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## NEPA: Full of Sound and Fury?

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## NEPA: FULL OF SOUND AND FURY . . . ?

The efforts of our citizens and the Congress to save our parklands and to preserve our environment deserve a more hospitable reception and more faithful observance than they have apparently found either in the Executive branch, or thus far, in the courts.<sup>1</sup>

Man has been, is, and will continue to be dependent upon the environment for the essential and non-essential components of his existence. In twentieth century America, the inevitable realization that environmental resources are not infinite has fostered an increased interest in stemming the tide of ecological devastation now being carried out in the name of progress and technological convenience.

Man's large scale efforts to actively conserve his resources, and to preserve his natural legacy for future generations, were a significant product of the sixties. At the state level, laws peculiarly directed toward environmental problems were enacted.<sup>2</sup> But more importantly, it became apparent that the ramifications of the ecological threat were national in scope, and consequently an appropriate subject of federal as well as state legislation. Congress has responded to this recognized need for national environmental legislation in several particular areas.<sup>3</sup>

Owing principally to the scope of activities which have become the province of federal agency activity in recent years, it may now be fairly said that the United States Government itself has become a significant factor in the erosion of environmental systems. Conversely, given the

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<sup>1</sup> Conservation Society v. Texas Highway Dep't, 400 U.S. 968, 971-72 (1970) (dissenting opinion to denial of certiorari).

<sup>2</sup> For a comprehensive breakdown of state air and water legislation to date, see BNA ENVIRONMENT RPTER.—STATE AIR LAWS & STATE WATER LAWS.

<sup>3</sup> See, e.g., Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135 (1970); Fish and Wildlife Coordination Act, 16 U.S.C. § 662 (1970); River and Harbor Act, 33 U.S.C. § 401 (1964); Federal Water Pollution Control Act, 33 U.S.C. § 466 (1964); Clean Air Act, 42 U.S.C. § 1857 (1964). See also Solid Waste Disposal Act, 42 U.S.C. §§ 3251-3259 (Supp. V, 1965); Water Resources Research Act of 1964, 42 U.S.C. §§ 1961a-4, 1961b, 1961c-7 (Supp. V, 1965); Water Resources Planning Act of 1965, 79 Stat. 244 (codified in scattered sections of 42 U.S.C.); Federal Aviation Act of 1958, 49 U.S.C. § 1431 (Supp. V, 1965); National Materials Policy Act of 1970, 42 U.S.C.A. § 3251.

proper incentives, it could become a most influential proselyte in the effort to preserve the environment for present and future generations. Assessed voter desire for limitations on environmental destruction by the agencies of the Federal Government led to congressional enactment of the National Environmental Policy Act of 1969 (NEPA).<sup>4</sup> Although its ultimate success or failure in contributing to the conservation and preservation of the environment must await later analysis, early administrative and judicial experience with NEPA allows tentative conclusions as to the validity of its purposes and the success of its methods in accomplishing them.

### I. ENVIRONMENTAL POLICY

NEPA declares that the continuing policy of the Federal Government, in cooperation with state and local governments, and other concerned public and private organizations, is to use all practicable means, including financial and technical assistance, in a manner calculated to create and maintain "conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."<sup>5</sup> To that end, the Act imposes on the federal agencies the continuing responsibility "to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources."<sup>6</sup> The Act represents a congressional compromise, combining features of bills introduced separately in the Senate and the House of Representatives during the 1969 session.<sup>7</sup>

Much of the National Environmental Policy Act speaks in laudable generalities of the necessity for and desirability of policy-level environmental controls, without actually requiring limitations on ecologically detrimental activities.<sup>8</sup> In contrast, the most far-reaching implications of the legislation arise from that portion, originating in the Senate, which

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<sup>4</sup> 42 U.S.C. §§ 4321-4347 (Supp. V, 1965). On the need for the legislation, see U.S. CODE CONG. & ADMIN. NEWS 2751-58 (1969). NEPA went into effect on January 1, 1970.

<sup>5</sup> 42 U.S.C. § 4331(a) (Supp. V, 1965).

