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# Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-existing Agency Authority

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# OF CRABBED INTERPRETATIONS AND FRUSTRATED MANDATES: THE EFFECT OF ENVIRONMENTAL POLICY ACTS ON PRE- EXISTING AGENCY AUTHORITY

Carl W. Tobias\* and Daniel N. McLean\*\*

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When Congress passed the National Environmental Policy Act (NEPA) in 1969,<sup>1</sup> the legislation was acclaimed as one of the most important environmental measures ever enacted.<sup>2</sup> States soon fol-

1. 42 U.S.C. § 4321 *et seq.* (1977).

2. Senator Jackson, in introducing for Senate consideration on July 10, 1969, the legislation of which he was the chief sponsor, stated that the National Environmental Policy Act of 1969 was the "most significant measure in the area of natural resource policy ever considered by the Congress." 115 CONG. REC. 19008 (1969). On December 20, 1969, the Senator added that S. 1075 was the "most important and far-reaching environmental and conservation measure ever enacted by the Congress." *Id.* at 40416 (1969). *Accord, id.* at 40422 (remarks of Senator Allott, the ranking minority member of the Senate Interior Committee); *id.* at 40924 (remarks of Representatives Dingell and Saylor, Managers on the Part of the House).

lowed the federal lead, so that by 1976 thirty jurisdictions had adopted statutes similar to the national legislation.<sup>3</sup> The Montana legislature was in the vanguard, passing the Montana Environmental Policy Act (MEPA) in 1971.<sup>4</sup>

The federal agencies now appear to have accepted full responsibility for implementation of NEPA, despite some initial reluctance.<sup>5</sup> Several agencies contended at first that the statute did not authorize them to consider in decisionmaking any environmental factors not expressly provided for in the substantive legislation pursuant to which the agency was acting. That interpretation never achieved widespread recognition, much less acceptance, in the federal bureaucracy and was summarily dismissed by the judiciary. Agencies never raise the issue today, and courts simply assume that it has been settled.

Despite the prompt and thorough demise of the notion in the national arena, the theory continues to be espoused in some states. Courts in few jurisdictions have addressed the question, but most have rejected the narrow interpretation of the effect that environmental policy acts have on agency decisionmaking. Montana, however, has been the exception. In 1976, the supreme court of the state appeared to endorse the doctrine; the Montana agencies immediately embraced the court's ruling and extended it.<sup>6</sup> This article is a critical analysis of the Montana interpretations, in light of analogous federal and state law and the Montana Constitution; it yields the conclusion that the views articulated are simply incorrect as a matter of law and policy.<sup>7</sup>

## I. THE ENVIRONMENTAL POLICY ACTS

Interpretation of the Montana Environmental Policy Act has not been extensive,<sup>8</sup> and the Montana Supreme Court has explic-

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3. W. RODGERS, ENVIRONMENTAL LAW 810 (1977) [hereinafter cited as W. RODGERS]. For more thorough discussion, see notes 181-82 *infra*.

4. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 75-1-101 *et seq.* (1979).

5. See Anderson, *The National Environmental Policy Act* in ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 244-46 (E.L. Dolgin & T.G.P. Guilbert, eds. 1974) [hereinafter cited as Anderson]. Accord, W. RODGERS, *supra* note 3, at 712-13.

6. Neither the judicial nor the agency articulation of this theory can be reduced to manageable proportions without sacrificing substantive content. For a thorough discussion of the court's interpretation, see section I(C)(3) of this article *infra*. For a full statement of the agency view, see notes 255 & 278 *infra*.

7. While this article does focus on the problem as it arises in a particular jurisdiction, the treatment accorded the issue is not wholly site specific. Thus, the paper should assist those who may on occasion encounter a recalcitrant bureaucrat, a reluctant agency, or a persistent applicant at any level of government.

8. The Montana legislature has provided little explicit guidance as to its intent in

itly declared that in construing the statute "it is appropriate to look to the federal interpretation of NEPA."<sup>9</sup> Therefore, a comprehensive evaluation of the national legislation will be provided. That assessment will be followed by a review of decisions rendered in states that have adopted environmental policy measures. Finally, an in-depth examination of developments in Montana will be presented.

### A. *The National Environmental Policy Act*

Congressional intent in enacting NEPA will be gleaned from analysis of the act's statutory language and legislative history. Lest the reader feel that he or she is being asked to accept on faith the view of Congressional purpose offered, judicial interpretation of that legislative intent will be included. This will precede a separate examination of the federal cases that address more directly the precise issue considered in this article.<sup>10</sup>

#### 1. *Congressional Intent*

##### a. *General Expressions in the Legislative History*

NEPA emerged in 1969 from a legislative process which had begun ten years earlier.<sup>11</sup> During that time, understanding of and concern about the environment increased substantially, while evidence of ecological abuse and degradation mounted.<sup>12</sup> Congress re-

passing the measure. Few Montana agencies have expressly articulated their views of MEPA, and none has done so in a manner that is very comprehensive, well-considered, or persuasive. Finally, the Montana Supreme Court has addressed the statute in a significant way only twice. For a thorough discussion of what has occurred in Montana, see section I(C)(3) of this article *infra*.

9. *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 506, 559 P.2d 1157, 1172 (1976) (Haswell, J., dissenting). *Accord*, *Kadillak v. Anaconda Co.*, — Mont. —, 602 P.2d 147, 153 (1979).

10. Because of the peculiar significance that attaches to these decisions, they will be accorded special treatment. This organizational scheme of necessity will entail duplication, since some of the cases that speak explicitly to the authority question also are those which most articulately construe Congressional purpose.

11. See S. REP. No. 91-296, 91st Cong., 1st Sess. 11 (1969); 115 CONG. REC. 29067 (1969) (remarks of Senator Jackson); *id.* at 40422 (remarks of Senator Allott). *Accord*, F.R. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 4* (1973) [hereinafter cited as *NEPA IN THE COURTS*].

12. See S. REP. No. 91-296, 91st Cong., 1st Sess. 4-5, 8-9, 12-13 (1969). Specific expressions of concern were voiced throughout floor debate on NEPA. See, e.g., 115 CONG. REC. 26577-80, 26583-85 (1969).

The terms "environmental" and "ecological" as well as "impacts" and "effects" respectively are used interchangeably in this article, even though the technical definition of the words may not be identical. While Congress is certainly not the definitive authority on matters of this sort, the terms are often mixed in the legislative history and the statute. *Com-*

sponded by enacting an impressive array of measures that were designed to remedy specific problems such as air and water pollution. However, no comprehensive scheme for addressing declining environmental quality was formulated.<sup>13</sup>

In the last half of the decade, members of Congress increasingly came to realize that agencies of the federal government were responsible for many environmental problems.<sup>14</sup> The legislators learned that a major source of difficulty was the failure of agencies to take into account ecological matters in the decisional process<sup>15</sup> and that this deficiency frequently was attributable to questions of agency authority. "In many areas of Federal action," Congress found "no body of experience or precedent for substantial and consistent consideration of environmental factors in decisionmaking."<sup>16</sup> In other fields of federal activity, the legislators discovered that "existing legislation [did] not provide clear authority for the consideration of environmental factors which conflict with other objectives."<sup>17</sup> Finally, and most significantly, Congress found that

pare 42 U.S.C. § 4332(2)(C)(i) (1977) with 42 U.S.C. § 4332(2)(C)(ii) (1977).

13. Congress over the past decade has passed a procession of landmark conservation measures on behalf of recreation and wilderness . . . establishment of a system of national trails and a system of national scenic rivers, air and water pollution control, noise abatement. . . .

S. REP. No. 91-296, 91st Cong., 1st Sess. 13-14 (1969). *Accord*, 115 CONG. REC. 40422 (1969) (remarks of Senator Allott).

[T]here is still no comprehensive national policy on environmental management. There are limited policies directed to some areas where specific problems are recognized to exist, but we do not have a considered statement of overall national goals and purposes.

S. REP. No. 91-296, 91st Cong., 1st Sess. 5 (1969) (emphasis added).

14. See S. REP. No. 91-296, 91st Cong., 1st Sess. 4, 8 (1969); 115 CONG. REC. 26573-74 (1969) (remarks of Representative Pelly); *id.* at 29052-53 (remarks of Senator Muskie).

15. Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view in the planning and conduct of Federal activities. . . .

In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors.

S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969). See R.A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT 80-82 (1976). *Cf.* 115 CONG. REC. 29055 (1969) (remarks by Senator Jackson stating that S. 1075 was designed to insure that agencies took into account all environmental considerations in decisionmaking).

16. S. REP. No. 91-296, 91st Cong., 1st Sess. 19 (1969). *Accord*, 115 CONG. REC. 29067 (1969) (Differences in the Senate- and House-Passed Versions of S. 1075).

Virtually every agency of the Federal Government plays some role in determining how well the environment is managed. Yet, many of these agencies do not have a mandate, a body of law, or a set of policies to guide their actions which have an impact on the environment.

S. REP. No. 91-296, 91st Cong., 1st Sess. 9 (1969). *Accord*, *id.* at 14.

17. *Id.* at 19. *Accord*, 115 CONG. REC. 29067 (1969) (Differences in the Senate- and

the "authorizing legislation of some agencies [had] been construed to prohibit the consideration of important environmental values."<sup>18</sup>

The specific contention made by the agencies was that they were precluded from applying in decisionmaking ecological factors not expressly provided for in the substantive statutes under which they were operating. The experience of the Atomic Energy Commission (AEC) is illustrative. The AEC "had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the [nonradiological] adverse environmental effects of its actions:"<sup>19</sup>

[T]he Commission . . . refuse[s] to consider, as outside its regulatory jurisdiction, evidence of possible thermal pollution [the effects on a river—its water, flora and fauna—of the injection of heated water] of the Connecticut River as a result of the discharge of cooling water by applicant's facility.<sup>20</sup>

The First Circuit Court of Appeals approved this interpretation in *New Hampshire v. Atomic Energy Commission*.<sup>21</sup>

The chief sponsor of NEPA, Senator Jackson, most clearly articulated the Congressional response to this problem in explaining the Senate Bill on the floor. The Senator indicated that he was aware of the construction espoused by agencies, such as the AEC, as well as its affirmation by the First Circuit, and that NEPA was intended, in part, to overturn that interpretation:

[NEPA] . . . will give all agencies a mandate, a responsibility, and a meaningful tool to insure that the quality of America's fu-

House-Passed Versions of S. 1075).

In [certain] agencies, especially when the expenditure of funds is involved, an official's latitude to deviate from narrow policies or the "most economical alternative" to achieve an environmental goal may be strictly circumscribed by congressional authorizations which have overlooked existing or potential environmental problems or the limitations of agency procedures.

S. REP. NO. 91-296, 91st Cong., 1st Sess. 13 (1969).

The members of Congress also realized that agencies could not be expected to, and did not in fact, accord the same consideration to environmental factors as those deemed to be part of their primary missions. See 115 CONG. REC. 29053 (1969) (remarks of Senator Muskie); *id.* at 26573 (remarks of Representative Pelly).

18. S. REP. NO. 91-296, 91st Cong., 1st Sess. 9 (1969).

In [certain] areas, lack of express authority has been interpreted to prohibit consideration of environmental factors.

115 CONG. REC. 29067-68 (1969) (Differences in the Senate- and House-Passed Versions of S. 1075).

19. *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

20. *New Hampshire v. AEC*, 406 F.2d 170, 171 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1969).

21. *Id.*

ture environment is as good or better than today's. Departments such as the Departments of Defense, Transportation, Commerce, and Housing and Urban Development will then no longer have an excuse for ignoring environmental values in the pursuit of narrower, more immediate, mission-oriented goals. *Agencies such as the Atomic Energy Commission which now contend they have no legislative authority to consider environmental values will be given the authority, the responsibility, and a directive to do so. . . . [I]t is time that AEC be given a larger mandate against which to weigh the environmental impact of its planned and proposed activities. The same is true of many other agencies.*<sup>22</sup>

Senator Jackson had earlier voiced almost identical sentiments, when he explained that his intention in amending the initial version of the Senate Bill was to provide

an expanded statement of national environmental management goals and to . . . grant new authority to Federal agencies, which at the present time, have no mandate or responsibility for the management and protection of the human environment [so that no] agency will then be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions.<sup>23</sup>

Similar views are articulated throughout the legislative history.<sup>24</sup>

22. 115 CONG. REC. 29055-56 (1969) (remarks of Senator Jackson) (emphasis added). One commentator has asserted that Congress knew about the contention made by the AEC in the First Circuit case. See Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 3 ENV'TL L. REP. 50035 (1971) [hereinafter cited as Peterson]. Cf. R. STEWART & J. KRIER, *ENVIRONMENTAL LAW AND POLICY* 778 n.8 (1978).

23. *National Environmental Policy: Hearing on S. 1075, S. 237 and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 206 (1969) [hereinafter cited as Hearing]. Nearly the same thought appears several times in the Senate Report. See S. REP. NO. 91-296, 91st Cong., 1st Sess. 9, 13 (1969).

24. These statements are made most often in the context of examination of particular provisions of NEPA. Thus, Representative Dingell declared that section 102 was "primarily designed to assure consideration of environmental matters by agencies in their planning and decision-making—but most especially those agencies who now have little or no legislative authority to take environmental considerations into account." 115 CONG. REC. 40925 (1969). *Accord, id.* at 40418 (Major Changes in S. 1075 as Passed by the Senate). The Senate Report includes similar statements. See, e.g., S. REP. NO. 91-296, 91st Cong., 1st Sess. 19-20 (1969). Senator Jackson stated that "subsection 102(b) requires the development of procedures designed to insure that all relevant environmental values and amenities are considered in the calculus of project development and decisionmaking." 115 CONG. REC. 29055 (1969). Finally, in alluding to section 105, the Senator remarked:

The bill specifically provides that its provisions are supplemental to the existing mandates and authorizations of all Federal agencies. This constitutes a statutory enlargement of the responsibilities and concerns of all instrumentalities of the Federal Government.

*Id.* at 19009. Expressions of legislative intent also may be found in the statutory language of specific provisions of NEPA. For a discussion of that wording and accompanying legislative



In sum, general expressions of Congressional intent in the legislative history indicate that Congress meant NEPA to address the contribution of federal agencies to the declining quality of the national environment and their failure to take into account ecological factors in decisionmaking by requiring agencies to fully consider all environmental impacts of their actions.<sup>25</sup>

*b. Statutory Language of NEPA and Specific Expressions in the Legislative History Explaining that Language*

Congress also manifested quite clearly its intent in the statutory language of particular provisions of NEPA and in the legislative history explicating the terminology employed. Thus, Congress formulated a national policy and goals for the environment and expressly declared that they were to be "supplementary to those set forth in existing authorizations of Federal agencies." All agencies were authorized and directed to "administer and interpret" extant powers in accordance with the newly articulated principles and to meet stringent requirements mandating comprehensive consideration of all environmental factors in decisionmaking. These commands were to be followed "to the fullest extent possible," unless full compliance was rendered impossible by a clear conflict of statutory authority. Agencies were instructed to review existing authorizations to ascertain whether discrepancies existed so that remedial measures might be proposed to the President.

*i. The National Environmental Policy and Goals of NEPA: Section 101*

In section 101 of NEPA, Congress declared a policy and established goals for the nation's environment.<sup>26</sup> Section 101(a) enunciates NEPA's fundamental policy: the federal government must use "all practicable means and measures" to protect ecological values.<sup>27</sup> This was grounded in Congressional recognition of the "profound

history, see section I(A)(1)(b) of this article *infra*.

25. The above interpretation of Congressional intent is supported by case law. See, e.g., *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972); *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). The construction also finds support in the scholarly commentary. See, e.g., Peterson, *supra* note 22; NEPA IN THE COURTS, *supra* note 11, at ch. I.

26. 42 U.S.C. § 4331 (1977).

27. *Id.* Congress evinced its concern by declaring that it would be the "continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations . . . to create and maintain conditions under which man and nature can exist in productive harmony . . ." *Id.*

impact of man's activity on the interrelation of all components of the environment" and the "critical importance of restoring and maintaining environmental quality."<sup>28</sup>

To insure that this general policy would be realized, Congress imposed upon agencies a duty to achieve six specific national goals for the environment, which are enumerated in section 101(b).<sup>29</sup> Thus, the federal government has a "continuing responsibility" to do everything possible to act as "trustee of the environment for future generations;"<sup>30</sup> to assure "safe, healthful, productive and aesthetically and culturally pleasing surroundings;"<sup>31</sup> to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable"<sup>32</sup> consequences; to "preserve important historic, cultural and natural aspects of our national heritage;"<sup>33</sup> to "maintain an environment which supports diversity and variety of individual choice;"<sup>34</sup> to "achieve a balance between population and resource use;"<sup>35</sup> and to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."<sup>36</sup> This obligation is qualified only by the requirement that agencies "use all practicable means, consistent with other essential considerations of national policy."<sup>37</sup>

While section 101 does not explicitly delineate the relationship between its exhortations and agency decisionmaking, its history clearly does. Senator Jackson observed that an important, specific

28. *Id.*

29. Section 101 was intended to provide

a congressional declaration that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with other essential considerations of national policy to improve and coordinate Federal planning and activities to the end that certain broad national goals in the management of the environment may be attained.

S. REP. NO. 91-296, 91st Cong., 1st Sess. 9 (1969). *Accord, id.* at 6.

30. *Id.* at 18.

31. *Id.*

32. *Id.*

33. *Id.*

34. 42 U.S.C. § 4331(b)(4) (1977).

35. *Id.*

36. S. REP. NO. 91-296, 91st Cong., 1st Sess. 19 (1969). The Senate Report stated that "it is vital that" efforts to protect and improve the "quality of the Nation's renewable resources such as air and water . . . be continued and intensified because they are among the most visible, pressing, and immediate concerns of environmental management." *Id.* at 19.

37. There is rather widespread agreement that the "general substantive policy of the Act [set forth in section 101] is a flexible one" and "leaves room for a responsible exercise of discretion." *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). *But cf.* Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. INDUS. AND COM. L. REV. 685, 694 (1972) [hereinafter cited as Cohen & Warren].

reason for including the "statement of national policy and the declaration of national goals found in section 101 . . . [was to provide] a statutory foundation to watch [sic] administrators may refer to it [sic] for guidance in making decisions which find environmental values in conflict with other values."<sup>38</sup> The Senate Report declares that one express purpose of the provision was to "contribute to a more orderly, rational, and constructive Federal response to environmental decisionmaking."<sup>39</sup> Similar expressions of intent were voiced by chief proponents of the measure in the House.<sup>40</sup> Finally, it is difficult to understand how Congress could have contemplated that the national environmental policy and goals would be realized without full consideration by agencies of all environmental effects of their actions.<sup>41</sup> Judicial interpretation also holds that section 101 was meant to provide guidance in agency decisionmaking that has ecological impacts.<sup>42</sup> Indeed, several Circuit Courts of Appeal have stated that agencies are to reach decisions "after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA" and that the "actual balance of costs and benefits struck by the agency according to those standards," must accord adequate "weight to environmental factors."<sup>43</sup>

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38. 115 CONG. REC. 40416 (1969). This statement echoes remarks that the Senator had made on the floor six months earlier. *See id.* at 19009. In describing section 101, Senator Jackson also observed:

What is involved is a congressional declaration that we do *not intend* as a government . . . to initiate actions which endanger the continued existence or the health of mankind.

*Id.* at 40416 (emphasis added). *Accord, id.* at 19009 & 29056.

39. S. REP. NO. 91-296, 91st Cong., 1st Sess. 9 (1969). The report then states that the section was meant specifically to rectify deficiencies in agency authority which prevented adequate "consideration of important environmental values." *Id.*

40. *See* 115 CONG. REC. 40925-26 (1969) (remarks of Representatives Mailliard and Saylor respectively, both of whom were Managers on the Part of the House).

41. *Cf.* NEPA IN THE COURTS, *supra* note 11, at 259 (Six provisions of section 101(b) when "read in conjunction with the legislative history and with the Act's other provisions . . . suggest that Congress said more about the freedom of agencies to consider and trade off environmental values than the courts have yet fully recognized.").

42. The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. *NEPA was intended to effect substantive changes in decisionmaking. Section 101(b) of the Act states that agencies have an obligation . . . to preserve and enhance the environment. To this end, § 101 sets out specific environmental goals to serve as a set of policies and to guide agency action affecting the environment.*

*Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973) (emphasis added). *Accord, Concerned About Trident v. Schlesinger*, 400 F. Supp. 454, 480 (D.D.C. 1975), *rev'd on other grounds sub nom., Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977).

43. *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 353 (8th Cir. 1972). *Ac-*

Case law fully supports the remainder of the analysis of this provision offered above. Thus, the District of Columbia Circuit Court of Appeals declared that "section 101 sets forth the Act's basic substantive policy: that the federal government 'use all practicable means and measures' to protect environmental values."<sup>44</sup> The Eighth Circuit Court of Appeals found that section 101(b) requires agencies to do everything feasible "to preserve and protect the environment" by enumerating "specific environmental goals to serve" as guidance.<sup>45</sup> In *Calvert Cliffs Coordinating Committee v. AEC*, the court observed that the same provision imposed an "explicit duty on federal officials" in the nature of a "continuing responsibility" to "avoid environmental degradation, preserve 'historical, cultural, and natural' resources, and promote 'the widest range of beneficial uses of the environment' . . ."<sup>46</sup> Other courts have found that the adequacy of agency decisionmaking should be measured in light of the substantive mandates of section 101.<sup>47</sup> Finally, the District of Columbia Circuit Court of Appeals has stated

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*cord*, Conservation Council of North Carolina v. Froehlike, 473 F.2d 664, 665 (4th Cir. 1973); *Sierra Club v. Froehlike*, 486 F.2d 946, 952 (7th Cir. 1973). The origin of this concept appears to be *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). While these observations arise in the context of explicating how judicial review of substantive agency decisions made pursuant to NEPA will be undertaken, the remarks still have considerable force. The District of Columbia Circuit Court of Appeals has even indicated that the substantive mandate of section 101 imposes upon agencies a duty to fully take into account environmental factors in their decisional processes:

Only once—in § 102(2)(B)—does the Act state, in terms, that federal agencies must give full "consideration to environmental impact as part of their decision-making processes." However, a requirement of consideration is clearly implicit in the substantive mandate of § 101. . . .

*Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112-13 n.5 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972) (emphasis added).

44. *Id.* at 1112. *Accord*, *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1174 (6th Cir. 1972); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 786 (D.Me. 1972). The *Calvert Cliffs* court appears to be referring in this passage to section 101(a). See *Anderson*, *supra* note 5, at 299.

45. *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). *Accord*, *Concerned About Trident v. Schlesinger*, 400 F. Supp. 451, 480 (D.D.C. 1975), *rev'd on other grounds sub nom.*, *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977).

46. *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). *Accord*, *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1174 (6th Cir. 1972). *Cf.* *Andrus v. Sierra Club*, 99 S.Ct. 2335, 2337 (1979) (section 101(b) articulates the NEPA purposes set forth in "bold strokes" in section 101(a) with even greater particularity).

47. See, e.g., *Akers v. Resor*, 339 F. Supp. 1375, 1380 (W.D. Tenn. 1972); *Sierra Club v. Froehlike*, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd on other grounds sub nom.*, *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); *Montgomery v. Ellis*, 364 F. Supp. 517 (N.D. Ala. 1973).

that the "general substantive policy 'of section 101' leaves room for a responsible exercise of discretion," while still recognizing the importance of taking into account ecological factors:

Congress did not establish environmental protection as an exclusive goal; rather it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations.<sup>48</sup>

In sum, Congress enunciated in section 101 of NEPA a broad national policy of environmental protection and six specific goals for agencies to attain in management of the country's environment. These principles were meant to impose new and additional responsibilities upon the federal bureaucracy.

ii. *The National Environmental Policy and Goals Supplement Existing Agency Authority: Sections 105 and 102(1)*

Congress made clear in both sections 105 and 102(1) of NEPA that it intended the declarations of section 101 to add to extant statutory powers. Section 105 explicitly states that "the policies and goals set forth in this Act are *supplementary* to those set forth in existing authorizations of Federal agencies."<sup>49</sup> Thus, agencies are to treat NEPA's mandates as additions to prior congressional commands.

The genesis of section 105 was an exchange during the hearing on the Senate Bill between Senator Jackson, the head, and Professor Caldwell, a consultant, of the Interior Committee. In that colloquy, the Senator stated that he was considering the imposition of a

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48. *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). The scholarly commentary supports the interpretation of section 101 provided in this paper. See, e.g., Peterson, *supra* note 22; NEPA IN THE COURTS, *supra* note 11, at chs. I, VII. The guidelines of the Council on Environmental Quality (CEQ) also are in agreement with the view espoused in this article. See 40 C.F.R. § 1500.1-1500.2 (1979 and 1973); 40 C.F.R. § 1500.6(b) (1973). The CEQ was established by Title II of NEPA, which also defines the council's responsibilities. See 42 U.S.C. § 4341 *et seq.* (1977). The CEQ has emerged as the overseer of NEPA implementation by the federal agencies. Between 1970 and 1973, the council promulgated three sets of guidelines for agency compliance with the act. The third set (38 Fed. Reg. 20550 (1973)) was not superseded until November 29, 1978, when a fourth set of guidelines was issued by the CEQ (43 Fed. Reg. 55992). For purposes of this article, the 1978 guidelines, which appear at 40 C.F.R. 1500 *et seq.* (1979), will be referred to as "new." The 1973 guidelines will be referred to as "old" and references to them will be dated "(1973)." Many courts have relied upon the CEQ guidance. See, e.g., *Scientists Institute for Public Information v. AEC*, 481 F.2d 1079, 1088, 1090 (D.C. Cir. 1973); *Simmans v. Grant*, 370 F. Supp. 5, 14-16 (S.D. Tex. 1974). But even though they "have become influential interpretive aids, the guidelines are not automatically embraced." W. RODGERS, *supra* note 3, at 708.

49. 42 U.S.C. § 4335 (1977) (emphasis added).

“general requirement that would be applicable to *all* agencies that have responsibilities that affect the environment rather than trying to go through agency by agency.”<sup>50</sup> The committee apparently decided to adopt the concept, because upon completion of the hearing, its staff was directed to

draft an expanded statement of national environmental management goals and to . . . *grant new authority to Federal agencies* which, at the present time, have no mandate or responsibility for the management and protection of the human environment [so that no] agency will then be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions.<sup>51</sup>

Committee intent that NEPA expand pre-existing statutory authority of agencies is confirmed by statements included in its report,<sup>52</sup> as well as subsequent remarks of Senator Jackson:

The bill specifically provides that its provisions are *supplemental* to the existing mandates and authorizations of all Federal agencies. This constitutes a *statutory enlargement* of the responsibilities and the concerns of all instrumentalities of the Federal Government.<sup>53</sup>

Nothing occurred during the deliberations of the conference committee that detracts from the Senate's clearly expressed intention to provide agencies with additional power; indeed, the actions of

50. Hearing, *supra* note 23, at 117. His reasons for exploring that possibility were clearly articulated during the exchange:

I am trying to avoid a recodification of all of the statutes . . . . If we try to go through all of the agencies that are now exercising certain responsibilities pursuant to law in which there is no environmental policy or standard laid out, we could be engaged in a recodification of the Federal statutes for a long, long time.

*Id.*

51. *Id.* at 206.

52. The purpose of S. 1075 is . . . to supplement existing, but narrow and fractionated, congressional declarations of environmental policy.

S. 1075, as reported by the committee, would provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of independent agencies as well as the ongoing activities of the regular Federal agencies.

S. REP. NO. 91-296, 91st Cong., 1st Sess. 9, 14 (1969). Moreover, the Section-By-Section Analysis included in the report states:

This section [105 of NEPA] provides that the policies and goals set forth in this act are supplementary to the existing mandates and authorizations of Federal agencies.

*Id.* at 21. *Accord*, 115 CONG. REC. 29068 (description of section of the Senate bill which became section 105 in Differences in the Senate- and House-Passed Versions of S. 1075).

