d 786 (9th Cir. June, 1975) (per Sneed, J.).

The defendants responded that an EIS on the 770 acre project alone was sufficient because the project, which would take five years to complete, was not dependent upon other phases of a larger plan to mine the region in question.[127] The *Cady* court agreed that each phase of the planned mining project was relatively independent, but it also concluded that additional phases were likely to occur, and it thus held that a comprehensive EIS for stripmining of the entire region had to be prepared *in addition to* a separate EIS for each phase.[128] The court felt that *Cady* involved a situtation where, in the words of the *Trout Unlimited* court, "it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken."[129] Accordingly, a requirement for an umbrella EIS was superimposed on the requirement that an EIS be prepared for each phase.

An Irretrievable Commitment of Resources

In *Friends of the Earth v. Coleman (Friends of the Earth I)*,[130] a situation similar to the one in *Trout Unlimited* occasioned a discussion of when an EIS for one project must consider the impact of subsequent projects. In *Friends of the Earth (I)*, soil fill for an environmentally unobjectionable highway was being excavated from the site of a proposed canal. The highway and proposed canal projects were independent of one another except for the coordination of efforts manifested by the excavation plan. Consequently, the EIS which had been prepared for the highway did not consider the impact of the canal. Plaintiffs argued that the coordination of excavation efforts actually constituted a commitment of resources to the canal project which was so significant that approval would be difficult to deny once the excavation was complete. They thus urged the court to require the preparation of an EIS which assessed the impact of both projects in order to insure meaningful review of the canal's environmental consequences.[131]

127. *Id.* at 794.

128. *Id.* at 795.

129. *Id.*, *citing* Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th Cir. Dec., 1974).

130. 513 F.2d 295 (9th Cir. Mar., 1975) (per Wright, J.).

131. For a discussion of the plaintiffs' contentions see *id.* at 299-300. The plaintiffs relied primarily on Scientists' Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973), which held that a preliminary research and development program regarding nuclear energy technology was a commitment of resources sufficient to require impact statements on later implementation phases of a project to develop a "breeder reactor." The *Scientists' Institute* court's holding was based on a balancing of four considerations: (1) the likelihood and imminence of commercial exploitation of the research; (2) the amount of information available with which to predict environmental conse-

The *Friends of the Earth (I)* court refused to adopt the plaintiffs' position. It concluded that the completion of the highway, including the planned excavation of one-third of the canal's watercourse, did not "inevitably involve an irreversible and irretrievable commitment of resources" to the canal project.[132] This conclusion was based on the particular facts of the case, which disclosed that contingent plans had been made for use of the excavation site if the canal project was never approved,[133] and even that excavation on the same site would, due to cost factors, probably occur even if no canal were planned.[134] The court also stressed that cost-saving coordination between two wholly independent projects should not lead to a linking of the two for EIS purposes, for to do so would simply discourage the coordination, rather than either of the projects.[135]

The *Friends of the Earth (I)* court pointed out that its decision would not have adverse environmental consequences because an EIS would have to be prepared before the canal project could be approved.[136] While it is probably unrealistic to assume that a major excavation will not hamper consideration of perhaps environmentally meritorious alternatives to the canal,[137] a defect in

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quences of later developments; (3) whether the preliminary activity entails an irretrievable commitment of resources to a subsequent project (thus foreclosing later options); and (4) the severity of a subsequent project's possible environmental effects. *See id.* at 1094; 87 HARV. L. REV. 1050, 1056 (1974). Although the first of these considerations appears to have little relevance to the issues in *Friends of the Earth (I)*, if it is viewed as an inquiry into how readily an initial investment of resources can be translated into a functional subsequent project, its relevance can be seen. The remaining factors are clearly relevant.

132. 513 F.2d at 299.

133. The highway project EIS contained the contingency plans. *Id.* at 300.

134. *Id.* The court was also probably greatly influenced by the fact that the highway project was nearly complete after many years of work and enormous expense, although this point was only mentioned in passing. The court was naturally reluctant to delay completion of the highway. *See id.* It is not clear that such considerations can properly be taken into account while evaluating an EIS for adequate scope. The court felt that Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), supported its decision to consider the need to complete the highway project, but the case seems inapposite, for it only mentioned the magnitude and long history of a project in connection with the resolution of an issue regarding the retroactive application of a CEQ regulation. *See id.* at 873.