<sup>6</sup> *Id.* § 4331(b).

<sup>7</sup> *EDF v. Corps of Engineers*, 325 F. Supp. 728, 749 (E.D. Ark. 1971). For a full treatment of the legislative history of the National Environmental Policy Act of 1969, see U.S. CODE CONG. & ADMIN. NEWS 2751 (1969).

<sup>8</sup> See 42 U.S.C. §§ 4321-31 (Supp. V, 1965).

requires federal agencies to consider the ecological effects of certain of their actions by following a set of procedural requisites:<sup>9</sup>

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>10</sup>

NEPA thus makes it clear that each agency of the Federal Government must comply with its procedural provisions unless the existing law applicable to the agency's operations expressly prohibits that compliance, or makes full compliance impossible.<sup>11</sup> However, if compliance is impossible as to one particular facet of an agency's actions, it may still be required in other activities of the agency.<sup>12</sup> Furthermore, the policies and goals set forth in the Act should be regarded as supplementary to those set forth in existing authorizations of federal agencies. They do not affect the specific statutory obligations of an agency to comply with existing criteria or standards of environmental quality, to coordinate or consult with any other federal or state agency, or to act or refrain from acting contingent upon the recommendations or certification of any other federal or state agency.<sup>13</sup> NEPA's procedural requirements are better viewed as mandatory:<sup>14</sup>

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<sup>9</sup> *Id.* § 4332.

<sup>10</sup> *Id.* § 4332(2)(c).

<sup>11</sup> See U.S. CODE CONG. & ADMIN. NEWS 2767, 2769-70 (1969).

<sup>12</sup> *Id.* at 2770.

<sup>13</sup> 42 U.S.C. § 4334.

<sup>14</sup> See *Conservation Society v. Texas Highway Dep't*, 400 U.S. 968, 969 (1970)

. . . 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. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.<sup>15</sup>

Subsequent to the congressional enactment of the National Environmental Policy Act, President Nixon, by executive order, rearticulated that the heads of the several federal agencies are under a continuing obligation to "monitor, evaluate, and control their agencies' activities so as to protect and enhance the quality of the environment."<sup>16</sup> Furthermore, they must develop procedures to ensure the fullest practicable provision of timely public information and understanding of federal plans and programs with environmental impact, in order to obtain the views of interested parties in the decision-making process.<sup>17</sup>

## II. ENVIRONMENTAL IMPACT STATEMENTS

The various federal agencies must comply with the procedural requirements of the Environmental Policy Act by filing an Environmental Impact Statement<sup>18</sup> with the Council on Environmental Quality, which was created by the Act.<sup>19</sup> The Council has issued guidelines for the agencies to follow in compliance with the mandate of the Act.<sup>20</sup> These guide-

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(dissenting opinion to denial of certiorari) wherein Mr. Justice Black uses mandatory language: the Act "requires a detailed study of the probable effects before approval of 'major Federal actions significantly affecting the quality of the human environment.'" (emphasis added); *Texas Comm. v. United States*, 1 ERC 1303, 1304, *vacated as moot*, 430 F.2d 1315 (5th Cir. 1970) wherein the court stated, "[i]t is hard to imagine a clearer or stronger *mandate* to the courts." (emphasis added). *But see Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971) indicating that compliance with the National Environmental Policy Act of 1969 is discretionary.

<sup>15</sup> U.S. CODE CONG. & ADMIN. NEWS 2767, 2770 (1969).

<sup>16</sup> Exec. Order No. 11,514, § 2(a), 35 Fed. Reg. 4247 (1970).

<sup>17</sup> *Id.* § 2(b).

<sup>18</sup> 42 U.S.C. § 4332(2)(c) (Supp. V, 1965).

<sup>19</sup> *Id.* §§ 4341-47.