53. 115 CONG. REC. 19009 (1969) (emphasis added).

that committee reinforce the "theory of a present jurisdictional grant."<sup>54</sup>

Most telling was the conference committee's deletion of a provision in the House Bill that was apparently intended to have the opposite effect of the section of the Senate Bill which had expressly made NEPA supplementary. The language in the House measure, which was adopted as an amendment on the floor provided:

Nothing in this Act shall increase, decrease, or change any responsibility or authority of any Federal official or agency created by other provision of law.<sup>55</sup>

Representative Aspinall, who offered the amendment, stated that its express purpose was

to make clear that *nothing* in this act *changes the authority and responsibility of existing agencies created by other provisions of law*. In my opinion, if additional authority is needed and direction to existing agencies is needed, *they should be provided by separate legislation*.<sup>56</sup>

The conference committee omitted this provision of the House Bill and retained the Senate version mandating supplementation.<sup>57</sup> The

54. Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 *RUTGERS L. REV.* 231, 254 (1970) [hereinafter cited as Hanks & Hanks]. Moreover, upon return of the legislation from conference, Senator Jackson inserted in the Congressional Record a document entitled Major Changes in S. 1075 as Passed by the Senate which provided: "The effect of . . . section [105] is to give recognition to the fact that the bill is *in addition to*, but does not modify or repeal *existing law*." 115 *CONG. REC.* 40418 (1969).

55. 115 *CONG. REC.* 26589 (1969). The amendment was in the nature of an addition; the House Bill never included a provision comparable to that in the legislation passed by the Senate. See H.R. 12549, 91st Cong., 1st Sess. (1969). Section 103 of the Senate Bill, which became section 105 of NEPA, provided:

The policies and goals set forth in this Act are supplementary to, but shall not be considered to repeal the existing mandates and authorizations of Federal agencies. S. 1075, 91st Cong., 1st Sess. (1969).

56. *Id.* at 26589 (emphasis added). In comments made just prior to introduction of the new language, the Representative indicated his recognition of the fact that the Senate version would supplement extant agency authority. Indeed, Representative Aspinall's very intent in proffering the amendment apparently was to counter the perceived effect of the Senate Bill. See *id.* at 26587.

57. "In accepting [certain] change[s] to section 102 (and also to the provisions of section 103), the House conferees agreed to delete section 9 of the House [Aspinall] amendment from the conference substitute." Statement of the Managers on the Part of the House, H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 8 (1969). Section 105 of NEPA "is a slightly revised version of section 103 of the Senate bill." *Id.* at 9. Compare section 103 of S. 1075, 91st Cong., 1st Sess. 1969, with section 105 of NEPA, 42 U.S.C. § 4335 (1977). In explaining the final provision, the House Managers stated:

This section declares that the policies and goals set forth in the bill are supple-

comments of Representative Aspinall, when sharply criticizing the reading accorded the final legislation by all of the other House conferees, only give credence to the view that NEPA was meant to enlarge extant agency power:

*It has been my position from the beginning that existing Federal agencies should not be given new statutory authority by the legislation. All agencies should cooperate so far as possible under their existing authority in complying with the congressional statement of environmental policy and should seek, through normal procedures, the authority they need to fully comply with this policy.*<sup>58</sup>

By deleting the Aspinall amendment and adopting the Senate provision, the conference committee clearly laid to rest any contention that NEPA was not intended to expand pre-existing authority of agencies.<sup>59</sup>

Section 102(1) of the act also manifests legislative intent to add to extant agency power:

*Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act.*<sup>60</sup>

By requiring that prior agency authority be construed and implemented in a manner that comports to the greatest degree possible

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mentary to those set forth in existing authorities of Federal agencies.

Statement of the Managers on the Part of the House, H.R. REP. No. 91-765, 91st Cong., 1st Sess. 10 (1969).

58. 115 CONG. REC. 40926 (1969) (emphasis added). Representative Aspinall's interpretation simply cannot withstand the overwhelming weight of contrary authority: the comments of Senator Jackson as well as the statements included in the Senate Report; the language in the Statement of the Managers; and the remarks of Senator Jackson and Senator Allott indicating support by the Senate conferees for the interpretation expressed by their counterparts in the House. See 115 CONG. REC. 40415-16, 40421 (1969). "Under the rules for interpretation of legislative history, the interpretation of the National Environmental Policy Act stated by the managers of the bill for the House of Representatives is the correct interpretation of the Act." V. YANNAcone & B. COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES 166 (1971) (citation omitted) [hereinafter cited as V. YANNAcone & B. COHEN]. Accord, Hanks & Hanks, *supra* note 54, at 256.

59. Another important modification made by the conference committee, which adds force to the argument that Congress intended to supplement pre-existing agency power, is fully explained in the Hanks article. *Id.* at 252.

60. 42 U.S.C. § 4332(1) (1977) (emphasis added). Omission of the term "goals," which appears in sections 101 and 105 of NEPA, from section 102(1) probably should be ascribed to deficient drafting, because there is not indication in the legislative history of any Congressional intent to exclude "goals" from section 102(1). Indeed, policies and goals, as well as principles, are used interchangeably throughout the legislative history. See, e.g., 115 CONG. REC. 19009 (1969) (remarks of Senator Jackson).



with the national policy and goals of environmental protection of section 101, Congress made those new considerations supplementary to existing authorizations.<sup>61</sup>

Very little legislative history speaks directly to section 102(1), and virtually none mentions its additive effect. However, the Senate report does state that one purpose of the provision was to address deficiencies in extant authority of agencies, which had prevented full consideration of environmental factors, by supplementing that power with the policy and goals of section 101.<sup>62</sup> Thus, section 102(1) also indicates that Congress intended to add to prior agency authority.<sup>63</sup>

The judiciary agrees with the interpretation of NEPA provided above. Few decisions have expressly analyzed either section

61. Supplementation thus results when the policy and goals of section 101 are superimposed upon extant statutory requirements by operation of the mandatory phraseology that both precedes, and is included in, section 102(1). The only exception to supplementation occurs when there is a clear conflict of statutory authority between those pre-existing authorizations and the policy and goals of section 101. The recent decision in *Natural Resources Defense Council v. Berklund*, 609 F.2d 553 (D.C.Cir. 1979) illustrates this phenomenon. The court found that NEPA did not vest the agency with discretion to deny on environmental grounds lease applications filed under the Mineral Leasing Act of 1920, 30 U.S.C. § 201(b) (1976), where Congress has indicated its intent that the leasing statute impose upon the agency a mandatory duty to grant such requests. The following specific observation about section 102(1) appears in *Berklund*: "The courts have concluded that the limit of this directive is reached when the NEPA policies conflict with an existing statutory scheme." *Natural Resources Defense Council v. Berklund*, 609 F.2d 553, 558 (D.C.Cir. 1979). See generally note 84 *infra*. For a discussion of how Congress intended agencies to construe prior authority and what agencies were instructed to do where clear conflicts were discovered, see *id.*

62. In many areas of federal action there is no body of experience or precedent for substantial and consistent consideration of environmental factors in decision-making. In some areas of federal activity, existing legislation does not provide clear authority for the consideration of environmental factors which conflict with other objectives.

To remedy present shortcomings in the legislative foundation of existing programs, . . . section 102 authorizes and directs that the existing body of federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act.

S.REP. NO. 91-296, 91st Cong., 1st Sess. 19-20 (1969). The few remaining direct references to the section in the legislative history are almost exclusively descriptive. See, e.g., Statement of the Managers on the Part of the House, H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 8 (1969). After making just such an allusion, Senator Jackson does state:

Taken together, the provisions 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. 40416 (1969). But, more explicit references to section 102(1) do not appear in the legislative history. Cf. *id.* at 40925-26 (1969) (remarks of Representatives Mailliard and Saylor linking section 102(1) to section 101). Finally, virtually no legislative history speaks with directness to supplementation.

63. For examination of section 102(1) from a different perspective, see section I(A)(1)(b)(iii)(b) of this article *infra*.

105 or 102(1) in this context.<sup>64</sup> However, many courts, by finding that the act requires agencies to take into account ecological considerations not explicitly provided for in the standards of the substantive legislation pursuant to which they are proceeding, have clearly indicated that NEPA is supplementary.<sup>65</sup> Finally, the guidelines of the Council on Environmental Quality (CEQ)

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64. *EDF v. Matthews*, 410 F. Supp. 336, 338 (D.D.C. 1976) provides the most comprehensive treatment of supplementation:

[I]n light of NEPA's broad mandate that all environmental considerations be taken into account, we find that NEPA provides FDA with supplementary authority to base its substantive decisions on all environmental considerations including those not expressly identified in the FDCA [Food, Drug, and Cosmetic Act] and FDA's other statutes. This conclusion finds support in the legislative history, the precise statutory language, the holdings of the courts, and the construction adopted by other Federal agencies. . . . NEPA requires FDA to *consider* environmental factors in its decision-making process and supplements its existing authority to permit it to act on those considerations.

Section 102(1) is one of the provisions of NEPA upon which *Calvert Cliffs* court relies for the proposition that the act by implication requires agencies to "give full 'consideration' to environmental impact as part of their decision-making processes." *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112 n. 5 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). *Cf. id.* at 1115 n. 12, 1126 (reference to section 105 in the context of stating that the Senate sponsors intended a "supplementing" of "responsibilities in water quality matters"). In *Gulf Oil Co. v. Morton*, 493 F.2d 141, 145 (9th Cir. 1973), the judges stated that section 102(1) would remove "any doubt in our minds that the secretary's range of choices [under the Outer Continental Shelf Lands Act] includes suspension [of leases] to conserve the natural resources of the outer continental shelf." One court has recently rejected a claim that section 102(1) of NEPA authorizes the Secretary of the Interior to deny on environmental grounds applications filed under the Mineral Leasing Act of 1920 where applicants have satisfied all requirements of the leasing measure. *See Natural Resources Defense Council v. Berklund*, 609 F.2d 553 (D.C.Cir. 1979).

65. Thus, the Atomic Energy Commission (now the Nuclear Regulatory Commission) must take into account nonradiological environmental effects, especially water quality impacts, when licensing nuclear power plants even though the Atomic Energy Act only mandates consideration of radiological hazards. *See Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). Similarly, the Corps of Engineers must take into account ecological impacts when issuing permits to allow refuse to be dumped into, or dredging and filling to occur in, navigable waters under the Rivers and Harbors Act. *See Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). *Cf. Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971), *rev'd and remanded*, 451 F.2d 1130, 1138 (4th Cir. 1971); *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829, 833-34 (D.D.C. 1974), *aff'd mem.*, 527 F.2d 1386, *cert. denied*, 427 U.S. 913 (1976); *NRDC v. SEC*, 389 F. Supp. 689, 695 (D.D.C. 1974), *remanded for reconsideration*, 432 F. Supp. 1190 (D.D.C. 1977), *rev'd and remanded on other grounds*, 606 F.2d 1031 (D.C. Cir. 1979).

Courts also have found that "NEPA makes environmental considerations part of the mandate" of agencies. *See, e.g., NRDC v. SEC*, 606 F.2d 1031, 1044 (D.C. Cir. 1979); *NAACP v. FPC*, 520 F.2d 432, 442 (D.C. Cir. 1975), *aff'd* 425 U.S. 662 (1976); *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 420 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972). Finally, courts have *not* accorded supplementary effect to NEPA in those rare instances where a clear conflict of statutory authority has been found to exist. *See, e.g., Natural Resource Defense Council v. Berklund*, 609 F.2d 553 (D.C.Cir. 1979). *See generally* note 84 *infra*.

strongly and explicitly support the construction offered in this article,<sup>66</sup> and the scholarly writing also favors this interpretation.<sup>67</sup>

In sum, Congress addressed the question of agency power most directly in sections 105 and 102(1) of NEPA by making the national environmental policy and goals of section 101 supplementary to extant authorizations.<sup>68</sup> Treatment of the issue in section 102(2), while often quite explicit, is sometimes less direct; however, the section does remain significant and will be examined below.<sup>69</sup>

### iii. *Agency Implementation of the National Environmental Policy and Goals to the Fullest Extent Possible: Section 102*

Section 102 is fundamentally important to the expansion of agency duties worked by NEPA. Some members of Congress feared that the "lofty declarations" of section 101 might become "nothing more than that"<sup>70</sup> and recognized that if the section's "goals and principles [were] to be effective, they must be capable of being applied in action."<sup>71</sup> The legislators also realized that those "policies

66. The new and old guidelines are substantially the same; however, the latter speak more comprehensively to supplementation:

This means that each agency shall interpret the provisions of the act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the act's national environmental objectives.

40 C.F.R. § 1500.4 (1973). *Accord*, 40 C.F.R. § 1500.6 (1979).

67. *See, e.g.*, Hanks & Hanks, *supra* note 54; Donovan, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 12 B.C. INDUS. COM. L. REV. 541 (1971).

68. The meaning of supplementation in this context is largely self-explanatory. Any ambiguity as to Congressional intent that remains after reading the statutory language can be clarified by consulting the legislative history in the text and footnotes immediately above. These passages indicate that Congress meant to grant *new authority* to agencies and to *enlarge* pre-existing statutory mandates so that all ecological factors would be considered in decisionmaking.

The authors of a treatise on environmental law explain that the effect of NEPA "upon the existing statutory authority of federal agencies should be described as 'supplemental' rather than 'modified' or some other word of limitation." V. YANNAKONE & B. COHEN, *supra* note 58, at 167 n. 12.

69. The implications of section 102(1) for section 102(2) are somewhat different from those for the concept of supplementation and will be discussed as well.

70. *See* Hearing, *supra* note 23, at 116 (remarks of Senator Jackson).

A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail. . . .

S. REP. No. 91-296, 91st Cong., 1st Sess. 9 (1969).

[I]f an environmental policy is to become more than rhetoric, and if the studies and advice of any high-level, advisory group are to be translated into action, each of these agencies must be enabled and directed to participate in active and objective-oriented environmental management.

115 CONG. REC. 29087 (1969) (remarks of Senator Jackson).

71. *Id.* The Senate Report states that the express purpose of section 102 was "to establish action-forcing procedures which will help to insure that the policies enunciated in

and goals [could] be implemented if they [were] incorporated into the ongoing activities of the Federal Government in carrying out its other responsibilities to the public."<sup>72</sup> Thus, Congress in section 102 sought to insure that these principles would be infused into day-to-day agency programs and operations<sup>73</sup> by imposing mandatory duties upon the agencies that require full consideration of ecological factors in decisional processes:

Section 102 authorizes and directs all Federal agencies, to the fullest extent possible, to administer their existing laws, regulations, and policies in conformance with the policies set forth in this act. It also directs all agencies to assure consideration of the environmental impact of their actions in decisionmaking. . . .

*Taken together, the provisions of section 102 direct any federal agency which takes action that it must take into account environmental management and environmental quality considerations.*<sup>74</sup>

section 101 are implemented." *Id.* at 19. The meaning of the action-forcing concept is most clearly defined in a colloquy between Senator Jackson and Professor Caldwell during the Senate hearing in which the committee consultant stated:

[I] would urge that in the shaping of [a national environmental] policy, it have an action-forcing, operational aspect. When we speak of policy we ought to think of a statement which is so written that it is capable of implementation; that it is not merely a statement of things hoped for; not merely a statement which will compel or reinforce or assist all of these things, the executive agencies in particular . . . to take the kind of action which will protect and reinforce what I have called the life support system of this country. . . . For example, it seems to me that a statement of policy by the Congress should at least consider measures to require the Federal agencies, in submitting proposals, to contain within the proposals an evaluation of the effect of these proposals upon the state of the environment, that in the licensing procedures of the various agencies such as the Atomic Energy Commission . . . there should also be, to the extent that there may not now exist fully or adequately, certain requirements with respect to environmental protection.

Hearing, *supra* note 23, at 116. Senator Jackson agreed. *Id.* at 116-17.

72. S. REP. No. 91-296, 91st Cong., 1st Sess. 19 (1969). *Accord*, 115 CONG. REC. 19009 (1969) (remarks of Senator Jackson).

73. To insure that the policies and goals defined in this act are infused into the ongoing actions and programs of the Federal Government, the act also establishes some important "action-forcing" procedures.

*Id.* at 40416. *Accord*, 115 CONG. REC. 29067 (1969) (Differences in the Senate- and House-Passed Versions of S. 1075).

74. *Id.* at 40416 (remarks of Senator Jackson) (emphasis added). *Accord, id.* at 40925 (remarks of Representative Dingell). *Cf.* S. REP. No. 91-296, 91st Cong., 1st Sess. 19-20 (1969) (section 102 remedies present deficiencies in agency authority so as to permit full consideration of environmental factors). The case law supports the interpretation of legislative intent that appears in this paragraph of the article. *See, e.g.,* *Andrus v. Sierra Club*, 99 S.Ct. 2335, 2337 (1979); *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1131-32 (5th Cir. 1974). So do the new CEQ guidelines. *See* 40 C.F.R. §§ 1500.1(a); 1502.1 (1979). The commentators agree. *See, e.g.,* Hanks & Hanks, *supra* note 54, at 251-53, 267; V. YANNAKONE & B. COHEN, *supra* note 58 at 159-61.

An explanation of the introductory language modifying the two parts of section 102 in which the obligations are imposed will precede analysis of those provisions.

### *Prefatory Language*

The introductory wording employed by the drafters clearly indicates that the enlarged agency responsibilities were intended to be mandatory: Congress *authorized and directed* that, *to the fullest extent possible*, the duties *shall* be performed. The legislative history also is instructive. The source of section 102 of the final act was the Senate bill. In the preliminary measure, "to the fullest extent possible" *did not* modify the provision that became section 102(2) of NEPA.<sup>75</sup> However, the conference committee *did make* the phrase applicable to it. The explanation of the House Managers for this change clearly indicates their intention that the modification be interpreted expansively:

The purpose of the new language is to make it clear that each agency of the Federal Government *shall comply* with the directives [of section 102(2)] *unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible.*<sup>76</sup>

Thus, an agency is to follow the commands of the section to the maximum extent, except where explicitly precluded from doing so

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75. The wording that introduced section 102 of S. 1075 provided:

The Congress authorizes and directs that the policies, regulations, and public laws of the United States to the fullest extent possible, be interpreted and administered in accordance with the policies set forth in this Act, and that all agencies of the Federal Government [perform six enumerated tasks].

See S.REP. No. 91-296, 91st Cong., 1st Sess. 2 (1969). The House Bill included no provision comparable to section 102. See H.R. REP. No. 91-378 (Part 2), 91st Cong., 1st Sess. (1969); H.R. REP. No. 91-765, 91st Cong., 1st Sess. 8 (1969), 115 CONG. REC. 26590-91 (1969).

The prefatory phraseology, "to the fullest extent possible," *did* modify the provision of the Senate Bill that became section 102(1). Thus, much of the legislative history which underlies the interpretation that follows is directed to the part of the Senate Bill that eventually became section 102(2). Nevertheless, that fact should not detract from its applicability to section 102(1), because the language modifying both sections is identical and Congress was fully aware of that. See H.R. REP. No. 91-765, 91st Cong., 1st Sess. 8-9 (1969); 115 CONG. REC. 40417-18 (1969) (Major Changes in S. 1075 as Passed by the Senate).

76. H.R. REP. No. 91-765, 91st Cong., 1st Sess. 9 (1969) (emphasis added). In observing that this addition was part of a compromise which had resulted in omission of the Aspinall amendment, all of the House conferees except Aspinall reiterated their "view that the new language *does not in any way limit the congressional authorization and directive to all agencies* of the Federal Government set out in subparagraphs (A) through (H) of clause (2) of section 102." *Id.* (emphasis added). The Senate conferees agreed with this reading of the "new language." 115 CONG. REC. 40418 (1969) (Major Changes in S. 1075 as Passed by the Senate).

by a "clear conflict between its existing statutory authority and [NEPA]."<sup>77</sup> In ascertaining whether any deficiencies or inconsistencies in extant authorizations prohibit total adherence to NEPA's mandates, the agency is specifically instructed by Congress that it "shall not construe its existing authority in an unduly narrow manner."<sup>78</sup> If a clear conflict "expressly prohibits or makes full compliance with one of" the act's commands impossible, "then compliance with the particular directive is not immediately required."<sup>79</sup> "However, as to other activities of that agency, compliance is required,"<sup>80</sup> and, even where clear conflicts were discovered, Congress contemplated future adherence.<sup>81</sup>

This reading of the prefatory language is drawn almost exclusively from the interpretation accorded the relevant terminology by the Managers on the Part of the House,<sup>82</sup> a view to which the

77. H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 10 (1969). The language employed by Congress is strong, clear, and repetitive. Agencies are to fully comply *unless* the "existing law applicable to such agency's operations expressly prohibits or makes full compliance . . . impossible" or "to do so would clearly violate their existing statutory authorizations." *Id.* at 9, 10. *Accord*, 115 CONG. REC. 40418 (1969) (Major Changes in S. 1075 as Passed by the Senate). A respected commentator has observed that "surprisingly few" conflicts of this sort exist. *See* W. RODGERS, *supra* note 3, at 718, 764.

78. H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 10 (1969). *Accord*, 115 CONG. REC. 40418 (Major Changes in S. 1075 as Passed by the Senate). This expression of legislative intent also was important enough to bear repetition. In explaining section 102, the House conferees emphatically stated that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 10 (1969). Their statement also declared that "it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102." *Id.* at 9, 10. *Accord*, 115 CONG. REC. 40418 (Major Changes in S. 1075 as Passed by the Senate).

The express requirements for agency review of prior authority appear in section 103 of NEPA:

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

79. H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 9 (1969). *Accord*, 115 CONG. REC. 40418 (Major Changes in S. 1075 as Passed by the Senate).

80. H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 9 (1969). *Accord*, 115 CONG. REC. 40418 (1969) (Major Changes in S. 1075 as Passed by the Senate). This affords additional evidence of the breadth of the command in section 102.

81. [Where] the existing law applicable to [an] agency's operations does not make compliance possible . . . then compliance with the particular directive is not required but the provisions of section 103 would apply.

*Id.*

82. That group, which was responsible for preparing the Statement of the Managers on the Part of the House that became part of the Conference Report, included all of the House conferees except Representative Aspinall. He "refused to sign" the Statement, be-

Senate fully subscribed,<sup>83</sup> and is strongly and clearly supported by case law,<sup>84</sup> the CEQ guidelines,<sup>85</sup> and scholarly writing.<sup>86</sup> In sum, the wording that introduces the two parts of section 102 commands agencies to comply with the duties imposed to the maxi-

cause he could not "read into the [statutory] language that was finally agreed upon by the conferees the interpretation that is given to it in the statement of the House managers." 115 CONG. REC. 40926 (1969).

83. See 115 CONG. REC. 40415-16, 40421 (1969) (remarks of Senators Jackson and Allott); *id.* at 40417-18 (Major Changes in S. 1075 as Passed by the Senate).

84. After some initial hesitation, the courts have accepted the view that Congress intended for NEPA's various requirements to be interpreted and applied in the strictest manner. The phrase "to the fullest extent possible," has become the touchstone of NEPA interpretation.

NEPA IN THE COURTS, *supra* note 11, at 49. *Calvert Cliffs* is exemplary:

Of course, all of these Section 102 duties are qualified by the phrase "to the fullest extent possible." We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies. . . Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies. . . [T]he dispositive factor in our interpretation is the expressed views of the Senate and House conferees who wrote the "fullest extent possible" language into NEPA. . . Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority.

*Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972) (citations omitted). *Accord*, *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1174-76 (6th Cir. 1972); *Public Serv. Co. v. NRC*, 582 F.2d 77, 81 (1st Cir. 1978), *cert. denied*, 439 U.S. 1046 (1979). The case law respecting conflicts in statutory authority is succinctly summarized in the recent decision of *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201, 206-07 (5th Cir. 1978), *reh. denied*, 576 F.2d 931, *cert. denied*, 439 U.S. 966:

The statutory conflict exception has been applied sparingly. . . . The conflict between the agency's organic statute and NEPA must be both fundamental and irreconcilable. . . . *Flint Ridge Development Co. v. Scenic Rivers Association*, 426 U.S. 776, *reh. den.*, 429 U.S. 875 (1976). In a limited number of cases statutorily mandated guidelines, *Gulf Oil Corp. v. Simon*, 373 F. Supp. (D.D.C.), *aff'd*, 502 F.2d 1154 (Em. App. 1974) or an indispensable need for haste, *Atlanta Gas Light Co. [v. FPC]*, 476 F.2d 142, 150 (5th Cir. 1977)] have rendered compliance with NEPA impossible. In a small number of cases NEPA compliance has not been required when the agency's organic legislation mandated specific procedures for considering the environment that were "functional equivalents" of the impact statement process. *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 489 F.2d 1247 (1973); *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (1973).

85. While the new and old guidelines are substantially the same, the old guidelines are more comprehensive and provide:

The phrase "to the fullest extent possible" in section 102 is meant to make clear that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible, in the light of the act's national environmental objectives.

40 C.F.R. § 1500.4 (1973).

86. See, e.g., NEPA IN THE COURTS, *supra* note 11, at chs. I, III; Donovan, *supra* note 67, at 546-48, 556; Hanks & Hanks, *supra* note 54, at 254-57.

mum degree possible, unless expressly precluded from doing so by a clear conflict of legislative authority. The statutory language and legislative history of both provisions will now be examined.

(a) *Section 102(2)*

Section 102(2) directs all agencies "to assure consideration of the environmental impact of their actions in decisionmaking" by establishing "some important 'action-forcing' procedures."<sup>87</sup> Several parts of the section explicitly command agencies to fully take into account ecological factors in their decisional processes, while others do so less directly. However, analysis of the obligations imposed by all of these provisions leads inexorably to the conclusion that Congress intended agencies to undertake comprehensive examination of all environmental effects of their proposed actions and consider those impacts fully before rendering final decisions.<sup>88</sup>

*102(2)(A)*

Section 102(2)(A) requires utilization of "a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment."<sup>89</sup> Thus, whenever an agency intends to take action that *could* have an ecological effect, the agency must conduct rigorous and comprehensive research which guarantees that the final agency decision results from integrated consideration of the widest possible range of information on the environmental impacts of the proposed action.<sup>90</sup>

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87. 115 CONG. REC. 40416 (1969) (remarks of Senator Jackson). *Accord*, S. REP. NO. 91-296, 91st Cong., 1st Sess. 19-20; 115 CONG. REC. 29067-68 (1969) (Differences in the Senate- and House-Passed Versions of S. 1075).

88. Sections 102(2)(A), (B), (C), (E), and (H) are relevant to the inquiry here. Each is modified, of course, by the prefatory instruction: "The Congress authorizes and directs, to the fullest extent possible, all agencies of the Federal Government shall . . ."

NEPA was amended in 1975, and the changes in clause 102(2) are best described by Professor Rodgers:

In August 1975 Congress amended NEPA by adding a new paragraph to section 102(2) . . . The new paragraph is designated 102(2)(D) and the old subsection 102(2)(D) is redesignated 102(2)(E) with subsequent redesignations for the remaining original paragraphs (now (F) through (I)). The change is confusing for the reason that the case law for several years has given personality to the original designations.

W. RODGERS, *supra* note 3, at 719 n. 26. The references in this article will be to the amended provisions.

89. 42 U.S.C. § 4332(A) (1977).

90. Congress gave virtually no substantive content to the phrase "integrated use of the natural and social sciences and the environmental design arts;" however, it is difficult to



This interpretation of the statutory language is supported by Congressional intent as expressed in the legislative history. The Senate Interior Committee, in explaining the "operating procedures" prescribed in section 102(2), provided explicit instructions "to be followed by all Federal agencies:"

Whenever planning is done or decisions are made which may have an impact on the quality of man's environment, the responsible agency or agencies are directed to utilize to the fullest extent possible a systematic, interdisciplinary team approach . . . that [brings] together the skills of the landscape architect, the engineer, the ecologist, the economist and other relevant disciplines. . . .<sup>91</sup>

The Senate Report affirms that environmental data is to be collected from the widest spectrum of areas and makes clear that the information assembled is to be *applied in agency decisionmaking*:

[D]ecisions . . . which may have an impact on the quality of man's environment . . . should draw upon the broadest possible range of social and natural scientific knowledge and design arts.<sup>92</sup>

Indeed, one of the most vexing problems which Congress sought to remedy with section 102(2)(A) was narrowly focused decisionmaking that did not take into account numerous pertinent ecological impacts:

Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view in the planning and conduct of Federal activities . . . . Too often planning is the exclusive province of the engineer and cost analyst.<sup>93</sup>

The case law supports this interpretation of the section and gives meaning to the provision, meaning that cannot be gleaned from a reading of the rather cursory legislative history. Several Circuit Courts of Appeal have stated that section 102(2)(A) must be complied with prior to an agency determination respecting envi-

imagine how Congress could have used more all-encompassing terminology. The Statement of the Managers on the Part of the House simply speaks in terms of "integrated use of the sciences and arts," which includes almost everything conceivable. H.R. REP. No. 91-765, 91st Cong., 1st Sess. 8 (1969). S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969).

