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party will allow a search. Therefore, the defendant cannot assert the
fourth amendment to bar admission of evidence seized in the search,
not because his rights were waived by the third party, but because he
has relinquished his privacy. The question whether the waiver
standard applies to the consent of the third party as a relinquishment
of his own right to privacy in the property over which he had control
remained unresolved in those cases.

It is clear from the foregoing analysis that the voluntariness test
for determining the validity of a consent to search is neither required
by precedent nor well suited to the policies of the fourth amendment.
Even so, the practical effects of the Court's decision may not be felt
immediately. However, the use of the consent search device to over-
come the warrant and probable cause requirements of the fourth amend-
ment is likely to increase. With voluntariness as the test to be used
for challenged searches, it is not difficult to predict that, in many cases,
unsophisticated defendants will be held to have "waived" constitutional
rights, the existence of which they had no knowledge.

WILLIAM R. SAGE


The National Environmental Policy Act of 1969 (NEPA) has had
a short yet tumultuous history. In declaring a national policy concern-

60. See Frazier v. Cupp, 394 U.S. 731 (1969). This rationale is logical when
read in conjunction with the "right to privacy" approach to the fourth amendment in

61. This approach is consistent with the "misplaced trust" cases in which a de-
fendant is unprotected by the fourth amendment in his disclosures to a trusted third
party who turns out to be a police informant and who either reports to the police
or simultaneously records or transmits his conversations with the defendant. See, e.g.,
(1966).

62. The Supreme Court has not been consistent in its justification of third party
consents. It initially accepted the rationale that the defendant had made the third
party his agent with "apparent authority" to waive his right to privacy. See Stoner
v. California, 376 U.S. 483 (1964). This "agency" rationale has been thoroughly crit-
icized; see Note, 67 COLUM. L. REV., supra note 28, at 48-50; Note, 113 U. PA. L. REV.,
supra note 42, at 272-77. See generally Holis, supra note 30, at 417-20; Mintz, supra
note 30, at 49-50; Scurllock, Basic Principles of the Administration of Criminal Justice

ing the environment\(^2\) and in establishing certain procedural requirements for federal agencies to follow to insure that their activities are environmentally advisable,\(^3\) NEPA was expected to have a profound effect on all "major Federal actions significantly affecting the quality of the human environment."\(^4\) NEPA has lived up to its expectations,\(^5\) involving the judiciary in the storm created by its mandates.\(^6\) Caught in the midst of NEPA litigation have been the federal agencies on whose shoulders the brunt of the NEPA burden has fallen. The "new and unusual"\(^7\) instruction to the agencies—to consider the environmental consequences of their activities "to the fullest extent possible"\(^8\)—is an attempt to broaden their jurisdictional responsibility,\(^9\) to prod them to internalize environmental considerations, and to force them to expose their crucial environmental decisions to public scrutiny. Now that agencies have the statutory obligation to consider fully the environmental effects of their actions and to "utilize a systematic, interdisciplinary approach"\(^10\) in planning their activities, some commentators have


\(^6\) "As of Dec. 1, 1972, there have been at least 140 reported federal court decisions dealing with NEPA challenges to federal projects." Brown, *NEPA Litigation to Date*, in 1 A. REITZE, ENVIRONMENTAL LAW 3 (Supp. 1973).

\(^7\) City of New York v. United States, 337 F. Supp. 150, 164 (E.D.N.Y. 1972). "NEPA is a new and unusual statute imposing substantive duties which overlie those imposed on an agency by the statute or statutes for which it has jurisdictional responsibility. Initially harmonizing and integrating the special duties imposed by NEPA with an agency's traditional regulatory functions is not an easy task." Id. See also Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972).


\(^9\) Justice Douglas in his dissent to the denial of certiorari in Scenic Hudson Preservation Conference v. FPC, 407 U.S. 926, 927 (1972), stated that the NEPA "mandate was aimed partly at eliminating the excuse which had often been offered by bureaucrats that their statutory authority did not authorize consideration of such factors [as environmental consequences] in their policy decisions." That NEPA has been effective for Douglas' purpose is indicated by a comment of Harold L. Price, AEC Director of Regulations, that "We [the AEC] now have to go back and study things like water quality where we didn't even think we had jurisdiction." 1 A. REITZE, supra note 6, at one-42.

