THRESHOLD DETERMINATIONS BY FEDERAL AGENCIES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972)

Plaintiffs sought injunctive relief against further construction of two federal buildings, one a jail, the other a conventional office building, on the basis that the defendant, Administrator of the General Services Administration (GSA), had failed to prepare an environmental impact statement required by the National Environmental Policy Act of 1969 (NEPA).[1] GSA contended that no statement was required because it had concluded that the buildings would have no significant adverse effect on the environment.[2] The trial court[3] held defendant had com-

1. 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970) [hereinafter cited as NEPA]. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) [hereinafter referred to as section 102(2)(C)], provides in part:

> (2) all agencies of the Federal Government shall—
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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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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented . . . .

2. The basis for GSA's contention was elaborated in the following internal memorandum prepared by the Regional Director of the Public Building Services of GSA:

> The impact of the proposed action will have no adverse effects on the environment, including ecological systems, population distribution, transportation, water or air pollution, nor will it be any threat to health or life systems or urban congestion. These points are further amplified as follows:
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> 1. It is our intention to connect with the existing New York utility services, including water supply, sewage disposal, solid waste disposal, storm water drainage, etc.
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> 2. It is planned that the heating will be by purchase steam from Con Edison Company of New York . . . .
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> 3. Trash removal will be by commercial contract.
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> 4. There will be no relocation of people involved . . . .
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> 5. There will be no material impact at all on public transportation.
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> 6. Number of people to be housed in the Bureau of Prisons operation is given as 405.
>
> 7. Zoning—C6-1.

plied with the Act and denied relief. On appeal the court of appeals affirmed as to the office building, but reversed[4] as to the jail. *Held:* a federal agency that undertakes a major federal action can avoid preparing an environmental impact statement only if it can demonstrate that it has adequately considered all possible environmental impact from the action.

Prior to the passage of NEPA,[5] there was no comprehensive federal

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8. We intend to follow the existing zoning regulations.
Hanly v. Mitchell, 460 F.2d 640, 645-46 (2d Cir. 1972).

3. Hanly v. Mitchell (S.D.N.Y., March 17, 1972) (unpublished memorandum).

4. However, the court "suggest[ed] that the injunctive order be stayed for a short period of time, but no more than 30 days, to allow the necessary threshold determination of the jail's environmental impact to be made while the preliminary work on the construction site continue[d]." Hanly v. Mitchell, 460 F.2d at 649. Other courts have stayed injunctions in the same way, on the grounds that the balance of hardships would render a suspension of work in progress inequitable. *E.g.*, City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971); *see* Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971). *But see* Scherr v. Volpe, 336 F. Supp. 886 (W.D. Wis. 1971).

5. NEPA became effective on January 1, 1970, when it was signed by President Nixon. An earlier bill, S. 2805, introduced in 1967, had resulted in a congressional colloquium in July, 1968, to discuss a national policy on the environment. For contributions to the colloquium, *see Hearings on a National Policy for the Environment Before the Senate Comm. on Interior & Insular Affairs and the House Comm. on Science & Astronautics*, 90th Cong., 2d Sess. (1968). The colloquium's findings are contained in SENATE COMM. ON INTERIOR & INSULAR AFFAIRS AND HOUSE COMM. ON SCIENCE & ASTRONAUTICS, 90TH CONG., 2D SESS., CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT (1968). On February 18, 1969, S. 1075 was introduced by Sen. Jackson (Wash.). The bill created a Council on Environmental Quality, and authorized the Secretary of the Interior to conduct environmental studies. After hearings on S. 1075 were held in April, 1969, the bill was amended to include procedural requirements under § 102. *See Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior & Insular Affairs*, 91st Cong., 1st Sess. 1-3, 112-16, 205-07 (1969). This form of S. 1075 required a "finding" by the responsible official on "proposals for legislation or other *significant* Federal *actions affecting* the quality of the human environment . . . ." *Id.* at 207 (emphasis added). Section 102 was further amended following suggestions of the Director of the Bureau of the Budget to read: "proposals for legislation and other *major* Federal actions *significantly affecting* . . . ." (Emphasis added.) *See* S. REP. No. 296, 91st Cong., 1st Sess. 27-34 (1969). This version of the bill was passed by the Senate on July 10, 1969. H.R. 12549, an extensively amended version of S. 1075 which deleted all procedural requirements, was sponsored by Rep. Dingell (Mich.) and passed by the House on September 23, 1969. A compromise bill, reported by a conference committee on December 17, 1969, replaced the word "findings" with "detailed statement," and otherwise essentially reinstituted the Senate bill's procedural directions. *See* H.R. REP. No. 765, 91st Cong., 1st Sess. 2-3 (1969). The compromise bill (enacted as Pub. L. No. 91-190, 83 Stat. 852) was passed by the Senate on December 20, 1969, and by the House on December 23, 1969. *See generally*