Congress meant for agencies to take seriously the obligation imposed, because the language of section 102(2)(A) commands agencies to "insure use of the arts and sciences" and is modified by the strong prefatory phrase.

91. *Id. Accord*, 115 CONG. REC. 29068 (1969) (Differences in the Senate- and House-Passed Versions of S. 1075).

92. S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969).

93. *Id.*

ronmental impact statement preparation under section 102(2)(C).<sup>94</sup> Some decisions find that the former provision requires use of a rigorous team approach that draws upon expertise from all relevant fields.<sup>95</sup> Many other opinions indicate that NEPA's mandate to employ interdisciplinary methodology is intended to assure that the ecological impacts of proposals are fully comprehended and addressed.<sup>96</sup> The scholarly commentary supports the interpretation accorded section 102(2)(A) in this article;<sup>97</sup> while the CEQ guidelines simply provide that agencies must "comply with the mandate of section 102(2)(A)."<sup>98</sup>

### 102(2)(B)

Section 102(2)(B) manifests similar Congressional purposes. This provision requires agencies to "identify and develop methods and procedures . . . which will insure that presently unquantified

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94. See *Hanly v. Kleindienst*, 471 F.2d 823, 834-36 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

95. See, e.g., *Hanly v. Kleindienst*, 471 F.2d 823, 835 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Environmental Defense Fund v. Corps of Engineers*, 348 F. Supp. 916, 927-28 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974). In *Environmental Defense Fund v. Corps of Engineers*, the court stated:

The systematic interdisciplinary approach of § 102(2)(A) is designed to assure better programs and a better environment by bringing together the skills of the biologist, the geologist, the ecologist, the engineer, and landscape architect, the economist, the sociologist and other disciplines relevant to the project. The mandated approach makes planning no longer the sole concern of the engineer and the cost analyst, and assures consideration of the relationship between man and his surroundings.

*Environmental Defense Fund v. Corps of Engineers*, 348 F. Supp. 916, 927-28 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974).

If the agency has made a good faith effort to comply, courts appear reluctant to find that the requirements of NEPA have not been satisfied. See, e.g., *id.* at 929; *Hanly v. Kleindienst*, 471 F.2d 823, 835 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

96. Thus, some courts have stated that agencies should consult with other agencies having some interest in, or expertise relating to, proposed actions. See, e.g., *Simmons v. Grant*, 370 F. Supp. 5, 19 (S.D. Tex. 1974); *Akers v. Resor*, 339 F. Supp. 1375 (W.D. Tenn. 1972). Another opinion states that agencies must support research on important issues raised by proposed actions prior to their implementation. *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401, 1403 (D.D.C. 1971). The District of Columbia Circuit Court of Appeals has stated that "officials making the ultimate decision . . . must be informed of the full range of responsible opinion [including opposing views] on the environmental effects in order to make an informed choice." *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971). That court also has suggested that an agency should seek the advice of impartial scientists. See *Soc'y for Animal Rights v. Schlesinger*, 512 F.2d 915, 917 (D.C. Cir. 1975).

97. See, e.g., *Donovan*, *supra* note 67, at 555-56; *Peterson*, *supra* note 22, at 50041; *W. ROGERS*, *supra* note 3, at 719-20.

98. 40 C.F.R. §§ 1501.2(a), 1502.6, 1507.2(a) (1979).

environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."<sup>99</sup> Thus, agencies whose activities affect the environment must develop analytical techniques to guarantee that all ecological effects of their proposed actions, not previously amenable to precise measurement, can be assessed so that the environmental desirability of proposals can be weighed with their economic and technical feasibility in reaching decisions.

The legislative history confirms this interpretation of the section's wording and clarifies some of the terminology employed. The Senate Report states that the provision applies to "*all agencies which undertake activities relating to environmental values*" and gives content to "environmental values" by emphasizing those qualities "relating to amenities and aesthetic considerations."<sup>100</sup> "Presently unquantified" values and amenities were defined by the Senate as ones "which are at present not considered in cost-benefit analysis and other methods used in Federal decisionmaking."<sup>101</sup>

Agencies were specifically instructed to create new means for assessing ecological factors not formerly reducible to ascertainable worth.<sup>102</sup> The express purpose for imposing this requirement was to guarantee that these environmental qualities would now be *fully taken into account in decisionmaking*. In calling for the development of analytical methods and procedures, the Senate Report speaks of incorporating the values *in official decisionmaking*, while the Statement of the Managers on the Part of the House declares unequivocally that the techniques are intended "to insure that unquantified environmental amenities will be *considered in the*

99. 42 U.S.C. § 4332(2)(B) (1977).

100. S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969).

101. 115 CONG. REC. 29068 (1969) (Differences in the Senate- and House-Passed Versions of S. 1075). The Senate Report also fleshes out the meaning of the term in the context of describing environmental factors as those that are *difficult to evaluate* "in comparison with economic and technical factors." S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969).

Some telling examples of the meaning of the phrase "presently unquantified environmental amenities and values" may be drawn from NEPA itself. Thus, terms such as "historical, cultural, and natural aspects of our national heritage," "diversity and variety of individual choice," and "esthetically and culturally pleasing surroundings," which appear in the goals enumerated in section 101(b), define the "environmental amenities and values" of section 102(2)(B).

102. "Sec. 102 authorizes and directs all agencies to develop new methods of evaluating environmental values." 115 CONG. REC. 29068 (1969) (Differences in the Senate- and House-Passed Versions of S. 1075). Cf. S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969) (adequate methodology must be developed for evaluating full environmental impacts and costs of federal actions).

It seems almost superfluous to note that the language used by Congress explicitly mandates that these qualities are to "be given appropriate *consideration in decisionmaking*."

*agency decisionmaking process.*"<sup>103</sup> The legislative history also makes clear that an important reason for the imposition of these new obligations was the failure of agencies to take into account many ecological parameters when rendering decisions:

In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors. As a result, unless the results of planning are radically revised at the policy level—and this often means the Congress—environmental enhancement opportunities may be foregone and unnecessary degradation incurred.<sup>104</sup>

Finally, the Senate Report indicates that unquantifiable ecological qualities were to be weighed fully with other values in making final choices:

A vital requisite of environmental management is the development of adequate methodology for evaluating the *full environmental impacts* and the *full costs* of Federal actions.<sup>105</sup>

Judicial decisions strongly support the interpretation of section 102(2)(B) offered above. The District of Columbia Circuit Court of Appeals has found that the provision forcefully and clearly manifests Congressional intent that agencies give full consideration to all environmental factors in decisionmaking.<sup>106</sup> Some

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103. S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969) (emphasis added); H.R. REP. No. 91-765, 91st Cong., 1st Sess. 8 (1969) (emphasis added).

104. S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969). The Senate Report and the floor debates are replete with examples of environmental abuse incurred because of agencies' failure to accord adequate weight to values less amenable to precise quantification. See, e.g., S. REP. No. 91-296, 91st Cong., 1st Sess. 9, 20 (1969); 115 CONG. REC. 26575, 26578 (1969) (remarks of Representatives Mailliard, Schadeberg and Minshall).

Of course, the term "appropriate," which modifies decisionmaking in section 102(2)(B), could be construed so as to downplay the significance accorded ecological factors; however, such an interpretation would directly contravene the very purposes for which NEPA was enacted. Consideration must be "appropriate" in light of the problem sought to be remedied—environmental degradation.

105. S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969) (emphasis added). This also is implicit in much of the rest of the legislative history. See, e.g., S. REP. No. 91-296, 91st Cong., 1st Sess. 9, 14, 16 (1969).

106. First, the court noted that section 102(2)(B) was the only provision of the act which states, "in terms, that agencies must give full 'consideration' to environmental impact as part of their decisionmaking processes." The District of Columbia Circuit Court then warned that a "purely mechanical compliance" with the requirements of "§ 102(2)(C) and (D) will not satisfy the Act if they do not amount to full good faith *consideration* of the environment," because such mandates "must not be read so narrowly as to erase the general import" of section 102(2)(B). *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112-13 n.5 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972). Next, the court specifically examined sections 102(2)(A) and (B), concentrating upon the latter:

The sort of consideration of environmental values which NEPA compels is clari-

opinions have stated that the purpose of the section is to insure that the complete ecological impact and total cost of federal actions will be properly balanced in the decisional process.<sup>107</sup> Many courts have made somewhat less salient observations which nonetheless affirm the analysis above.<sup>108</sup> Scholarly writing supports the construction in this article,<sup>109</sup> and the new CEQ guidance simply provides for agency compliance.<sup>110</sup>

In sum, the express wording and the legislative history of sections 102(2)(A) and 102(2)(B) show that Congress intended for agencies to deploy techniques which would guarantee that full consideration was accorded in decisionmaking to all environmental

fied in Section 102(2)(A) and (B). . . *In order to include all possible environmental factors in the decisional equation, agencies must "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."*

*Id.* at 1113. One of the citations omitted from this quotation (note 9) included a statement by Senator Jackson in which he declared that "subsection 102(b) requires the development of procedures designed to insure that all relevant environmental values and amenities are considered in the calculus of project development and decisionmaking." The other deleted citation (note 8) stated that the "word 'appropriate' in § 102(2)(B) cannot be interpreted to blunt the thrust of the whole Act or to give agencies broad discretion to downplay environmental factors in their decisionmaking processes."

107. The purpose of § 102(2)(B) is to lend methodology to the broad interdisciplinary approach. It requires that agencies develop purposeful methods and procedures to *evaluate* objectively the *full environmental impact of a proposed project* and weigh the ecological desirability of the project along with its economic and technical feasibility in planning and decisionmaking. This technique *insures* that the *full cost* of the federal action will be known.

*Environmental Defense Fund v. Corps of Engineers*, 348 F. Supp. 916, 928 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974) (citation omitted) (emphasis added). The omitted reference was to the legislative history mentioned in this article. On appeal, the Fifth Circuit Court of Appeals expressly referred to, but did not disturb, the "full cost" analysis of the district court. *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1133 (5th Cir. 1974). However, the appellate court stated that the "provisions of subsection (B) . . . order no more than that an agency search out, develop and follow procedures reasonably calculated to bring environmental factors to peer status with dollars and technology in their decisionmaking." *Id.* The court in *Sierra Club v. Froehle*, 359 F. Supp. 1289, 1366 (S.D. Tex. 1973), *rev'd on other grounds sub nom.*, *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974), found that the "reason for the methodology required by Section 102(2)(B) of NEPA is to ensure that the 'full cost' of the action will be known, including the environmental factors:"

The legislative history of NEPA clearly reveals that Congress intended the "development of adequate methodology for evaluating the full environmental impacts and the full costs—social, economic, and environmental—of federal actions.

108. *See, e.g.*, *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971); *Hanly v. Kleindienst*, 471 F.2d 823, 835 (2d Cir. 1972).

109. *See, e.g.*, Peterson, *supra* note 22, at 50041; Donovan, *supra* note 67, at 555.

110. 40 C.F.R. § 1507.2(b) (1979). *Cf., id.* at § 1501.2(b) & § 1502.23. The old guidelines only rely upon the section as authority for their promulgation. *See* 40 C.F.R. § 1500.1(b) (1973).

effects.<sup>111</sup>

### 102(2)(H)

Section 102(2)(H) requires agencies to "initiate and utilize ecological information in the planning and development of resource-oriented projects."<sup>112</sup> Thus, "each agency which studies, proposes, constructs or operates projects having resource management implications" must undertake research to secure data respecting the "effects upon ecological systems" of its proposals.<sup>113</sup> While the statutory language does not explicitly require that information so assembled be applied by agencies in making decisions on particular proposals, such use is implicit in the wording of the provision. Similar Congressional intent is manifested in the Senate Report, which states that any agency undertaking "projects having resource management implications is authorized and directed to consider the effects upon ecological systems to be *a part of the analyses governing its actions* and to study such effects as a part of its data collection."<sup>114</sup> The few courts that have addressed section 102(2)(H) generally have agreed with this interpretation,<sup>115</sup> as have the commentators.<sup>116</sup>

### 102(2)(C)

Section 102(2)(C) requires that agencies "include in every rec-

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111. Sections 102(2)(A) and (B) address in a very similar manner the issue of agency authority. Each clearly commands agencies to deploy techniques which will guarantee that full consideration is accorded in decisionmaking to all environmental factors, particularly those not formerly taken into account. Congress could not have contemplated that agencies would restrict their consideration in decisionmaking to ecological effects expressly mentioned in their substantive mandates, when many of those environmental impacts were the very ones previously ignored in agency decisional processes and for whose consideration Congress explicitly sought to provide in the two sections.

112. 42 U.S.C. § 4332(2)(H) (1977). This section is treated here because its thrust is more similar to those just considered than to sections 102(2)(C) and (E).

113. S. REP. No. 91-296, 91st Cong., 1st Sess. 22 (1969). Little attention will be accorded the legislative history of this section, which consists of only one paragraph.

114. *Id.*

115. This directive recognizes the growing importance of the environmental sciences and directs the agencies to undertake research of a broader scope than may have been traditionally within their jurisdiction.

*Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401, 1404 (D.D.C. 1971). *Cf. Citizens Against Toxic Sprays v. Bergland*, 428 F. Supp. 908, 912, 933-35 (D.Ore. 1977) (one section of NEPA relied upon by court for finding inadequate agency examination of effects of herbicide spraying on human and animal health).

116. *See, e.g., Peterson, supra* note 22, at 50045; *Donovan, supra* note 67, at 555. The new CEQ guidelines merely call for agencies to "comply with the requirements of Sec. 102(2)(H)." 40 C.F.R. § 1507.2(e) (1979). The old guidance is silent. *See* 40 C.F.R. § 1500 (1973).

ommendation or report on proposals for . . . 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 ir retrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>117</sup>

The section also provides that "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" and that "copies of such statement and the comments and views of the appropriate Federal, State and local agencies . . . shall accompany the proposal through the existing agency review processes." Thus, whenever an agency intends to take any action that will have important ecological impact, an agency employee must confer with agencies that have responsibility for each environmental effect concerned and then prepare and circulate for comment a comprehensive written statement. That document must analyze fully the ecological consequences of the proposed activity so that the agency can consider throughout its decisional process all environmental impacts with other relevant factors in making a final decision.<sup>118</sup>

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117. 42 U.S.C. § 4332(2)(C) (1977).

118. This is the section that imposes the infamous environmental impact statement requirement. According to one commentator, "thousands of such statements have been prepared by the agencies" and the "issues clustering about § 102(2)(C) have dominated NEPA litigation." Anderson, *supra* note 5, at 320. Another writer has observed that "section 102(2)(C) is the heart of NEPA," combining the "legislative objectives of full disclosure, consultation, and reasoned decisionmaking prescribed as the cutting edge of administrative reform." W. RODGERS, *supra* note 3, at 725.

Because the legislative history pertaining to this section is very sparse, considerable reliance will be placed upon the CEQ guidelines and commentary as each provision of the section is examined. A major reason for the dearth of legislative history was an important modification in the measure by Senators Jackson and Muskie after the Senate bill had passed and been sent to the House, but before the legislation went to conference. Section 102(2)(C) of S. 1075, as initially agreed upon in the Senate, required agencies to make, and justify "findings" in five areas, relating to the ecological impacts of proposed agency actions. Under the Jackson-Muskie "agreement, but with no apparent reason for a 'compromise', the requirement for a 'finding' was changed to a requirement for a 'detailed statement.'" NEPA

Actions that trigger impact statement preparation include any activity that could have a significant effect on the environment, such as "project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs."<sup>119</sup> Once a determination is made that the proposed action may have an important ecological impact, a responsible agency employee must prepare a comprehensive document in writing that addresses five topics related to the environmental consequences of the activity.<sup>120</sup> That official must confer with, and solicit the views

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IN THE COURTS, *supra* note 11, at 8. See 115 CONG. REC. 29058 (1969). The language mandating justification for those findings was deleted as well. Compare section 102(c) of S. 1075, S. REP. NO. 91-296, 91st Cong., 1st Sess. 2 (1969) with section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1977). The relevant Senate and House reports were prepared prior to the time when the agreement was consummated, and the conference report does not mention the changes.

119. S. REP. NO. 91-296, 91st Cong., 1st Sess. 20 (1969). "Major Federal actions significantly affecting the quality of the human environment" are defined comprehensively in the new and old CEQ guidance. See 40 C.F.R. §§ 1502.4, 1508.14, 1508.18, 1508.27 (1979); 40 C.F.R. § 1500.6 (1973). Professor Rodgers observes that an "issue perpetually in litigation is the threshold NEPA question of whether a particular proposal is a 'major' federal action," and a thorough discussion of the case law is provided in his treatise. See W. RODGERS, *supra* note 3, at 750-67.

It is important to note that the "major federal action" requirement is not imposed upon agencies under the other provisions of section 102(2). Thus, agencies must comply with them "even when no § 102(2)(C) environmental impact statement [is] required." *Hanly v. Kleindienst*, 471 F.2d 823, 834 n. 16 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). *Accord*, *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 232 (7th Cir. 1975), cert. denied 424 U.S. 967 (1976).

120. Thorough treatment of each requirement in this article is simply not warranted for several reasons. First, the provisions, as enacted in final form, were never explained by Congress. See note 118 *supra*. Second, the wording of the initial three is largely self-explanatory: they simply mandate full consideration of *all* environmental effects of the proposal, especially those that would be unavoidable were it approved, and of alternatives to the proposal. The language employed is very broad: "the" environmental impact and "any" adverse environmental effects. Some assistance can be gleaned from the CEQ guidelines. For definitions of the terms "environmental impact of the proposed action," "adverse environmental effects which cannot be avoided should the proposal be implemented," and "alternatives to the proposed action," see 40 C.F.R. § 1500.8 (1973). For a more thorough discussion of "alternatives," see the analysis of section 102(2)(E) at notes 127-37 and accompanying text *infra*.

The fourth factor requires comparison of the lasting and cumulative losses of resources to be incurred for the sake of present gains. There is no helpful legislative history on this provision. The 1973 CEQ guidance speaks of "tradeoffs between short-term environmental gains at the expense of long-term losses, or vice versa" and foreclosure of future options. 40 C.F.R. § 1500.8(a)(6) (1973). An example would be offshore oil leasing, where near-term depletion of the resource means that it will be unavailable in the future.

The fifth requirement mandates consideration of the permanent losses not only to the environment, but also of the resources committed to the particular action proposed. The old CEQ guidelines speak in terms of action that "irreversibly curtails the range of potential uses of the environment" and warn that the term "resources" includes the "natural and cultural resources committed to loss or destruction by the action" as well as the "labor and materials devoted to [the] action." 40 C.F.R. § 1500.8(a)(7) (1973).



of, any other federal agency that has power over, or peculiar experience with reference to, any ecological effect of the proposed action.<sup>121</sup> Copies of the document and attendant suggestions of federal, state, and local environmental agencies are to be circulated to interested parties, and both must accompany the proposal through the extant agency procedures for review leading to a final decision.<sup>122</sup> While Congress did not explicitly command agencies to apply in the decisionmaking process the full range of ecological information gathered, indications of this Congressional intent appear throughout the language and relevant legislative history of section 102(2)(C).<sup>123</sup>

Case law interpreting the provision is legion, primarily because section 102(2)(C) affords so many procedural bases upon which to challenge specific project proposals. Indeed, significant segments of

Even though the language in the Senate bill that expressly mandated balancing in decisionmaking was deleted, Congress still intended that agencies engage in a weighing process. This intent is manifested in the wording of the statute itself. Inherent in the duties imposed by section 102(2)(C)(iii) is the prospect that the agency may select an approach that is less detrimental to the environment than the proposal. Implicit in the requirements of section 102(2)(C)(iv) and (v) is the notion that agencies are to weigh the permanent losses to be incurred for present gain with long-term productivity in making decisions. That Congress intended balancing to occur also becomes clear when the commands of section 102(2)(C) are read in light of the statute as a whole and particularly with the policy and goals of section 101(b) as well as the general Congressional purpose for enacting NEPA. See section I(A)(1) of this article *supra*.

121. For a thorough discussion of "who" must prepare the EIS, see W. RODGERS, *supra* note 3, at 777-85. The legislative history suggests that the provision was intended to induce coordination in environmental decisionmaking:

The problem of providing for better federal environmental management practices is not totally caused by the lack of a policy . . . . The present problem also involves the need to rationalize and better coordinate existing policies.

S. REP. No. 91-296, 91st Cong., 1st Sess. 14 (1969). The consultation requirement also can be construed as an "important aspect of the interdisciplinary decisionmaking sought to be promoted by NEPA because the consultation must precede the statement which in turn must precede the action." W. RODGERS, *supra* note 3, at 729. The new CEQ guidelines make extensive provision for preparers to obtain the comments of other agencies. 40 C.F.R. § 1500.3 (1979).

122. The legislative history directly addresses these requirements in only a very limited manner. The language of the commands and the broad Congressional purpose in passing NEPA discussed above, at section I(A)(1), however, manifest Congressional intent that the impact statement procedures were to be an integral component of the broader decisional process. See W. RODGERS, *supra* note 3, at 731. The CEQ clearly recognizes this in its guidelines. See 40 C.F.R. § 1502.1; 1502.5; 1503.4; and Pt. 1505 (1979).

123. NEPA requires preparation of a thorough document detailing all environmental effects of proposed action which must be *included* in every recommendation or report on proposals. Two of the five topics to be discussed in the impact statement explicitly mandate balancing. See note 120, *supra*. Agencies are instructed to solicit expert opinion from other agencies both before and after preparation of the document so that this expertise may be applied in making determinations. Finally, the impact statement and expert comment on it must accompany the proposal and be given full consideration, at every meaningful stage of the agency decisional process. See notes 121-22 *supra*.

whole books have explored the hundreds of judicial decisions construing this provision. They should be consulted for detailed analysis.<sup>124</sup> While examination of those opinions is beyond the scope of this article, it is still possible to state that judicial interpretation comports with the view of NEPA articulated here.<sup>125</sup> The CEQ guidelines and scholarly writing also support the analysis offered.<sup>126</sup>

### 102(2)(E)

Section 102(2)(E) requires that agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."<sup>127</sup> Thus, whenever the suggested manner of proceeding with any proposed activity may lead to irreconcilable conflicts over competing and incompatible use of the environment, the agency must fully explore and evaluate options that could have less adverse ecological impact so that all alternatives might be considered with the principal recommendation in final decisionmaking.

The legislative history of section 102(2)(E) is not extensive; however, it does afford some guidance. Agencies have an affirmative duty to seek out, examine, develop, and provide comprehensive information on all feasible approaches to any proposed activity that could result in unavoidable environmental conflicts.<sup>128</sup> The

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124. It hardly bears repeating that the issues clustering about § 102(2)(C) have dominated NEPA litigation to date and that consequently a major portion of this chapter must discuss those cases.

Anderson, *supra* note 5, at 320. For full treatment of the topic, *see id.* at 320-410; NEPA IN THE COURTS, *supra* note 11, at 56-178; W. RODGERS, *supra* note 3, at 725-98.

125. For a thorough discussion of the case law, *see* the sources listed in note 124 *supra*.

126. The council guidance has been treated extensively above. Much of the commentary also has been relied upon to support the interpretation in this paper, and therefore, will not be referred to again. Moreover, most of the writers not mentioned in the preceding discussion of 102(2)(C) agree with the construction espoused. *See, e.g.*, Peterson, *supra* note 22, at 50041-43; F. GRAD, TREATISE ON ENVIRONMENTAL LAW, § 9.02, at 9-37 through 9-117 (1977) [hereinafter cited as F. GRAD].

127. 42 U.S.C. § 4332(2)(E). A simple comparison of the language of this section and the "alternatives" wording of section 102(2)(C)(iii) clearly reveals that Congress intended to impose greater obligations upon agencies under section 102(2)(E).

128. The Differences in the Senate- and House-Passed Versions of S. 1075 advises that the agency obligations are triggered "in instances where environmental conflicts cannot be avoided." 115 CONG. REC. 29068 (1969). The type of activity about which Congress evinced concern was that which involved "unresolved conflicts over competing and incompatible uses of land, water, or air resources." S. REP. NO. 91-296, 91st Cong., 1st Sess. 21 (1969). The Senate Report states that agencies "shall develop information and provide descriptions of the alternatives." *Id.* The wording of section 102(2)(E) requires full consideration of options.

possibilities explored must be broad. They should include no action, an equivalent with fewer side effects than the initial proposal, activity on a smaller scale that reduces harm to the environment, and mitigation that decreases the adverse impacts of the proposed action.<sup>129</sup> In order to minimize premature foreclosure of less damaging options, the analysis of alternatives is to be prepared early enough to accompany the principal recommendations through the agency review process.<sup>130</sup> The possible approaches must be discussed in sufficient detail for agency officials to make a reasoned final choice by contrasting the major proposal with these options.<sup>131</sup> While this provision of NEPA does not expressly mention decisionmaking, implicit in the duty to develop alternatives is the prospect that the agency may select an approach that is less detrimental to the environment than the course of action recommended.

The case law fully supports this interpretation of section 102(2)(E). An early leading decision prescribes a rule of reason for agency treatment of options.<sup>132</sup> However, courts clearly emphasize

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A description is a thorough and comprehensible account; development cannot be limited to the mere statement of an idea, but rather mandates elaboration which leads to meaningful proposals; and study means more than consideration and could entail research or modeling. See W. RODGERS, *supra* note 5, at 797-98.

129. Legislative intent that there be extensive examination of all feasible possibilities may be gleaned from Congressional outrage at the contribution of agencies to environmental degradation, which was often attributable to failure to consider alternatives. See generally section I(A)(1) *supra*.

130. Cf. S. REP. No. 91-296, 91st Cong., 1st Sess. 20 (1969) (Omission of ecological factors from consideration in early stages of planning in the past had meant that environmental enhancement opportunities were foregone and unnecessary degradation incurred); 40 C.F.R. § 1501.2(c) (1979) (agencies are to study, develop, and describe appropriate alternatives early in the planning process to insure that planning and decisions reflect environmental values).

131. S. REP. No. 91-296, 91st Cong., 1st Sess. 21 (1969). *Accord*, 40 C.F.R. § 1502.14(b) (1979).

132. The requirement in NEPA of discussion as to reasonable alternatives does not require "crystal ball" inquiry . . . But if the requirement is not rubber, neither is it iron. The statute must be construed in the light of reason.

Natural Resources Defense Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972). This standard is *not* as restrictive as it may appear at first blush. In the context of the agency proposal to lease 380,000 acres for offshore energy development, the court required examination of the options of elimination of oil import quotas, increased exploration and development onshore, and modifications in FPC pricing and rationing of natural gas, some of which the agency had no statutory authority to implement. Moreover, the same court has recently stated that "under the rule of reason, the agency is not released from its obligation to consider alternatives 'to the fullest extent possible.'" *Natural Resources Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979). Furthermore, "NRDC v. Morton's rule of reason does not preclude a discussion of alternatives because implementation is dependent upon action by another agency or because they do not offer a complete solution to the problem; or because they require radically new approaches to the agency mission; or because they would

the need for agencies to discuss the possibilities of taking no action, of proposed activities fundamentally reduced in magnitude, and of projects developed concurrently with mitigation measures.<sup>133</sup> The judiciary has stated that this examination of options "must make clear the reasons for the agency's choice, address the environmental effects of the alternatives, compare them, explain how future options might be narrowed by present decisions, and respond to the recommendations of responsible critics."<sup>134</sup> In the end, "what is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned."<sup>135</sup> Courts also have defined the important terms included in section 102(2)(E) similarly to the way they are described in this article.<sup>136</sup> The CEQ guidance and the commentary strongly substantiate the interpretation provided above.<sup>137</sup>

Discussion of this provision concludes examination of section 102(2). Its relevant parts evince clear Congressional intent that agencies are to undertake comprehensive review of all environmental impacts of their proposed actions and utilize the information collected in making decisions on proposals. Some of the provisions explicitly manifest this purpose, while the others do so less

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take time to implement." W. RODGERS, *supra* note 3, at 793 (citations omitted). For a discussion of the cases that stand for these propositions, *see* the deleted references.

