ENVIRONMENTAL LAW: WHAT IS "MAJOR" IN "MAJOR FEDERAL ACTION"?

Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974)

Plaintiffs sought declaratory and injunctive relief to prevent further logging, begun pursuant to contract with the United States Forest Service, by the private defendants in the Boundary Waters Canoe Area (BWCA).[1] Finding that certain activities of the defendant Forest Service required the preparation of an Environmental Impact Statement (EIS) in compliance with the National Environmental Policy Act[2] (NEPA), the federal district court enjoined logging operations until the statement had been prepared.[3] Sitting en banc, the Court of Appeals for the Eighth Circuit affirmed and *held*: The Forest Service's modification or extension of some of the contracts and its supervision of defendant's day-to-day logging activities constitute major federal action significantly affecting the quality of the human environment within the purview of NEPA.[4]

The National Environmental Policy Act was the product of ten years of congressional interest and discussion.[5] To give substance to the new

1. The Boundary Waters Canoe Area of northern Minnesota is part of the Superior National Forest. Its 1,060,000 acres of lakes, streams, and trees make the Area a natural resource of great beauty. Along with the adjoining Canadian Quetico-Superior Forest, it forms the world's only canoe wilderness area. Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1316 (8th Cir. 1974).

2. 42 U.S.C. §§ 4321-47 (1970).

3. Minnesota Pub. Interest Research Group v. Butz, 358 F. Supp. 584, 630 (D. Minn. 1973). The defendants included the Secretary of Agriculture, the U.S. Forest Service, various wood and paper product manufacturing corporations, and a group of independent loggers. *Id.* at 597-604. The Forest Service administered the BWCA Management Plan under which private groups were sold rights to remove timber from the BWCA. *Id.* at 604-09. Logging operations began prior to January 1, 1970, the effective date of NEPA. After that date, however, the Forest Service extended and modified some of the sales contracts and exercised general supervision over the logging operations. *Id.*

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

5. *See generally* F. ANDERSON, NEPA IN THE COURTS (1973) [hereinafter cited as ANDERSON]. The major policy statements of the Act are found in section 101 of the Act, 42 U.S.C. § 4331 (1970). Title II of the Act, 42 U.S.C. §§ 4341-47 (1970), commits to the President the responsibility for overseeing the effectiveness of the legislation and reporting to Congress on his findings. The Council on Environmental Quality was created to assist the President in this task.

policy provisions, Congress included "action-forcing" provisions that required federal agencies to review certain current and proposed actions and prepare written statements assessing the possible environmental impact of the actions.[6] While section 101 of NEPA contains the primary policy statement, most litigation has been generated by the action-forcing provisions of section 102, particularly the section 102(2)(C) requirement that agencies prepare an EIS on proposals for "major Federal actions significantly affecting the quality of the human environment . . . ."[7]

Litigation under section 102(2)(C),[8] challenging agency decisions not to prepare an EIS,[9] has resulted in the development of two standards of judicial review of the agency action. The Second Circuit has adopted the "arbitrary and capricious" standard of the Administrative Procedure Act[10] (APA), a standard giving great deference to the "threshold" agency decision not to prepare an EIS.[11] The Fifth and

6. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. No. 91-296, 91st Cong., 1st Sess. 9 (1969):

> If goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain action forcing provisions and procedures . . . .

The "action-forcing" provisions are found in subsections 102(2) (A)-(H) of the Act, 42 U.S.C. §§ 4332(2)(A)-(H) (1970). The most important of these provisions states:

> The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—
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> . . . .
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> (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—
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> (i) the environmental impact of the proposed action,
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> . . . .

7. 42 U.S.C. § 4332(2)(C) (1970), *quoted in* note 6 *supra*; *see also* ANDERSON 57.

8. 42 U.S.C. § 4332(2)(C) (1970).

9. This litigation has focused on the construction of the statutory language "major federal action significantly affecting the quality of the human environment." *See, e.g.*, Wyoming Outdoor Coord. Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).

The adequacy of statements has also been challenged in litigation focusing on the requirements found in 42 U.S.C. §§ 4332(2)(C)(i)-(v) (1970). *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Sierra Club v. Froehlke, 345 F. Supp. 440 (W.D. Wis. 1972), *aff'd*, 486 F.2d 946 (7th Cir. 1973).

10. 5 U.S.C. § 706(2)(A) (1970).

