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Environmental Law -- Substantive Judicial Review Under The National Environmental Policy Act of 1969

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percent.[59] Unlike the rulings on the right to counsel,[60] search and seizure,[61] or coerced confession,[62] for example, which affected most criminal defendants, the *Apodaca* decision will directly touch only one of every one or two hundred defendants. Its psychic impact on the American system of justice may be more difficult to measure.

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Environmental Law-Substantive Judicial Review Under The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 (NEPA)[1] sets forth a declaration of national environmental policy (section 101)[2] and establishes procedural requirements for governmental agencies whenever a major Federal activity which will have a major impact on the environment is undertaken (section 102).[3] These procedural requirements include the compilation of information and submission of an environmental impact statement to the Council on Environmental Quality before any work on a major federal project is begun. Section 102

[59] *Id.* at 17-18.

[60] Argersinger v. Hamlin, 92 S. Ct. 2006 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

[61] Mapp v. Ohio, 367 U.S. 643 (1961).

[62] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[1] 42 U.S.C. §§ 4321-47 (1970).

[2] 42 U.S.C. § 4331 (1970):

> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, 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.
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> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
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> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

has consistently been held to be a ground on which to base judicial review of an administrative agency's action.[4] Environmentalists have been quick to utilize the courts to enforce as stringently as possible the procedural requirements of NEPA in cases involving agency actions which have ranged from nuclear warhead tests[5] to the attempted abandonment of a railroad line.[6] As a result of this active social concern on the part of groups and individuals, most agencies have realized that compliance with section 102 is necessary. However, many agencies now seem to be reluctantly seeking to comply with the letter, but not the spirit of NEPA. In these cases environmentalists have turned to section 101 in their efforts to enforce the policy of NEPA. This note will deal with the controversy over judicial review of administrative actions under section 101,[7] specifically focusing on the case of *Conservation Council of North Carolina v. Froehlke*.[8]

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(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enchance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) 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.

[3]42 U.S.C. § 4332 (1970).

[4]*See, e.g.*, Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Natural Resources Defense Council v. Morton, 337 F. Supp. 165 (D.D.C. 1971), *aff'd*, 3 Envir. Rep. Cas. 1558 (4th Cir. Jan. 13, 1972).

[5]Committee for Nuclear Responsibility v. Seaborg, 3 Envir. Rep. Cas. 1126 (D.C. Cir. 1971).

[6]City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972).

[7]For a clear recognition of the distinctions between procedural and substantive judicial review *see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). There the court stated that an agency's action is to be set aside if it fails to meet statutory, procedural, or constitutional requirements (procedural review), or if the action was not supported by "substantial evidence" or was "unwarranted by the facts" (substantive review). The latter involves a "searching and careful" inquiry into the facts, but the court is not empowered to substitute its judgment for that of the agency. *Id.* at 414, 416. In addition, *see* Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. IND. & COM. L. REV. 685 (1972).

[8]340 F. Supp. 222 (M.D.N.C.), *aff'd mem.*, 4 Envir. Rep. Cas. 1044 (4th Cir. May 2, 1972).

On December 30, 1963, Congress authorized a "project for the comprehensive development of the Cape Fear River Basin,"[9] North Carolina's largest river basin. This development, designated New Hope Lake, was to be created by an earthen dam to be built upstream from the point where the Deep River and the Haw River join to form the Cape Fear River. The lake to be formed by the dam would cover a total of 14,300 acres.[10] The land within this projected pool is primarily woodland and farms. The woodland is made up of hardwoods mixed with pine, and the chief crops produced are corn, cotton, tobacco, and pasture grasses.[11]

The purposes of the dam include flood control, water supply, water quality control, general recreation, and fish and wildlife enhancement. The original cost of the New Hope project was to be 44.5 million dollars but was later revised to fifty-three million dollars. Ground breaking occurred on December 7, 1970, and as of September, 1971, fifty-four percent of the land had been acquired and twenty-two percent of the work completed with total cost as of that date of 16.9 million dollars.[12]

On August 10, 1971, the Conservation Council of North Carolina brought an action in United States District Court for the Middle District of North Carolina seeking injunctive and declaratory relief against the construction of the New Hope Dam by the United States Army Corps of Engineers. This action, *Conservation Council of North Carolina v. Froehlke*,[13] came before Chief Judge Eugene A. Gordon who on February 14, 1972, issued a memorandum order denying plaintiffs' motion for a preliminary injunction.[14]

The heart of the New Hope case involved the court's denial of substantive review under section 101.[15] NEPA, in the opinion of the

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[9]Act of Dec. 30, 1963, Pub. L. No. 88-253, 77 Stat. 841.