135. *See* 513 F.2d at 300.

136. *See id.* The court went so far as to say that a discussion of the canal's environmental impact would "serve no useful purpose" if it occurred before there was a firm decision to seek approval of the canal project. *Id.* However, useful purposes can be envisioned. For instance, excavation entails something of a commitment to one of perhaps several possible routes for the watercourse. Early impact evaluation could assist in assessing the merits of various routes.

137. The excavation of one third of a watercourse, combined with the obviously sig-

the court's analysis is of greater concern. The court stated that section 102(a)(C)(v) of NEPA requires that an EIS discuss a second project if "completion of one project will inevitably involve an 'irreversible and irretrievable commitment of resources' to the second."[138] However, this section of NEPA "concentrates on the future resource commitments that would be entailed if an action proposal were adopted."[139] In *Friends of the Earth (I)*, the preliminary project had already been adopted; presumably, section 102(2)(C)(v) itself only requires the discussion of resources which will probably be committed by virtue of the highway project.[140] Increasing the scope of the highway EIS to include the canal would only be done by analogy to section 102(2)(C)(v), and would only be done to insure that already emerging resource commitments are not realistically foreclosing future options to modify or perhaps even abandon the canal project.[141] Consequently, there is no need to insist that such foreclosure will "inevitably" flow from the first project; the policy of NEPA would be best served by impact statements whenever foreclosure is a strong possibility.[142] If this more flexible approach had been adopted, the court would have been justified in finding a strong possibility that options regarding the canal were severely limited by the excavation, and thus that excavation may render approval of the canal project a

nificant amount of preliminary planning required to insure the proper location of the excavation, suggests that it would be difficult to prevent completion of the canal once it comes up for formal approval.

138. 513 F.2d at 299.

139. 87 HARV. L. REV. 1050, 1059 (1974).

140. Section 102(2)(C)(v) states that resource commitments "involved in *the* proposed action" must be discussed in a project's EIS. 42 U.S.C. § 4332(2)(C)(v) (1970) (emphasis added). Only one particular action seems to be contemplated by this language. However, if the objective is to accurately evaluate significant resource commitments which may stem from a given project, it would be appropriate to require the project's EIS to consider actions which may become a virtual certainty in the wake of "the" project. *See* Scientists' Institute for Pub. Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973). For a brief discussion of *Scientists' Institute* see note 131 *supra*. *Scientists' Institute* advanced four factors to consider before determining the scope of an EIS. *See id.* These four factors reveal that the "virtual certainty" mentioned above need not mean, as the *Friends of the Earth (I)* court suggested, that a subsequent project "inevitably" eventuate. What is involved is a balancing process, wherein the foreclosing of options which is represented by the emergence of a probable subsequent project is considered along with the certainty, seriousness and ascertainability of the environmental consequences which may result if the project eventuates. If evaluation of these factors indicates that effective review of the subsequent project will only be possible if review is begun early in the sequence of events which will lead to the project, then an EIS concerning both the initial and subsequent projects should be required. *See generally* 87 HARV. L. REV. 1050, 1057-60 (1974).

141. For a discussion of how the spirit of section 102(2)(C)(v) can be applied to the *Friends of the Earth (I)* problem see note 140 *supra* and authorities cited therein.

142. *See* note 140 *supra*.

virtual certainty. Such a finding would have supported the plaintiff's position that the highway and canal should have been linked for EIS purposes.

E. EIS Adequacy

Section 102(2)(C) of NEPA requires a detailed impact statement for major federal actions significantly affecting the quality of the environment. This section also provides that a detailed, or "adequate,"[143] EIS must consider: (1) the environmental impact of the proposed action; (2) unavoidable adverse environmental effects; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed actions. The purpose of this EIS procedural requirement is to provide decision-makers with substantial environmental information to aid in the substantive decision of whether to proceed with a project even though there may be adverse environmental consequences. This requirement of a detailed EIS has resulted in litigation over whether given EISs are sufficiently detailed to aid in a substantive decision to approve a project's initiation or continuation.