legislation directing national priorities with respect to environmental problems.[6] Particular problems, such as allocation of resources, pollution, and urban congestion, were dealt with independently by the agencies having jurisdiction, often without guidance or accountability.[7] NEPA was designed to supplant this practice of isolated decision-making by coordinating agency activities that affect the quality of the environment.[8] The Act attempted to accomplish this by: (1) declaring a national policy on the environment;[9] (2) creating an administrative

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S. REP. No. 296, 91st Cong., 1st Sess. 9-13 (1969); 115 CONG. REC. 40415-19 (1969) (remarks of Sen. Jackson); 115 CONG. REC. 26572 (1969) (remarks of Rep. Dingell); Yannacone, *National Environmental Policy Act of 1969*, 1 ENVIR. L. 8 (1970). For an analysis of the overall achievement of the ninety-first session of Congress on environmental matters, see SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 92D CONG., 1ST SESS., CONGRESS AND THE NATION'S ENVIRONMENT: ENVIRONMENTAL AFFAIRS OF THE 91ST CONGRESS (1971).

6. *See generally* LAW AND THE ENVIRONMENT (Baldwin & Page eds. 1970); 1 A. REITZE, ENVIRONMENTAL LAW (1972); FEDERAL PROGRAMS FOR THE DEVELOPMENT OF HUMAN RESOURCES, A COMPENDIUM OF PAPERS SUBMITTED TO THE SUBCOMM. ON ECONOMIC PROGRESS OF THE JOINT ECONOMIC COMM., 90th Cong., 2d Sess. (1968); SUBCOMM. ON SCIENCE, RESEARCH, & DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE & ASTRONAUTICS, 90TH CONG., 2D SESS., MANAGING THE ENVIRONMENT (1968); *Hearings on H.R. 6750 et al. Before the Subcomm. on Fisheries & Wildlife Conservation of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 1st Sess., ser. 6 (1969); *America's Changing Environment*, 96 DAEDELUS 1003 (1967); Feiss, *Standards for Urban Development in the United States*, in *Hearings on the Quality of Urban Life Before the Ad Hoc Subcomm. on Urban Growth of the House Comm. on Banking & Currency*, 91st Cong., 1st & 2d Sess., pt. 2 (1970); Comment, *America's Changing Environment—Is the NEPA a Change for the Better?* 40 FORD. L. REV. 897, 898-902 (1972).

7. *See* S. REP. No. 296, 91st Cong., 1st Sess. 13-16 (1969); P. WEISS, RENEWABLE RESOURCES: A REPORT TO THE COMMITTEE ON NATURAL RESOURCES (NAS-NRC Publ. No. 100A) (1962); Jackson, *Foreward: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073 (1970); Liroff, *Administrative, Judicial and Natural Systems: Agency Response to the National Environmental Policy Act of 1969*, 3 LOYOLA U.L.J. 19 (1972).

8. *See generally* Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army, 325 F. Supp. 728, 743, *injunction granted*, 325 F. Supp. 749, *injunction vacated*, 342 F. Supp. 1211 (E.D. Ark. 1971); Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 ENVIR. L. REP. 50035 (1971); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 647 (1970).

9. Declarations of purpose in the Act are found in 42 U.S.C. §§ 4321 & 4331(a) (1970). NEPA has been criticized as being merely a statement of policy, without creating affirmative duties for federal agencies. *See, e.g.*, Bucklein v. Volpe, 2 E.R.C. 1082, 1083 (N.D. Cal. 1970); Lynch & Stevens, *Environmental Law—The Uncertain Trumpet*, 5 U. SAN FRAN. L. REV. 10 (1970); Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?* 37 BROOKLYN L. REV. 139 (1970).

agency to coordinate and oversee agency efforts to achieve that policy;[10] and (3) establishing procedural requirements for all federal agencies to insure consideration of environmental problems in planning.[11]

The procedural requirements, contained in section 102(2)(C), apply to "major Federal actions significantly affecting the quality of the human environment." Such actions must be preceded by a "detailed statement" on five prescribed environmental considerations.[12] The Act thus implies that there are actions for which no detailed statement is required,[13] but fails to provide further standards by which the agency is to determine whether it must file a statement.[14] The legislative history of the Act, however, reveals an intent that agency discretion be limited,[15] and that

10. The agency created was the Council on Environmental Quality (CEQ). The duties and responsibilities of CEQ are outlined in Title II of NEPA, 42 U.S.C. §§ 4341-47 (1970).