[10]1 U.S. ARMY CORPS OF ENGINEERS, ENVIRONMENTAL IMPACT STATEMENT FOR THE NEW HOPE LAKE, NORTH CAROLINA PROJECT 1 (1970).

[11]*Id.* at 6.

[12]Conservation Council of North Carolina v. Froehlke, 340 F. Supp. 222, 224 (M.D.N.C.), *aff'd mem.*, 4 Envir. Rep. Cas. 1044 (4th Cir. May 2, 1972).

[13]*Id.*

[14]*Id.* at 228.

[15]Specifically, plaintiffs contended, *inter alia*, that:

(1) the defendants had given insufficient consideration to alternatives to the project in that the environmental impact statement merely listed certain alternatives without sufficiently discussing them;

(2) the environmental impact statement failed to meet the requirements of section 102(2)(c) because it omitted consideration of two future nuclear power plants to be constructed downstream

court, does not provide such review, but only establishes procedures with which government agencies must comply: "[T]hese requirements provide only procedural remedies instead of substantive rights, and the function of the court is to insure that the requirements are met."[16] The court relied on several cases in support of its conclusion that the judiciary is powerless to substitute its own opinion as to whether or not a project should be undertaken.

Probably the clearest support for the court's decision in *Froehlke* is found in *Environmental Defense Fund v. Corps of Engineers.*[17] There the plaintiffs sought to enjoin the damming of the Cossatot River in Arkansas by the Corps of Engineers, basing their action on both section 101 and section 102 of NEPA. The court refused the injunction and expressly denied the existence of substantive review under section 101:

> [NEPA] appears to reflect a compromise which, in the opinion of the Court, falls short of creating the type of "substantive rights" claimed by the plaintiffs. . . . If the Congress had intended to leave it to the courts to determine such matters [prohibition of the dam]; if, indeed, it had intended to give up its own prerogative and those of the executive agencies in this respect, it certainly would have used explicit language to accomplish such a far-reaching objective.[18]

In *Environmental Defense Fund v. Hardin*[19] plaintiffs sought to enjoin the Secretary of Agriculture from undertaking a cooperative federal-state program to control the fire ant population in the southeastern United States by spraying insecticides. Plaintiffs based their action on allegations that the defendant failed to satisfy the substantive and procedural requirements of NEPA. In denying the preliminary injunction the court limited its review to the procedural aspects of NEPA, saying: "Thus in reviewing the Department of Agriculture program under consideration here, the Court will not substitute its judgment for

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from the dam and the effect of a proposed extension of Interstate Highway 40 which will transect one of the wildlife sub-impoundments planned for the project;

(3) the ratio of the costs of the project to its benefits had been exaggerated in the following areas: interest rate and project life, nutrient removal costs, flood control benefits, water quality benefits, water supply and recreational benefits.

See Brief for Plaintiffs, Conservation Council of North Carolina v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972).

[16]340 F. Supp. at 225.

[17]325 F. Supp. 749 (E.D. Ark. 1971).

[18]*Id.* at 755.

[19]325 F. Supp. 1401 (D.D.C. 1971).

that of the Secretary on the merits of the proposed program but will require that the Secretary comply with the procedural requirements of [NEPA]."[20]

Froehlke also held that the purpose of judicial review under NEPA is to insure that the procedural requirements are met, that is, that the environmental impact statement is complete, thus allowing Congress and the President to consider the evidence presented and decide on the desirability and feasibility of the project.