133. For a discussion of relevant precedent, *see id.* at 793-94.

134. For decisions that impose these requirements, *see id.*

135. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972). Discussion by the agency, which "makes passing mention of possible alternatives to the proposed action [but] does so in such a conclusory and uninformative manner that it affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives," has been found inadequate. *See Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

Another observation by that court summarizes the importance of the section and emphasizes the difficulty of divorcing its commands from those of the third element of section 102(2)(C):

The requirement for a thorough study and a detailed description of alternatives, which was given further Congressional emphasis in § 4332(2)(E), is the linchpin of the entire impact statement.

*Id.* at 697-98 (citation omitted). The Fifth Circuit Court of Appeals has found that "section 102(2)(E) is supplemental to and more extensive in its commands than the requirement of 102(2)(C)(iii)." *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974). *Accord*, *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975).

136. *See Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975); *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1134-35 (5th Cir. 1974).

137. Numerous references to alternatives appear throughout the new CEQ guidelines that support the views expressed in this article. *See, e.g.*, 40 C.F.R. §§ 1501.2(c), 1502.1, 1502.2(d) & (e), 1502.10(e), 1502.14 (1979). The commentary is in accord with the construction of section 102(2)(E) provided above. *See* W. RODGERS, *supra* note 3, at 724, 792-98; *NEPA IN THE COURTS*, *supra* note 11, at 270-71, 285; *Peterson*, *supra* note 22, at 50039, 50044.

directly.

(b) *Section 102(1)*

Any lingering doubt that Congress intended agencies to apply the full range of data on ecological effects assembled should be dispelled by section 102(1):

Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act.<sup>138</sup>

Thus, whenever agencies are construing or implementing prior authority, they must do so in a manner that comports to the greatest degree possible with the national policy and goals of environmental protection enunciated in section 101. An interpretation that precludes agency consideration of ecological factors not found in pre-existing authorizations simply could not be one which either construes or administers that power in a way that most fully agrees with section 101.

The legislative history confirms this interpretation of Congressional intent. The Senate Report clearly states that the explicit purpose of section 102(1) was to rectify deficiencies and conflicts in prior agency authorizations, which had precluded agencies from fully taking into account all ecological impacts of their decisions:

In many areas of Federal action there is no body of experience or precedent for substantial and consistent consideration of environmental factors in decisionmaking. In some areas of Federal activity, existing legislation does not provide clear authority for the consideration of environmental factors which conflict with other objectives.

To remedy present shortcomings in the legislative foundation of existing programs, . . . section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act.<sup>139</sup>

The Differences in the Senate- and House-Passed Versions of S.1075 went even further by declaring that "lack of express authority" in certain "areas of Federal activity" had "been interpreted to

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138. 42 U.S.C. § 4332(1) (1977).

139. S. REP. No. 91-296, 91st Cong., 1st Sess. 19-20 (1969). An almost identical indication of legislative purpose, that does not explicitly mention section 102(1), appears at page 13 of the report under the rubric of "Relationship of S. 1075 to Existing Policies and Institutions."

prohibit consideration of environmental factors."<sup>140</sup> The more general proposition, that section 102(1) was a "mandate to heed the policies of section 101,"<sup>141</sup> also is articulated throughout the legislative history.<sup>142</sup> The decisional precedent,<sup>143</sup> the guidelines of the CEQ,<sup>144</sup> and scholarly writing support the view espoused in this article.<sup>145</sup>

*Summary of Congressional Intent as Expressed in Statutory  
Language and Legislative History of NEPA*

It is arguable, of course, that Congress intended agencies to gather comprehensive data on all environmental effects of their proposed activities, but only utilize information collected on those impacts explicitly provided for in the substantive standards of the statute pursuant to which the agency was acting. Indeed, the precise command to consider ecological values in agency review

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140. 115 CONG. REC. 29067 (1969). That document also adopts almost verbatim the first two sentences of the quotation from the Senate report appearing in the text accompanying note 139, *supra*. The other specific references to clause 102(1) that appear in the legislative history simply describe the clause. See note 62 *supra*. Subsequent to making just such a statement, however, Senator Jackson declared that "taken together, the provisions 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. 40416 (1969). That observation certainly could be taken to mean that *all* ecological factors, including those not expressly provided for in extant statutory authorizations, were to be considered in decisionmaking.

141. Hanks & Hanks, *supra* note 54, at 261 n. 121.

142. See, e.g., 115 CONG. REC. 40925 (1969). *Accord, id.* at 40926 (remarks of House Manager Saylor); *id.* at 19009 (remarks of Senator Jackson).

143. There is simply very little case law that directly addresses section 102(1). It was one of the provisions of NEPA relied upon by the District of Columbia Circuit Court of Appeals for the proposition that the act implicitly requires agencies to "give full 'consideration' to environmental impact as part of their decisionmaking processes." *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112 n. 5 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). In *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974), the Eighth Circuit Court of Appeals similarly observed that "section 102(1) of the Act contains a Congressional declaration that environmental factors be considered 'to the fullest extent possible.'" That court also has stated that the purpose of section 102(1) is to insure that the policies enunciated in section 101 are implemented." *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). *Accord, Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1973). The Second Circuit Court of Appeals was astounded by the FPC's failure to "consider all available and relevant information in performing its [licensing] functions" in "view of the explicit requirement in NEPA . . . that the Commission interpret its mandate under the Federal Power Act in accordance with the policies set forth in [section 102(1) of] NEPA." *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 424 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

144. See note 66 *supra*.

145. See Peterson, *supra* note 22, at 50037-38; Hanks & Hanks, *supra* note 54, at 251, 256-57, 261; Anderson, *supra* note 5, at 239-40, 283, 304; Donovan, *supra* note 67, at 546-47.

processes appears only once in NEPA.<sup>146</sup> However, Congressional intent, as expressed throughout the statutory language and legislative history of the act, clearly contravenes such a limited interpretation. Moreover, it simply makes no practical sense for Congress to prescribe procedures that compel thoroughgoing analysis of all environmental effects while restricting agency consideration of the data compiled.

The legislative history plainly states that one of the major reasons for enactment of NEPA was to remedy environmental abuse and degradation attributable generally to agency failure to take into account ecological impacts in decisionmaking and specifically to the claim of many agencies that their authority either explicitly precluded consideration of, or minimized the value assignable to, environmental factors. The statutory mandates of all agencies were enlarged by section 105 of NEPA, which expressly states that the policy and goals of the act *supplement* existing agency authorizations and by section 102(1), which *authorizes* and *directs* that extant authority is, *to the fullest extent possible, to be administered and interpreted in accordance with* the national policy of environmental protection and the six specific goals declared in section 101. Explicit commands that agencies take into account ecological impacts in decisionmaking appear in sections 102(2)(A) and (B). Implicit in the requirements of 102(2)(C) and (E), that agencies undertake comprehensive review of all environmental effects of, and alternatives to, their proposed actions is a mandate to consider in decisional processes the impacts found. An intent that agencies perform this thorough analysis, but not take into account many of the ecological effects discovered, simply cannot be ascribed to Congress. Finally, agencies must follow to the maximum extent possible the directives of section 102 unless a clear conflict of statutory authority renders full compliance impossible, in which event section 103 instructs agencies to propose appropriate remedial measures.

In sum, Congress clearly manifested its intent in the legislative history and statutory language of NEPA that agencies were *not* to be restricted in decisionmaking to consideration of those environmental factors expressly provided for in the substantive standards of the legislation under which they are proceeding. This construction of Congressional purpose is fully supported by judicial

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146. Section 102(2)(C) states that "copies of the staff's 'detailed statement' and comments thereon 'shall accompany the proposal through the existing agency review processes.'" Sections 102(2)(A) and (B), however, do require agencies to insure that consideration is accorded to certain ecological values in decisionmaking.

interpretation, the CEQ guidelines, and scholarly commentary.

## 2. *Federal Case Law*

The federal courts have flatly rejected the theory that agencies are precluded from taking into account ecological impacts not mentioned in the statutes pursuant to which they are acting. Some courts have done so quite explicitly by addressing the precise question of agency authority. Others have been less direct; many have construed Congressional intent as interpreted above, while some have simply indicated that agencies must consider all environmental effects. Thorough analysis of those cases that address the exact issue treated in this article will precede less comprehensive examination of those opinions which are more indirect.<sup>147</sup>

### a. *Decisions Explicitly Addressing the Issue*

Shortly after the passage of NEPA, the activities of several agencies raised directly the issue of agency authority to take into account ecological considerations not expressly enumerated in the substantive legislation under which the agency was proceeding. Four courts expeditiously and summarily dismissed the argument that agencies were precluded from considering environmental factors not explicitly provided for in extant statutory mandates, so that by 1971 the theory had been effectively quashed.<sup>148</sup>

*Calvert Cliffs Coordinating Committee v. Atomic Energy Commission* was the first major case in which a federal appellate court interpreted NEPA.<sup>149</sup> In assessing "claims that one of the agencies charged with its administration [had] failed to live up to the congressional mandate," the District of Columbia Circuit Court of Appeals stated that its duty was "to see that important legislative purposes, heralded in the halls of Congress, are not lost or

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147. Few courts have had an opportunity to decide the precise question of agency authority to take into account those ecological impacts not expressly mentioned in statutes under which they are proceeding. An important reason for this is that the theory that agencies were precluded from considering such factors was never espoused by many agencies, was thoroughly and quickly discredited by the federal judiciary, and was totally abandoned by the agencies soon after its demise in the courts.

148. *Environmental Defense Fund v. Matthews*, 410 F. Supp. 336 (D.D.C. 1976) is the only decision subsequent to this time in which an agency raised, and a court explicitly considered, the exact question examined in this article. That case probably should be characterized as aberrational. See note 171 *infra*. For a discussion of cases decided after 1971 in which the issue was either not squarely raised or met, see *id.*

149. 449 F.2d 1109, 1111 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). Many cases were decided prior to this one; however, no court had construed NEPA in the same detail or with such breadth. See, e.g., *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).



misdirected in the vast hallways of the federal bureaucracy."<sup>150</sup> The court performed that task quite admirably; indeed, *Calvert Cliffs* is the most widely cited NEPA decision, and its "interpretation has been accepted as the definitive judicial gloss on NEPA."<sup>151</sup>

The case arose from a challenge to AEC rules implementing the act that "specifically exclude[d] from full consideration a wide variety of environmental issues."<sup>152</sup> The Commission contended that it lacked independent authority, in making decisions on the licensing of nuclear power plants, to take into account nonradiological environmental effects when other agencies had specific responsibility for those particular impacts.<sup>153</sup> The court emphatically rejected that interpretation, expressly holding that the "sweep of NEPA is extraordinarily broad, *compelling consideration of any and all types of environmental impact* of federal action."<sup>154</sup> The command clearly was not restricted to those ecological factors explicitly enumerated in the statute pursuant to which the AEC was acting:

NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions [other than the "specific radiological hazards caused by its actions" a position that "was upheld in *State of New Hampshire v. Atomic Energy Commission*"]. Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account. *Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates.*<sup>155</sup>

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150. *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

151. *Anderson*, *supra* note 5, at 297.

152. *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1122 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). A technical reading of the AEC's rules reveals that the Commission did *not* completely deny that it had authority to consider ecological impacts outside its statutory mandates. *See* 35 Fed. Reg. 18469 (1970).

153. *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1122 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

154. *Id.* at 1122 (emphasis added).

155. *Id.* at 1112 (emphasis added).

Only once—in § 102(2)(B)—does the Act state, in terms, that federal agencies must give full "consideration" to environmental impact as part of their decision making processes. However, a requirement of consideration is clearly implicit in the substantive mandate of § 101, in the requirement of § 102(1) that all laws and regulations be "interpreted and administered" in accord with that mandate, and in the other specific procedural measures compelled by § 102(2). . . . Thus a

In explaining the "sort of consideration of environmental values which NEPA compels,"<sup>156</sup> the court drew from expressions of intent in the legislative history a requirement for full and rigorous consideration of *all* relevant ecological effects as an integral part of agency decisionmaking.<sup>157</sup> To the AEC's contention that "environmental data and evaluations merely [need] 'accompany' an application through the review process, but receive no consideration whatever from the hearing board,"<sup>158</sup> the court reacted sharply and critically:

We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. . . . The word "accompany" . . . must . . . be read to indicate a congressional intent that environmental factors, as compiled in the "detailed [environmental impact] statement" be *considered* through agency review processes. . . . Compliance to the "*fullest*" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.<sup>159</sup>

The Corps of Engineers assumed very different positions in two early NEPA cases. In *Kalur v. Resor*, the Corps promulgated regulations governing consideration of environmental matters in

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purely mechanical compliance with the particular measures required in § 102(2)(C) & (E) will not satisfy the Act if they do not amount to full good faith *consideration* of the environment. . . . The requirements of § 102(2) must not be read so narrowly as to erase the general import of §§ 101, 102(1) and 102(2)(A) & (B).

*Id.* at 1112-13 n.5. As to the specific question of impacts on water quality, the court stated: Water quality certifications essentially establish a *minimum condition* for the granting of a license. But they need not end the matter. The Commission can then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and consider alterations (above and beyond the applicable water quality standards) which would further reduce environmental damage.

*Id.* at 1125.

156. *Id.* at 1113.

157. *Id.* at 1113-14 nn. 6, 7, & 9.

158. *Id.* at 1117.

159. *Id.* at 1117-18. The District of Columbia Circuit Court of Appeals added that the commission "must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process." *Id.* at 1119. The court also relied upon legislative history for the proposition that "section 102 duties . . . must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority." *Id.* at 1115. This is exemplary of the statements about Congressional intent made throughout *Calvert Cliffs* which serve to confirm the interpretation provided in this article.

which the agency contended that it did not have to comply totally with NEPA.<sup>160</sup> The Corps argued, as did the AEC, that it was not required to independently take into account water quality considerations but could defer to the determinations of agencies responsible for water pollution control when issuing refuse permits under the Rivers and Harbors Act of 1899.<sup>161</sup> The court found *Calvert Cliffs* controlling and rejected the Corps' position,<sup>162</sup> stating that under NEPA the "particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs."<sup>163</sup>

Water quality certifications essentially establish a minimum condition for the granting of a license. But they need not end the matter. The Corps of Engineers can then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and consider alterations above and beyond the applicable water quality standards that would further reduce environmental damage.<sup>164</sup>

The same agency adopted a quite different posture in litigation involving another provision of the Rivers and Harbors Act.<sup>165</sup> Plaintiffs argued that the Corps' authority to deny their permit application was limited to considerations expressly enumerated in the substantive legislation.<sup>166</sup> However, the Corps asserted, and the

160. *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971). One reason espoused for NEPA's inapplicability was the fact that the "Corps of Engineers is an agency dedicated to guarding the environment." *Id.* at 12. However, the court summarily dismissed that claim.

161. Recognizing the expertise of the Environmental Protection Agency (EPA), the Corps will accept the findings, determinations and interpretation, as the Regional Representative of the EPA decides, concerning the applicability of water quality considerations upon requests for permits to dump refuse into navigable waters.

*Id.* at 13. The Corps was proceeding under section 13 of the Rivers and Harbors Act, 33 U.S.C. § 407 (1970).

162. This is analogous to the Atomic Energy Commission stating that it would not independently examine any problem of water quality. These cases having distinctions without meaning it is held that the *Calvert Cliffs'* reasoning applies here with equal force.

*Id.* at 13-14.

163. *Id.* at 14.

[A]lternatives must be considered that would effect the balance of values. The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.

*Id.*

164. *Id.* at 14-15.

165. In *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the Corps of Engineers was exercising its power to issue a permit to dredge and fill in navigable waters under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1970).

166. [Landholders] urged that the proposed [dredge and fill] work would not hinder navigation and that the Secretary [of the Army] had no authority to refuse

court agreed, that NEPA expanded the agency's power by authorizing denial of permits for ecological reasons unrelated to interference with navigation, flood control, or power production.<sup>167</sup> In discussing the obligations imposed upon the agency by NEPA, the Fifth Circuit Court of Appeals found that:

[T]he Army must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors [in NEPA]. In rejecting a permit on non-navigational grounds, the Secretary of the Army does not abdicate his sole ultimate responsibility and authority. Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors.<sup>168</sup>

In *Ely v. Velde*, the Law Enforcement Assistance Administration (LEAA) claimed that it could "not look beyond its governing statute and [was] prohibited in approving grants [to states], from reading into that statute the requirements of NHPA and NEPA."<sup>169</sup> However, the Fourth Circuit Court of Appeals rejected that contention and held that LEAA was duty-bound to comply with NEPA.<sup>170</sup>

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the permit on other grounds. They acknowledged that "there was evidence before the Corps of Engineers sufficient to justify an administrative agency finding that our fill would do damage to the ecology or marine life on the bottom."

*Zabel v. Tabb*, 430 F.2d 199, 203 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). The court stated that the question presented to it was "whether the Secretary of the Army can refuse to authorize a dredge and fill project in navigable waters for factually substantial ecological reasons even though the project would not interfere with navigation, flood control, or the production of power." *Id.*

167. "There is no doubt that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act." *Id.* at 214. The Fifth Circuit Court of Appeals also relied upon a Report of the House Committee on Government Operations, H.R. REP. No. 91-917, 91st Cong., 2d. Sess. (1970) and the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.* (1974), in reaching its determination. See *Zabel v. Tabb*, 430 F.2d 199, 213-14 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

168. *Id.* at 213. The same court reaffirmed *Zabel v. Tabb* in *Bankers Life & Casualty Co. v. Village of North Palm Beach, Fla.*, 469 F.2d 994 (5th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973).

169. *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971), *rev'd and remanded*, 451 F.2d 1130, 1133 (4th Cir. 1971), *denying injunction*, 363 F. Supp. 277 (E. D. Va. 1973), *rev'd and remanded*, 497 F.2d 252 (4th Cir. 1974). "NHPA" is the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (1974), a measure also relied upon by plaintiffs. LEAA's "governing statute" is the Omnibus Crime Control and Safe Streets Act, 42 U.S.C. §§ 701 *et seq.* (1977). An important component of the agency's argument was that this legislation prohibited "any interference or control of the states by the federal government in the spending of grants, except as expressly authorized by the statute." *Ely v. Velde*, 451 F.2d 1130, 1133 (4th Cir. 1971) (citation omitted).

170. "To summarize, we hold that the LEAA is duty-bound, in approving the grant at issue here, to comply with the procedural requirements of NHPA and NEPA." *Id.* at 1139.

*Environmental Defense Fund v. Matthews* was the only case decided after 1971 in which an agency raised, and a court expressly addressed, the precise issue under consideration in this article.<sup>171</sup> However, the opinion has considerable significance for Montana, because the position asserted by the agency in *Matthews* is virtually identical to that now espoused by the Montana agencies.<sup>172</sup>

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Earlier in the decision the court articulated its reasoning:

Reliance in the present case is misplaced, for it is plain that the LEAA has overdrawn the "hands off" policy of the Safe Streets Act. Properly read, neither the Act's language nor its policy prohibits or excuses compliance with NHPA and NEPA.

*Id.* at 1135-36. The Fourth Circuit Court of Appeals also stated:

It is our conclusion that Congress, in enacting the Safe Streets Act, did not intend to forbid the LEAA from considering NHPA and NEPA.

*Id.* at 1136-37.

171. 410 F. Supp. 336 (D.D.C. 1976). Agency espousal in 1975 of the aberrational position which led to this litigation may have been prompted more by threat of suit from the industry and desire to have the issue resolved than agency commitment to the principle involved. Indeed, the preamble announcing promulgation of the rule appeared to invite litigation when it pronounced that this "amendment to the regulations constitutes final agency action on the matter." 40 Fed. Reg. 16,662 (1975).

In other cases, agencies did make contentions similar, but not identical to, those of FDA in *Matthews*. In a lengthy dispute involving the SEC, the Commission never actually denied that NEPA empowered it to take environmentally protective measures pursuant to its substantive mandates. See *NRDC v. SEC*, 339 F. Supp. 689 (D.D.C. 1974), *remanded for reconsideration*, 432 F. Supp. 1190 (D.D.C. 1977), *rev'd on other grounds*, 606 F.2d 1031 (D.C. Cir. 1979); *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829, 834, 837-38 (D.D.C. 1974), *aff'd mem.*, 527 F.2d 1386 (D.C. Cir. 1975), *cert. denied*, 427 U.S. 913 (1976). In *Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 516 F.2d 378 (2d Cir. 1975), the service prepared an EIS but claimed that section 410 of the Postal Reorganization Act of 1970, 39 U.S.C. § 410 (1962), exempted the agency from NEPA compliance. The Second Circuit Court of Appeals compared the language and legislative history of the two statutes and concluded that the service was not exempt from NEPA. *Id.* at 386. *Accord*, *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 974-75 (2d Cir. 1976).

Finally, some agencies have contended that they did not have to comply with NEPA where there was a conflict of statutory authority between that act and the legislation pursuant to which the agencies were acting. See generally note 84 *supra*; W. RODGERS, *supra* note 3, at 764-66. Several agencies charged with responsibility for management of the public lands have recently asserted that NEPA had little, or no, applicability to them when acting pursuant to certain specific statutory schemes. The efforts of the Forest Service in this regard have met with no success. See, e.g., *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978), *reh. denied*, 576 F.2d 931, *cert. denied*, 439 U.S. 966. In *Citizens Against Toxic Sprays v. Bergland*, 428 F. Supp. 908 (D.Ore. 1977), the court employs reasoning most similar to that used in decisions rendered in the early 1970's. However, it is not clear that the contentions of the Forest Service were like those espoused by agencies during the earlier period, and the court's rejection of the agency's muddled claims consists of less than one page of a thirty-two page opinion. See *id.* at 926-27. The Interior Department has been vindicated in several cases where the agency contended that full NEPA compliance was not required for action taken pursuant to statutes governing mineral extraction on public lands. See, e.g., *Natural Resources Defense Council v. Berkland*, 609 F.2d 553 (D.C.Cir. 1979); *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980).

172. In most of the cases just examined in the text, agencies simply did not make the type of thorough and precise disclaimer of authority articulated by FDA in *EDF v. Mat-*

The FDA attempted to amend its regulations governing agency obligations under NEPA by limiting the "grounds on which the Commissioner of FDA [could] base any action to those expressly provided for in the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (FDCA) or in other statutes which FDA administers [and by prohibiting the Commissioner] from acting solely on the basis of environmental considerations not identified in those statutes."<sup>173</sup>

A determination of adverse environmental impact has no legal or regulatory effect and does not authorize the Commissioner to take or refrain from taking any action under the laws he administers. The Commissioner may take or refrain from taking action on the basis of a determination of an adverse environmental impact only to the extent that such action is independently authorized by the laws he administers.<sup>174</sup>

The District of Columbia District Court thoroughly and emphatically repudiated all of the agency's claims. The court first made a general finding that "this limitation of the agency's discretion to act in accordance with environmental considerations directly contravenes the mandate of NEPA to all Federal agencies to consider the environmental effects of their actions to the fullest extent possible."<sup>175</sup> FDA's specific contention that its statutes were in direct conflict with NEPA, thereby excusing the agency from full compliance, was then subjected to rigorous scrutiny and found to be wanting.<sup>176</sup> The court relied on this finding and the sweeping command of NEPA to explicitly reject the theory espoused by

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*thews.* For example, in *Calvert Cliffs* and *Kalur*, the agency position was more in the nature of a deferral to the power of other agencies.

173. *EDF v. Matthews*, 410 F. Supp. 336, 338 (D.D.C. 1976).

174. 40 Fed. Reg. 16, 662 (1975).

175. *EDF v. Matthews*, 410 F. Supp. 336, 338 (D.D.C. 1976).

176. Defendants [also] contend that FDA's statutes, particularly the FDCA, dictate that it act only in accordance with specifically expressed criteria, and that to the extent that NEPA demands consideration of additional criteria, it is in direct conflict with those statutes. Accordingly, they maintain that such a direct statutory conflict exempts FDA from full compliance with NEPA.

It appears clear to us that, contrary to defendants' contention, FDA's existing statutory duties under the FDCA and its other statutes are not in direct conflict with its duties under NEPA. The FDCA does not state that the listed considerations are the only ones which the Commissioner may take into account in reaching a decision. Nor does it explicitly require that product applications be granted if the specified grounds are met. It merely lists criteria which the Commissioner must consider in reaching his decision. In the absence of a clear statutory provision excluding consideration of environmental factors . . . we find that NEPA provides FDA with supplementary authority to base its substantive decisions on all environmental considerations including those not expressly identified in the FDCA and FDA's other statutes.

## FDA:

In the absence of a clear statutory provision excluding consideration of environmental factors, and in light of NEPA's broad mandate that all environmental considerations be taken into account, we find that NEPA provides FDA with supplementary authority to base its substantive decisions on all environmental considerations including those not expressly identified in the FDCA and FDA's other statutes. This conclusion finds support in the legislative history, the precise statutory language, the holdings of the courts, and the construction adopted by other Federal agencies.<sup>177</sup>

Finally, the court made clear that the NEPA mandate to take into account ecological considerations in decisionmaking was necessarily meant to add to extant authority so that agencies could make determinations based upon them:

NEPA requires FDA to *consider* environmental factors in its decision-making process and supplements its existing authority to permit it to act on those considerations. It permits FDA to base a decision upon environmental factors, when balanced with other relevant considerations. Since the contested regulation prohibits FDA from acting on the basis of such environmental considerations, it is directly contrary to the letter and spirit of NEPA.<sup>178</sup>

By 1972, most agencies had simply abandoned the argument advanced by FDA in *Matthews*, so that the case is aberrational. However, the opinion is valuable because it provides a clear, definitive, and thorough statement of the federal law on the precise question addressed in this article. In sum, all federal courts that have considered the issue have found that NEPA requires agencies to take into account in decisionmaking environmental factors not explicitly included in the legislation pursuant to which they are acting.

b. *Decisions Indirectly Addressing the Issue*

There are quite a few cases in which the federal judiciary has

177. *Id.*

178. *Id.* "Defendants also contend that the amending regulation constitutes full compliance with NEPA because it does not prohibit 'consideration' of environmental factors, but merely prohibits such factors from being the exclusive basis for agency action." *Id.* at 339. However, the court summarily dismissed this argument:

This view clearly places form over substance. What possible purpose can be served by consideration of environmental factors without the concomitant authority to act on those considerations? . . . Requiring consideration without permitting action as a result would render the NEPA process futile and meaningless in a way which the Court in *Calvert Cliffs* found it was never intended to be.

*Id.*

indicated less explicitly that agencies are to consider all ecological impacts in their decisional processes. Most of these decisions arise in the context of challenges to the adequacy of agency impact statement preparation. By finding that the agency failed to address properly certain environmental considerations, the courts indicate that agencies do have authority to take into account many ecological effects not mentioned in their substantive legislation. This phenomenon is manifested quite clearly in *Hanly v. Mitchell*.<sup>179</sup> In that case, the court examined the review of ecological factors undertaken by the General Services Administration in deciding whether to locate a federal detention center in Manhattan and found the analysis deficient:

The National Environmental Policy Act contains no exhaustive list of so-called "environmental considerations," but without question its aims extend beyond sewage and garbage and even beyond water and air pollution. . . . The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban "environment" . . . . Thus, plaintiffs do raise many "environmental considerations" that should not be ignored. We believe the record in this case indicates that, as to the proposed jail, they were.<sup>180</sup>

In sum, federal courts have stated indirectly that agencies are to take into account all ecological impacts of their actions.