<sup>20</sup> See BNA ENVIRONMENT RPTER.—FEDERAL LAWS 71:0301 (1970) [hereinafter cited as FEDERAL GUIDELINES]. These guidelines for federal agencies under NEPA, though not carrying the weight accorded legislation or decisional law, nevertheless have persuasive value in establishing the standards to which the agencies must adhere: "When faced

lines establish that, as a matter of policy, before undertaking a major action, an agency must assess the potential long- and short-term environmental impact "in order that adverse effects are avoided, and environmental quality is restored or enhanced, to the fullest extent practicable."<sup>21</sup> In particular, alternative actions that will minimize adverse impact should be explored.<sup>22</sup> Agency heads must set up methods for identifying actions which require Environmental Impact Statements, obtaining information required in their preparation, designating which individuals are to be responsible for the statements, consulting with and taking account of the comments of appropriate federal, state and local agencies, and providing the required timely public information on federal plans and programs having environmental impact. They must file information on these procedures with the Council on Environmental Quality.<sup>23</sup>

NEPA requires an Environmental Impact Statement whenever an agency makes recommendations or reports on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.<sup>24</sup> Such actions include, but are not limited to:

- (i) recommendations or reports relating to legislation and appropriations;
- (ii) projects and continuing activities
  - directly undertaken by Federal agencies
  - supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance

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with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153 (1946). See *Udall v. Tallman*, 380 U. S. 1 (1965); *Gray v. Powell*, 314 U.S. 402 (1941); *Universal Battery Co. v. United States*, 281 U.S. 580 (1930). In *Udall*, *supra*, the Court stated:

Particularly in this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the man charged with the responsibility of setting its machinery in motion, of making the parts work efficiently while they are yet untried and new. 380 U.S. at 16.

See generally *Perkins v. Matthews*, 400 U.S. 379, 391 (1971).

<sup>21</sup> FEDERAL GUIDELINES, *supra* note 20.

<sup>22</sup> *Id.* ¶ 2.

<sup>23</sup> *Id.* ¶ 3(a).

<sup>24</sup> 42 U.S.C. § 4332(2)(c) (Supp. V, 1965).

—involving a Federal lease, permit, license, certificate or other entitlement for use;

(iii) policy—and procedure-making.<sup>25</sup>

The statutory clause, “major Federal actions significantly affecting the quality of the human environment,” is to be construed by the agencies with a view to the overall, cumulative impact of the action proposed, and of further actions contemplated. Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement must be prepared. Proposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, it should be borne in mind that the effect of many federal decisions concerning a project or a complex of projects can be individually limited, but cumulatively considerable. The agency should prepare an Environmental Impact Statement if it is reasonable to anticipate a cumulatively significant impact on the environment from the federal action.<sup>26</sup>

The Council on Environmental Quality has taken the position that an Environmental Impact Statement should be prepared for further “major Federal actions” even though the environmental impact arises in part from projects or programs initiated before January 1, 1970, the effective date of the Act. Even when it is not practical to reassess the basic course of action, it is still important that further increments of federal action be so shaped as to minimize adverse environmental consequences. It is also important, in further action, that account be taken of environmental consequences not fully evaluated at the outset of the project or program.<sup>27</sup>

The Council on Environmental Quality has established six guidelines to be used by the agencies in preparing Environmental Impact Statements. A Statement should include (1) a discussion of the probable impact of the proposed action on the environment—including primary and secondary consequences,<sup>28</sup> (2) any unavoidable adverse effects,<sup>29</sup> (3) a rigorous analysis of alternatives to the proposed action,<sup>30</sup> (4) an assess-

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<sup>25</sup> FEDERAL GUIDELINES, *supra* note 20, ¶ 5 (a).

<sup>26</sup> *Id.* ¶ 5 (b).

<sup>27</sup> *Id.* ¶ 11.

<sup>28</sup> *Id.* ¶ 7 (a) (i).

<sup>29</sup> *Id.* ¶ 7 (a) (ii).