> It is clear that NEPA was not intended to be a means for the Courts to second guess congressional appropriations, but was intended to be a means of disclosing to Congress and other decisionmakers all environmental factors in order that decisions and appropriations could be made with as little adverse effect on the environment as possible.[21]

The immediate result of the *Froehlke* decision was denial of the plaintiffs' motion for preliminary injunction. This order was affirmed by the United States Court of Appeals for the Fourth Circuit.[22] At present the case is before Judge Gordon on cross-motions for summary judgment.

The principle in *Froehlke* has been followed in at least two cases: *Pizitz v. Volpe*[23] and *Environmental Defense Fund v. Corps of Engineers*.[24] In the latter case plaintiffs challenged construction of Alabama's Tennessee-Tombigbee Waterway, basing some of their allegations on section 101 in much the same manner as the plaintiffs in

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[20] *Id.* at 1404.

[21] 340 F. Supp. at 228. Support for this is found in Committee for Nuclear Responsibility v. Seaborg, 3 Envir. Rep. Cas. 1126 (D.C. Cir. 1971). There the United States Court of Appeals for the District of Columbia Circuit refused to enjoin, under NEPA, nuclear tests on Amchitka Island, saying the court's "function is only to assure that the statement sets forth the opposing scientific views, and does not take the arbitrary and impermissible approach of completely omitting . . . any responsible scientific opinions concerning possible adverse environmental effects." *Id.* at 1128-29. Other cases concurring in the basic holding include: Bradford Township v. Highway Authority, 4 Envir. Rep. Cas. 1301 (7th Cir. June 22, 1972); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971) (limited to cases involving national security); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971). The latter case presents an interesting quirk in that the provisions of NEPA are invoked, not by an environmental group but by several large oil companies, to prevent the federal government from discontinuing the purchase of helium from them. In the district court's words, it was "passing strange" to see the giants of the oil and gas industry representing the public interest. *Id.* at 654.

[22] 4 Envir. Rep. Cas. 1044 (4th Cir. May 2, 1972) (mem.).

[23] 4 Envir. Rep. Cas. 1195 (M.D. Ala. May 1, 1972).

[24] 4 Envir. Rep. Cas. 1408 (N.D. Miss. Aug. 4, 1972).

Froehlke. The Mississippi court cited *Froehlke* in support of its holding that:

> Courts do not sit to decide the substantive merits or demerits of a federal undertaking under NEPA, but only to make certain that the responsible federal agency, in this case the Corps of Engineers, makes full disclosure of environmental consequences to the decisionmakers. While the exact scope of § 101 has not been defined by the Supreme Court, the prevailing view of the federal courts is that neither this section nor other provisions of NEPA create substantive rights that are enforceable in the courts.[25]

Notwithstanding these decisions, several courts have engaged in substantive judicial review under section 101 and to that extent are in disagreement with the ruling of the *Froehlke* court. In one such case, the Court of Appeals for the District of Columbia Circuit concluded that "reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[26]

Furthermore, in *Scenic Hudson Preservation Conference v. Federal Power Commission*,[27] one of the two[28] most recent recent developments in the litigation over Consolidated Edison's plan to construct a pumped storage hydro-electric project at Storm King Mountain on the Hudson River, the Court of Appeals for the Second Circuit construed section 101 as requiring the detailed and exhaustive consideration of environmental factors required by that court when it remanded the same case to the Federal Power Commission five years prior.[29] These requirements included detailed substantive review by the court of alternate plans to the project and of the project's impact on "the conservation of natural resources, the maintenance of natural beauty, and the preserva-

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[25]*Id.* at 1413.

[26]Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

[27]453 F.2d 463 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 2453 (1972).

[28]The other being deRham v. Diamond, 69 Misc. 2d 1, 330 N.Y.S.2d 71 (Sup. Ct. 1972), a case not involving NEPA but a clear example of substantive judicial review in that the New York Supreme Court held that the New York Commissioner of Environmental Conservation acted "in excess of his authority and in violation of law" in certifying that the Storm King project complied with state water quality standards. *Id.* at ____, 330 N.Y.S.2d at 75.