### 3. Conclusion

All relevant indications of Congressional intent, as expressed

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179. 460 F.2d 640 (2d Cir. 1972), *aff'd sub nom.*, *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

180. *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972). Some courts subscribe to the principle propounded in *Hanly*. See, e.g., *Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 516 F.2d 378, 387-88 (2d Cir. 1975); *McDowell v. Schlesinger*, 404 F. Supp. 221, 246 (W.D. Mo. 1975); *Town of Groton v. Laird*, 353 F. Supp. 344, 349-50 (D. Conn. 1972). Others state that agencies should prepare impact statements detailing the ecological effects of proposals "regardless of whether the agency has authority to do anything about it." *Scenic Rivers Ass'n v. Lynn*, 520 F.2d 240, 245 (10th Cir. 1975), *rev'd on other grounds sub nom.*, *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976) (citations omitted). *Accord*, *Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029, 1041 (D.C. Cir. 1973); *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1340-43 (S.D.N.Y. 1975).

As with the decisions expressly addressing the precise question of agency authority, there simply is not a plethora of case law that is less explicit, because after 1971 agencies generally had abandoned the argument that they lacked the power to apply ecological factors not found in their substantive mandates and courts appeared to presume that the question had been resolved. Those decisions, that treat the issue indirectly by interpreting Congressional intent, are discussed in section I(A)(1) of this article *supra*.



in the statutory language and legislative history of NEPA, as well as case law interpreting that purpose, emphatically support the conclusion that Congress intended to require that agencies fully consider in their decisionmaking those environmental factors not explicitly provided for in the substantive mandates of the statutes under which agencies are acting.

### B. *State Environmental Policy Acts*

Approximately thirty jurisdictions have adopted measures similar to NEPA.<sup>181</sup> The intent of state legislatures in enacting these statutes is very difficult to ascertain. Little legislative history accompanies passage of most legislation at this level of government, and environmental policy acts are no exception. While the language used in some of these statutes is quite similar because they are patterned after NEPA, many of the state measures differ significantly from the federal act and from each other.<sup>182</sup> For these reasons, the intent of the state legislatures in passing "little NEPA's" will not be examined in this paper.<sup>183</sup> Considerable emphasis, however, will be placed upon decisions rendered by state courts. There has not been much case law development at this level, but most courts interpreting the state acts have construed the legislation in a manner quite similar to the federal courts.<sup>184</sup>

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181. As of January 1, 1976, environmental impact statement requirements had been adopted by 30 states and Puerto Rico. Comprehensive legislation is found in 13 states and Puerto Rico, and administrative equivalents in four others. Special SEPA's [State Environmental Policy Acts], limited to identifiable actions or geographical areas, are effective in 14 states. . . .

W. RODGERS, *supra* note 3, at 810 (citations omitted).

182. Generally, the SEPA's adhere closely to the language of NEPA. Several, in fact, incorporate virtually verbatim the federal provisions. Many of the state statutes, however, deviate from the federal model and from one another in notable particulars.

W. RODGERS, *supra* note 3, at 811.

183. Even if the purpose of these legislative bodies in enacting an environmental policy measure could be ascertained, that information would be of limited value. State courts, in construing little NEPA's passed in a particular jurisdiction, rarely have looked to the intent of legislatures in other states, despite the fact that these courts frequently have relied upon federal interpretation. *See* note 244 *infra*. Nevertheless, legislative purpose will be examined in the context of judicial interpretation of legislative intent in passing measures substantially similar to NEPA and MEPA. This discussion will appear under the heading "Decisions Indirectly Addressing the Issue" at section I(B)(2) of this article *infra*, because no separate examination of legislative purpose (like section I(A)(1) *supra*) is provided in this part of the article.

184. "The early history of 'little NEPA' litigation strongly suggests that the state courts will generally follow the federal courts in their interpretation of NEPA." F. GRAD, *supra* note 126, § 9.07[3], at 9-168. *Cf.* W. RODGERS, *supra* note 3, at 814 ("Case law on SEPA applicability falling into the broad categories of coverage familiar under NEPA" by 1977).

### 1. *Decisions Explicitly Addressing the Issue*

The courts of Washington state have directly confronted the question considered in this article and have declared that Washington's State Environmental Policy Act (SEPA) mandates consideration of environmental factors not present in the substantive legislation under which state or local agencies are acting.<sup>185</sup> *Polygon Corporation v. City of Seattle*<sup>186</sup> provides the broadest and clearest articulation of the interpretation accorded SEPA by the Washington courts. The views expressed there originated in a line of case law that extends back to 1973.<sup>187</sup>

In *Polygon*, an applicant for a building permit claimed that

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Because there are so few relevant state decisions, especially in comparison to federal case law development, those state court opinions examined will be accorded comprehensive treatment.

185. Many of the Washington cases involve entities of local rather than state government; however, that does not detract from the validity of these decisions because the Washington legislature explicitly provided that SEPA would apply to local agencies. See WASH. REV. CODE § 43.21C.030 (1970).

These cases have special importance for Montana because the Montana Supreme Court looked to the decisional precedent of Washington for guidance in resolving the major MEPA case. See *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 494, 559 P.2d 1157, 1166 (1976) (Haswell, J., dissenting).

186. 90 Wash.2d 59, 578 P.2d 1309 (1978).

187. After holding that "SEPA confers substantive authority to the deciding agency to act on the basis of the [environmental] impacts disclosed," the *Polygon* court expressly stated that "this view was presaged by the Court of Appeals" in *Juanita Bay Valley Community Ass'n v. Kirkland*, 9 Wash. App. 59, 73, 510 P.2d 1140, 1149 (1973), *petition for review denied*, 83 Wash.2d 1002 (1973). In *Kirkland*, the court observed:

The essential point is that SEPA requires the City, acting through its city council, actually to consider the various environmental factors. The change in the substantive law brought about by SEPA introduces an element of discretion into the making of decisions that were formerly ministerial, such that even if we assume, *arguendo*, that the issuance of a grading permit was prior to SEPA, a ministerial, nondiscretionary act, SEPA makes it legislative and discretionary.

*Id.* Indeed, the supreme court itself had strongly indicated in a case decided earlier in 1973 that SEPA provided agencies with substantive authority to deny permit applications where the activity contemplated would impose adverse environmental effects. See *Stempel v. Department of Water Resources*, 82 Wash.2d 109, 118, 508 P.2d 166, 171-72 (1973). Similar expressions appear in an opinion rendered several months thereafter. See *Eastlake Community Council v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 492, 513 P.2d 36, 47 (1973). The Washington Supreme Court cited with approval the views espoused in *Stempel* and *Eastlake* again during that year. See *Loveless v. Yantis*, 82 Wash.2d 754, 764, 513 P.2d 1023, 1029 (1973). In 1976, this interpretation was reiterated. See *Norway Hall Preservation and Protection Ass'n v. King County Council*, 87 Wash.2d 267, 552 P.2d 674 (1976).

The courts of Washington state also have expressly and consistently recognized that SEPA is "'supplementary' to existing authorizations" in a line of decisions extending back to 1973. See *Eastlake Community Council v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 492, 513 P.2d 36, 47 (1973). *Accord*, *Bellevue v. King County Boundary Review Bd.*, 90 Wash.2d 856, 865, 586 P.2d 470, 476 (1978); *Sisley v. San Juan County*, 89 Wash.2d 78, 83, 569 P.2d 712, 715-16 (1977); *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wash.2d 271, 276, 525 P.2d 774, 778-80 (1974).

SEPA did not authorize denial of the permit where the applicant satisfied the substantive requirements of the legislation pursuant to which the permit would issue.<sup>188</sup> The Washington Supreme Court unanimously rejected that argument and held that "SEPA confers substantive authority to the deciding agency to act on the basis of the [environmental] impacts disclosed."<sup>189</sup> In response to the applicant's specific allegation that the act conferred no discretion upon the agency,<sup>190</sup> the court expressly stated that SEPA is supplementary to extant agency authorizations. The court observed that the provision of that act, which is similar to section 105 of NEPA and MCA § 75-1-105, "added to" the "authority" found in the permitting measure and that SEPA was intended to "'over-lay' the requirements which existed prior to its adoption."<sup>191</sup>

188. Polygon first contends that SEPA does not create in the superintendent the authority to deny a building permit which he is otherwise directed to issue under applicable laws and regulations. . . .

Procedurally, the environmental protection policy is to be implemented by the preparation and circulation of an environmental impact statement disclosing the environmental impacts of the proposed action. RCW 43.21C.030(2)(c). Polygon urges that this procedural duty is all that SEPA requires. It contends that SEPA serves only an "informational" purpose and does not confer substantive authority to act with reference to the environmental impacts disclosed.

*Polygon Corp. v. City of Seattle*, 90 Wash.2d 59, 63, 578 P.2d 1309, 1312 (1978).

189. We have said that SEPA requires the disclosure and full consideration of environmental impacts in governmental decision making. . . . That mandate would be meaningless under the facts of this matter if the superintendent was powerless to decide in the manner that "full consideration of environmental impacts" impelled. . . .

We hold that SEPA confers on the City, acting through its superintendent of buildings, the discretion to deny a building permit application on the basis of adverse environmental impacts disclosed by an EIS.

*Id.* at 63-64, 65, 578 P.2d at 1312-13 (citation omitted). The court also observed that a 1977 amendment to SEPA "strongly indicates [its holding] to be the legislature's view." *Id.* at 64, 578 P.2d at 1312. That amendment cannot be taken to detract from the strength of the decision because the modification was, as the court noted, "not applicable to this case." *Id.* Moreover, the addition does not diminish the significance of the other important case decided subsequent to its passage because the developer in that controversy also had applied for a permit prior to enactment of the amendment. See *State v. Lake Lawrence Public Lands Protection Ass'n*, 92 Wash.2d 656, 601 P.2d 494 (1979). However, the court there relied upon the amendment for several propositions. See note 194 *infra*.

190. Polygon insists, however, that SEPA does not confer discretion here where prior to its enactment the superintendent's duties were ministerial. . . . The Seattle Municipal Code § 3.03.020(e) provides in pertinent part:

If the superintendent of buildings is satisfied that the work described in an application for permit and the plans filed therewith conform to the requirements of this Code and other pertinent laws and ordinances . . . he shall issue a permit therefor to the applicant. . . .

*Polygon Corp. v. City of Seattle*, 90 Wash.2d 59, 64-65, 578 P.2d 1309, 1312-13 (1978).

191. *Id.* RCW 43.21C.060, however, added to that authority [to grant a building permit] by providing:

The policies and goals set forth in this chapter are *supplementary to*

In a very recent case, *State v. Lake Lawrence Public Lands Protection Association*,<sup>192</sup> the Washington Supreme Court reiterated and further explicated its views. The issue there was very similar to the one presented in *Polygon*: whether a Board of County Commissioners had "authority to deny a preliminary plat on environmental grounds."<sup>193</sup> The court summarily stated that there "no longer [is] any question that a governmental decision-making body whose deliberation is subject to the requirements of SEPA is empowered by that act to deny a permit application on environmental grounds" and that this "substantive aspect of SEPA [is] a *supplement to all other statutory authorization*."<sup>194</sup> The court found that the developer's specific contention—that satisfaction of the platting measure's prescriptions required that the developer's application be approved—"misconstrues the nature of the SEPA mandate for environmental consideration."<sup>195</sup>

[T]he absence of environmental criteria from the platting statute is immaterial, for the obligation and authority to consider such matters is provided by SEPA.

As we have repeatedly pointed out, *SEPA is an overlay of law which supplements existing statutory authority*. . . . Thus, it makes no difference that the platting statute does not provide explicit authority to deny the plat on environmental grounds, because SEPA does provide such authority.<sup>196</sup>

*those set forth in existing authorizations of all branches of government of this state, including . . . municipal . . . corporations. . . .*

(Italics ours.) Thus, SEPA has been said to "overlay" the requirements which existed prior to its adoption.

*Id.* at 65, 578 P.2d at 1313 (citation omitted). For a discussion of other Washington decisions which recognize that SEPA is supplementary, see notes 187 *supra* & 194 *infra*. In *Dunstan v. City of Seattle*, 24 Wash. App. 265, 600 P.2d 674, 675-76 (1979), the Washington Appellate Court recently expounded upon the operations of SEPA, but added little to what was said in *Polygon*.

192. 92 Wash.2d 656, 601 P.2d 494 (1979).

193. *Id.* at —, 601 P.2d at 498. The platting statute included no specific environmental standards, but rather, required the Commissioners to "determine if 'the public use and interest will be served by the platting.'" *Id.*

194. *Id.* (emphasis added). After relying primarily upon *Polygon*, the court does cite in a secondary way the amended provision of SEPA, discussed in note 189 *supra*, for two somewhat similar propositions. *Id.* However, the rather limited reliance placed upon this statutory provision certainly should not be taken to blunt the force of the remainder of the opinion.

195. *Id.* at —, 601 P.2d at 498.

196. *Id.* (emphasis added).

The Commissioners here were required by SEPA to consider the possible adverse impact of the proposed plat on the use of Wood Point for eagle perching and feeding, and were empowered by SEPA to deny the plat on the ground the adverse impact was too great.

*Id.*

Finally, in explaining how the power of the Commissioners under the platting act was related to the authority of the Shorelines Hearing Board to issue a permit for development, the court had another opportunity to explain SEPA's effect:

In making its determination whether a permit for development within the Shoreline may issue, the Board is subject to the mandates of SEPA to consider environmental concerns. . . . It is likewise empowered by SEPA to deny or condition the permit application on the basis of specific adverse environmental effects discovered in the process of these deliberations.<sup>197</sup>

Many of the earlier Washington decisions (which are only referred to in footnotes) construe SEPA in a manner quite similar to the two principal cases.<sup>198</sup> In sum, the state courts of Washington have consistently, persuasively, and forcefully found that the environmental policy act of that jurisdiction empowers agencies to make decisions on the basis of considerations not expressly provided for in substantive legislation pursuant to which agencies are proceeding and that SEPA supplements extant agency authorizations.

The question in *City of Roswell v. New Mexico Water Quality Control Commission*<sup>199</sup> was more akin to that presented by *Calvert Cliffs* and *Kalur v. Resor* than the line of Washington state cases. However, the response of the New Mexico Court of Appeals was very similar to those of the Washington and federal courts. The state agency maintained that it was not subject to the New Mexico Environmental Quality Control Act (NMEQCA) because that " 'would in effect suspend, amend, or modify its authority to act

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197. *Id.* at \_\_\_, 601 P.2d at 499 (citations omitted).

[T]he [Shoreline] Board's finding that the proposed plat was adequate to protect against adverse effects to the eagles . . . cannot bind the County Commissioners in their determination of an entirely different question—whether the preliminary plat should be approved. This conclusion follows from the limited and differing jurisdictions of the decision-making agencies, and from the unique nature of SEPA as a supplement to the statutory authority of each agency. . . . In summary, the environmental determinations mandated by SEPA are uniquely related to the particular decision being taken, and are conclusive only for that purpose. They are not binding on other decision-making bodies. . . . Such a result could contravene the clear intent of SEPA to infuse every governmental exercise of discretion with consideration of environmental amenities and values.

*Id.*

198. *See, e.g.,* *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wash.2d 267, 277-78, 552 P.2d 674, 680 (1976). References to the other cases appear at note 187 *supra*. For decisions that fully support the interpretation of NEPA provided in section I(A)(1) of this article, *see* note 214 *infra*.

199. 84 N.M. 561, 505 P.2d 1237 (1972), *cert. denied*, 84 N.M. 560, 505 P.2d 1236 (Ct. App. 1973).

pursuant to its specific statutory mandate' ”<sup>200</sup> and because it was an environmental control agency.<sup>201</sup> Both arguments were summarily dismissed.<sup>202</sup> The court stated that it could “see no apparent conflict with [the water pollution abatement] mandate and the requirements of NMEQCA.”<sup>203</sup> In response to the commission’s contention—“that to elevate this section ‘to the status of a condition precedent to the exercise of an agency’s regulatory functions would, in effect, suspend, amend, or modify the authority of an agency to act pursuant to its specific statutory mandate pending performance of the obligations imposed’ ”—the court stated that “this is exactly what the legislature intended.”<sup>204</sup>

This act requires that every agency or department consider, to the fullest extent possible under its statutory mandate, the effect that its action might have on the environment. Therefore, an agency or department is exempt from compliance only when there is a clear conflict of statutory mandate and then only to the extent of the conflict.<sup>205</sup>

The court replied to the same argument by observing that application of the environmental policy act does “not suspend, amend or modify the authority of the Water Quality Control Commission” but “does *add an additional requirement* in the exercise of the Commission’s authority.”<sup>206</sup> The court also rejected the agency’s claim that “all that is required is that an agency keep environmental matters in mind:”

Such is not the case. The requirements are strict and demanding. “To the fullest extent possible” throughout the decision-making process agencies must consider the environmental consequences of their proposed action.<sup>207</sup>

In sum, the few state courts that have examined the precise question treated in this article have found that agencies must take

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200. *Id.* at 562, 505 P.2d at 1238. The commission argued that “it was not the intention of the legislature that it be subject to NMEQCA.” *Id.*

201. The agency contended that the “provisions of NMEQCA do not rationally apply to agencies or programs whose chief functions are regulation of the environment.” *Id.* The Commission’s substantive statutory mandate was basically water pollution control.

202. The court “rejected the contention that [NMEQCA] does not apply to environmental protection agencies and also rejected the contention that the Water Quality Act is in conflict with [NMEQCA].” *Id.* at 564, 505 P.2d at 1240.

203. *Id.* at 564, 505 P.2d at 1239.

204. *Id.* at 564-65, 505 P.2d at 1240.

205. *Id.*

206. *Id.*

207. *Id.* The New Mexico statute was repealed by 1974 N.M. Laws, Ch. 46 § 1. See generally Note, *The Rise and Demise of the New Mexico Environmental Quality Act*, “Little NEPA,” 14 NAT. RESOURCES J. 400, 405-06 (1974).

into account in decisionmaking environmental factors not expressly mentioned in the legislation pursuant to which they are acting.

## 2. *Decisions Indirectly Addressing the Issue*

Because there is a dearth of case law development in the states, the number of courts that have *indirectly* confronted the question of agency authority is small. Nonetheless, additional support for the view that agencies are to consider all ecological impacts may be found in those decisions where courts have interpreted the statutory language of "little NEPA's" or addressed the issue examined in this article in other less direct ways.<sup>208</sup>

The number of relevant opinions *construing* environmental policy acts is further limited by the fact that the wording of individual statutes differs. However, courts in some jurisdictions have interpreted provisions of state legislation that are substantially similar to parts of NEPA and MEPA. The Wisconsin Supreme Court, in construing language "identical to NEPA's [section] 102(2)(E),"<sup>209</sup> has subscribed to the view expressed in section I(A)(1) of this article:

The obligation imposed is greater than the simple taking into account of alternatives by the agency in its decision-making. The agency must "study, develop and describe" alternatives. *Thorough agency action is required.*<sup>210</sup>

That court, in a different case with the identical title, interpreted the prefatory wording, "to the fullest extent possible," as was done in section I(A)(1) above.<sup>211</sup> The court also found that the Wisconsin Environmental Policy Act was enacted for the general policy

208. No line of decisional precedent comparable to that which follows *Hanly v. Mitchell* has yet emerged at the state level. See generally § I(A)(2)(b) of this article *supra*. But cf. *Russian Hill Improvement Ass'n v. Board of Permit Appeals*, 44 Cal. App. 3d 158, 171, 118 Cal. Rptr. 490, 498 (1974) (agency in considering application for building site permit must "take into account the total environmental impact").

209. *Wisconsin's Environmental Decade, Inc. v. Public Serv. Comm'n*, 79 Wis.2d 161, 174, 255 N.W.2d 917, 925 (1977).

210. *Id.* (emphasis added) (citation omitted).

The purposes of this "study, develop and describe" requirement is [sic] to assure that alternatives are adequately explored in the initial decision-making process

. . . .

*Id.* at 175, 255 N.W.2d at 926.

211. *Wisconsin's Environmental Decade, Inc., v. Public Serv. Comm'n*, 79 Wis.2d 409, 416, 438, 256 N.W.2d 149, 157, 160 (1977). The court relied upon that language to require the Public Service Commission to consider direct and indirect environmental effects of its ratemaking activities in deciding whether to prepare an EIS. *Id.* at 429. 256 N.W.2d at 159-60.

reason of effecting change in agency decisionmaking<sup>212</sup> and that the state legislature meant to accomplish this result through action-forcing procedures.<sup>213</sup> The Washington Supreme Court has recognized that the same broad purpose underlies SEPA and has construed one of its provisions that is practically identical to section 102(2)(B) of NEPA just as the national provision was interpreted in section I(A)(1) of this article.<sup>214</sup> In terms much like those employed by the Washington court to describe the specific provision of SEPA, a New York opinion states that its "little NEPA" was intended to affect agency decisional processes.<sup>215</sup> California

212. The evident purpose of WEPA was to effect an across-the-board adjustment of priorities in the decision-making processes of agencies of state government. The Act constitutes a clear legislative declaration that protection of the environment is among the "essential considerations of state policy," and as such, is an essential part of the mandate of every state agency.

*Id.* at 416, 256 N.W.2d at 153.

213. Like its federal counterpart, WEPA contains a broad statement of governmental commitment to the protection and enhancement of the environment . . . and imposes upon governmental agencies certain procedural obligations with respect to their decision-making processes to assure that the substantive policies of the Act will be implemented.

*Id.* (citations omitted). For thorough discussion of the Wisconsin statute, see Comment, *Agency Decisionmaking Under the Wisconsin Environmental Policy Act*, 1977 Wis. L. Rev. 111.

214. A very recent opinion illustrates the court's appreciation of the strong legislative mandate to protect the environment. In *Asarco v. Air Quality Coalition*, 92 Wash.2d 685, 601 P.2d 501, 515 (1979), the supreme court declared that the purpose of the act was "not only to prevent further environmental degradation but to reverse, where possible, ecological damage already done." Moreover, the court went to great lengths in rejecting claims that a state agency was exempt from SEPA compliance either on the basis of a conflict between that statute and the Washington Clean Air Act or on the grounds that the procedures mandated in the air legislation provided the functional equivalent of an EIS. *Id.* at \_\_\_, 601 P.2d at 516-18. Two other cases in which the court recognizes the policy implications of SEPA are *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wash.2d 267, 277, 552 P.2d 674, 680 (1976) and *Stempel v. Department of Water Resources*, 82 Wash.2d 109, 118, 508 P.2d 166, 171 (1973). In *Stempel*, the court also spoke to the provision of its law that parallels section 102(2)(B):

"Environmental amenities" will undoubtedly often conflict with "economic and technical considerations." In essence, what SEPA requires, is that the "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations."

*Id.* at 118, 508 P.2d at 172 (citations omitted).

215. SEQRA [State Environmental Quality Review Act] was modeled after the National Environmental Policy Act (NEPA). Its purpose was to intelligently assess and weigh environmental factors along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken.

*Tuxedo Conservation and Taxpayers Ass'n v. Town Bd. of Town of Tuxedo*, 96 Misc.2d 1, 408 N.Y.S.2d 668, 671 (1978), *aff'd*, 418 N.Y.S.2d 638 (1979). On appeal, even dissenting Justice Suozzi recognized that SEQRA was supplementary. *Id.* at \_\_\_, 418 N.Y.S.2d at 649-50. For discussions of the New York statute, see Comment, *The New York State Environmental Quality Act: An Overview and Analysis*, 41 ALBANY L. REV. 293 (1977).



cases find that the same general policies apply to legislation passed there.<sup>216</sup>

Decisions of very few jurisdictions address in other indirect ways the issue of agency authority. However, the judiciary in California has required agencies to satisfy the procedural mandates of the California Environmental Quality Act (CEQA)<sup>217</sup> in several situations where the contention was made that compliance was unnecessary.

In *Natural Resources Defense Council v. Arcata National Corporation*,<sup>218</sup> the forestry industry claimed that the review and approval of timber harvesting plans under the Forest Practice Act (FPA) were exempt from the provisions of CEQA.<sup>219</sup> The court first examined the two statutes and found them compatible.<sup>220</sup> The court also refused to "attach overriding significance" to the timber industry's contention that time discrepancies in the acts evinced legislative intent that environmental information reports (EIR's) not be prepared in connection with timber harvest plans.<sup>221</sup> The court then rejected the industry's argument that the "Forest Practice Act was the 'functional equivalent' of CEQA," which would

216. In *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.2d 247, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972), the California Supreme Court concluded that the "Legislature intended the EQA to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Id.* at 260, 104 Cal. Rptr. at 768, 502 P.2d at 1056. *Accord*, *Wildlife Alive v. Chickering*, 18 Cal.3d 190, 199, 132 Cal. Rptr. 377, 381, 553 P.2d 537, 541 (1976).

The California cases also analyze agency consideration of alternatives in a manner similar to the interpretation presented in section I(A)(1) of this article. *See, e.g.*, *Wildlife Alive v. Chickering*, 18 Cal.3d 190, 198, 132 Cal. Rptr. 377, 380, 553 P.2d 537, 540 (1976); *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.3d 247, 964 n.8, 104 Cal. Rptr. 761, 771 n.8, 502 P.2d 1049, 1059, n.8 (1972); *Environmental Defense Fund v. Coastside County Water Dist.*, 27 Cal. App.3d 695, 705, 104 Cal. Rptr. 197, 202 (1972).

217. CAL. PUB. RES. CODE § 21000 *et seq.* (1972).

218. 59 Cal. App.3d 959, 131 Cal. Rptr. 172 (1976).

219. First, it is argued that in enacting the Forest Practice Act the Legislature demonstrated an intention not to require preparation of EIRs [Environmental Information Reports] in conjunction with the review of timber harvesting plans . . . . Secondly, it is maintained that the Forest Practice Act, which is a comprehensive, self-contained regulatory system for the protection of the environment, is a "functional equivalent" of CEQA.

*Id.* at 965, 131 Cal. Rptr. at 175. The Forest Practice Act, CAL. PUB. RES. CODE § 4511 *et seq.* (1972), provides for the review and approval of timber harvesting plans required to be submitted to the state forester.

220. We entertain no doubt that the two acts in question are not in conflict, but rather supplement each other and, therefore, must be harmonized. . . . Since under the rules of interpretation we are to harmonize the two statutes, the provisions of CEQA are deemed to be a part of the Forest Practice Act as well.

*Natural Resources Defense Council v. Arcata*, 59 Cal. App.3d 959, 966, 131 Cal. Rptr. 172, 176 (1976).

221. *Id.* at 973, 131 Cal. Rptr. at 180.

have rendered the requirements of the latter inapplicable.<sup>222</sup> One important reason for repudiation of this contention was the court's observation that the "test of 'functional equivalence' is met only if the . . . process outlined in the special legislation addresses the same issues as are addressed in . . . CEQA."<sup>223</sup> In comparing the procedures prescribed in CEQA and FPA, the court made some telling comments about the impact that CEQA was intended to have on agency consideration of environmental factors under substantive legislation.<sup>224</sup>

Most of the findings of the intermediate appellate court in *Arcata* received the imprimatur of the California Supreme Court in *Wildlife Alive v. Chickering*.<sup>225</sup> The Fish and Game Commission argued that it was exempt from CEQA in fixing dates for hunting seasons,<sup>226</sup> but the supreme court found that "both the express language and the apparent intent of CEQA require its application to the adoption of hunting regulations by the Commission."<sup>227</sup> As in *Arcata*, the court carefully compared the procedural commands of the two relevant statutes and concluded that the "disparity between [their] respective demands . . . strongly suggests that the administrative procedures found in the Fish and Game Code were not intended as a substitute for compliance with CEQA."<sup>228</sup> The court then rejected the agency's claim that temporal conflicts between the two measures indicated "legislative intent to exclude the Commission from application of [CEQA]."<sup>229</sup> Finally, the court re-

222. *Id.* at 975, 131 Cal. Rptr. at 181.

223. *Id.* at 975, 131 Cal. Rptr. at 181-82 (citations omitted).

224. While the Forest Practice Act contains numerous provisions to protect the soil, air, fish, wildlife, water resources and establishes minimum conservation standards for forest stocking and regeneration . . . there is no requirement whatever to comply with the crucial criteria laid down in section 21000 of CEQA. Especially, it is not required that the timber harvesting plan fully analyze and disclose the adverse environmental consequences of the proposed projects; that it provide reasonable alternatives to the proposed actions or that it recommend mitigation measures to minimize the impact of the proposed activities . . . .