<sup>30</sup> *Id.* ¶ 7 (a) (iii).

ment of the action from the standpoint of cumulative and long-term effects on succeeding generations,<sup>31</sup> (5) an identification of any irreversible and irretrievable commitments of resources,<sup>32</sup> and (6) a discussion of problems and objections raised by other federal, state and local entities in the review process and in the disposition of the issues involved.<sup>33</sup>

Implicit in the requirement that an Environmental Impact Statement be prepared is the requirement of the National Environmental Policy Act that the information contained therein must be utilized in the agency's determination of the overall feasibility of a project. To this end, the federal agencies are obliged to identify at what stage or stages in their actions on a particular matter the procedures will be applied. It will often be necessary to use the procedures in the development of a national program and in the review of proposed individual projects within the national program.<sup>34</sup>

Pursuant to statutory requirements, numerous agencies have established procedural guidelines they intend to follow, and have filed them with the Council on Environmental Quality. Furthermore, a number of Environmental Impact Statements relating to specific federal actions have been filed with the Council.

The Council on Environmental Quality, however, has refused to make public its criticisms of those Statements it receives, claiming executive privilege. Furthermore, it has no power to require the filing of adequate Statements by withholding funds until an agency complies. As a consequence, the potential intra-governmental effectiveness of NEPA is seriously impaired. Persons aggrieved by agency action are needlessly deprived of potential concurring evidence by the Council on Environmental Quality. More seriously, non-compliant, environmentally detrimental projects may be begun before aggrieved individuals may secure access to the courts to gain relief. On the administrative level, NEPA provides simply no machinery to enforce compliance with its policies, or to prohibit arbitrary, violative agency practices which may result in detriment to the environment. Consequently, it is hoped that Congress will amend the Act, perhaps by giving the Council on Environmental

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<sup>31</sup> *Id.* ¶ 7(a) (iv).

<sup>32</sup> *Id.* ¶ 7(a) (v).

<sup>33</sup> *Id.* ¶ 7(a) (vi). State and local review of the environmental action is also provided. For a detailed discussion of procedure, see GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW 1038-67 (1970).

<sup>34</sup> *Id.* ¶ 10(a).

Quality the authority to require the filing of Environmental Impact Statements.

### III. JUDICIAL INTERPRETATION

In the courts, the National Environmental Policy Act of 1969 is emerging primarily as a private vehicle for limiting federal and federal-state actions which arbitrarily affect the beauty and utility of parks, historical areas, wildlife preserves, and like public interest property. However, there is no limitation against its use in other types of environmental cases. Injunctions are granted for violation of the Act. Yet, no cases have been found where damages have been sought for its breach. NEPA's ramifications are not limited to actions causing environmental impact in the United States.<sup>35</sup> It is before the courts that an aggrieved party stands his best chance of relief in environmental actions under NEPA:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material “progress.” But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role.<sup>36</sup>

#### *A. Standing to Sue*

In the federal judiciary, environmental conservation groups as well as private individuals have been allowed to invoke the aid of NEPA as a result of recent Supreme Court decisions eroding the requirements of standing to sue.<sup>37</sup> Thus, even in those cases where the courts have not granted relief to the complainants, they have recognized the complainants' standing, as private citizens and organizations, to enforce the mandatory requirements of the Act.<sup>38</sup>

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<sup>35</sup> See *State Comm. v. Laird*, 317 F. Supp. 664 (W.D. Wisc. 1970).

<sup>36</sup> *Calvert Cliffs' Coordinating Comm. v. AEC*, — F.2d —, 1 ELR 20346 (D.C. Cir. 1971).

<sup>37</sup> See *EDF v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971); *EDF v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971); *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971); *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

<sup>38</sup> *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971) (holding NEPA discretionary).

Under NEPA, standing to sue involves a two-pronged test: (1) whether the plaintiff has alleged an act which has caused him injury, in fact, economic or otherwise, and (2) whether the interest asserted by the plaintiff is arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question.<sup>39</sup> The first requirement was held to be satisfied by pleading that unless an act is enjoined, injury—though not economic—will occur to the plaintiffs and sufficiently damage their interests as citizens, sportsmen, and environmentalists. As to whether the plaintiff's interest is within a zone of protected interests:

. . . [I]f the statutes involved in the controversy are concerned with the protection of natural, historic and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.<sup>40</sup>

Furthermore, under NEPA, private plaintiffs are regularly held to be persons "aggrieved by agency action within the meaning of a relevant statute," and they are accorded access to the court under the Administrative Procedure Act.<sup>41</sup>