11. *See* National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1111-12 (D.C. Cir. 1971); Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 786-88 (D. Me. 1972); S. REP. No. 296, 91st Cong., 1st Sess. 4-6 (1969); 115 CONG. REC. 40416 (1969) (remarks of Sen. Jackson); Jackson, *Foreward: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073, 1079 (1970).

12. *See* note 1 *supra*.

13. *See* Hanly v. Mitchell, 460 F.2d at 644; Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 788 (D. Me. 1972); Scherr v. Volpe, 336 F. Supp. 882, 888 (W.D. Wis. 1971); Echo Park Residents Comm. v. Romney, 3 E.R.C. 1255 (C.D. Cal. 1971).

14. CEQ's Guidelines stated that the phrase "major Federal actions significantly affecting the quality of the human environment" is "to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated)." Further, if "there is *potential* that the environment may be significantly affected," or if the action is likely to be "highly controversial," a statement is to be prepared. CEQ Guidelines § 5(b), 36 Fed. Reg. 7724 (1971) (emphasis added). Pursuant to a directive of the Guidelines and to Executive Order No. 11514, 35 Fed. Reg. 4247 (1970), GSA has issued its own administrative guidelines for compliance with NEPA. The document states that the determination of what is a "major Federal action significantly affecting the quality of the human environment" is "in large part a judgment based on the circumstances of the proposed action," and lists very general criteria, including "likely to be environmentally controversial." GSA Environmental Statements, Attachment B, § 1, 36 Fed. Reg. 23336 (1971).

For an outline of the initial response of other agencies to NEPA, *see Hearings on First Annual Environmental Quality Report Before the Senate Comm. on Interior & Insular Affairs*, 91st Cong., 2d Sess. 16-24 (1970); *Hearings on the Administration of the National Environmental Policy Act Before the Subcomm. on Fisheries & Wildlife Conservation of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess., ser. 41, pts. 1 & 2 (1970).

15. *See, e.g.*, S. REP. No. 296, 91st Cong., 1st Sess. 9, 14 (1969) (legislative mandate to consider environmental consequences of actions); *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior & Insular Affairs*, 91st Cong., 1st Sess. 80-86, 116 (1969); 115 CONG. REC. 40927 (1969) (remarks of Rep.

a statement must be filed if there is a reasonable possibility of environmental impact.[16]

When agencies have attempted to comply with NEPA by actually filing an impact statement, courts have not applied a uniform standard of review. It has been held that a court may review only procedural compliance with NEPA, and not the judgment of the agency.[17] Impact statements have been held inadequate because they contained only unsupported conclusions,[18] or because they were not sufficiently "detailed."[19] Courts have found compliance with NEPA under a "good

Galifianakis) (purpose of NEPA to prevent subjective judgment by federal agencies); 115 CONG. REC. 40416 (1969) (remarks of Sen. Jackson: "action-forcing procedures . . . of section 102 direct any Federal agency which takes action that it must take into account environmental management and environmental quality considerations"); 115 CONG. REC. 29053 (1969) (remarks of Sen. Muskie) (§ 102(2)(C) designed to prevent "self-policing" by federal agencies); 115 CONG. REC. 26572 (1969) (remarks of Rep. Dingell).

16. *See* note 15 *supra* and accompanying text. The emphasis in the legislative materials is on the phrase "to the fullest extent possible" rather than on any limitations on the application of the procedures to specified agency actions. Frequently the phrase "significantly affecting the quality of the human environment" is omitted in the materials. *See, e.g.*, H.R. REP. No. 765, 91st Cong., 1st Sess. 9 (1969); 115 CONG. REC. 40925 (1969) (remarks of Rep. Dingell).

17. Sierra Club v. Froehlke, 345 F. Supp. 440, 444 (W.D. Wis. 1972); Conservation Council v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972); *cf.* Scenic Hudson Pres. Conf. v. FPC, 453 F.2d 463, 468 (2d Cir. 1971).

18. Environmental Defense Fund v. TVA, 339 F. Supp. 806 (E.D. Tenn. 1972). The court asserted that the statement was intended not only to "aid the agency's decision-making process," but to "advise the public of the environmental consequences of the proposed action" as well. The statement provides *evidence* that the agency has adequately considered the relevant factors. *Id.* at 810.