In *Trout Unlimited v. Morton*,[144] the specific problem confronted was whether the EIS prepared prior to the construction of the Teton Dam and Reservoir was adequate under section 102(2)(C). In coming to a decision, the court took cognizance of the EIS purpose to aid in a decision of whether to proceed with the dam and reservoir project.[145] It also noted that two other inter-related purposes exist—to make data about a project's environmental impact available to the public, and to encourage greater public participation during a project's planning stages.[146]

After considering the purposes of the EIS, the court specified that remote and highly speculative consequences of a plan need

143. The issue of adequacy involves additional considerations as well. For instance, the proper scope of an EIS, discussed at notes 110-41 *supra*, also relates to the issue of adequacy. However, the following discussion will focus on the adequacy issues raised by section 102(2)(C)'s express provisions. The language of the section is reproduced at note 86 *supra*.

144. 509 F.2d 1276 (9th Cir. Dec., 1974). For the facts in *Trout Unlimited* see note 116 *supra*.

145. *Id.* at 1283.

146. *Id.*

not be discussed.[147] Only a reasonably thorough discussion of the significant aspects of the probable environmental consequences is necessary. The court added that supporting studies need not be physically attached to the EIS in order for the EIS to meet the requirement of sufficient detail. As long as the additional materials are available and accessible to the public, the EIS will be considered adequate.[148] Using this rationale, the court in *Trout Unlimited* held that the EIS and the supporting "mitigation plan" filed by the Bureau of Reclamation were adequate because the decision-makers were properly informed and because the documents discussed measures which might be taken to mitigate possible harm to the environment.[149]

The impact of adverse environmental factors on the quality of the environment is another aspect of the EIS adequacy question. Various factors affecting the environment (*i.e.*, economic, social and physical environmental factors) have been considered by the court in terms of the seriousness of their consequences to the environment. In *City of Davis v. Coleman*,[150] the court stated that an impact statement which analyzes only the direct or primary effects of social, economic, and other environmental factors is insufficient because indirect or secondary impacts can ultimately cause greater environmental harm.[151] Although acknowledging

147. *Id.*, *citing* Environmental Defense Fund v. Corps of Eng'rs, 348 F. Supp. 916, 933 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974).

148. 509 F.2d at 1284; Life of the Land v. Brinegar, 485 F.2d 460, 468-69 (9th Cir. 1973).

149. 509 F.2d at 1284. Mitigation measures discussed in the EIS with regard to the dam and reservoir came under eight headings: Construction specifications, minimum flows, upstream borrow, transmission and switchyard facilities, field station and operator's residence, roadway damsite, fish and wildlife, and temperature study based on reservoir liminology. Additionally, the EIS contained suggestions related to mitigating fish and wildlife losses. They included suggestions for spawning facilities, hatchery ponds, fish screens at new and existing canal headings, and the maintenance of minimum flow in downstream waters.

150. 521 F.2d 661 (9th Cir. July, 1975). For the facts in *City of Davis* see note 98 *supra*.

151. *Id.* at 676. Primary impacts are often the most immediate physical effects on the environment. For example, air pollution resulting from a project would be a direct effect on the environment. Secondary impacts are long-term effects which occur well after a project has been completed. They may include residential and industrial growth as well as pressures on water supply and sewage treatment facilities.

Section 6(a)(ii) of the CEQ Guidelines, 36 Fed. Reg. 7724, 7725 (1971), speaks of primary and secondary impacts in the course of discussing the contents required in an EIS. The contents of an EIS should cover:

> 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 in-

that it is presently very difficult to assess indirect effects on the environment because of the speculative nature of future indirect effects, the court nonetheless found that all major environmental problems must be addressed if impact statements are to accomplish their purpose of protecting the environment.[152] Thus, the EIS on the City of Davis highway project was deemed inadequate because secondary impacts were not considered along with primary impacts.[153]

III. THE CLEAN AIR ACT

Prior to the enactment of NEPA and the creation of the EPA, Congress passed environmental protection acts such as the Clean Air Act of 1963 (CAA).[154] Recent Ninth Circuit dedecisions have contributed to the continuing process of integrating the earlier environmental legislation with the policies and goals of NEPA and the EPA.

A. Air Quality Implementation Plans

In *Brown v. EPA*,[155] the court considered whether the Administrator of the EPA could impose sanctions against the state of California for failure to administer and enforce air pollution regulations imposed on the state by the EPA under the CAA. The facts of the case indicate that a California implementation plan submitted to the EPA for approval was initially approved in part and disapproved in part. A revised plan submitted to the EPA also received partial approval.[156] After the partial approval of the state

> cluded 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.