11. Hanly v. Kleindienst, 471 F.2d 823, 829-30 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973):

Tenth Circuits, relying on *Citizens to Preserve Overton Park, Inc. v. Volpe*,[12] have adopted a "reasonableness" standard, which allows a more penetrating judicial review of the agency decision.[13] The difference between the two standards as applied is minimal, however. Even those courts adopting the "arbitrary and capricious" standard have thoroughly examined the agency decision.[14] The trend thus appears to be in the direction of careful judicial scrutiny of the agency's determination not to prepare a statement.[15]

> We see no reason for application of a different approach here since the APA standard permits effective judicial scrutiny of agency actions and concommitantly permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise.

For other cases applying the "arbitrary and capricious" standard, see Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 349 F. Supp. 1212 (D.D.C. 1972), *remanded on other grounds*, 487 F.2d 1024 (D.C. Cir. 1973); Citizens for Clean Air, Inc. v. Corps of Eng'rs, 349 F. Supp. 696 (S.D.N.Y. 1972); Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971); Echo Park Residents Comm. v. Romney, 3 E.R.C. 1255 (C.D. Cal. 1971).

12. 401 U.S. 402 (1971). Construing section 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f) (1970), which mandates that transportation plans must "include measures to maintain or enhance the natural beauty of the lands traversed," the Court in *Overton Park* developed a "substantial inquiry" standard of review, which allowed judicial inquiry beyond the question whether the agency's action was arbitrary and capricious.

13. The Fifth Circuit was the first to adopt a "reasonableness" standard. Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973) (action to enjoin construction of federal office building). The court stated:

> [The agency's] decision should have been court-measured under a more relaxed rule of reasonableness . . . .
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> . . . The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review.

Id. at 465-66; *accord*, Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973). The Tenth Circuit adopted the reasoning of the *Save Our Ten Acres* decision in Wyoming Outdoor Coord. Council v. Butz, 484 F.2d 1244 (10th Cir. 1973). Some courts have adopted a procedure calling for a de novo consideration of the merits of the proposal when reviewing agency action. *See* Kisner v. Butz, 350 F. Supp. 310 (N.D.W. Va. 1972); National Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972); Scherr v. Volpe, 336 F. Supp. 886 (W.D. Wis. 1971), *aff'd on other grounds*, 466 F.2d 1027 (7th Cir. 1972).

14. *See* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 349 F. Supp. 1212 (D.D.C. 1972), *remanded on other grounds*, 487 F.2d 1029 (D.C. Cir. 1973); Citizens for Clean Air, Inc. v. Corps of Eng'rs, 349 F. Supp. 696 (S.D.N.Y. 1972).

15. Yarrington, *The National Environmental Policy Act*, [Monograph] BNA ENVIRON. REP. No. 17, at 24 (Jan. 4, 1974) states:

Courts have used various methods of analysis in construing the phrase "major Federal action significantly affecting the quality of the human environment."[16] Courts have found agency action to be within the coverage of NEPA in cases involving highway construction,[17] dams and watershed projects,[18] electric power projects,[19] and building construc-

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> The better-reasoned cases seem to favor the substantial inquiry test, and, while the issue is as yet unresolved, it would appear that the courts will assume an ever-increasing role in scrutinizing agency decisions that a particular action is not a major federal action significantly affecting the quality of the human environment.

See Arizona Pub. Serv. Co. v. FPC, 483 F.2d 1275, 1282 (D.C. Cir. 1973); Environmental Defense Fund v. TVA, 468 F.2d 1164, 1177 (6th Cir. 1972); Greene County Planning Bd. v. FPC, 455 F.2d 412, 420 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); City of New York v. United States, 337 F. Supp. 150, 160 (E.D.N.Y. 1972).

16. The question whether an action is "federal" is beyond the scope of this Comment. It should be noted, however, that the courts have readily found federal action. *See* Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and The National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 230 n.2 (1970):

> The Act is limited to federal activities—a limitation perhaps not quite as serious as it may at first appear. Many state, local and private environmental activities have some not insubstantial nexus to a federal department or agency. Arguably, such a nexus may suffice for applicability of the Act.

See also ANDERSON 57-73.

MPIRG may be the first case to raise the question whether a major federal action could significantly affect the environment but not the the "human" environment. The court dismissed this contention in one paragraph, 498 F.2d at 1322, and it seems doubtful that the issue will receive more serious treatment in other cases.

17. *See, e.g.*, Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975); Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974), *petition for cert. filed sub nom.* Coleman v. Conservation Soc'y of S. Vt., Inc., 43 U.S.L.W. 3615 (U.S. May 9, 1975) (No. 74-1413); Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974); Brooks v. Volpe, 460 F.2d 1193 (9th Cir. 1972); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); Named Individual Members of the San Antonio Conserv. Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).