19. *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army, 325 F. Supp. 728, *injunction granted*, 325 F. Supp. 749 (E.D. Ark. 1971). The court described NEPA as a "full disclosure law," and indicated that the environmental impact statement

> . . . should, at a minimum, contain such information as will alert . . . the public . . . to all known *possible* environmental consequences of proposed agency action. Where experts, or concerned public or private organizations, or even ordinary lay citizens, bring to the attention of the responsible agency environmental impacts which they contend will result from the proposed agency actions, then the § 102 statement should set forth those contentions and opinions, even if the responsible agency finds no merit in them whatsoever.

Id. at 759. *Cf.* Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, *motion for summary reversal denied*, 463 F.2d 796 (D.C. Cir. 1971).

For cases in which the agency's impact statement was held to be sufficiently detailed, *see* Sierra Club v. Froehlke, 345 F. Supp. 440 (W.D. Wis. 1972); National Forest Pres. Group v. Butz, 343 F. Supp. 696 (D. Mont. 1972); Daly v. Volpe, 326 F. Supp. 868 (W.D. Wash. 1971); Environmental Defense Fund v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971). *But cf.* Harrisburg Coalition Against Ruining Environment v. Volpe,

faith" standard,[20] and non-compliance under the "rule of reason."[21] Finally, the section 102(2)(C) statement has been held to require a "balancing" of environmental costs and benefits, with full, "individualized" consideration of relevant factors.[22]

When agencies have relied on their discretion *not* to make a statement,[23] on the basis that the proposed action either is not "major" or

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330 F. Supp. 918 (M.D. Pa. 1971) (paper submitted under both NEPA and § 4(f) of the Department of Transportation Act, 49 U.S.C. §§ 1651 *et seq.* (1970)).

20. Aleut League v. AEC, 337 F. Supp. 534 (D. Alaska 1971). Courts have looked at the agency's activities in compiling an environmental record, as well as at the final statement itself. *See, e.g.*, Harrisburg Coalition Against Ruining Environment v. Volpe, 330 F. Supp. 918 (M.D. Pa. 1971).

21. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). The court was concerned that, although the impacts of the proposed action were set forth "in considerable range and detail," the report's conclusion was apparently ignored by the agency in its planning. *Id.* at 830.

22. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971):

> NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned actions must be assessed and then weighed against the environmental costs; alternatives must be considered which would effect the balance of values . . . . The magnitude of possible benefits and possible costs may lie anywhere on a broad spectrum. Much will depend on the particular magnitudes involved in particular cases. In some cases, the benefits will be great enough to justify a certain quantum of environmental costs; in other cases, they will not be so great and the proposed action may have to be abandoned or significantly altered so as to bring the benefits and costs into a proper balance. The point of the individualized balancing analysis is to ensure that, with possible alternatives, the optimally beneficial action is finally taken.

The court held the AEC regulations inadequate, among other reasons, for restricting AEC's consideration of environmental problems at various stages of the review process. AEC's current regulations, revised in response to this decision, were published in 10 C.F.R. 50, App. D (1971). For further discussion of the *Calvert Cliffs* case, see 52 B.U.L. REV. 425 (1972); 58 VA. L. REV. 177 (1972). *See generally* 1 A. REITZE, ENVIRONMENTAL LAW 102 (1972).

23. When agencies have been challenged for failure to file a statement under § 102(2)(C) of NEPA, the issues have been framed by the defense proffered by the agency. These defenses can be grouped into five general categories. The first is a reliance on discretion not to file a statement, discussed in text accompanying notes 23-27 *infra.*

Second, when the agency has argued that the primary responsibility for preparing the impact statement lies with the state agency or private company which is more directly involved in the action, courts have granted injunctions until the responsible *federal* agency complies with the statute. Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 880 (D. Ore. 1971); *cf.* City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972); Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537 (7th Cir. 1972); Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972); Upper

will not "significantly affect the quality of the human environment," most courts have reviewed the decision only to determine if it was "arbitrary" or "capricious."[24] Rarely have courts remanded for a more

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Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971).