*Id.* at 976-77, 131 Cal. Rptr. at 182-83 (citations omitted).

225. 18 Cal.3d 190, 132 Cal. Rptr. 377, 553 P.2d 537 (1976). One particular issue considered in *Arcata* had been treated somewhat less comprehensively but quite similarly by the supreme court in *Bozong v. Local Agency Formation Comm.*, 13 Cal.3d 263, 118 Cal.Rptr. 249, 529 P.2d 1017 (1975). In determining whether CEQA applied to the annexation activities of a Local Agency Formation Commission (LAFCO), an entity charged with environmental responsibilities by the statute creating it, the supreme court clearly found that CEQA and the formation statute should be harmonized. *Id.* at 283, 118 Cal. Rptr. at 261, 529 P.2d at 1029-30.

226. See FISH AND GAME CODE § 200 *et seq.* (1958).

227. *Wildlife Alive v. Chickering*, 18 Cal.3d 190, 207, 132 Cal. Rptr. 377, 386, 553 P.2d 537, 546 (1976).

228. *Id.* at 199, 132 Cal. Rptr. at 381, 553 P.2d at 541.

229. *Id.* at 201, 132 Cal. Rptr. at 382, 553 P.2d at 542.

fused "to apply the 'functional equivalence' test."<sup>230</sup>

Some California cases treat more tangentially the issue of agency authority considered in this article; however, the decisions discussed above are most relevant to the question.<sup>231</sup> Courts in other jurisdictions have either been silent or spoken so indirectly to the issue as to add little to this discussion. In sum, state courts addressing explicitly and less directly the precise problem treated here have indicated that agencies are to consider in their decisional processes ecological factors not found in their substantive mandates.

### C. *The Montana Environmental Policy Act*

#### 1. *Legislative Intent*

During the 1960's, Montanans had become increasingly concerned about the declining quality of their environment. One of the initial responses to this problem was enactment by the legislature of the Montana Environmental Policy Act in 1971.<sup>232</sup> Although little legislative history exists,<sup>233</sup> there can be no question that the Montana statute is based upon the national legislation.

230. *Id.* at 203, 132 Cal. Rptr. at 383, 553 P.2d at 543. The court stated that the federal cases from which the test was derived "recognize an exemption only if the agency in question was primarily created for the protection of the environment" and only where the agency has prepared a "statement which constitutes a 'functional equivalent' of an environmental impact report." *Id.*

231. Thus, in the landmark case of *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.3d 247, 264 n.8, 104 Cal. Rptr. 761, 776 n.8, 502 P.2d 1049, 1059 n.8 (1972), the supreme court indicated that agencies may act upon adverse environmental impacts that they discover. In *Russian Hill Improvement Ass'n v. Board of Permit Appeals*, 44 Cal. App.3d 158, 171, 118 Cal. Rptr. 490, 498 (1974), the court added that agency "failure to consider the total environmental impact led, in turn, to a failure to analyze the project in terms of . . . unavoidable adverse environmental effects, mitigation measures, and feasible alternatives." *Id.*

232. MEPA was touted as one of the most important measures passed by the legislative assembly that year:

One of the major actions of the 1971 legislature, with long-term significance for the future of the state, was enactment of the Montana Environmental Policy Act. ENVIRONMENTAL QUALITY COUNCIL, FIRST ANNUAL REPORT iv (1972). This observation appeared in the preface of the report and was written by Representative George Darrow, Chairman of the Environmental Quality Council, and chief sponsor of the act. The Montana Supreme Court has recognized that "Montana's Environmental Policy Act . . . is a broadly worded policy enactment in response to growing public concern over the innumerable forms of environmental degradation occurring in modern society." *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 500, 559 P.2d 1157, 1169 (1976) (Haswell, J., dissenting).

233. The Montana legislative assembly, like its counterparts in most other states, does not produce, record, or maintain much legislative history. Minutes, which are more in the nature of notes than verbatim transcripts, are taken of the committee meetings; and they are stored at the Montana Historical Society in Helena.

The language of MEPA and NEPA are almost identical.<sup>234</sup> In testifying before the House Committee on Environment and Resources, the chief sponsor of the measure observed that those sections of MEPA which "dealt with the responsibility of state agencies for protecting the environment . . . were taken directly from the national policy act."<sup>235</sup> Finally, the Montana Supreme Court has flatly stated that "MEPA is modeled after NEPA."<sup>236</sup>

There are only two differences of any significance between the language of the federal and state laws.<sup>237</sup> The first appears in MCA § 75-1-103(3), where the Montana legislature explicitly declared that "each person shall be entitled to a healthful environment,"<sup>238</sup> in contrast to the significantly weaker phraseology of the national legislation.<sup>239</sup> The second difference, in MCA § 75-1-201(2)(e), requires agencies of the state to recognize only the "national" rather than the "worldwide" character of environmental problems in providing support for "initiatives, resolutions and programs designed to maximize *national*," rather than "*international*, cooperation in

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234. For a comparison of the phraseology of the two statutes, see notes 237-40 and accompanying text *infra*.

235. Minutes of State House of Representatives Committee on Environment and Resources, January 14, 1971. What transpires in committee meetings, as reflected in the minutes, is very much a function of the minute taker's capability to accurately select, interpret, and record what has happened. Thus, the material appears vulnerable to attack on several grounds. The Montana Supreme Court, however, has relied upon these minutes. See *State v. Coleman*, \_\_\_ Mont. \_\_\_, 605 P.2d 1000, 1006 (1979). Cf. *State v. Helfrich*, \_\_\_ Mont. \_\_\_, 600 P.2d 816, 818 (1979) (reliance upon statement of delegate who introduced proposed section of state constitution).

236. *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 506, 559 P.2d 1157, 1172 (1976) (Haswell, J., dissenting). *Accord*, *Kadillak v. Anaconda Co.*, \_\_\_ Mont. \_\_\_, 602 P.2d 147, 153 (1979). In the first case, the supreme court added that "Montana's Environmental Policy Act was enacted in 1971 and is patterned after the National Environmental Policy Act." *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 500, 559 P.2d 1157, 1169 (1976) (Haswell, J., dissenting).

237. There are, of course, numerous substitutions that reflect the respective level of government. Compare MCA § 75-1-103(2) (1979) with 42 U.S.C. § 4331(b) (1977). Moreover, several minor technical changes were made. Compare MCA § 75-1-201(1)(c) (1979) with 42 U.S.C. § 4332(2)(C) (1977).

It is interesting to note that the provision of MEPA as originally enacted, which required agencies to review their statutory authority for discrepancies and propose changes, was deleted subsequent to the review of the Montana Code Commission. Compare R.C.M. 1947, § 69-6505 (Supp. 1977) with MCA § 75-1-101 *et seq.* (1979).

238. MCA § 75-1-103(3) (1979). The language employed is quite similar to that used in Article II, Section 3 of the Montana Constitution. See section II of this article *infra*.

239. The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. 42 U.S.C. § 4331(c) (1977). Section 102(b) of the Senate Bill, which was similar to the Montana provisions, was modified in conference. See 115 CONG. REC. 40416 (1969) (remarks of Senator Jackson).

anticipating and preventing a decline in the quality of mankind's world environment."<sup>240</sup>

Despite periodic attempts to repeal the act,<sup>241</sup> the statute was not even amended until 1979, when the legislative assembly specifically exempted one state agency from NEPA compliance when performing certain functions.<sup>242</sup> During the same session, efforts also were made to codify the position now adopted by the Montana agencies, as well as the interpretation espoused in this article; however, both attempts failed.<sup>243</sup>

Because the Montana legislature has adopted whole cloth the wording in the national act, Congressional intent and federal case law should be accorded considerable importance in construing MEPA.<sup>244</sup> By enacting verbatim the provisions of the national stat-

240. Compare MCA § 75-1-201(2)(e) (1979) with 42 U.S.C. § 4332(2)(F) (1977). This section of MEPA is troubling because Montana shares a common border, and many environmental problems, with three Canadian provinces.

241. See, e.g., S.B. 332, 44th Montana Legislature (1975).

242. The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of this chapter.

MCA § 75-1-201(4) (1979). The testimony respecting costs of MEPA compliance given by a department employee at a hearing on the provision may have persuaded the legislative assembly. William J. Opitz submitted a prepared statement, alleging that a "core environmental group [seven people] would cost the general fund approximately \$135,000 per year," to the Business and Industry Committee of the Montana Senate on March 9, 1979. Passage of this amendment, which shows that the legislature knew how to excuse agency compliance when it wanted to, arguably manifests legislative intent that no other agencies are meant to be exempt. In 1974, a measure was introduced that would have required agencies to prepare economic impact statements. See H.R. 612, 43rd Montana Legislature (1974). However, a compromise, in the nature of a resolution calling for "thorough economic analysis in environmental impact statements," was reached. See H.R. J. Res. No. 73, 1974 Mont. Laws 1570 (1974).

243. Compare S.B. 506 with H.R. 742, 46th Montana Legislature (1979). It is always difficult to draw reliable conclusions from failure of a legislative body to enact proposals. See *Helvering v. Hallock*, 309 U.S. 106, 119, 121 (1940); *United States v. Southern Underwriters Ass'n*, 322 U.S. 533, 560-61 (1944). This is especially true where two bills purporting to have the opposite effect were rejected. Perhaps the only conclusion that can be drawn is that the legislative assembly intended to leave this issue to judicial resolution.

244. Montana, like many other states, subscribes to the well-established general principle of statutory interpretation that the "construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and . . . only strong reasons will warrant a departure from it." *Ancient Order of Hiberians v. Sparrow*, 29 Mont. 132, 135, 74 P. 197, 198 (1903). More specifically, the Montana Supreme Court has applied that doctrine to MEPA:

Because MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA.

*Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 506, 559 P.2d 1157, 1172 (1976) (Haswell, J., dissenting). *Accord*, *Kadillak v. Anaconda Co.*, \_\_\_ Mont. \_\_\_, 602 P.2d 147, 153 (1979). Courts in other jurisdictions have treated the question similarly. See, e.g., *Eastlake Community Council v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 488 n.5, 513 P.2d 36, 45 n.5 (1973); *No Oil, Inc. v. Los Angeles*, 13 Cal.3d 68, 86 n.21,

ute, the legislative assembly should be taken to have intended, as did Congress, that agencies consider in decisionmaking ecological impacts not mentioned in the legislation under which they are acting. This legislative purpose is manifested in the state environmental policy and goals expressly provided for in section 103 of MEPA, which are "supplementary to those set forth in existing authorizations of all boards, commissions and agencies of the state," as stated in section 105. The intent is evidenced as well in the commands of section 102 that all agencies are to "interpret and administer" the "policies, regulations and laws of the state" in accordance with the environmental policy and goals of section 103 and to undertake comprehensive analysis of all ecological effects of agency decisions. These mandates are to be followed by the agencies "to the fullest extent possible," except where they are prohibited from doing so by a clear conflict of statutory authority, in which event such discrepancies were to be reported to the Governor and the Environmental Quality Council (EQC) by July 1, 1972, so that corrective action could be taken.<sup>245</sup> State agencies simply have not implemented satisfactorily these express commands of MEPA.<sup>246</sup>

## 2. Agency Implementation

### a. *The Early Years: 1971 to 1974*

Implementation of the Montana statute between 1971 and 1974 was marked by considerable variation among state agencies and some recalcitrance. The act, which became law on March 9, 1971, created a 13-member Environmental Quality Council.<sup>247</sup> The

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118 Cal. Rptr. 34, 46 n.21, 529 P.2d 66, 78 n.21 (1974); Wisconsin's Environmental Decade, Inc., v. Public Serv. Comm'n, 79 Wis.2d 161,174, 255 N.W.2d 917, 925 (1977).

245. The intent that agencies fully consider all environmental impacts is strongly reinforced in Montana by the special recognition accorded the right of "each person to a clean and healthful environment" in section 103(3) of MEPA, MCA § 75-1-103 (1979).

246. This assessment is based upon the historical survey that follows. However, caveats are in order. The study is not meant to be definitive but rather is a good faith attempt to provide, through examination of available secondary sources and interviews with some who participated in implementation, a general narrative. For more thorough discussion, the reader may wish to consult the written sources upon which this account is based. See S. PERLMUTTER, *THE MONTANA ENVIRONMENTAL POLICY ACT THE FIRST FIVE YEARS* (1976) [hereinafter cited as S. PERLMUTTER]; *ANNUAL REPORTS OF THE ENVIRONMENTAL QUALITY COUNCIL*; Sharon M. Solomon, *The Montana Environmental Policy Act (MEPA): An Overview* (1974) (unpublished masters thesis, University of Montana, a copy of which is on file at the Reserve Desk, Mansfield Library, University of Montana, Missoula, Montana) [hereinafter cited as Solomon].

247. MCA § 5-16-101 *et seq.* (1979). The EQC is primarily a creature of, and responsible to, the legislature. For a description of its functions and responsibilities, see MCA § 75-1-301 *et seq.* (1979). The council is not explicitly directed to oversee MEPA implementation.

council began operating on September 1, 1971, with a small staff that assumed major responsibility for coordination of MEPA administration within the state agencies. The EQC promulgated interim guidelines for preparation of environmental impact statements on October 7, 1971, and published revised interim guidelines on July 21, 1972.<sup>248</sup>

The effect of this guidance on agency operations is difficult to assess; many agencies apparently acted pursuant to internal procedures without promulgating regulations, while others followed the EQC guidelines.<sup>249</sup> In the council's First Annual Report, the EQC characterized as "uncertain and incomplete" early attempts of agencies to comply with the impact statement requirement<sup>250</sup> and cited a few examples of agency failure to take into account environmental considerations in decisionmaking.<sup>251</sup> The council also noted that, "as of June 30, 1972, six agencies had filed 64 EIS's covering a wide range of action."<sup>252</sup>

Agency reluctance to follow the commands of MEPA was evidenced by the poor response to the requirement that agencies review their authority for inconsistencies with the act and report to the Governor and the EQC by July 1, 1972.<sup>253</sup> During the first year of MEPA administration, recalcitrance also was exhibited by those agencies which alleged that the environmentally protective nature of their statutory mandates should exempt them from compliance with the act.<sup>254</sup>

See MCA § 75-1-324 *et seq.* (1979). However, like the Council on Environmental Quality at the federal level, the EQC has filled the breach, assuming considerable responsibility for administration of the Montana measure.

248. ENVIRONMENTAL QUALITY COUNCIL, FIRST ANNUAL REPORT 126 (1972). The revised guidelines appear at 170-74.

249. *Id.* at 126. *Accord*, Solomon, *supra* note 246, at 19-20.

250. ENVIRONMENTAL QUALITY COUNCIL, FIRST ANNUAL REPORT 128 (1972). *Cf.* S. PERLMUTTER, *supra* note 246, at 6-7 (agency uncertainty as to proper function of EIS).

251. In some instances the EIS is an after-the-fact exercise used to justify decisions already made. Consideration of alternatives is frequently inadequate. . .

ENVIRONMENTAL QUALITY COUNCIL, FIRST ANNUAL REPORT 128 (1972).

252. *Id.* at 127. A list appears at 175.

253. *See id.* at 129. An agency that failed to conduct this review and propose appropriate changes, or which conducted the review and found no discrepancies, could arguably be estopped from relying upon such a conflict in the future. *Cf.* note 237 *supra* (Code Commission deletion of MEPA provision mandating agency review of authority).

254. There is some support for this position in the legislative history at the federal level. *See, e.g.*, 115 CONG. REC. 40423, 40425 (1969) (remarks of Senator Muskie); *Id.* at 40925 (remarks of Representative Dingell). Moreover, "a court developed exception for EPA regulatory activities providing 'the functional equivalent of an impact statement,' has been cautiously but consistently applied." W. RODGERS, *supra* note 3, at 765 (citations omitted). *Accord*, note 84 *supra*. The question remains, however, whether this limited rule would apply to any Montana agencies and its application would be especially troubling with respect to agencies such as the Department of State Lands, which apparently claimed that it was an

Although many agencies now espouse the view that MEPA does not compel them to consider ecological factors other than those found in their substantive legislation, there is little evidence that any agency did so during the initial year of MEPA implementation. However, in March, 1973, the Department of Health and Environmental Sciences claimed that it lacked authority to deny a permit to construct a powerplant on grounds not expressly provided for in the air pollution statute, and the Department of Natural Resources and Conservation assumed a similar position with respect to its authority in August, 1974.<sup>255</sup> The council revised its guidelines again in September, 1973.<sup>256</sup> Through the end of that year, the EQC seemed to vacillate "between viewing the guidelines as a service to state agencies and of having the force of law."<sup>257</sup>

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environmentally protective agency. *Cf.* *Kalur v. Resor*, 335 F. Supp. 1, 12 (D.D.C. 1971) (rejection of contention that Corps of Engineers was an agency dedicated to environmental protection and thus exempt from NEPA).

255. The Department of Health stated that "over 3000 responses [had] been received commenting directly or indirectly on the draft [environmental impact] statement, mostly in opposition to the construction" and concluded that the "long-term adverse effects may well outweigh the short term gains." MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, FINAL ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED MONTANA POWER COMPANY ELECTRICAL GENERATING PLANT AT COLSTRIP, MONTANA ii-iii (1973). As to its authority, however, the department noted:

Although MEPA requires this agency to assess all foreseeable impacts that might result from construction of the proposed plant, issuance of the requested permit is contingent only upon adequate demonstration by the applicant of the ability to prevent illegal air pollution. To date, research by the State and the applicant has not indicated that illegal air pollution would result.

*Id.* at i.

The Department of Natural Resources and Conservation prepared an EIS on a water use permit application for a project that could have had severe adverse effects on water quality in the stream and possibly resulted in the dewatering of the creek downstream. The department apparently was constrained by the Water Use Act, MCA § 85-2-101 *et seq.* (1979), which provides that permits are to be granted for beneficial uses whenever unappropriated water is available:

Consequently, it appears that the Department's immediate legal obligation is to grant a permit for that amount of water, over and above that required for existing rights, which can be put to beneficial use—even if the result is dewatering of the stream.

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, FINAL ENVIRONMENTAL IMPACT STATEMENT ON THE PRICKLY PEAR CREEK WATER DIVERSION PROPOSAL 38 (1974). This position was adopted, even though the EIS referred to MEPA several times and noted:

Environmental quality is unquestionably a valid concern, and there are convincing arguments which support denying a water use permit solely on the basis of environmental quality. However, the legality of such an action has not been firmly established.

*Id.* at 39.

256. ENVIRONMENTAL QUALITY COUNCIL, SECOND ANNUAL REPORT 85-89 (1973). That report also includes a list of documents submitted in compliance with MEPA. *Id.* at 50.

257. See Solomon, *supra* note 246, at 58, citing a memorandum from EQC to Agency Heads of August 6, 1973, for the first proposition and remarks of R. Klinger, attorney for



However, in 1974, the council decided to attempt to enforce them.<sup>258</sup>

b. *The Years of Ferment: 1974 to 1976*

The EQC argued that its guidelines had binding effect; but, in 1975, that position was rejected by a state trial court.<sup>259</sup> In response to that decision and the failure of many agencies to issue procedural guidelines, the Governor created on April 30, 1975, a "Commission on Environmental Quality [CEQ] to promulgate uniform rules for implementation of the Montana Environmental Policy Act."<sup>260</sup> The commission drafted proposed rules, based upon the guidelines of the federal Council on Environmental Quality, in the summer of 1975, held a public hearing on November 17, 1975, and solicited written submissions during a comment period that closed on November 21, 1975.<sup>261</sup> In January, 1976, the Montana CEQ adopted a final uniform version of the proposed rules implementing MEPA, and many state agencies promulgated procedural regulations drawn almost verbatim from those rules during the remainder of that year.<sup>262</sup>

EQC, at an Environmental Assessment Seminar on November 13, 1973, for the second.

258. During 1974, the EQC began reviewing EIS's to determine whether the documents were in compliance with the council's guidelines. Interview with G. Steven Brown, former head of the Montana Commission on Environmental Quality (March 5, 1980).

259. *Montana Wilderness Ass'n v. Board of Land Commissioners*, 1st Judicial District of Montana, No. 38544 (1975). In response to the question of "whether the EQC's guidelines are binding on and enforceable against the agencies of the State government," the district court stated that the council had "no apparent authority to require anybody to do anything." *Id.* at 6-7. Thus, it was incumbent upon the executive branch to develop procedural rules implementing MEPA. *Id.* at 8. The court also made some gratuitous comments about MEPA implementation:

A search by the Court of the Montana Administrative Code has failed to reveal any duly adopted rules by either EQC or any Department or agency having to do with MEPA environmental impact statements. . . .

I would add in passing that MEPA is now more than four years old . . . . In that time, neither the EQC nor the executive or legislative branches of the state government have developed a workable system for effective enforcement of its provisions.

*Id.* at 7-9.

260. Exec. Order No. 4-75 (1975). The commission was comprised of the Directors of the Montana Departments of Health and Environmental Sciences, State Lands, and Natural Resources and Conservation and of the Montana Fish and Game Commission, as well as G. Steven Brown, an advisor to the Governor on environmental matters, who was appointed head.

261. See Summary of Testimony and Recommendations of the Hearing Officer in the matter of the Adoption of Rules Implementing the Montana Environmental Policy Act 1 (1975).

262. See, e.g., Administrative Rules of Montana § 36-2.2(6)-P200 through -P280 (1976).

On November 29, 1976, the EQC published a staff report entitled "The Montana Environmental Policy Act The First Five Years," which remains the most reliable critical analysis of the act's implementation.<sup>263</sup> Some of the conclusions reached in that report are disturbing. The council staff found that MEPA administration generally was marked by considerable misunderstanding about the effect of the act on agency decisionmaking.<sup>264</sup> More specifically, there was much uncertainty regarding the purpose of impact statement preparation.<sup>265</sup> The most troubling conclusions, however, are those respecting the impact of MEPA on existing statutory authority of state agencies:

There is general confusion as to MEPA's effect on an agency's authority to grant or deny a permit. If other, more specific statutes would allow for permit approval, agencies are reluctant to deny the permit on MEPA grounds, regardless of the severity of environmental harm which may result . . . .<sup>266</sup> [T]he most pervasive obstacle to effective implementation of MEPA in the permit process [is] the lack of consistent definition of agency authority. When agencies grant or deny permits or licenses they are operating under specific statutory authorizations which, in most cases, set out conditions for granting or denying permits. Agencies hesi-

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263. There simply has been very little dependable critical evaluation of MEPA administration. There is the masters thesis, *supra* note 246, but it is more descriptive than analytical. There are indications in other sources. See, e.g., the legislative responses, at notes 241-43 and accompanying text *supra*; the Annual Reports of the Environmental Quality Council. But these are certainly not comprehensive or systematic and are subject to varying interpretations.

Thus, the EQC staff report probably is the most reliable source; however, that study is vulnerable to criticism on quite a few grounds. The report was prepared by a staff member of the entity which has been the most vigorous proponent of rigorous MEPA implementation. Little explanation of the methodology for analyzing administration of the act is given, and the conclusions reached often appear impressionistic and subjective. However, those who prepared the report do openly admit the perspective employed: "If this discussion has tended to overemphasize the problems, it is because the report is aimed at searching for solutions." S. PERLMUTTER, *supra* note 246, at 25.

264. See *id.* at 5-7, 14, 24.

265. Agencies are preparing EISs, and can be forced to do so by a court of law. But since the responsibility for policy implementation is unclear and the other action-forcing provisions in Section 69-6504 have been ignored, no one is quite sure what the proper function of an impact statement is, what it should contain, or what should be done with it once it is prepared and presented to the agency decisionmakers. . . .

The EIS is therefore relegated to a subordinate role; it is a descriptive document, a compilation of data, a defense against litigation. But it is not an integral part of the decisionmaking process. It is seen by agency personnel as an unwanted and irrelevant burden imposed on them by a legislature which does not understand their problems.

*Id.* at 6, 24.

266. *Id.* at 7.

tate to rely on the policy statements and directives of MEPA as a basis for decisionmaking, preferring to limit their considerations to the range of factors set out in the specific permit-authorizing statute.<sup>267</sup>

Finally, the assessments of the act's efficacy by the staff are problematic:

In many cases, MEPA's only effect is to delay the announcement of decisions, which are made without regard to MEPA's policies in any event, until an impact statement is prepared . . . .<sup>268</sup> [T]he environmental impact statement becomes a meaningless exercise in data compilation, designed to avoid litigation and to support decisions which are made on other than MEPA grounds. In this context, it is not surprising that EIS's are viewed by most agency personnel as a cumbersome, expensive, and superfluous burden.<sup>269</sup>

Despite the deliberately hypercritical focus of the staff's analysis, the report does state that "MEPA has had a significantly healthy impact."<sup>270</sup> The staff found that "first and foremost, MEPA has gone a long way towards opening up the decisionmaking processes in state government."<sup>271</sup> Moreover, the report attributed significant changes in numerous proposed agency actions to the act.<sup>272</sup> The chapter entitled "MEPA and the Permit Process" concludes on a cautiously optimistic note:

Compared with the pre-MEPA situation, then, progress has been made toward more responsible decisionmaking. Compared with the potential impacts of MEPA, however, and the urgent needs

267. *Id.* at 14. Confusion about the effect of MEPA on extant agency power may have emanated from the highest levels of state government. In a letter to the Executive Director of the EQC in 1976, the Governor revealed some misunderstanding of the environmental policy statute:

[D]uring the five year history of the Act . . . there has been legitimate and expressed disagreement over the impact of MEPA on the executive branch's decision-making authority. The executive branch has been caught between the general mandate of MEPA and the specific limitations on executive branch authority proposed by the Legislature in specific laws. The Legislature has passed legislation which specifically limits the authority of the executive branch to make decisions in the issuance of licenses, contracts, permits and leases.

Letter from Thomas L. Judge to John W. Reuss (Aug. 20, 1976).

268. S. PERLMUTTER, *supra* note 246, at 15.

269. *Id.* at 8.

270. *Id.* at 25. "It would be a mistake to assume that MEPA has had no positive effects on the permit activities of state agencies." *Id.* The authors readily admit: "If this discussion has tended to overemphasize the problems, it is because the report is aimed at searching for solutions." *Id.*

271. *Id.*

272. *Id.* at 25-26.

still to be addressed, we have barely begun.<sup>273</sup>

c. *MEPA Implementation After the Beaver Creek Decision*

In July, 1976, the Montana Supreme Court issued the first opinion in which it analyzed the effect of MEPA on agency decisionmaking under other state laws. In *Montana Wilderness Association v. Board of Health and Environmental Sciences*,<sup>274</sup> the supreme court expansively interpreted the act, finding that MEPA requires agencies to consider fully all environmental impacts of their decisions.<sup>275</sup> That broad reading of the statute, and agency adoption of new guidelines during 1976, seemed to bode well for improved MEPA implementation. However, just when it appeared as if the act might be accorded the rigorous application that the legislative assembly contemplated,<sup>276</sup> this expectation was dashed by the issuance, upon rehearing, of a second opinion that completely reversed the earlier decision.<sup>277</sup> Many state agencies quickly seized upon the December, 1976, opinion to fashion what has become the present agency stance respecting the relationship between MEPA and other statutory authorizations.<sup>278</sup>

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273. *Id.* Those who compiled the report also concluded that compliance with MEPA was significantly better where an agency intended to take action than "when an agency reviews a project designed by a private applicant." *Id.* at 8.

274. 171 Mont. 477, 559 P.2d 1157 (1976) (Haswell, J., dissenting). The decision referred to in the text was issued in July, 1976, and is the first opinion rendered in the case. Upon rehearing, the supreme court reversed the initial decision in December of that year, and the majority opinion in the first case became the dissenting opinion in the second. In this article, the second decision is referred to as the majority opinion and the first as the dissenting opinion. For comprehensive discussion of the *Beaver Creek* decisions, so named for the subdivision involved in the litigation, see section I(C)(3) of this article *infra*.