[29]Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

tion of historic sites."[30] The court said that "the policy statement in Section 101 envisions the very type of full consideration and balancing of various factors which we, by our remand order, required the Commission to undertake."[31]

Similarly, in *National Resources Defense Council v. Morton*[32] an injunction was granted banning the sale of oil and gas leases on the outer continental shelf off eastern Louisiana. The court reviewed the substance of the environmental impact statement and found that "the defendants only superficially discussed the alternatives listed in the Final Impact Statement, and they failed to discuss in detail the environmental impacts of the alternatives they listed in the statement."[33]

In *Hanly v. Mitchell*[34] the Second Circuit again recognized NEPA's substantive review provision. The General Services Administration (GSA) was required to submit an environmental impact statement covering the proposed construction of a federal jail in a neighborhood of New York City containing several government buildings and two apartment complexes which housed fifty thousand people. The court found the GSA's action "arbitrary and capricious"[35] in not considering all relevant factors in making its determination that an environmental impact statement was not necessary. The statement should include a "hard look at the particular environmental impact of squeezing a jail into a narrow area directly across the street from two large apartment houses."[36] The court issued a preliminary injunction and remanded the case to GSA for a "proper determination, . . . taking account of all relevant factors, of whether the proposed jail significantly affects the quality of the human environment."[37]

In *Students Challenging Regulatory Agency Procedures v. United States*[38] the plaintiffs sought injunctive relief against the Interstate

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[30]Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463, 469 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 2453 (1972).

[31]*Id.* at 481.

[32]3 Envir. Rep. Cas. 1558 (D.C. Cir. Jan. 13, 1972).

[33]*Id.* at 1560.

[34]4 Envir. Rep. Cas. 1152 (2d Cir. May 17, 1972). This case originally involved only procedural review under section 102(2)(c) since GSA contended that an impact statement was not necessary. However a short impact statement was ultimately submitted. The court discussed the procedural aspects in ruling that an impact statement was required and discussed the substantive aspects in finding the impact statement insufficient.

[35]*Id.* at 1157.

[36]*Id.* at 1156.

[37]*Id.* at 1158.

[38]4 Envir. Rep. Cas. 1312 (D.D.C. July 10, 1972), *stay denied sub nom.* Aberdeen R.R. v.

Commerce Commission, which had ordered a 2.5 percent surcharge to the normal tariff on all rail freight. The challenge was based on the theory that this surcharge increased the cost of shipping recyclable materials, thus discouraging the environmentally desirable use of recyclable goods to the extent that an environmental impact statement was required under NEPA. The ICC had stated that the environmental impact of this surcharge was "unclear."[39] Its statement had also examined alternatives to the increase "in extremely cursory fashion."[40] The court agreed with the plaintiffs that improper consideration was given to the environmental impact and issued relief.

There is obviously a great difference of opinion over the availability of review under section 101. Several courts have engaged in substantive review under NEPA, but none have specifically and comprehensively discussed it in their opinions. However, a closer look at the facts of the New Hope case reveal that it was an ideal vehicle for such an undertaking.

It has been decided that in reviewing an agency action under NEPA, the reviewing court cannot substitute its own judgment for that of the agency.[41] However, the court can reverse a substantive agency decision which has been based on an arbitrary balance of costs and benefits or insufficient consideration of environmental factors.[42] The facts of the New Hope case presented a clear case for finding an arbitrary cost-benefit balance and a lack of consideration of environmental factors.

Three areas will be considered here to show that the cost-benefit ratio was improper and therefore, should have been subject to judicial review. The first factor to be considered is the cost of nutrient removal. The environmental impact statement submitted by the Corps of Engineers expressed concern over nutrient enrichment of the lake and possible algae blooms which may occur.[43] Yet the analysis of the project by the Corps of Engineers included no costs for the necessary removal of

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Students Challenging Regulatory Agency Procedures, 41 U.S.L.W. 2068 (Burger,Circuit Justice, July 19, 1972).

[39]*Id.* at 1315.

[40]*Id.*

[41]Calvert Cliffs' Coordinating Comm., v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

[42]*Id.*

[43]1 U.S. ARMY CORPS OF ENGINEERS, *supra* note 10, at 21-22.

these nutrients.[44] Thus the entire cost of the project had not been shown.

