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NEPA in the Courts—A Legal Analysis of the National Environmental Policy Act. By Frederick R. Anderson. Washington, D.C.: Resources for the Future, Inc., 1973. Pp. xii, 324.

This study by Frederick R. Anderson, the Executive Director of the Environmental Law Institute, is certainly the most comprehensive and probably the best of the legal literature analyzing judicial interpretation of the National Environmental Policy Act (NEPA).[1] All the reported cases have been tracked down, organized, and synthesized. Mr. Anderson very adequately analyzes the case law, points out differences in interpretation among various federal courts of appeals, and suggests how various judicial issues may be best resolved.

The format of the book is largely dictated by the issues that courts have been called on to resolve in NEPA litigation. It is geared principally to informing the legal practitioner how to bring a NEPA action in court and what issues to raise in challenging agency decision-making. After an informative chapter on the legislative history of NEPA, the author carefully and exhaustively discusses the administrative law problems of standing to sue and judicial review of agency decisions within the scope of NEPA. Another chapter is devoted to court and agency interpretation of the problem of what agency actions are subject to NEPA's requirements and who makes that determination. The procedural requirements of NEPA and the problem of procedural adequacy of the impact statement process are fully treated. There is also an interesting chapter on the "frontier" of the NEPA process: the extent to which courts should engage in substantive review of agency decisions which significantly affect the environment. It is the author's thesis that courts should be more active in reviewing the merits of agency decisions on the basis of whether they are arbitrary and capricious since procedural review alone has not been sufficient to change traditional agency bias in favor of non-environmental factors.

In short, this book provides a comprehensive "snapshot" view of where we are in terms of NEPA judicial-decisional law. It does this very well, and if judged by this relatively narrow purpose, it is a very useful book despite the obvious drawback that certain parts of it will rapidly go out of date as additional judicial decisions are handed down.

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1. 42 U.S.C. §§ 4321-47 (1970).

At the same time, one comes away from reading this book, as well as the other published legal literature on NEPA, with the view that much more needs to be done by legal scholars in analyzing and evaluating this statute, which is the centerpiece of recent legislative activity in the field of environmental law. NEPA, after all, was intended to affect decision-making by the executive and legislative branches of government, not the courts, and to provide a mechanism for review of such decision-making by the Council of Environmental Quality, the President, agencies with primary responsibility for environmental management, and the public. The willingness of the courts to review agency decisions to determine their compliance with NEPA has been an important and laudable development. However, it is regrettable that legal scholarship has concentrated too much on this aspect of NEPA while neglecting more difficult and fundamental problems. The illusion is created that one can get at problems of the process of agency decision-making and the implementation of a complex statute merely through reading and analyzing appellate court decisions. This, in turn, is a reflection of the larger problem that the training of lawyers and legal scholars is skewed in favor of analyzing cases even in areas, such as this, in which case law is merely the tip of the iceberg.

The fact remains that we know very little about whether and how NEPA works. This is dramatically illustrated by the opposing positions taken by two of the most competent legal writers on NEPA, Dean Roger Cramton and Professor Joseph Sax. Dean Cramton and Richard Berg, writing in the *Michigan Law Review*,[2] state that NEPA has caused a "dramatic change" in the perspectives of a number of federal agencies. They argue that NEPA has not been a toothless tiger but, together with court decisions requiring implementation of its requirements, has caused a real change in the values and the process of decision-making of federal agencies. They even point out the possibility that NEPA, if too stringently applied, may hold agencies to unrealistic standards and provide too great a disruption of traditional decision-making processes.

Professor Sax, on the other hand, says that NEPA has produced little more than "fodder for law review writers" and contracts for environmental consultants.[3] His view is that NEPA has not affected the traditional behavioral characteristics of mission-oriented government agencies and that, pious pronouncements of the courts notwithstanding, the

2. Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511 (1973).

3. Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239 (1973).

effect of NEPA on activities of these agencies has only been a matter of form.

Which view is more correct? Both writers offer very little empirical evidence for their conclusions. Cramton and Berg rely on observations of "insiders conversant with the Washington scene"[4] and judicial decisions, while Sax uses his experience with the FAA regarding airport expansion. In both cases the authors views are personal and impressionistic.

At least these writers have begun to grapple with the crux of the problem. NEPA in the courts has been overstudied when the real issues are NEPA in the agencies, NEPA in the Council of Environmental Quality, and NEPA in the public arena. There is a desperate need for more empirical and case studies of the agency decision-making process; only these can tell us how and whether NEPA actually works. We can no longer rely on dramatic court decisions, such as the landmark *Calvert Cliffs*[5] decision, as an accurate description of agency conduct just because a case sets out ideal principles concerning how agencies *should* act. Empirical studies could provide a basis for real reform of agency decision-making.[6]

Another need is better factual and legal evaluation and assessment of the merits of projects subject to the NEPA impact statement requirement. Up to now, published legal studies on this issue have been limited to the largely peripheral problems of the appropriate judicial standards for the scope and basis of substantive review. As any lawyer who has participated in NEPA litigation knows, the standard and scope of review problem is only the beginning of analysis. Anyone seriously evaluating a project must be prepared to plunge into sophisticated concepts of welfare economics and cost-benefit analysis, air and water quality parameters, and hydrological, geologic, and engineering data. One of the most severe problems under NEPA is that there is no established mechanism for independent assessment of projects and impact statements. Neither the CEQ nor EPA has performed this function to any great extent. Comments by these and other environmental agencies on proposed projects have been so superficial as to be largely useless. Judges and other potential reviewers of the merits of projects

4. Cramton & Berg, *supra* note 2, at 512 n.4.

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

6. *See* the interesting suggestions of Professor Sax in this regard, *supra* note 3, at 248.

have thus understandably shied away from such complexities and have, with few exceptions,[7] given the agencies the benefit of the doubt.

Until this situation is corrected, legal and scientific scholars, conservation organizations, and public interest groups must compensate for this deficiency. A pioneering project in this regard is being carried out by the Institute of Ecology under a grant by the Ford Foundation. Interdisciplinary teams are being formed to prepare substantive critiques of twenty to twenty-five impact statements and projects relating, for example, to coal and oil shale leasing and development on public lands, forest management, highway construction and waste treatment.[8] This prototype effort, if supplemented by similar research by legal and other writers, could help in dispelling the "mystery" which now surrounds substantive review of large federal projects. It could lend needed assistance to formulating guidelines for the evaluation of different categories of projects and the institutionalization of independent review and assessment of projects subject to the impact statement requirement.

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7. *See* Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973) (the Trinity River—Wallisville Dam case).

8. *See* Carter, *Environment: Academic Review for Impact Statements*, 182 SCIENCE 462 (1973). The director of the project is Malcolm F. Baldwin, a lawyer. He is assisted by Robert B. Smythe, an ecologist. An initial evaluation of the Federal oil shale leasing program has been published. *See* A SCIENTIFIC AND POLICY REVIEW OF THE PROTOTYPE OIL SHALE LEASING PROGRAM FINAL ENVIRONMENTAL IMPACT OF THE U.S. DEPARTMENT OF THE INTERIOR (Institute of Ecology, October 29, 1973).