275. Montana's Environmental Policy Act . . . is a broadly worded policy enactment in response to growing public concern over the innumerable forms of environmental degradation occurring in modern society.

*Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 500, 559 P.2d 1157, 1169 (1976) (Haswell, J., dissenting).

[W]e find simply that the Revised EIS does not sufficiently consider and balance the full range of environmental factors required under the terms of MEPA.

*Id.* at 515, 559 P.2d at 1176. For thorough analysis of this decision which became the dissenting opinion in *Beaver Creek*, see section I(C)(3) of this article *infra*.

276. Some agencies apparently were on the "verge of changing" in response to the July decision of the supreme court. Interview with Steven J. Perlmutter, former attorney for the EQC and author of the report on MEPA cited at note 246 *supra* (March 13, 1980).

277. The decision of the Court today deals a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control.

*Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 486, 559 P.2d 1157, 1161 (1976) (Haswell, J., dissenting).

278. The position of the Department of State Lands is as follows:

The Department of State Lands as an agency of the State of Montana, acting

The only other significant activity relating to administration of the act began in March, 1978, when the CEQ was reestablished for the purpose of formulating revised uniform rules for MEPA implementation.<sup>279</sup> The commission completed its work in May, 1979, at which time the state agencies with major responsibility for administering the statute published notices proposing to adopt new rules based on the efforts of the CEQ. A public hearing was held on August 30, 1979, and the comment period remained open until September 14, 1979.<sup>280</sup> Thereafter, the agencies reviewed the material submitted and reported to the CEQ on December 10. The commission subscribed to the suggestions of the agencies and recommended to them in turn that they adopt the revised rules implementing MEPA. Many agencies did so on January 17,

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pursuant to laws passed by the Montana Legislature must be governed by such state law as interpreted by the Montana Supreme Court. The Montana Supreme Court in *Montana Wilderness Association* . . . held that the Montana Environmental Policy Act is not regulatory in nature. The court withdrew an earlier opinion which held that MEPA authorized an agency to take into consideration environmental factors other than those specifically contained in the permitting legislation.

ASARCO has applied for a permit under the Hard Rock Act. The Department is mandated to issue the permit unless it is demonstrated that reclamation cannot be accomplished or that air and water quality standards will be violated. These are the only grounds the Department may use in denying a permit.

Although MEPA requires that the impact on wildlife and the overall social and economic impact on the community be brought to the attention of the decision-maker and the public, it does not authorize denial of the application on these grounds. The Legislature could certainly make such a provision, but it has not done so.

MONTANA DEPARTMENT OF STATE LANDS, FINAL ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED PLAN OF MINING AND RECLAMATION FOR TROY PROJECT ASARCO INC., LINCOLN COUNTY, MONTANA 113-14 (1978). The position of the Department of Health and Environmental Sciences is similar:

The "*Beaver Creek South*" case indicates that the department's substantive decision-making authority to approve or deny subdivisions is limited to a consideration of whether proposed water supply, sewage disposal and solid waste disposal systems are adequate to protect public health and prevent water pollution.

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, DRAFT ENVIRONMENTAL IMPACT STATEMENT ON THE SKI YELLOWSTONE SUBDIVISION, GALLATIN COUNTY, MONTANA 1 (1979). The Montana Department of Fish and Game accorded MEPA a similar interpretation when considering an application for a zoo and menagerie permit under MCA § 87-4-801 *et seq.* (1979). See MONTANA DEPARTMENT OF FISH AND GAME, PRELIMINARY ENVIRONMENTAL REVIEW FOR THE SNAKE PIT, A TOURIST ATTRACTION 5 (1977).

The interpretation now espoused by the Montana agencies may very well be an unwarranted extension of the *Beaver Creek* decision. It is certainly arguable that the applicability of the opinion should be limited to the Department of Health and only when it is acting pursuant to the Sanitation in Subdivisions Act. The court did not, and probably could not, bind other agencies in conducting their activities under different regulatory schemes.

279. Exec. Order No. 4-78 (1978).

280. See Mont. Admin. Reg. 88 (Jan. 17, 1980).

1980.<sup>281</sup> Oddly enough, however, there is no reference to the precise question of agency authority in those rules.

In summary, examination of the evaluation of MEPA administration that has been done, as well as the action and inaction of the agencies themselves, leads inexorably to the conclusion that the act has not been particularly well implemented. Much of the difficulty can be attributed to a basic reluctance on the part of the agencies.<sup>282</sup> To be sure, some agencies and many state employees have performed admirably in the face of significant adversity.<sup>283</sup> Moreover, officials in the legislative and judicial branches of government, as well as the Governor, must share the blame. First, the legislature has provided inadequate guidance for agencies, has appropriated insufficient resources to permit proper administration of the act, and has undertaken too little oversight to insure that MEPA has been implemented in accord with its intent. Second, the judiciary has not always interpreted the act in a manner which guarantees that "important legislative purposes heralded in the halls of the [legislative assembly] are not lost or misdirected in the vast hallways of the [state] bureaucracy."<sup>284</sup> Finally, the Governor probably has not provided sufficient policy guidance or adequate

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281. The Departments of State Lands, Natural Resources and Conservation, and Health and Environmental Sciences promulgated regulations. *See id.* at 88, 124, 80, respectively.

282. Some officials at the higher levels of state agencies have exhibited a distaste for MEPA as a matter of policy, and thus have not been concerned whether the act was implemented properly. Others in the upper echelons, as well as many at lower levels, have no doubt viewed MEPA as a nuisance to be tolerated and one which complicates achievement of primary agency missions. All of these factors, of course, mean that few rewards accompany effective implementation of the act. Finally, sheer lack of resources simply may dictate that higher priority be accorded other agency responsibilities.

283. The writers, as employee and student respectively of a state institution, are acutely aware of, and sensitive to, the severe fiscal constraints under which many Montana public servants labor. *Cf.* Solomon, *supra* note 246, at 67-68 (lack of adequate funding determinative factor in narrow MEPA implementation); note 242 *supra* (assertion that assembling a core team to prepare EIS's would cost the Department of Public Service Regulation \$135,000).

Many public servants in state government are competent individuals who make good faith efforts under less than ideal conditions. *Cf.* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 529 (1972) (regulators in federal government are "generally persons of ability who are trying to do the best job they can under difficult circumstances"). Moreover, significant advances have been made in some areas of MEPA implementation. For example, the quality of EIS preparation has improved markedly. Furthermore, even the admittedly hypercritical EQC analysis of the act's administration found some encouraging signs. *See* notes 270-72 and accompanying text *supra*.

284. The allusion is to *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

coordination for the executive branch agencies.<sup>285</sup>

In the end, however, it is simply impossible to ignore the lack of enthusiasm with which agencies pursued MEPA implementation in the early 1970's, especially when contrasted with the warm reception accorded the *Beaver Creek* decision in the latter years of the decade. Most troubling, though, is the lingering impression that agencies view the act as something to be tolerated; that they consider impact statement preparation a worthless exercise in data collection; and that agency decisionmaking on actions that have important environmental impacts has not changed significantly.<sup>286</sup>

### 3. *Decisions of the Montana Supreme Court Interpreting MEPA*

The Montana Supreme Court has interpreted MEPA only twice.<sup>287</sup> The first and principal decision is, of course, *Montana Wilderness Association v. Board of Health and Environmental Sciences*.<sup>288</sup> That case is truly an anomaly: it is two opinions in one. The first decision was rendered in July 1976; but, upon rehearing, the court reversed its position and the initial opinion became the dissent.<sup>289</sup>

The dispute in the *Beaver Creek* case involved the effect of MEPA on decisionmaking by the Department of Health and Envi-

285. In the letter from the Governor to the Executive Director of the EQC mentioned in note 264 *supra*, the Governor evinced misunderstanding of MEPA. The letter from the Executive Director, which elicited the Governor's response, also clearly expressed EQC concern about the agencies' interpretation of MEPA's effect on their authority to act under substantive legislation. See notes 266-67 and accompanying text *supra*; Letter from John W. Reuss to Thomas L. Judge (July 15, 1976). The Governor's cursory response to that expression of concern also reveals some lack of appreciation for the problem: "I believe that the executive branch has made a good faith effort to implement the MEPA mandate." Letter from Thomas L. Judge to John W. Reuss (Aug. 20, 1976).

286. All of these difficulties, of course, may be ascribed to the narrow interpretation accorded MEPA by the Montana agencies. For criticism of environmental policy acts as "process" solutions, which cannot be expected to affect substantive agency decisionmaking, see Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239 (1973); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1780-81 (1975).

287. The Montana Supreme Court denied a petition requesting that it take original jurisdiction over a matter raising the very issue considered in this paper. See *Montana Wilderness Ass'n v. Montana Dept. of Health and Environmental Sciences*, Montana Supreme Court No. 14814 (July 20, 1979).

288. 171 Mont. 477, 559 P.2d 1157 (1976). This opinion is relied upon by Montana agencies for the position that they presently espouse. The other decision is *Kadillak v. Anaconda Co.*, \_\_\_ Mont. \_\_\_, 602 P.2d 147 (1979), and it is more limited in scope.

289. The second decision rendered in December, 1976, appears at 171 Mont. 477, 559 P.2d 1157 (1976). The first opinion, which is the dissent in the second, is reported at 171 Mont. 486, 559 P.2d 1161 (1976).

For an informative account of the "bizarre change of position" and the *Beaver Creek* litigation as a whole, written by counsel for plaintiffs, see Goetz, *Recent Developments in Montana Land Use Law*, 38 MONT. L. REV. 96, 109-21 (1977) [hereinafter cited as Goetz].

ronmental Sciences under the terms of the Sanitation in Subdivisions Act.<sup>290</sup> That statute directs the agency to review proposed subdivisions for water quality and availability as well as sewage and solid waste disposal.<sup>291</sup> The developer contended that MEPA was not applicable to departmental review of the proposed subdivision plat. Moreover, the developer and the agency "strenuously argued that the Subdivision and Platting Act preempted the field of subdivision review to the nearly complete exclusion of other legislation."<sup>292</sup>

The supreme court majority was persuaded by the legislature's intent as expressed in the platting measure, to "place control of subdivision development in local governmental units in accordance with a comprehensive set of social, economic and environmental criteria and in compliance with detailed procedural requirements."<sup>293</sup> Because the court found no similar legislative purpose underlying MEPA, it reasoned that any extension of state agency authority over subdivisions beyond the substantive areas expressly provided for in the Sanitation in Subdivisions Act would clearly violate the intent of the legislature to assign responsibility over subdivisions to localities in the platting statute.<sup>294</sup> The majority then observed

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290. MCA § 76-4-101 *et seq.* (1979).

291. *See* MCA § 76-4-121 (1979).

292. Goetz, *supra* note 289, at 112.

Beaver Creek allies itself with the Department's position. The Department concedes that an environmental impact statement is required, but contends its responsibilities under MEPA are circumscribed by . . . the Subdivision and Platting Act and the Sanitation in Subdivisions Act. They allege the clear legislative intent of the Subdivision and Platting Act is to place final subdivision approval authority in the hands of local government (e.g., [MCA § 76-3-101 (1979)]), and the Department can interfere with town, city, or county subdivision approval only to the extent of its particular expertise and authority under the Sanitation in Subdivisions Act. Thus, they allege, if a Department environmental impact statement is required, it need deal in detail only with the environmental effects related to water supply, sewage disposal, and solid waste disposal.

Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, 171 Mont. 477, 500, 559 P.2d 1157, 1169 (1976) (Haswell, J., dissenting).

293. *Id.* at 484-85, 559 P.2d at 1161.

294. Significantly, no similar mandate is given in the 1971 MEPA. Thus we conclude that the district court's reasoning, necessarily implied from its holding, that MEPA extends the Department's control over subdivisions beyond matters of water supply, sewage and solid waste disposal is in error as it is in direct conflict with the legislature's undeniable policy of local control as expressed in the Subdivision and Platting Act.

A further comparison of the local control versus State control over subdivisions is this—the 1973 legislature charged local governing bodies with comprehensive control over subdivision development, and amended that law in 1974 and 1975. If the 1971 MEPA already lodged this control in the state Department, such legislation was superfluous.

*Id.* at 485, 559 P.2d at 1161.



that "nowhere in the MEPA is found any regulatory language" and that the department's "only regulatory function is in the statutorily prescribed areas of water supply, sewage and solid waste disposal."<sup>295</sup> The majority's opinion totally ignores legislative purpose as expressed in the statutory language and legislative history of both MEPA and NEPA, as well as federal and state case law interpreting statutory provisions analogous to those in the Montana act. Thus, the majority's reasoning is simply not persuasive, especially when contrasted with the clear and comprehensive thinking of the dissenting justices.<sup>296</sup>

The dissenters accurately perceived at the outset that "state v. local control is simply a 'red herring' in this case."<sup>297</sup> Those in dissent rejected the contention that provision in the Subdivision and Platting Act for "local review of environmental factors [obviated] the necessity for departmental review," by declaring unequivocally that "such an interpretation conflicts with the terms of MEPA," specifically those provisions making the act "supplementary."<sup>298</sup> Justice (now Chief Justice) Haswell, author of the dissenting opinion, addressed the question of conflict among the three acts and found none, reasoning that the "statutes must be read together as creating a complementary scheme of environmental protection."<sup>299</sup>

295. *Id.*

296. Not one case—federal, state, or Montana—is cited in the majority opinion. Moreover, the court resolved the issue on the merits without ever considering the preliminary questions of standing and right to injunctive relief. *See id.* at 482, 559 P.2d at 1160. Furthermore, the majority wholly ignores the commands of Montana's constitution. For additional critical analysis of the opinion, *see* Goetz *supra* note 289, at 109-21.

The *Beaver Creek* decision should be limited to its facts. The majority did not purport to, nor could it, bind agencies other than the Department of Health, and as to that agency, only when acting pursuant to the Sanitation in Subdivisions Act. Even if the case is read in its most favorable light, the proposition for which it stands cannot be extended beyond those situations in which schemes of regulatory control present clear conflicts between state and local authority.

297. *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 486, 559 P.2d 1157, 1162 (1976) (Haswell, J., dissenting).

The essential fallacy of the majority approach lies in the premise that the legislature vested control of subdivision development in the local governments to the exclusion of state involvement. This is obviously not the case since the Department of Health and Environmental Sciences is directed by statute to review subdivisions by the Sanitation in Subdivisions Act, and that Act contains an express reference to the preparation of an environmental impact statement.

Goetz, *supra* note 289, at 115 (citation omitted).

298. *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 503-04, 559 P.2d 1157, 1171 (1976) (Haswell, J., dissenting):

Had the legislature intended local review to replace the rigorous review required by responsible state agencies, it could easily have so stated.

*Id.* at 504, 559 P.2d at 1171.

299. *Id.* at 505, 559 P.2d at 1171.

The existing statutes evince a legislative intent that subdivision decisions be made at the local planning level based upon factors with an essentially local impact, and that state involvement triggers a comprehensive review of the environmental consequences of such decisions which may be of regional or statewide importance.<sup>300</sup>

In finding that there was "no irreconcilable repugnancy between these acts which would render either the Subdivision and Platting Act or MEPA a nullity,"<sup>301</sup> the dissenting justices stated that the policy act was intended to improve the quality of environmental decisionmaking by state agencies.<sup>302</sup> Chief Justice Haswell concluded that the "district court was correct in treating MEPA as the controlling statute in this case."<sup>303</sup>

The dissenters observed that their interpretation of the act found strong support in the *Calvert Cliffs* decision, especially the federal court's rejection of the agency's contention that it was precluded from considering ecological parameters regulated by other federal agencies, but not mentioned in its own express authority.<sup>304</sup> By requiring that the state agency's impact statement include discussion of environmental factors not explicitly enumerated in the agency's existing statutory mandates, the dissent made clear that MEPA imposes upon state agencies the additional responsibility to consider those matters in decisionmaking. The dissenting opinion called for full treatment of aesthetics and wildlife concerns even though the Sanitation in Subdivisions Act speaks *only* to water

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300. *Id.* at 504, 559 P.2d at 1171.

The concurrent functions of local and state governments with respect to environmental decisions serve to enhance the environmental policy expressed in all of the statutes here considered, that action only be taken upon the basis of well-informed decisions.

*Id.*

The dissent illustrated its interpretation by comparing the provisions of MEPA with certain parts of the Subdivision and Platting Act. The dissenters found that the environmental factors, which the subdivision legislation required localities to consider, did "not approach the scope of the inquiry required by MEPA." *Id.*

301. *Id.* at 504, 559 P.2d at 1171. The dissenters admit that the prospect of departmental "'veto' [of] local subdivision approval solely on the basis of its EIS" is "feasible," but dismiss the "specter of state government vetoing viable local decisions." *Id.* at 505, 559 P.2d at 1171.

302. *Id.*

303. *Id.* at 506, 559 P.2d at 1172.

304. Support for our interpretation of the scope of MEPA is found in a leading federal case interpreting the NEPA. In *Calvert Cliffs* . . . the AEC argued that . . . it was prohibited from independently evaluating and balancing environmental factors which were considered and certified by other federal agencies. The *Calvert Cliffs* court found the AEC's interpretation of NEPA unduly restricted.

*Id.* at 505-06, 559 P.2d at 1171-72.

supply, sewage, and solid waste disposal. In finding the impact statement inadequate, the dissenters noted that the document "does not sufficiently consider and balance a full range of environmental factors required under the terms of MEPA."<sup>305</sup> Finally, the dissenting justices rejected the majority's opinion that the act is not regulatory, stating instead that "MEPA does more than express lofty policies which want for any means of legislative or agency implementation."<sup>306</sup>

The dissent's view of MEPA's effect upon agency decision-making thus fully comports with the intent of the Montana legislature in passing that act, with Congressional intent in enacting NEPA and federal decisional precedent, as well as state case law: pre-existing agency authority is supplemented by the requirements of MEPA and that power must be administered and interpreted to the fullest extent possible in accordance with the act. The only exception to that strong regulatory mandate is a clear and unavoidable conflict between MEPA and prior statutory authority.

The dissenters' interpretation of the act also is consistent with the later opinion of the Montana Supreme Court in *Kadillak v. Anaconda Co.*<sup>307</sup> In *Kadillak*, the court found an irreconcilable conflict in statutory power that precluded MEPA compliance. That conflict was created by the restrictive time frame for decisionmaking in the Hard Rock Mining Act.<sup>308</sup> The court observed that the "60 day period [was] a woefully inadequate period for the

305. *Id.* at 515, 559 P.2d at 1176.

If the policy and purpose of MEPA are to have any practical meaning, state agencies must perform their duties pursuant to the directives contained in that Act. *Id.* at 515-16, 559 P.2d at 1176-77.

306. *Id.* at 502, 559 P.2d at 1170. The dissenters then referred to the action-forcing provisions of MEPA and linked them to the goals and policies of the act. Numerous other allusions, which support the interpretation of environmental policy acts provided in section I(A)(1) and I(C)(1) of this article, appear throughout the case. *See, e.g.,* Montana Wilderness Ass'n v. Board of Health and Environmental Sciences, 171 Mont. 477, 505, 559 P.2d 1157, 1171 (1976) (Haswell, J., dissenting).

307. — Mont. —, 602 P.2d 147 (1979).

308. MCA § 82-4-301 *et seq.* (1979).

At the time application for Permit 41A was filed, the Hard Rock Mining Act required:

"Upon receipt of an application for an operating permit the mining site shall be inspected by the department. *Within sixty (60) days* of receipt of the complete application and reclamation plans by the board and receipt of the permit fee, the board shall either issue an operating permit to the applicant or return an incomplete or inadequate application to the applicant along with a description of the deficiencies. Failure of the board to so act within that period shall constitute approval of the application and the permit shall be issued promptly thereafter." Section 82-4-337, MCA. (Emphasis added.)

*Kadillak v. Anaconda Co.*, — Mont. —, 602 P.2d 147, 152 (1979).

preparation of a proper EIS."<sup>309</sup> The court relied heavily on federal case law for the specific "proposition that when a statutory time limit precludes the statutory duty of preparing an EIS, the EIS must yield,"<sup>310</sup> and for the general idea that "'where a clear and unavoidable conflict in statutory authority exists [the environmental policy act] must give way.'"<sup>311</sup>

Chief Justice Haswell, the author of *Kadillak*, was careful to limit the holding in that case to its particular facts—existence of an irreconcilable conflict between the statutes.<sup>312</sup> Thus, the decision should have limited applicability in the future because few of the Montana regulatory measures impose such rigid time constraints.<sup>313</sup> Notably, the Montana legislature has already amended the temporal provision of the Hard Rock Mining Act, so that there is no longer any conflict which prevents full compliance with MEPA.<sup>314</sup>

309. *Id.*

As noted by the United States Supreme Court, a draft EIS on simple projects prepared by experienced personnel takes some three to five months to complete. . . .

. . . .

The trial court found that an adequate EIS would require 5 to 6 months to complete and that an EIS for the Permit 41A project could not have been prepared in 60 days.

*Id.* at 152-53 (citation omitted).

310. *Id.* at 153.

The federal courts have concluded that in such situations an EIS is not necessary. . . . Under the facts of the instant case this court holds that an EIS was not required for the same reasons that an EIS was not required in the *Flint Ridge* case.

*Id.* (citation omitted). *Flint Ridge* is *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976), the leading federal case on conflicts in statutory procedures created by the temporal provisions of substantive agency legislation. See note 84 *supra*.

311. *Id.* The language quoted by the Montana court comes once again from *Flint Ridge*. The court appeared compelled to follow relevant federal case law by a statement drawn from the dissenting opinion in *Beaver Creek*: "[B]ecause MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA." *Kadillak v. Anaconda Co.*, \_\_\_ Mont. \_\_\_, 602 P.2d 147, 153 (1979).

312. Under the facts of the instant case this Court holds that an EIS was not required for the same reason that an EIS was not required in the *Flint Ridge* case.

. . . .

We emphasize that *Flint Ridge* and similar federal cases are uniformly based on the unavoidable and irreconcilable conflict between federal statutes.

*Id.*

313. Examples of statutes that do not are MCA § 75-20-101 *et seq.* (1979); MCA § 75-5-101 *et seq.* (1979); and MCA § 82-4-101 *et seq.* (1979). Cf. S. PERLMUTTER, *supra* note 246, at 16-17 (Review of the policy statements and criteria for granting or denying permits contained in the important permit statutes reveals that explicit conflict is rare.).

314. If the department determines that additional time is needed to review the application and reclamation plan for a major operation, the department and the applicant shall negotiate to extend the 60-day period by not more than 365 days

#### 4. Summary of MEPA

The Montana Environmental Policy Act was passed in 1971 to combat the declining quality of Montana's environment by effecting changes in the decisionmaking processes of state agencies. However, those agencies, and to some extent the Montana Supreme Court, have interpreted MEPA in a way that frustrates its mandates. The judicial construction and the agency interpretation extending it find no support in legislative intent of the Montana legislature or Congress, as evidenced by the statutory language and legislative history of the environmental policy acts passed by them, or in case law interpreting the analogous federal and state measures. Any viability that the theory might retain in other jurisdictions is vitiated in this state by the Montana Constitution.

## II. THE MONTANA CONSTITUTION

### A. Introduction

The statutory interpretation provided in the first section of this article demonstrates that the construction espoused in Montana is untenable. Agencies of any state that has adopted legislation comparable to NEPA have an affirmative duty, in addition to their other obligations, to consider environmental impacts of their decisions. Montana agencies have an even stronger reason to fulfill that duty. The Montana Constitution includes two environmental provisions that buttress MEPA's mandate to all state agencies. Article II, § 3 of the constitution declares that all Montanans enjoy an inalienable right to a clean and healthful environment.<sup>315</sup> Article IX, § 1(1) commands the state and all persons to maintain and improve the environment for present and future generations.<sup>316</sup>

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in order to permit reasonable review.

MCA § 82-4-337(1)(b)(ii) (1979). Indeed, the Montana Supreme Court observed that the fact that the 60-day period for EIS preparation is woefully inadequate was "recognized by the legislature when in 1977 the statute was amended." *Kadillak v. Anaconda Co.*, \_\_\_ Mont. \_\_\_, 602 P.2d 147, 152 (1979).

315. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

MONT. CONST. art. II, § 3.

316. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the en-

Many states in recent years have resorted to their constitutions for environmental protection because agencies have failed to properly enforce environmental statutes.<sup>317</sup> There is no indication that agency recalcitrance provided the impetus for Montana to adopt the environmental provisions in the constitution, but the Constitutional Convention delegates were well aware of MEPA and sought to reinforce the duties imposed by the statute.<sup>318</sup> It is ironic that agencies in Montana have since adopted a position that frustrates the policy established by the legislature in MEPA and enshrined by the people of Montana in the constitution.

The provision made for protection of the environment in the Montana Constitution surpasses the efforts of other states. Montana's provisions are unique in that they declare both a right and a duty in separate articles.<sup>319</sup> Some state constitutions merely announce a general policy of conservation<sup>320</sup> or direct the legislature to provide for environmental protection.<sup>321</sup> In contrast, Montana's constitution enjoins the state and all persons to maintain and improve the environment. Several states declare a right to a decent environment,<sup>322</sup> but few go so far as to establish that right on a par with fundamental, inalienable rights.<sup>323</sup>

By establishing a policy of environmental protection as a constitutional imperative, the Montana Constitution reinforces in the strongest way possible MEPA's command to state agencies to consider ecological factors in their decisions. Both MEPA and the con-

vironmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

MONT. CONST. art. IX, § 1.

317. Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 ENV'TL AFF. 473, 473 (1974) [hereinafter cited as Tobin]. See also Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A.J. 1061, 1062 (1970).

318. See, e.g., *Proceedings of the Montana Constitutional Convention 3770-71* (1972) [hereinafter cited as *Proceedings*] (remarks of delegate Brazier).

319. Some states create both a right and a duty, but not in separate articles. See, e.g., ILL. CONST. art. II, §§ 1, 2; R. I. CONST. art. 1, § 17; TEX. CONST. art. 16 § 59(a). Where particular provisions are placed within a constitution is a significant factor in determining the meaning of those provisions. Comment, *The Montana Constitution: Taking New Rights Seriously*, 39 MONT. L. REV. 221, 227 (1978) [hereinafter cited as *Taking Rights Seriously*].

320. E.g., FLA. CONST. art. II, § 7 (General Provisions article); N.Y. CONST. art. 14, § 4 (Conservation article); VA. CONST. art. II, § 1 (Conservation article).

321. E.g., MICH. CONST. art. IV, § 52.

322. E.g., MASS. CONST. amend. XLIX; PA. CONST. art. 1, § 27.

323. MONT. CONST. art. II, § 3. Montana's declaration of an inalienable right to a clean and healthful environment reflects Rutherford Platt's view that the use of constitutions as vehicles for conservation "is based on the parallelism between today's environmental anxieties and the fear of political oppression that motivated the drafters of the original Bill of Rights." Platt, *Toward a Constitutional Recognition of the Environment*, 56 A.B.A.J. 1061, 1062 (1970).

stitutional provisions are intended to accomplish the same result, and in a similar manner. In fact, the broad policy established by Congress in NEPA, which is echoed in MEPA, has been likened to a constitutional provision:

In form, the National Environmental Policy Act is a statute; in spirit, a constitution:

[Its] statement of environmental policy is more than a statement of what we believe . . . . It establishes priorities and gives expression to our . . . goals and aspirations. It serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values.

It is in this sense that the Act must be read.<sup>324</sup>

Moreover, the common basis for MEPA and the constitutional declarations is reflected in language in Montana's policy act, not found in its federal counterpart, that compares with the inalienable right declared in the constitution: "The legislature recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."<sup>325</sup> When the same policy that underlies MEPA is enshrined in the constitution, that policy is strengthened. Agencies have a duty to honor broad policies established outside of their own enabling legislation;<sup>326</sup> this is especially true when the policy is expressed in a state's constitution.<sup>327</sup> An interpretation that denies effect to MEPA's mandate also disregards the fundamental law of Montana.