18. *See, e.g.*, Trout Unltd. v. Morton, 509 F.2d 1276 (9th Cir. 1974); Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123 (5th Cir. 1974); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972); Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50 (N.D. Cal. 1972), *aff'd*, 487 F.2d 814 (9th Cir. 1973); National Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D. N.C. 1972); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971).

19. *See, e.g.*, Sierra Club v. Hodel, 511 F.2d 526 (9th Cir. 1974); Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973); Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); Citizens

tion.[20] Beyond these factual groupings, courts have been inconsistent in finding agency action to be major and significant.[21] Some courts have chosen a definitional approach, finding agency action to be "major" if it "requires substantial planning, time, resources or expenditures,"[22] or if the agency retains any significant discretionary powers,[23]

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for Clean Air, Inc. v. Corps of Eng'rs, 349 F. Supp. 696 (S.D.N.Y. 1972); Izaak Walton League v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971).

20. *See, e.g.*, Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974); Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971). *But cf.* Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973); Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 349 F. Supp. 1212 (D.D.C. 1972), *remanded on other grounds*, 487 F.2d 1029 (D.C. Cir. 1973); Echo Park Residents Comm. v. Romney, 3 E.R.C. 1255 (C.D. Cal. 1971).

21. The courts have required an EIS in the following cases: Wyoming Outdoor Coord. Council v. Butz, 484 F.2d 1244 (10th Cir. 1973) (Forest Service lumber contract); Arizona Pub. Serv. Co. v. FPC, 483 F.2d 1275 (D.C. Cir. 1973) (FPC refusal of certificate for proposed pipeline); National Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (lease of 380,000 acres of ocean floor); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971) (proposed cancellation of government procurement of helium); Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1972) (Corps of Engineers dredging of harbor); Lee v. Resor, 348 F. Supp. 389 (M.D. Fla. 1972) (Corps of Engineers spraying herbicide to kill vegetation in river); Boston Waterfront Resident's Ass'n, Inc. v. Romney, 343 F. Supp. 89 (D. Mass. 1972) (proposed demolition of historical buildings); City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972) (ICC approval of abandonment of local railroad operation); Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971) (Corps of Engineers approval of refuse dumping in navigable stream); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971) (pesticide control of fire ants by Secretary of Agriculture); Brotherhood Blocks Ass'n v. Secretary of Housing & Urban Dev., 5 E.R.C. 1867 (E.D. N.Y. 1973) (sale of 152 parcels of repossessed land in Brooklyn).

In other cases the courts found that the agency action was either not "major," or not "significant," or both. Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973) (dredging permit for marina); Simmans v. Grant, 370 F. Supp. 5 (S.D. Tex. 1974) (channel improvement and creation of small reservoir); Citizens Organized to Defend Environment, Inc. v. Volpe, 353 F. Supp. 520 (S.D. Ohio 1972) (approval of transfer of mining equipment across interstate highway); Kisner v. Butz, 350 F. Supp. 310 (N.D.W. Va. 1972) (construction of 4.3-mile road in national forest); Julis v. City of Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972) (widening of city street); Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972) (introduction of "stretch" jets at Washington National Airport); Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972) (mock amphibious assault by Marines). *See also* Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973); Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 349 F. Supp. 1212 (D.D.C. 1972); Echo Park Resident's Comm. v. Romney, 3 E.R.C. 1255 (C.D. Cal. 1971).

22. Citizens Organized to Defend the Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (S.D. Ohio 1972); National Resources Defense Council, Inc. v. Grant, 341 F. Supp.

or, following a narrower view, "only when a project is wholly or partly federally funded."[24] The courts have also disagreed whether the words "major" and "significantly" should be construed separately (the bifurcated approach)[25] or together.[26] None of these methods of analysis, however, have produced consistent results. Perhaps the most accurate conclusion is that the existence of "major Federal action" must be determined in each case by "a judgment based on the circumstances of a proposed action."[27]

The majority in *Minnesota Public Interest Research Group v. Butz*[28] relied on the policy considerations underlying NEPA to support the first two stages of its opinion. First, the majority found that the concern for environmental disclosure in NEPA was so great that an agency should have little discretion in its decision to prepare an EIS.[29] Having

356, 366-67 (E.D.N.C. 1972); Julis v. City of Cedar Rapids, 349 F. Supp. 88, 89 (N.D. Iowa 1972).