152. 521 F.2d at 676, *quoting* Scientists' Institute For Public Information, Inc. v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973). The *Scientists' Institute* court said that "reasonable forecasting and speculation" was implicit in NEPA. *Id.* The EIS requirement that alternatives and contingencies be discussed is a way of dealing with this problem of uncertainty.

153. 521 F.2d at 677.

154. 42 U.S.C. §§ 1857 *et seq.* (1970). Section 1857 states congressional findings and purposes with regard to the Clean Air Act. For a discussion of the Clean Air Act and related legislation see Settle, *Guarding the Guardian: The "Citizen Suit" for Clean Air*, 3 Environmental Law 1, 3-5 (1973).

155. 521 F.2d 827 (9th Cir. Aug., 1975) (per Sneed, J.), *cert. granted*, 44 U.S.L.W. 3681 (U.S. June 1, 1976) (No. 909).

156. 521 F.2d at 829. The court indicated that following revision and partial approval,

revision, the EPA asked California to submit a second revised plan to comply with new regulations for previously uncontrolled photochemical oxidants.[157] The state did not comply with the request. Upon California's failure to submit a revamped plan, the EPA prepared an implementation plan for the state.[158] The *Brown* court recognized that the EPA Administrator had the authority under the CAA to establish regulations where the state plan fails to provide for "implementation, maintenance and enforcement" of national primary and secondary ambient air quality standards.[159] The court then considered whether the EPA Administrator had authority to impose sanctions against California for failure to administer and enforce the EPA regulations. The opinion of the court distinguished between the imposition of sanctions against the state as a polluter and the imposition of sanctions against the state for failure to administer and enforce EPA regulations against polluters within the state.[160] The court held that under the provisions of the CAA, the EPA could only impose sanctions against the state as a polluter. It could not force the state to acquiesce to the EPA plan designed to prevent air pollution.[161]

The court based its conclusion on the congressional intent as evidenced in section 113 of the CAA, which provides for federal enforcement procedures against "persons" violating implementation plans.[162] Although the Act does not mention enforcement procedures against a "state" violating implementation plans, the court reasoned that Congress wrote the Act in this manner for the purpose of facilitating cooperation between states and the federal

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rules were promulgated by the Administrator applicable to "certain aspects of air pollution control" under federal regulations, 37 Fed. Reg. 19812-15, 19829-35 (1972). It did not specify which aspects had been approved under these regulations.

157. The regulations in question can be found at 38 Fed. Reg. 16550, 16556, 16564 (1973). These regulations were promulgated pursuant to a court order issued in City of Riverside v. Ruckelshaus, 4 E.R.C. 1728 (C.D. Cal. 1972), but California was granted a two year extension by the Administrator to attain the national primary standard, 38 Fed. Reg. 2194, 10851 (1973). Such extensions were held impermissible in National Resources Defense Council v. EPA, 475 F.2d 968 (D.C. Cir. 1972), resulting in a directive to those states granted an extension to submit forthwith. 521 F.2d at 829.

158. As a result of California's failure to comply, the Administrator promulgated a transportation control plan for California. 521 F.2d at 829. Clean Air Act § 110(c)(1), 42 U.S.C. § 1857c-5(c)(1)(B) (Supp. IV, 1974), empowers the EPA Administrator to promulgate an implementation plan for the state if the state's plan does not comply with the requirements of this section of the Act.

159. 521 F.2d at 829.

160. *Id.* at 832.

161. *Id. See* Alaska v. EPA, 521 F.2d 842, 844 (9th Cir. Aug., 1975); Arizona v. EPA, 521 F.2d 825, 826 (9th Cir. Aug. 1975).

162. 42 U.S.C. § 1857c-8 (1970).

government.[163] The court implied that enmity between a state and the federal government could result if a federal agency (*i.e.*, the EPA) had the power to impose sanctions against a state, and thus limited EPA enforcement under the CAA to individual polluters.