Third, agencies have argued that NEPA does not apply to them on four grounds. (A) The statute authorizing their activities precludes NEPA compliance. *See* Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701 *et seq.* (1970)); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971) (Helium Act, 50 U.S.C. §§ 67 *et seq.* (1970)). (B) The agency involved is a private corporation subsidized by the federal government. *See* Miltenberger v. Chesapeake & Ohio Ry., 450 F.2d 971 (4th Cir. 1971) (dictum) (defendant railroad placed under federal control by AMTRAX legislation, 45 U.S.C. §§ 501 *et seq.* (1970)). (C) The agency involved is an "environmental protection agency." *See* Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971) (Corps of Engineers). (D) The needs of national security rendered public consideration of the project impracticable. *See* McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971). In these cases, courts have generally stressed the inclusive language of §§ 101 & 102 of NEPA, and granted immunity only in special circumstances.

Fourth, agencies have argued—usually unsuccessfully—that NEPA cannot be applied to actions initiated before January 1, 1970. It is now settled that the Act can be applied retroactively. *See, e.g.*, Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Environmental Law Fund v. Volpe, 340 F. Supp. 1328 (N.D. Cal. 1972); City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972); Nolop v. Volpe, 333 F. Supp. 1364 (S.D.S.D. 1971) (dictum); Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army, 325 F. Supp. 728 (E.D. Ark. 1971); *cf.* Morris v. TVA, 345 F. Supp. 32 (N.D. Ala. 1972) (continual operation of dam project initiated prior to 1970). *Contra*, Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3d Cir. 1971). No clear standard has emerged, but the rule generally seems to be that the Act will be applied except where final decisions or substantial commitments were begun prior to 1970; *see* Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972); Maddox v. Bradley, 345 F. Supp. 1255 (N.D. Tex. 1972); San Francisco Tomorrow v. Romney, 342 F. Supp. 77, 82 (N.D. Cal. 1972); *cf.* Conservation Soc'y v. Volpe, 343 F. Supp. 761 (D. Ver. 1972) (balancing test); Investment Synd., Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970). Section 11 of the CEQ Guidelines requires compliance "to the maximum extent practicable" to projects initiated prior to the effective date of NEPA. 36 Fed. Reg. 7724, 7727 (1971).

Fifth, agencies have admitted their duty to file a statement, but have argued that the proper time for preparing it had not yet arrived. Courts, emphasizing the purpose of NEPA to ensure consideration of environmental problems as early as possible in order to minimize destructive effects from federal projects, have generally ruled against agencies when they argue that the statement is not required until final approval of the planned action. *See, e.g.*, Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971). *But see* Port of New York Authority v. United States, 451 F.2d 783, 789-90 (2d Cir. 1971) (dictum); Lever Bros. Co. v. FTC, 325 F. Supp. 371 (D. Me. 1971); *cf.* Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971).

24. *See* Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971):

> If the LEAA [Law Enforcement Assistance Administration], after following

thorough consideration of this "threshold determination";[25] rather, they have decided on the facts that an action does[26] or does not[27] necessitate a statement, and required the agency either to file one before continuing with the activity, or dismissed the case, accordingly. Because each case centers largely on the peculiar facts of the proposed action, and on the allegations of plaintiffs, no consistent standard of review has emerged.

The court in *Hanly* established a minimum guideline, or "content requirement," of the threshold determination by the agency by requiring GSA to explain in detail *why* it decided that no impact statement was

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> the precepts of . . . NEPA, makes a good faith judgment as to the consequences, courts have no further role to play. We note, however, that a federal agency obligated to take into account the values that . . . NEPA seek[s] to safeguard, may not evade that obligation by keeping its thought processes under wraps. Discretion to decide does not include a right to act perfunctorily or arbitrarily. That is the antithesis of discretion. The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure so that in the event of a later challenge to the agency's procedure, the court will not be left to guess whether the requirements of . . . NEPA have been obeyed.

For further discussion of the *Ely* case, see 1972 DUKE L.J. 667. *See also* Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972); Scherr v. Volpe, 336 F. Supp. 856 (W.D. Wis. 1971). In Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971), the court noted CEQ's construction of the phrase "significantly affecting the quality of the human environment" (*see* note 14 *supra*) and held that HUD had inadequately considered problems such as population distribution, traffic, and changes in the character of the neighborhood in determining what impact the proposal (construction of a high-rise apartment complex) would have.

25. *But see* Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972).

26. *See, e.g.*, Students Challenging Regulatory Agency Procedures v. United States, 346 F. Supp. 189 (D.D.C. 1972); Businessmen Affected Severely by Yearly Action Plans, Inc. v. D.C. City Council, 339 F. Supp. 793 (D.D.C. 1972) (held that an urban renewal project was both "major" and would "significantly affect" the environment as a matter of law); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972). The court in *Natural Resources Defense Council* defined "major federal action" as a "federal action that requires substantial planning, time, resources, or expenditure," and said of the standard "significantly affecting the quality of the human environment" that it "can be construed as having an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment. The cumulative impact with other projects must be considered." *Id.* at 367. *See also* Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971); *cf.* Fayetteville Area Chamber of Commerce & Interstate 95 Comm. v. Volpe, 463 F.2d 402 (4th Cir. 1972).