Two decisions of the Montana Supreme Court raise some questions about the relationship between the constitution and the act. In *Beaver Creek*, the majority failed to consider the constitutional provisions when it stated that MEPA did not expand the scope of agency authority to take into account environmental factors other than those expressly provided for in the Sanitation in Subdivisions Act.<sup>328</sup> Chief Justice Haswell's well-considered dissent intimated that Article IX, § 1 of the constitution was not intended to be self-executing, because it contemplates legislative implementation.<sup>329</sup> He observed, however, that the court should recognize

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324. Hanks & Hanks, *supra* note 54 at 245, quoting 115 CONG. REC. S7815 (daily ed. July 10, 1969).

325. MCA § 75-1-103(3) (1979).

326. Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 210 (1972) [hereinafter cited as Howard].

327. *Id.* at 213.

328. 171 Mont. at 485, 559 P.2d at 1161.

329. *Id.* at 498, 559 P.2d at 1168 (Haswell, J., dissenting).

the fact that the legislature had not fulfilled its duty under Article IX, § 1(2),<sup>330</sup> which suggests that the court could enforce the subsection (1) command on its own. The Chief Justice also emphasized that the Article II, § 3 inalienable right to a clean and healthful environment enabled persons to compel agency action; otherwise, it would be a "right without a remedy."<sup>331</sup>

In *Kadillak v. Anaconda Co.*,<sup>332</sup> however, the inalienable right argument did not persuade the Chief Justice to require compliance with MEPA.<sup>333</sup> The court reasoned that because the act predated adoption of the constitution, the statute could not be said to implement the environmental provisions. The court held specifically that MEPA's EIS requirement was not raised to constitutional status by the subsequent enactment of the constitutional guarantees.<sup>334</sup> The holding seemed to focus on the Article IX duty to maintain and improve the environment; the court did not address the effect of the Article II inalienable right. Nor did the court expressly examine the issue of self-execution of either article, but implied that neither is self-executing.

A self-executing constitutional provision is one that is immediately effective without the necessity of ancillary legislation; that is, it supplies a sufficient rule by which a right given may be enjoyed or a duty imposed may be enforced.<sup>335</sup> If both the Article IX command to maintain and improve the environment and the Article II inalienable right are self-executing, they greatly reinforce MEPA's mandate that all agencies incorporate ecological considerations into their decisions. But even if the two provisions are not self-executing, that does not mean they are of no effect. The remainder of this article will examine whether the constitutional provisions are self-executing, and what implications either interpretation would have for agency decisionmaking.

### B. Article II, § 3 Inalienable Right to a Clean and Healthful Environment

There can be little doubt that the Montana Constitution's declaration of an inalienable right to a clean and healthful environment is self-executing. The environmental right is on a par with

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330. *Id.*

331. *Id.*

332. — Mont. —, 602 P.2d 147 (1979).

333. *Id.* at —, 602 P.2d at 154.

334. *Id.*

335. BLACK'S LAW DICTIONARY 1525 (4th ed. rev. 1968).



more traditional inalienable rights.<sup>336</sup> No one would seriously contend that the rights to pursue life's basic necessities and to acquire and possess property depend upon legislation to be effective. These are guaranteed by the same section, indeed the very sentence, of the constitution that secures the right to a clean and healthful environment. Moreover, the latter provision satisfies all the traditional criteria for self-execution: 1) it is a limitation on government; 2) it provides a standard for judicial review; and 3) it does not depend on legislation to be effective.<sup>337</sup>

The Montana Supreme Court addressed the question of self-execution of fundamental rights almost forty years ago. In *State ex rel. Palagi v. Regan*,<sup>338</sup> the court stated that "a declaration of a fundamental right may be the equivalent of a prohibition against legislation impairing the right. . . . Furthermore, constitutional prohibitions against legislative actions are self-executing."<sup>339</sup>

With respect to the inalienable right to a clean and healthful environment in particular, the Constitutional Convention proceedings indicate that the framers intended the right to be self-executing. Delegate Dahood, the head of the Bill of Rights Committee, was asked specifically whether the right would be self-executing, and he responded affirmatively.<sup>340</sup>

Finding Article II, § 3 to be self-executing is only the first part of the inquiry; a more difficult question is the effect that the right to a clean and healthful environment has on an agency's duty to consider environmental factors in its decisions. The constitutional status of the right has great significance. In *General Agriculture Corp. v. Moore*,<sup>341</sup> the Montana Supreme Court stated that:

No function of government can be discharged in disregard of or in opposition to the fundamental law. The state constitution is the mandate of sovereign people to its servants and representatives. No one of them has a right to disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations.<sup>342</sup>

Professor Tribe concurs in discussing the effect of the United

336. *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. at 498, 559 P.2d at 1167 (Haswell, J., dissenting).

337. *Taking Rights Seriously*, *supra* note 319, at 233, citing T. COOLEY, CONSTITUTIONAL LIMITATIONS 165-72 (8th ed. 1927) [hereinafter cited as COOLEY].

338. 113 Mont. 343, 126 P.2d 818 (1942).

339. *Id.* at 356, 126 P.2d at 826.

340. *Proceedings*, *supra* note 318, at 5067-68. See *Taking Rights Seriously*, *supra* note 319, at 233.

341. 166 Mont. 510, 534 P.2d 859 (1975).

342. *Id.* at 515-16, 534 P.2d at 862-63.

### States Constitution on non-judicial government officials:

The United States Constitution addresses its commands not only to federal judges but to all public authorities in the United States. It is at least ironic that generations of students and lawyers preoccupied with lamenting judicial excess have paid virtually no attention to the substantive meaning of the Constitution as a guide to choice by nonjudicial actors. . . . Must not a state legislator, voting on a proposed regulation of contraception or abortion, ask whether the regulation would deprive women of liberty without due process of law? . . . [I]t is, after all, a *constitution*, and not merely its judicial management, that we are expounding.<sup>343</sup>

Tribe's reasoning applies with equal force to the actions of state agency officials in performing their functions under state constitutions. Public servants should consider seriously whether their failure to take into account in decisionmaking all environmental factors will infringe on citizens' rights to a clean and healthful environment.

Other commentators agree. Professor Howard states that "it is implicit in the character of public agencies that they are to be compatible with public policy as ordained by the constitution."<sup>344</sup> Some are even more explicit:

[T]here is widespread agreement that constitutional environmental declarations can set goals and provide guidance for state agencies. . . . In short, a constitutional declaration that guarantees citizens the right to a decent environment should also require all state agencies to consider the impact of their decisions on the environment.<sup>345</sup>

Similarly, Montana's inalienable right to a clean and healthful environment demands that agencies take into account all ecological effects in their decisional processes.

The obligation to consider environmental factors in agency decisionmaking arises apart from the specific mandate in MEPA.<sup>346</sup> But it is not argued here that the constitution imposes

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343. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-9 (1978), citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) (emphasis in original).

344. Howard, *supra* note 326, at 212.

345. Tobin, *supra* note 317, at 475. See also Comment, *A Constitutional Right to a Livable Environment in Oregon*, 55 ORE. L. REV. 239, 244-45 (1976) [hereinafter cited as *A Constitutional Right to a Livable Environment*].

346. There is contrary authority. Pennsylvania's environmental rights provision, PA. CONST. art. I, § 27, was held not to require consideration of factors beyond those which, by statute, must be considered in evaluating projects posing potential harm to the environment. *Snelling v. Dept. of Transportation*, 366 A.2d 1298, 1305 (Pa. Comm. 1976); Common-

the precise procedural requirements that the act prescribes. As with most constitutional declarations, Montana's environmental right lacks explicit definition.<sup>347</sup> The lack of specificity in Article II, § 3 should not bar the accomplishment of its purposes, however.<sup>348</sup> Agencies should take into account the constitutional limitation imposed on them by Article II, § 3. MEPA provides the statutory framework for incorporating ecological considerations into agency decisions. Article II, § 3 simply amplifies the specific duties of the act by imposing a constitutional obligation to protect environmental rights.

### C. Article IX, § 1 Command to Maintain and Improve the Environment

#### 1. Self-Execution

The extent to which Article IX, § 1 affects an agency's obligation to comply with MEPA may depend in part on whether the charge to maintain and improve a clean and healthful environment is self-executing. The modern view is that constitutional provisions are presumed self-executing,<sup>349</sup> unless they require future legislative action.<sup>350</sup> Montana follows this general rule.<sup>351</sup> At first blush, then, it appears that the direction to the legislature in subsection (2) of Article IX, § 1—to administer and enforce the duty prescribed by subsection (1)—renders the entire section non-self-

wealth v. Precision Tube Co., 358 A.2d 137, 140 (Pa. Comm. 1976); Commonwealth College of Delaware County v. Fox, 342 A.2d 468, 482 (Pa. Comm. 1975). It must be noted, however, that Pennsylvania's environmental rights provision differs significantly from Montana's, in that Pennsylvania's is based on a public trust, a concept that was rejected by the Montana Constitutional Convention. *Taking Rights Seriously*, *supra* note 319, at 228-29; *Proceedings*, *supra* note 318, at 3789.

347. See Tobin, *supra* note 317, at 478. Most authorities agree, however, that a constitution should declare fundamental law, leaving details to statute. *A Constitutional Right to a Livable Environment*, *supra* note 345, at 249.

348. Article II, § 3 is no less definite than the concepts of due process and equal protection. If the United States Supreme Court can infuse substance into the indefinite provisions of the United States Constitution, the Montana Supreme Court should not hesitate to define Montana's right to a clean and healthful environment. See *Taking Rights Seriously*, *supra* note 319, at 236-37 and n. 89. Unlike due process and equal protection, however, Montana's inalienable right to a clean and healthful environment has no common law tradition to help define the right. See *A Constitutional Right to a Livable Environment*, *supra* note 345, at 243. But definition must start somewhere, and the Montana court should begin the task.

349. 16 AM. JUR. 2d *Constitutional Law* § 142 (1979).

350. COOLEY, *supra* note 337, at 165; Tobin, *supra* note 317, at 481; Frye, *Environmental Provisions in State Constitutions*, 5 ENV'T L. REP. 50028, 50037 (1975).

351. *General Agriculture Corp. v. Moore*, 166 Mont. 510, 514, 534 P.2d 859, 862 (1975); *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 74, 132 P.2d 689, 700 (1942).

executing.

Critical analysis leads to a different conclusion, however. A constitutional provision does not lose its self-executing character merely because it also directs the legislature to pass supplementary legislation.<sup>352</sup> Subsection (1) of Article IX, § 1 is more than a mere statement of policy; it is itself an enforceable command, and does not require legislation to make it effective.<sup>353</sup> The directive to the legislature in subsection (2) merely supplements the command to the state and all persons to maintain and improve the environment.

The purpose of interpreting a constitutional provision is to ascertain the intent of those who framed it.<sup>354</sup> There is a danger in relying too heavily on arbitrary rules of construction, especially where they may not reflect the true purpose of the drafters.<sup>355</sup> The best indications of the intent of the framers of Article IX, § 1 are the report of the committee that drafted the provision and the proceedings of the Constitutional Convention. The report of the Natural Resources Committee clearly states that the committee considered the duty to maintain and improve the environment self-executing:

[Subsection (2) mandates the legislature to administer and enforce this duty.] Your committee was urged by many to detail the manner of accomplishing this duty, but the temptation to legislate in the Constitution was resisted and confidence reposed in the legislature. To those who may lack such confidence in the elected representatives of the people *the clear and concise duty to maintain and enhance the Montana environment can't be contravened.*<sup>356</sup>

The possibility that subsection (2) might be construed to delegate to the legislature exclusive authority to execute Article IX, § 1 was raised by the head of the Natural Resources Committee.<sup>357</sup> The ensuing debate on whether the section should expressly charge the legislature to administer and enforce the subsection (1) duty indi-

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352. COOLEY, *supra* note 337, at 170; *General Agriculture Corp. v. Moore*, 166 Mont. 510, 514, 534 P.2d 859, 862 (1975).

353. See COOLEY, *supra* note 337, at 167-69.

354. *General Agriculture Corp. v. Moore*, 166 Mont. 510, 518, 534 P.2d 859, 864 (1975).

355. See COOLEY, *supra* note 337, at 171. "All external aids, and especially all arbitrary rules, applied to instruments of this popular character, are of very uncertain value. . . . [T]hey are to be made use of with hesitation, and only with much circumspection."

356. *Montana Constitutional Convention, Reports of the Substantive Committees, Report VI—Natural Resources* 7 (1972); *Proceedings, supra* note 318, at 3702-03.

357. *Proceedings, supra* note 318, at 3859 (remarks of delegate Cross).

cated that the delegates did not share the head's doubts.<sup>358</sup> A fair reading of the debate discloses that the framers of Article IX considered the first subsection self-executing and that subsection (2) was intended to be supplementary. Furthermore, this interpretation of section (1) comports with the frequently stated purpose of adopting the strongest environmental provision possible.<sup>359</sup> Allowing the command to maintain and improve the environment to lie dormant until the legislature acted would contravene this intention.

Use of the adjectives "clean and healthful" in subsection (1) also demonstrates that the command is self-executing. One of the fundamental tests for self-execution is whether language is directed to the courts or the legislature.<sup>360</sup> The history of the subsection reflects an intention to encourage judicial interpretation. Subsection (1) as originally proposed did not include the adjectives "clean and healthful;" they were added during floor debate.<sup>361</sup> By so doing, the convention rejected a concerted effort to prevent judicial construction,<sup>362</sup> thus evincing intent that the provision be self-executing.

The Montana Supreme Court has held self-executing a comparable section of Article IX, despite a directive to the legislature in one of its subsections. In *General Agriculture Corp. v. Moore*,<sup>363</sup> the court construed section 3 of Article IX, which concerns water rights and their regulation:<sup>364</sup>

The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not

358. *Id.* at 3859-66.

359. *Id.* at 3702, 3728.

360. *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 73, 132 P.2d 689, 700 (1943).

361. *Proceedings*, *supra* note 318, at 3857.

362. *Taking Rights Seriously*, *supra* note 319, at 232.

363. 166 Mont. 510, 534 P.2d 859, 862 (1975).

364. MONT. CONST. art. IX, § 3 provides:

- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
- (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
- (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
- (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

of itself prevent the provision in question from being self-executing; nor does the self-executing character of a constitutional provision necessarily preclude legislation for the better protection of the right secured, or legislation in furtherance of the purposes, or of the enforcement of the provision.<sup>365</sup>

The court then held self-executing all of Article IX, § 3, except for subsection (4), which requires legislation to implement it.<sup>366</sup> Section 3 of Article IX, the provision on water rights, compares favorably with section 1, the environmental provision. Subsection 4 of the water rights provision directs the legislature to provide for the administration, control, and regulation of those rights, which are described in general terms in the preceding subsections. Subsection 2 of the environmental provision similarly instructs the legislature to provide for the administration and enforcement of the duty generally prescribed in subsection 1. The holding of *General Agriculture Corp.* thus compels the conclusion that Article IX, § 1 is self-executing.

That interpretation also comports with the intention of the framers.<sup>367</sup> It is significant that in each of the other sections of Article IX, the command to the legislature is not stated in a separate subsection.<sup>368</sup> The different treatment of sections 1 and 3 of Article

365. *General Agriculture Corp.*, 166 Mont. at 514, 534 P.2d at 862.

366. *Id.* at 515, 534 P.2d at 862.

367. See text accompanying notes 357-60 *supra*.

368. The other sections of Article IX provide:

(1) All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed.

(2) The legislature shall provide for a fund, to be known as the resource indemnity trust of the state of Montana, to be funded by such taxes on the extraction of natural resources as the legislature may from time to time impose for that purpose.

(3) The principal of the resource indemnity trust shall forever remain inviolate in an amount of one hundred million dollars (\$100,000,000), guaranteed by the state against loss or diversion.

MONT. CONST. art. IX, § 2.

The legislature shall provide for the identification, acquisition, restoration, enhancement, preservation, and administration of scenic, historic, archeologic, scientific, cultural, and recreational areas, sites, records and objects, and for their use and enjoyment by the people.

MONT. CONST. art. IX, § 4.

The legislature shall dedicate not less than one-fourth ( $\frac{1}{4}$ ) of the coal severance tax to a trust fund, the interest and income from which may be appropriated. The principal of the trust shall forever remain inviolate unless appropriated by vote of three-fourths ( $\frac{3}{4}$ ) of the members of each house of the legislature. After December 31, 1979, at least fifty percent (50%) of the severance tax shall be dedicated to the trust fund.

MONT. CONST. art. IX, § 5.

IX demonstrates that the framers intended the substantive rights and duties of those sections to stand on their own and that the mandates to the legislature were meant to be supplementary.

Finally, a proper determination of the character of Article IX, § 1 requires examination of the constitution as a whole.<sup>369</sup> Article IX, § 1 is inextricably intertwined with the inalienable right declared in Article II, § 3, and that provision certainly is self-executing. The bond between the inalienable right and the command to maintain and improve the environment is shown not only by the common subject matter and repetition of the adjectives "clean and healthful," but also by the convention transcript. During debate on the Bill of Rights, Delegate Burkhardt moved to add the environmental right to Article II, § 3 by stating that it was "the other side of the balance" to the duty imposed in Article IX, § 1.<sup>370</sup> Finally, the last sentence in the inalienable rights section recognizes the existence of corresponding duties.<sup>371</sup> It would be inconsistent to create a right without giving effect to the corresponding duty expressed in Article IX.

## 2. *Effect of Article IX on MEPA Compliance*

A self-executing command to maintain and improve the environment strongly reinforces MEPA's mandate that all agencies incorporate ecological factors into their decisions. The constitutional directive alone demands attention to environmental considerations. It is difficult to imagine how a state agency could satisfy its constitutional obligation to maintain and improve the environment without taking into account all of the ecological impacts of its actions in decisionmaking. MEPA supplies the procedural framework for accomplishing the constitutional objective. The importance of that objective is further emphasized by the corresponding inalienable right declared in Article II, § 3.

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369. *Board of Regents of Higher Education v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323, 1330 (1975) ("All of the provisions of the constitution bearing upon the same subject matter are to receive appropriate attention and be construed together."). See also COOLEY, *supra* note 337, at 127-29 ("[T]he whole is to be examined with a view to arriving at the true intention of each part. . . . This rule is applicable with special force to written constitutions.").

370. *Proceedings, supra* note 318, at 5047.

371. Art. II, § 3 provides:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing, and protecting property, and seeking their safety, health, and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. [Emphasis added.]

The relationship between Article IX and MEPA is evidenced by the proceedings of the Constitutional Convention. The proceedings show that the delegates were aware of the policy act,<sup>372</sup> so there is no need even to rely on the presumption that a constitutional provision has been framed and adopted in light of existing laws and with reference to them.<sup>373</sup> The Constitutional Studies prepared by the Montana Constitutional Convention Commission for use by the delegates also emphasized the need for "something which [would] compel compliance with the policy propounded by [MEPA]."<sup>374</sup> Telling evidence of the link between the constitutional provision and the policy act is the parallel statement in MEPA recognizing that each person is entitled to a clean and healthful environment and has a corresponding responsibility to contribute to its preservation and enhancement.<sup>375</sup> Agencies and courts alike should recognize the connection between the constitution and MEPA and give full effect to their mandates.

Considerable attention has been focused on whether the Article IX, § 1 mandate is self-executing. Even if the provision were not self-executing, it would still have significant force. At a minimum, a non-executed provision prohibits actions which contravene its principles.<sup>376</sup> For example, even if the legislature has not passed implementing legislation to execute a constitutional provision, it cannot enact laws inconsistent with the provision.<sup>377</sup> There is no reason to limit application of this principle to the actions of the legislature; the rationale applies as well to agency action.<sup>378</sup> Thus, even an unexecuted Article IX, § 1 prohibits an agency from approving a project that would significantly harm the environment. This is especially true in light of the inalienable right to a clean and healthful environment declared in Article II, § 3.

Moreover, the Montana legislature has implemented Article IX, § 1. That body has enacted since 1972 significant legislation

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372. See, e.g., *Proceedings, supra* note 318, at 3722, 3726-27, 3759, 3770-71, 3882.

373. *Krutka v. Spinuzzi*, 153 Colo. 115, 124, 384 P.2d 928, 933 (1963). *Accord*, *Henrie v. Rocky Mountain Packing Corp.*, 113 Utah 415, 426, 196 P.2d 487, 493 (1948).

374. *Montana Constitutional Studies, Report No. 10, Environmental Protection* 256 (1972).

375. MCA § 75-1-103(3) (1979). A similar, but significantly weaker provision appears in NEPA. See notes 238-39 and accompanying text *supra*. The corresponding section of the Washington State Environmental Policy Act (SEPA) states that "each person has a fundamental and inalienable right to a healthful environment." RCWA 43.21 C.020(3) (Supp. 1978). SEPA has been said to have constitutional dimension. Note, *A Standard for Judicial Review of Administrative Decisionmaking under SEPA*, 54 WASH. L. REV. 693, 705 (1979).

376. 16 AM. JUR. 2d *Constitutional Law* § 140 (1979).

377. *Id.*

378. See notes 341-45 and accompanying text *supra*.



pursuant to the command of Article IX, § 1(2) as well as the other sections of Article IX.<sup>379</sup> The statutes passed under Article IX, § 1(2) include the Major Facility Siting Act,<sup>380</sup> the Nongame and Endangered Species Act,<sup>381</sup> and a temporary moratorium on the use of uranium solution extraction.<sup>382</sup> This legislation treats specific problems; as such, it represents a piecemeal approach to environmental protection, which is no substitute for the broad mandate to consider ecological factors in MEPA.<sup>383</sup> But since the policy act already existed, the legislature had no reason to pass another comprehensive statute after the constitution was adopted.

The Montana Supreme Court's opinion in *Kadillak* presents difficulty with respect to the effect of the constitution on MEPA. The decision, read narrowly, states only that the policy act's EIS requirement lacks constitutional status.<sup>384</sup> However, the premise underlying that observation is troubling. The court stated that since the legislature had enacted MEPA before the constitution was adopted, the statute cannot be said to implement the Article IX, § 1 duty.<sup>385</sup> The court's focus was misdirected. Ascertaining what the legislature intended when it passed MEPA is not the question; the issue is what effect to accord the statute now, in light of the constitutional policy. MEPA still has vitality. The new constitution did not repeal it; on the contrary, a savings clause preserved all statutes that are not in conflict with the constitution.<sup>386</sup> MEPA is certainly not inconsistent with the constitution. The legislature should not be required to re-enact a valid statute in order to give effect to the constitutional provision. Instead of asking whether the legislature intended to implement Article IX, § 1, the question should be whether the framers of the constitution meant to strengthen the policy behind MEPA. The convention record answers the latter question affirmatively.<sup>387</sup> The Montana Supreme

379. Roberts & Stone, *Recent Developments in Montana Natural Resources Law*, 38 MONT. L. REV. 169, 180-81 (1977).

380. MCA § 75-20-101 *et seq.* (1979).

381. MCA § 87-5-101 *et seq.* (1979).

382. The moratorium is no longer in effect, but was formerly codified at REVISED CODES OF MONTANA (1947), §§ 50-1701 through -1704 (Supp. 1977).

383. See Hanks & Hanks, *supra* note 54, at 247.

384. *Kadillak*, \_\_\_ Mont. \_\_\_, 602 P.2d at 154.

385. *Id.*

386. MONT. CONST. Transition Schedule § 6(1) states:

All laws, ordinances, regulations and rules of court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution.

387. See notes 372-74 and accompanying text *supra*. Cf. *O'Neill v. White*, 343 Pa. 96, 100, 22 A.2d 25, 26-27 (1941). There the Pennsylvania court considered the effect of a non-

Court should reconsider the view espoused in *Kadillak* and limit the decision to clear conflicts in *statutory* authority created by time constraints.<sup>388</sup>

Similarly, the *Beaver Creek* opinion should not prevent the court from recognizing and giving effect to the constitutional provisions. The majority based its finding on the issue of local control of subdivisions,<sup>389</sup> and the decision should be limited to Department of Health review under the Sanitation in Subdivisions Act.<sup>390</sup> The majority failed to cite any cases in support of the proposition that the department lacked authority to examine factors outside that statute.<sup>391</sup> The majority also did not address the effect of the constitutional provisions. Chief Justice Haswell's dissent offers valuable guidance in interpreting those provisions:

The real issue in this case concerns the right of two . . . organizations . . . to compel a state agency to conform to the requirements of the [MEPA] . . . to the end that an adequate environmental assessment will be made and considered by the decision makers. . . . If they cannot, the inalienable right of all persons to a clean and healthful environment guaranteed by Montana's Constitution confers a right without a remedy.<sup>392</sup>

The Chief Justice also intimated that the court could enforce the Article IX, § 1(1) command to maintain and improve the environment, even in the absence of implementing legislation.<sup>393</sup> That interpretation properly gives effect to the constitutional provisions and MEPA, instead of rendering them "useless verbiage, stating rights without remedies, and leaving the state with no checks on its

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self-executing provision of the Pennsylvania Constitution relating to the filling of vacancies in public office. The court stated:

It is obvious that the . . . mandate of Article 4, Section 8 of the Constitution assumes the existence of election machinery to carry it out. But the election machinery provided by the Election Code is not geared to the carrying out of that constitutional mandate.

The pre-existing election statutes in *O'Neill* conflicted with the new constitutional provision. The court implied, however, that if the statutes had been compatible, they would sufficiently execute the constitutional provision. MEPA is consistent with the Montana Constitution. That the statute predates the constitution should not render it ineffective to implement the constitutional mandate.

388. *Kadillak*, — Mont. —, 602 P.2d at 153.

389. *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. at 484-85, 559 P.2d at 1161.

390. MCA § 76-4-101 *et seq.* (1979).

391. *See Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. at 485, 559 P.2d at 1161.

392. *Id.* at 486, 559 P.2d at 1162 (Haswell, J., dissenting).

393. *Id.* at 498, 559 P.2d at 1168 (Haswell, J., dissenting).

powers and duties under [MEPA]."<sup>394</sup>

Finally, the Montana legislature since 1972 has reaffirmed its commitment to the policy expressed in MEPA. In a 1974 joint resolution, Montana's lawmakers directed all agencies in the state to "achieve forthwith the full implementation of the Montana Environmental Policy Act."<sup>395</sup> Short of re-enacting the statute, which would serve no purpose, the legislature has done all that it can to confirm the act's vitality. *Beaver Creek* and *Kadillak* should not be allowed to thwart the express intent of the legislature.

#### D. Summary

If agencies in Montana are to take their constitutional obligations seriously, they should immediately implement in full MEPA's mandate. Both the right to a clean and healthful environment and the command to maintain and improve the environment should be considered self-executing. Even if the latter provision is not, it still has considerable force. Agencies at least must not contravene the policy underlying the Article IX, § 1 directive, and they must respect the declared inalienable right to a clean and healthful environment.

The constitutional provisions themselves demand consideration of environmental factors by all branches of government. MEPA provides the specific framework for agencies to fulfill their obligations under the constitution. The constitutional provisions were adopted in response to the same problems that engendered MEPA. The elevation of the policies that underlie the statute to a constitutional imperative demands that they be considered seriously. As Professor Howard stated:

A constitution, whether state or national, is the ultimate repository of a people's considered judgment about basic matters of public policy. When the framers of a constitution elevate environmental quality to the stature of a constitutional postulate, then officials, courts, and citizens alike should repair to that standard.<sup>396</sup>

### III. CONCLUSION

The state agencies, and to some degree the Montana Supreme Court, have interpreted the Montana Environmental Policy Act in a way that finds no support in any other jurisdiction or in the in-

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394. *Id.* at 499, 559 P.2d at 1168 (Haswell, J., dissenting).

395. 1974 MONT. LAWS, H.R.J. Res. 73, p. 1571.

396. Howard, *supra* note 326, at 229.

tent of the Montana legislature, as expressed in the statutory language and legislative history of the act. By according MEPA such a narrow construction, the agencies have ignored their constitutional obligations and violated the inalienable rights of the citizens of Montana. The legislative intent of the Montana legislature, as buttressed by the unequivocal constitutional duty to prevent degradation of the environment by the state, imposes a clear and incontrovertible obligation upon Montana agencies: they must consider fully in decisionmaking all environmental impacts of their actions, including those not expressly provided for in the substantive legislation pursuant to which they are acting. Until the state agencies comply with this mandate their crabbed interpretation will continue to make a mockery of the Montana Environmental Policy Act.