23. Jones v. Lynn, 477 F.2d 885, 890 (1st Cir. 1973).

24. James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority, 359 F. Supp. 611, 628 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973).

25. *See* Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972):

> Defendants claim that the term "major Federal action" refers to the cost of the project, the amount of planning that preceded it, and the time required to complete it, but does not refer to the impact of the project on the environment. We agree with the defendants that the two concepts are different . . . .

Accord, Julis v. City of Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972).

26. *Cf.* Wyoming Outdoor Coord. Council v. Butz, 484 F.2d 1244 (10th Cir.), *rev'g* 359 F. Supp. 1178 (D. Wyo. 1973) (adopted *Hanly* rationale, *see* cases cited note 25 *supra*); Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972). *See also* Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972); Conservation Soc'y of S. Vt., Inc. v. Volpe, 343 F. Supp. 761 (D. Vt. 1972), *aff'd on other grounds*, 508 F.2d 927 (2d Cir. 1974), *petition for cert. filed sub nom.* Coleman v. Conservation Soc'y of S. Vt., Inc., 43 U.S.L.W. 3615 (U.S. May 9, 1975) (No. 74-1413); Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972).

This is not, however, a well developed area, for agencies have generally conceded that a project was major and argued instead that it created no significant effect on the environment. *See* Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore. 1971). As a result, few courts have considered the question.

27. Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 n.7 (5th Cir. 1973), *quoting* Public Bldg. Serv. procedure 1095.1A, Attachment B, 36 Fed. Reg. 23336 (1971).

28. 498 F.2d 1314 (8th Cir. 1974).

29. *Id.* at 1320:

> Section 102(1) of the Act contains a Congressional direction that environmental factors be considered "to the fullest extent possible." An initial decision not to prepare an EIS precludes the full consideration directed by Congress. In view of the concern for environmental disclosure present in NEPA, the agency's discretion as to whether an impact statement is required is properly exercised only within narrow bounds.

concluded that a reviewing court was not committed by law to the "arbitrary and capricious" standard, the court adopted a standard of "reasonableness in the circumstances."[30] Second, relying on the Council on Environmental Quality Guidelines 5 and 11,[31] the court stated that the bifurcated approach[32] "does little to foster the purposes of the Act,"[33] and determined that it would consider the "magnitude of the federal action" together with "its impact on the environment."[34]

In the third stage of the opinion, the majority used its "reasonableness under the circumstances" standard to scrutinize the Forest Service determination that its actions were neither major nor significant. The court adopted, without question, the district court's findings that logging significantly affected the BWCA.[35] The court considered only the involvement of the Service in the logging operations, and, after listing the supervisory activities of the Service,[36] the court concluded that the agency's activities were as "significant" as those found to be major federal action in prior cases in which agencies had authorized actions by private parties.[37] In particular, the majority noted that the Service's income from the logging contracts was "clearly inadequate to finance the [required] reforestation program."[38]

The dissent, pointing out that the Forest Service actions when viewed alone were very minor,[39] called for a narrow standard of review

30. *Id.*

31. 36 Fed. Reg. 7724 (1971), *subsequently codified at* 40 C.F.R. §§ 1500.6, 1500.13 (1975).

32. *See* cases cited note 25 *supra* and accompanying text.

33. 498 F.2d at 1321.

34. *Id.*

35. *Id.* at 1322.

36. *Id.*:

> The Forest Service has been significantly involved with these timber sales . . . . Its contracts require it to, *inter alia*, approve locations of timber roads, logging camps and buildings; mark the trees to be cut; and negotiate payment for the timber cut. In addition, it extended six of the sales after the effective date of NEPA and made contract modifications with the consent of the purchasers on seven of the sales.

37. *Id.* at 1323:

> These actions were as significant in the context of these timber sales as was the approval of a right-of-way and coal stack heights found to be major federal action in Jicarilla Apache Tribe of Indians v. Morton [471 F.2d 1275 (9th Cir. 1973)], and the clear cutting of some 670 acres of timber pursuant to Forest Service sales found to be major federal action in Wyoming Outdoor Coordinating Council v. Butz [484 F.2d 1244 (10th Cir. 1973)].

38. *Id.* at 1322-23.