found "a dramatic change in the perspectives of a number of federal agencies."11 Others, however, have noted that agencies are "reluctantly seeking to comply with the letter, but not the spirit of NEPA."12

Agencies have used several defenses in an attempt to avoid NEPA's obligations.13 One of these defenses is the contention that a particular project does not involve a "major Federal action significantly affecting the quality of the human environment,"14 and thus the "action forcing"15 command of NEPA's section 102(2)(C) impact statement does not apply. This note will examine this agency defense against NEPA's application, especially as it relates to the recent case of Rucker v. Willis.16

THE FACTS OF RUCKER V. WILLIS

Defendant Edward Willis owned a tract of land on Bogue Bank17 near the town limits of Emerald Isle, North Carolina. The property

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11. Cramton & Berg, supra note 5, at 512. The authors further report that "insiders conversant with the Washington scene agree that the AEC and the Army Corps of Engineers have undergone a dramatic transformation since enactment of NEPA. Significant changes in the manner and substance of decision-making in the Departments of Defense, Interior, and Transportation have also been noted." Id. at 512 n.4. It has also been argued, however, that "it is fatuous to expect that administrators can do any more than get a little outside of their normal perspectives." 3 Envir. Rep. 1434 (March 30, 1973).

12. Note, Environmental Law—Substantive Judicial Review Under The National Environmental Policy Act of 1969, 51 N.C.L. Rev. 145, 146 (1972). Cramton & Berg, supra note 5, at 512, also address this concern: "[T]here is danger that the spirit [of NEPA] will be undermined—in some agencies—by mere observance of form that fails to grapple with the underlying realities." Another commentator has noted the tendency of some agencies to move "with less than deliberate speed" in fulfilling NEPA's obligations. 3 Envir. Rep. 1434 (March 30, 1973).

13. Brown, supra note 6, gives three categories of cases that have arisen because of defenses used by federal agencies to justify their decision not to prepare an environmental impact statement. The first category addresses the issue of NEPA's retroactivity, i.e., whether NEPA's mandates attach to projects begun before 1970. The second group deals with the agency contention that the agency is exempt from NEPA's mandate. The third category addresses the agency contention, investigated by this note, that its action under review is not a major federal action or that it does not significantly affect the environment. Brown uses these four broad categories to categorize very effectively all the cases under NEPA.


17. Bogue Bank is a narrow island off the North Carolina coast. The Bank lies
stretched across the narrowest part of Bogue Bank where the distance between the Atlantic Ocean and Bogue Sound is less than six hundred feet. Defendant Willis and defendant Twin Piers, Inc. agreed to develop this property by constructing a 1,150 foot pier into the Atlantic Ocean and a pier and marina extending four hundred feet into Bogue Sound. The marina required that a boat basin and access channel be dredged in Bogue Sound. Between the marina and the pier a paved parking lot would be constructed that would occupy practically the entire width of the Bank.

On December 2, 1972, Willis filed with defendant Wilmington District Corps of Engineers a request for a permit\(^{18}\) authorizing construction of the piers and dredging operations. Public notice of Willis' application was given on January 4, 1973, by the Corps.\(^{19}\) The notice indicated that written comments pertinent to the proposed work would be received in the Corps' Wilmington office until February 5, 1973, and copies were mailed to approximately one hundred seventy-five governmental agencies, environmental groups, corporations, and individuals. After receipt of all the comments in response to the public notice, and after a three month period of "study and consideration,"\(^{20}\) the Corps determined that the proposed development was not a "major Federal action significantly affecting the quality of the human environment,"\(^{21}\) and that therefore no environmental impact statement was required. No written findings were made by the Corps itself, and no record of the Corps' own independent analysis of the application was released, if such an analysis were ever compiled. The Corps simply issued the permit on April 9, 1973, without comment. Construction on the project began immediately, and by April 20, 1973, the defendants had completely

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18. The request was made pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1970). The Act requires a permit to create any "obstruction" to the "navigable capacity of any of the waters of the United States . . . ."

19. The public notice described the project briefly and then stated:

The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on the public interest. Factors affecting the public interest include, but are not limited to, navigation, fish and wildlife, water quality, economics, conservation, aesthetics, recreation, water supply, flood damage prevention, ecosystems, and in general, the needs and welfare of the people. Comments on these factors will be accepted and made part of the record and will be considered in determining whether it would be in the best public interest to grant a permit.