B. VARIANCES

Another issue arising under the CAA concerns variances from air quality standards. In *Natural Resources Defense Council, Inc. v. EPA*,[164] the issue was whether variances from state air quality implementation plans should receive different treatment in periods before and after the CAA air quality standard attainment date.[165] The suit challenged the EPA's approval of an Arizona air quality implementation plan which contained post-attainment variances. Although aware that courts in the First, Second, and Eighth Circuits have given minor variances more restrictive treatment in the post-attainment period[166] than in the pre-attainment period, the court held that there is no statutory basis under the CAA for differentiating between pre- and post-attainment dates when a variance is minor.[167]

The *NRDC* court interpreted the inclusion of the variance provision in the CAA as congressional recognition of the need for flexibility when compliance with statutory standards within the specified attainment time (three years) is not possible.[168] Further, it was asserted that Congress intended the variance provision to encompass only major modifications of a state plan.[169] The court reasoned that since major variances from state plans were more likely to inhibit the attainment of national air quality standards than were minor variances, more restrictive treatment should be

163. 521 F.2d at 834-35.

164. 507 F.2d 905 (9th Cir. Nov., 1974). *NRDC* is also discussed at text accompanying notes 20-33 *supra*.

165. *Id.* at 911, 912. The Clean Air Act requires implementation plans to assume primary ambient air quality within three years from the date of the plan's approval. 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970). It further provides that national secondary ambient air quality standards must be realized within a "reasonable time" which is to be specified in the state implementation plan. 42 U.S.C. § 1857c-5(a)(2)(A)(ii) (1970).

166. *See* 507 F.2d at 911. The court specifically recognized Natural Resources Defense Council, Inc. v. EPA, 494 F.2d 519, 523 (2d Cir. 1974); Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875, 886 (1st Cir. 1973); Natural Resources Defense Council, Inc. v. EPA, 483 F.2d 690, 693-94 (8th Cir. 1973), as illustrative of more restrictive treatment given to minor variances in the post-attainment period.

167. 507 F.2d at 912.

168. *Id.* at 913-14.

169. *Id.* at 912-13.

accorded the major variances. In other words, the court equated the prevention of attainment with major variances only. However, under the CAA minor variances by pollution sources are permissible only if the governor of the state receives EPA approval of the variance.[170] The court stated that this requirement applies regardless of whether the variances occur in pre- or post-attainment periods because the EPA is thereby able to ascertain when a variance is in fact minor, thereby helping to achieve national air quality standards within the CAA attainment period. Thus, in *NRDC*, the court held that despite the occurrence of minor variances in the post-attainment period, the EPA had the power to approve the minor variances following a request by the state for EPA approval of them.[171]

Finding that the EPA had authority to approve minor variances, the court then considered under what circumstances approval should be given. In *NRDC*, the state of Arizona had a conditional permit system which allowed polluters time variances from compliance with the state implementation plan so long as public health would not be unduly endangered.[172] In upholding the conditional permit system, the panel initially considered the legislative intent of the CAA. It said that the ultimate purpose of the CAA is to protect public health by reaching and maintaining national ambient air standards, even at a cost to the economy.[173] Specifically, the court indicated that compliance with air quality standards under state plans could be required despite the possible demise of business enterprises arising from adherence to state plans.[174] However, the CAA's purpose of protecting public health and the public health language of the Arizona plan, which is consistent with the CAA's purpose, prompted the court to hold that the EPA properly approved the conditional permit system.[175]

C. Public Disclosure

The CAA provides that the appropriate public agency publish quantitative and qualitative statistics on pollution emissions for the purpose of keeping the public informed about the quality

170. *Id.* at 913-14.
171. *Id.* at 914-15.
172. *Id.* at 911, 914. It was the EPA's approval of this plan allowing for variances which was at issue in this case.
173. *Id.* at 914.
174. *Id.*
175. *Id.*

of the air.[176] The inclusion in implementation plans of provisions which prevent public access to emission data within a state conflicts with this requirement that pollution information be made public. The confidentiality provision in Arizona's implementation plan was at issue in *NRDC*. In evaluating the propriety of the EPA's approval of the confidentiality provision, the court relied on one of the Administrative Procedure Act's standards of review with regard to agency decisions. That is, whether the EPA's determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[177] The Arizona provision at issue *allowed* information to remain confidential if it pertained to production and sales unique to an owner and operator of a company and if disclosure would effect the competitive position of the company. In the course of reviewing the EPA's decision, the court distinguished between publication of data adverse to a company's competitive position or unique to the company and publication of quantitative and qualitative pollution emission statistics.[178] The court implied that data in the first instance may be kept for the confidential use of a company's director, but the pollution emission data in the second instance must be made public as required under the CAA.[179] Thus, based on the facts of *NRDC*, the court sustained EPA approval of the confidentiality provision in Arizona's implementation plan because the EPA decision to allow confidentiality for the purpose of protecting the competitive position of corporations was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the CAA requirement that emission data be disclosed to the public.[180]

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176. *Id.* at 917; 42 U.S.C. §§ 1857c-5(a)(2)(F)(iii)-(iv) (1970). These provisions provide that:

(2) The Administrator shall, within four months after the date required for submission of a plan . . . approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that . . .