39. *Id.* at 1325.

giving great judicial deference to agency expertise.[40] Although arguing for reversal, the dissenters were more concerned that the majority had overstepped the bounds of the judicial role than with the result in this particular case.[41]

Neither of the opinions showed a full understanding of the applicable case law. By citing cases in which agency approval of action by private parties was found to be major federal action,[42] the majority relied on, but did not adequately explore, the licensing/permit analysis. Agency approval or licensing of major action by private parties should suffice to meet the statutory requirement of major federal action.[43] When the federal activity is limited to licensing and supervision, any rational measure of the magnitude of the federal action must include the private action that is authorized. The majority, however, failed to look to the activities of the private contractors to determine whether the logging operations were "major," and had to exaggerate the supervisory activities of the Forest Service in order to fit the facts and result in the case to the statutory language. As a result, the court implicitly held that the agency action was major because it was significant, thus effectively reading the word "major" out of the statute.

The majority's analysis also rejected separate review of whether an agency action is "major" and whether it "significantly affects" the environment. The bifurcated approach, nevertheless, seems eminently sensible.[44] Since the private action that has been licensed is usually

40. *Id.* at 1326.

41. *Id., citing* Aberdeen & Rockfish R.R. v. SCRAP, 409 U.S. 1207, 1217-18 (1972) (Burger, Circuit Justice). In *Aberdeen* Chief Justice Burger, after noting legislative advances in environmental protection, stated:

> These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task.

42. 498 F.2d at 1323.

43. *See* Scientist Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (footnotes omitted):

> [T]here is "Federal action" within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment.

In Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972), the court stated that "the only involvement necessary by the federal government to constitute major federal action is approving or licensing the project . . . ."

44. As the court in Julis v. City of Cedar Rapids, 349 F. Supp. 88, 89 (N.D. Iowa

of sufficient magnitude, it seems clear that the anomaly suggested by the majority of a " 'minor federal action significantly affecting the quality of the human environment' "[45] would not occur. By rejecting the bifurcated approach and failing to consider first whether the action is major, the court twisted the language of the statute.[46] If the bifurcated approach is rejected, one commentator has suggested replacing it with a "sliding scale" test.[47] Under this suggested test, as the significance of the environmental impact of the proposed project increases, the amount of federal involvement necessary to require the filing of an EIS decreases.[48] Despite a disclaimer by the author,[49] this proposed test also risks requiring an EIS without an independent determination that the action is major. Such a sliding scale would, however, undoubtedly produce results consistent with the general willingness of the courts to find that an EIS is required. Nonetheless, the analytical weakness of the sliding scale test and the strained statutory construction and imprecise reasoning of *Minnesota Public Interest Research Group v. Butz* can be avoided by adoption of the licensing/permit method of analysis.[50]

Although its analysis might have been clearer, the *Minnesota Public Interest Research Group v. Butz* majority decision was consistent with the judicial view of NEPA as an "environmental full-disclosure law."[51]

1972) indicated:

> [T]he inclusion of the term "major" raises the obvious inference that not every federal action was meant to be included. Congress evidently intended to exclude from consideration the myriad minor activities with which the federal government becomes involved.

Accord, Citizens Organized to Defend the Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (S.D. Ohio 1972) ("Clearly the NEPA contemplates some federal actions which are minor, or have so little environmental impact, as to fall outside its scope").

45. 498 F.2d at 1321-22.

46. Viewing the private action as "major" is not such a twisting of the statute, for the agency decision authorizing the private action is sufficient to "federalize" it.

47. 26 S. CAR. L. REV. 119 (1974).

48. *Id.* at 134.

49. *Id.* at 134 n.78.

50. For example, applying the test to the facts of Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972), a court would find minimal federal involvement (the Secretary of Transportation's approval of the introduction of stretch jets), and a minimal effect on the environment (except for being slightly longer, the 727-200 is virtually identical to the 727-100), and thus no EIS would be required. There were, however, substantial front-end costs involved in the introduction of these new jets, and it would have been much more precise for the court to have recognized that while there was a "major" action being licensed by the federal government, it did not "significantly" affect the environment.

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

Chief Justice Burger has warned the judiciary against stepping into this role of policy-maker,[52] but the extensive line of NEPA cases granting injunctions pending preparation of an EIS will not be overturned without action by Congress or the Supreme Court.[53]

52. *See* Aberdeen & Rockfish R.R. Co. v. SCRAP, 409 U.S. 1207, 1217-18 (1972) (Burger, Circuit Justice), *quoted in* Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1326 (8th Cir. 1974) (dissenting opinion); note 41 *supra*.

53. This conclusion is particularly true if one accepts the view of one commentator who thinks that all of the procedural questions of 42 U.S.C. § 4332 (1970) have been settled by the courts and that we are entering a "second generation" of NEPA cases which will recognize that § 4331 creates substantive rights. *See* Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 S.D.L. REV. 279 (1974).