### *B. Substantive Rights*

The National Environmental Policy Act of 1969 creates procedural requirements which are enforceable in the courts through injunctive and declaratory procedures. Thus, it is held that whenever a "major federal action" is contemplated, the acting agency must file a detailed Environmental Impact Statement containing, at a minimum, "such information . . . as will alert the President, the Council on Environmental Quality, the public and . . . congress, to all known, *possible* environmental consequences of a proposed agency action."<sup>42</sup> Even if the agency finds no

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<sup>39</sup> See *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

<sup>40</sup> *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238, (M.D. Pa. 1970). In *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971), plaintiffs established standing by asserting not only injury to their personal interest, but, acting as private attorneys general, injury to the public interest.

<sup>41</sup> See cases cited note 40, *supra*.

<sup>42</sup> *EDF v. Corps of Engineers*, 325 F. Supp. 728, 749 (E.D. Ark. 1971).

merit in the potential consequences whatsoever, "the record should be complete."<sup>43</sup>

Furthermore, the adequacy of a filed Environmental Impact Statement is subject to judicial review. The filing of an adequate statement has been held to presuppose "a detailed study and examination of the important environmental factors"<sup>44</sup> which will influence the agency when it decides whether to undertake an action involving environmental consequences. "The Congress of the United States is intent upon requiring the agencies of the United States Government . . . to objectively evaluate all of their projects, regardless of how much money has already been spent thereon, and regardless of the degree of completion of the work."<sup>45</sup>

The procedural requisites of NEPA are, in the better view, regarded as mandatory, although they have been classified as discretionary.<sup>46</sup> In addition, while not retroactive,<sup>47</sup> they have been held to apply to continuing federal actions, as well as those originating before January 1, 1970.<sup>48</sup> While the environmental analysis approach employed by an agency may vary according to whether the action contemplated is a new or an ongoing project, the outcome should be essentially the same in both cases.<sup>49</sup>

The courts have evidenced a reluctance to review an administrative decision on an environmental matter once the procedural requirements of the National Environmental Policy Act are met. However, an arbitrary abuse of administrative decisional power, though procedurally perfect, is subject to reversal.<sup>50</sup> The burden of proving such an arbitrary exercise is on the plaintiff.

In early actions under NEPA, plaintiff's counsel have urged that the Act, and the ninth amendment create in the plaintiffs a substantive right to "safe, healthful, productive, and aesthetically and culturally pleasing surroundings"<sup>51</sup> and to "an environment which supports diversity

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1262.

<sup>45</sup> *Id.* at 1262.

<sup>46</sup> See note 16, *supra*.

<sup>47</sup> See *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970); *Investment Syndicates v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970); *Brooks v. Volpe*, 319 F. Supp. 90 (W.D. Wash. 1970).

<sup>48</sup> *Id.*

<sup>49</sup> *EDF v. Corps of Engineers*, 325 F. Supp. 728, 749 (E.D. Ark. 1971).

<sup>50</sup> See *Citizens v. Volpe*, 432 F. 2d 1307 (6th Cir. 1970).

<sup>51</sup> *EDF v. Corps of Engineers*, 325 F. Supp. 728, 749 (E.D. Ark. 1971).

and variety of individual choice' and 'the widest range of beneficial values'.<sup>52</sup> However, the courts have adopted a narrow interpretation of the Environmental Policy Act:

. . . [I]t is highly doubtful that the Environmental Policy Act can serve as the basis for a cause of action. Aside from establishing the council, the Act is simply a declaration of congressional policy; as such, it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only the general command to federal officials to use all practicable means to enhance the environment. . . . It is unlikely that such a generality could serve or was intended to serve as a source of court-enforceable duties.<sup>53</sup>

Furthermore, it has been recognized that the Act reflects a compromise which falls short of creating such substantive rights, and that they do not now exist under the Constitution. "Apparently, the sponsors could obtain agreement only upon an act which declared the national environmental policy. While this represents a giant step, it is, nevertheless, only a step. It does not purport to vest in anyone a right to a particular type of environment."<sup>54</sup>