27. *See* Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n, 464 F.2d 1358 (3d Cir. 1972); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972); Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972); Davis v. Morton, 335 F. Supp. 1258 (D.N.M. 1971) (approval of lease of Indian land not "major").

needed. This position is supported by the legislative history of the Act, which indicates that two statements were envisioned, one to reflect the agency's judgment on whether the action will have the requisite "effect," the second the full impact statement explicitly required by section 102 (2)(C).[28]

The *Hanly* court rejected plaintiffs' argument that all "major" federal actions necessarily have a "significant effect" on the environment, and found that these were distinct concepts, each subject to the agency's judgment.[29] The court stated that the purpose of section 102 was to require federal agencies to "affirmatively develop a reviewable environmental record,"[30] and that this record must reflect a consideration of all relevant information. The court indicated that if GSA determined that a statement was needed, it would then have to comply with the detailed procedures of section 102(2)(C); if not, its decision could again be reviewed by the district court.[31]

In deciding that the GSA memorandum[32] was inadequate with respect to the jail,[33] the court noted that even by the most conservative standard of judicial review of agency actions, GSA acted arbitrarily in not "tak[ing] into account all relevant factors in making its determina-

28. 115 CONG. REC. 40419-20 (1969) (Exh. 2: Section-by-section Analysis of NEPA) (emphasis added):

> (C) After consultation with and obtaining the comments of Federal and State Agencies which have jurisdiction by law with respect to any environmental impact, each agency which proposes legislation or *any other major Federal action* shall make a *detailed statement as to whether the proposal would have a significant effect upon the quality of the human environment. If* the proposal is considered to have such significant effect, *then* the recommendation or report of the proposal must include a *detailed statement* by the responsible official . . . .

Section 6 of the CEQ Guidelines also recommends two statements—a "draft statement" and a "final statement"—designed to ensure circulation of proposed alternatives as early as possible. 36 Fed. Reg. 7724, 7725 (1971).

29. 460 F.2d at 644. This position is supported by S. REP. No. 296, 91st Cong., 1st Sess. 20 (1969), and the materials cited in note 28 *supra.*

30. 460 F.2d at 647.

31. *Id.* at 649.

32. A second memorandum, written by the Commissioner of the Public Building Service of GSA, dealt only with the office building. *Id.* at 645 n.5.

33. *Id.* at 646 (emphasis added):

> The memorandum contains no hard look at the *peculiar* environmental impact of squeezing a jail into a narrow area directly across the street from two large apartment houses. Indeed, there is not even a word about these apartment houses or the others located nearby. If GSA were planning a missile base on that site, a compact discussion of sewage, garbage, water and heat would hardly be adequate. *Additional factors* would have to be considered, and the same principle holds true here.

tion."[34] The court specifically pointed to the agency's failure to consider noise problems and possible inmate disturbances, the potential dangers of placing an out-patient treatment center in an urban residential area, and traffic and parking problems.[35] The court apparently relied on the trial record and plaintiffs' specific allegations in finding GSA's evaluation inadequate.[36]

The *Hanly* court places a further requirement on federal agencies that attempt to avoid writing a section 102(2)(C) impact statement. By forcing them to make a detailed explanation of a no-impact decision, the thoroughness required of this "threshold determination" will depend largely on the deficiences raised at trial by the challenging party, so that the court will have some basis for determining whether the agency acted arbitrarily. It is unclear, however, how closely the detail required of a challenged threshold determination corresponds to the detail required of a full section 102(2)(C) impact statement.

34. *Id.* at 648. Yet the court held that the *same* considerations (and conclusions) of GSA were adequate with respect to the office building. "Thus, whatever the theoretical environmental impact of a nine-story office building may be, in this case the actual impact appears to be minimal and adequately accounted for in the . . . memorandum." *Id.* at 646.

35. *Id.* at 646-47.

36. *See id.* at 643, 647. The court acknowledges that NEPA does not offer an "exhaustive list of so-called 'environmental considerations,'" but states that the Act's aims "without question . . . extend beyond sewage and garbage and even beyond water and air pollution." *Id.* at 647.