> (F) it provides . . . (iii) for periodic reports on the nature and amounts of such emissions; [and] (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection. . . .

177. 507 F.2d at 917, *citing* 5 U.S.C. § 706(2)(A) (1970). Note that this standard is not applied when compliance with NEPA is at issue. *See* notes 61-65 *supra* and accompanying text.

178. 507 F.2d at 917.

179. *Id. See* 42 U.S.C. §§ 1857c-5(a)(2)(F)(iii)-(iv).

180. 507 F.2d at 917.

D. Review of New and Modified Pollution Sources

The CAA requires air quality implementation plans to include a procedure to review projects under construction in order to ensure that new and modified pollution sources do not prevent the attainment of national air standards.[181] The specific issue in *NRDC* was whether the Arizona operating permit system constituted a review procedure that could control new and modified pollution sources. The Arizona scheme expressly required that state board of health standards be met by potential polluters.[182] It did not require that CAA standards be met. Additionally, the plan established a control strategy[183] which involved the issurance of yearly permits to review whether there was compliance with state rules and regulations as well as the CAA. Based on the facts, the court set aside the part of the plan subject to only state health standards because there was no requirement of CAA compliance.[184] In contrast, it upheld the control strategy provision of the plan because that part of the review plan required compliance with CAA standards as well as compliance with state standards.[185]

IV. FEDERAL WATER POLLUTION CONTROL ACT

People of the State of California v. EPA[186] confronted the issue of whether federal agencies are required under the Federal Water Pollution Control Act (FWPCA)[187] to comply with California and Washington permit requirements for control of water pollution. Under the FWPCA, there exists a National Pollutant Discharge Elimination System (NPDES) designed to control the discharge of pollutants into navigable waters.[188] Under the NPDES, the EPA administrator has the initial responsibility to issue permits to polluters;[189] a state may, however, submit a proposed state-operated

181. *Id.* at 918; 42 U.S.C. § 1857c-5(a)(2)(D) (1970) provides that the implementation plans include

> a procedure, meeting . . . [CAA] requirements . . . for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply.

182. 507 F.2d at 918; Ariz. Rev. Stat. § 36-1700, subd. B (West Supp. 1973).

183. 507 F.2d at 918.

184. *Id.*

185. *Id.* at 919.

186. 511 F.2d 963 (9th Cir. Feb., 1975) (per Wright, J.), *cert. granted*, 422 U.S. 1041 (1975).

187. 33 U.S.C. §§ 1251-376 (Supp. IV, 1974).

188. *Id.* § 1324.

189. *Id.* § 1323.

plan to the administrator, and if the plan is consistent with the Act and with guidelines promulgated by the administrator, the administrator must transfer permit issuing authority to the state.[190] The states thereafter have the primary authority for enforcement of the Act.[191] In addition, FWPCA section 313 requires federal agencies to comply with state "requirements" relating to the control and abatement of pollution. Under section 313, federal agencies can gain exemption from adherence to state requirements only by a presidential determination that non-adherence is in the "paramount interest of the United States."[192]

In *California v. EPA*, the states of California and Washington challenged the EPA administrator's partial approval of their water pollution control plans which apply to all polluters within the respective states. In approving the states' plans, the EPA exempted federal agencies from complying with the states' permit requirements under the plans. Based upon the express language of the FWPCA providing for federal agency compliance,[193] the court held that the permit requirements of the states' plans were applicable to federal agencies.[194]

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190. *Id.*

191. *Id.* §1342(b) provides for the EPA administrator's approval of state permit plans so long as the plans insure compliance with federal standards under the Act. According to the court, this provision assumes that the NPDES is the primary responsibility of the states.

192. 33 U.S.C. § 1323 (Supp. IV, 1974).

193. *Id.*

194. 511 F.2d at 974-75.