### C. *Preliminary Injunction*

Alleged violation of the National Environmental Policy Act of 1969 is grounds for granting a temporary injunction. Prerequisites include a showing of irreparable injury to the plaintiff, and a reasonable chance of success on the merits.<sup>55</sup> The process has been viewed as a traditional "balancing of the equities."<sup>56</sup>

Although the requirement of bond exists, and may act as a significant deterrent to an impecunious plaintiff, the amount—when bond is required—has been set as low as one hundred dollars.<sup>57</sup> The granting of a temporary injunction is largely discretionary, and the Supreme Court has

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<sup>52</sup> *Id.* at 1264.

<sup>53</sup> *Bucklein v. Volpe*, — F. Supp. —, 2 ERC 1082, 1083 (N.D. Calif. 1971).

<sup>54</sup> *EDF v. Corps of Engineers*, 325 F. Supp. 728, 749 (E.D. Ark. 1971).

<sup>55</sup> *Texas Comm. v. United States*, 430 F.2d 1315 (5th Cir. 1970); *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

<sup>56</sup> *Investment Syndicates v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970).

<sup>57</sup> *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

denied certiorari where the plaintiff has sought pre-judgment review of a denial of a temporary order.<sup>58</sup>

#### *D. Defenses to Actions Under NEPA*

Because an action under the National Environmental Policy Act of 1969 contemplates injunctive relief, the courts have applied the equitable defense of laches to it.<sup>59</sup> There is divergent authority on whether sovereign immunity will bar an injunction against the Army Corps of Engineers and the United States Army,<sup>60</sup> but it has been held not to bar an action against the chief of the Army Corps of Engineers and the Secretary of the Army.<sup>61</sup> On the other hand, sovereign immunity will bar an action against a state director of highways, and against contractors working at his direction.<sup>62</sup> Furthermore, it may be expected that other equitable defenses will be applied to these actions in future cases.

#### *E. Quo Vadis?*

The National Environmental Policy Act of 1969 is a curious conglomerate of desirable objectives coupled with inadequate machinery for the enforcement and ultimate realization of its goals. It creates no substantive rights to environmental quality. Yet, it establishes complex procedural machinery to ensure that federal agencies go through the motions of environmental consideration, as though such a right did exist. It requires that an elaborate, detailed Environmental Impact Statement be filed with the Council on Environmental Quality, to expose the possible environmental threats posed by major federal actions. However, the Council has no power to compel the filing of an adequate statement, and will not release its criticisms of those statements which are filed. While Congress may have acted wisely in refusing to sacrifice agency productivity on the altar of environmental excellence, its present ap-

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<sup>58</sup> *Conservation Society v. Texas Highway Dep't*, 400 U.S. 968 (1970) (dissenting opinion to denial of certiorari).

<sup>59</sup> See *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970) (holding no unreasonable delay, hence no bar).

<sup>60</sup> *EDF v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971) (sovereign immunity not applicable); *EDF v. Corps of Engineers*, 325 F. Supp. 728, 749 (E.D. Ark. 1971) (sovereign immunity applicable).

<sup>61</sup> *EDF v. Corps of Engineers*, 325 F. Supp. 728, 749 (E.D. Ark. 1971).

<sup>62</sup> *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

proach to the environmental issue tends toward an overly permissive view of ecological abuse.

The Act seeks to further national policy in favor of environmental balance, yet the courts have granted sovereign immunity to state officials directly responsible for implementation of projects which violate its most basic mandates.

In plain terms, the act must be strengthened to become effective. Enforcement machinery must be incorporated on the administrative level so that its policy objectives may be translated into reality. The NEPA represents a giant step, it is true—but only a step. It is to be hoped that its weaknesses will be strengthened, and that the courts will interpret it more liberally. Only then will the laudable objective of a more pleasing environment for present and future generations of Americans be realized.

*J. D. F., III\**

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\* *Editor's note:* The *Review* is grateful to J. Durwood Felton, III for this contribution. Mr. Felton, a former member of the Editorial Board, received his J.D. from Richmond in June, 1971.