Secondly, in determining the amount of benefit from flood control, the Corps of Engineers determined flood frequency by using flood data for the region in which the project is located.[45] The method of calculating flood frequency used here by the Corps of Engineers[46] requires that local data be used if available; otherwise regional data is acceptable.[47] Local data was available in this case[48] but was not used. Plaintiffs' expert witness, Dr. Edward H. Wiser, in his deposition, stated that use of local rather than regional data would reduce the estimate of flood control benefits from 2,094,000 dollars (as estimated by the Corps of Engineers) to 938,800 dollars annually[49] and cause a corresponding drop in the cost-benefit ratio.

A final consideration is the potential recreational benefits of the project. In determining the dollar value of recreational benefits, the environmental impact statement used an admission price of fifty-five cents per person and placed the average number of man-days of recreation per year at 2,760,000.[50] This latter figure is probably derived from an estimation of the total possible number of man-hours of recreation that the lake could provide.[51] It is very unlikely that the lake will be filled to recreational capacity every day of its existence.

Froehlke not only failed to utilize the opportunity to interpret NEPA as allowing substantive judicial review but virtually emasculated NEPA, leaving only the shell of the statute which was designed to establish and enforce a national environmental policy. For example, *Froehlke* held that the project in question need not be more environmentally desirable than those alternatives to the project which are required to be listed in the environmental impact statement.[52] After *Froehlke* the

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[44]*See id.*

[45]*Id.* at 81.

[46]The log-Pearson Type III Method. For a discussion of this calculation *see* 3 *id.* at 321-64.

[47]*Id.* at 343.

[48]*Id.* The preliminary impact statements included no mention of local data. There the flood control frequency was based on regional data. However, Dr. Wiser's deposition, in which the local data was discussed, was included in the final impact statement even though the determination of flood frequency was not changed to reflect the local data.

[49]*Id.* at 341-42.

[50]1 *Id.* at 18, 28.

[51]The Corps of Engineers gave no explanation of the source of this figure. However, plaintiffs understood it to be based on this estimation. Interview with Thomas Schoenbaum, counsel for plaintiffs, in Chapel Hill, N.C., Aug. 1, 1972.

[52]340 F. Supp. at 228.

reviewing court would be powerless to act where the agency had gone through the formality of listing the alternatives, thus complying with the procedural requirements of section 102(2)(c). This leaves NEPA with no muscle to halt an undesirable project after the agency has "filled in the blanks" by simply listing the alternatives.

Finally, the facts of *Froehlke* indicate that the inadequacies and inaccuracies of the environmental impact statement were so great as to constitute a breach of the procedural as well as the substantive requirements of NEPA. The court did not insist upon the detailed consideration of the project that is required by NEPA. Instead it accepted the self-serving description of the project presented by the Corps of Engineers which casually dismissed many of New Hope's costs and adverse effects while relying on exaggerated benefits. The inadequate consideration of the alternatives to the project also amounted to noncompliance with section 102. Section 102 implicitly requires that the reports of alternatives be complete and accurate. NEPA does not contemplate the submission of misleading reports. When inaccurate reports are submitted the agency has not even met the procedural requirements of NEPA.

This case could have become the cornerstone of substantive judicial review under NEPA without breaching the traditional limits on judicial power. Without doubt, substantive judicial review conjures up visions of the court completely disregarding a reasonable and well-supported administrative decision by substituting its own subjective beliefs and preferences. Agencies on occasion fail to fully consider the environmental impact of their programs and projects. Section 101 should be interpreted as providing a judicial solution to such situations without unduly restricting agency discretion.

STEPHEN T. SMITH

Income Taxation—Deductibility of Employment Agency Fees

Within the last few years executive level employees have been seeking new employment as frequently as blue-collar workers.[1] In a highly specialized technological or administrative field, employment opportunities are rare, and it is frequently necessary for the job seeker to engage

[1]Tucker, *An Individual's Employment-Seeking Expenses: Analyzing the New Judicial Climate*, 34 J. TAX. 352 (1971).