20. The terminology is that of the Fourth Circuit. 484 F.2d at 161. The degree of "study and consideration" is not specified.

"leveled the sand dunes" between the ocean and the sound. Dredging and construction began soon afterwards.

On April 19, 1973, adjoining landowners filed an action seeking injunctive relief against the project. The next day motions for a temporary restraining order and preliminary injunction were heard by the district court. The court denied these motions, finding that the Corps of Engineers "followed a systematic procedure and reached a reasonable decision" in not requiring an environmental impact statement. The court further found that the issuance of the permit to the defendants' project was not a "major Federal action." The plaintiffs appealed, and the Fourth Circuit affirmed the district court decision.

The backbone of the district and circuit court opinions in Rucker was the holding that the grant of the Corps' permit did not constitute a "major Federal action significantly affecting the quality of the human

22. 358 F. Supp. at 426.
23. Id. at 430.
24. Id. The decision of the circuit court that the Willis project was not a "major federal action" does not lend itself to lengthy analysis. The "major federal action" question can be discussed independently of the "significantly affecting" phrase due to the "dual test" used by the Fourth Circuit. See note 54 infra. Two points on the "major federal action" issue are significant in Rucker.

(1) The permit-project distinction. The district court took notice of the fact that there were not federal funds involved in the project but merely a federal review for permit purposes, and held that "reviewing only . . . does not constitute 'major federal action' as contemplated by NEPA." 358 F. Supp. at 430. This view runs directly contrary to the CEQ guidelines which provide that federal "actions" include . . . (ii) Projects and continuing activities . . . involving a federal lease, permit, license, certificate, or other entitlement for use." 36 Fed. Reg. 7724-29 (1971), see note 33 infra. The district court holding also runs contrary to the Corps' own regulations which contain guidelines and procedures to be followed when "Regulatory Permits" are involved in projects that "would have a significant and adverse effect" on environmental quality. 37 Fed. Reg. 2526 (1972); see note 19 supra. See also Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 410 (1971) (ecology of area taken into account); Citizens for Clean Air, Inc. v. Army Corps of Engineers, 349 F. Supp. 696, 700-01 ("total impact" to be considered); 33 C.F.R. §§ 209.120(d)(1), (3) (1973) (Corps regulations: effect on conservation, pollution, aesthetics, ecology, and adjacent shore properties is to be considered).

(2) The jurisdiction question. There is a latent dispute about the scope of the Corps' jurisdiction in evaluating the Willis project. The district court found a large percentage of the project "above mean-high water line," and declared correctly that federal jurisdiction only extended to the mean-high mark. The Corps' public notice, however, places no such limitation on the scope of the Corps' inquiry when the Corps seeks to evaluate the environmental effects of a project for permit purposes. See note 19 supra. See also Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 410 (1971) (ecology of area taken into account); Citizens for Clean Air, Inc. v. Army Corps of Engineers, 349 F. Supp. 696, 700-01 ("total impact" to be considered); 33 C.F.R. §§ 209.120(d)(1), (3) (1973) (Corps regulations: effect on conservation, pollution, aesthetics, ecology, and adjacent shore properties is to be considered).

25. Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973). Judge Widener was joined by Chief Judge Haynsworth, with Circuit Judge Craven dissenting.
Considerable conflict over the meaning of this NEPA phrase has been created by attempts to interpret what has been characterized as NEPA's "opaque" and "woefully ambiguous" language. Implicit in these attempts have been efforts to balance competing interests. On the one hand, is the need to avoid the application of NEPA to agency actions that are "too trivial, too routine, or too remote in consequences to merit an impact statement." On the other hand, is the realization by the courts that if they determine that an agency action does not fall within the NEPA phrase, NEPA will not be activated at all, and all of its procedural and substantive safeguards will be avoided. From this perspective, some have realized that if no major and significant federal action is found, NEPA's effectiveness would be negated "in the most fundamental way" in that "low level federal activities would be exempted" from the statute's mandates. For these reasons "the courts have policed the lower boundaries of NEPA's application with greater than ordinary vigilance and have worked in concert with the CEQ [Council of Environmental Quality] guideline-setting process to keep the threshold low."

**The Scope of an Agency's Discretion in Making a Threshold Impact Statement Determination**

There have been scattered judicial attempts to clarify NEPA's statutory language, even in the face of an early admonition that NEPA's

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26. For a comprehensive collection of other cases decided on a basis similar to Rucker, see F. Anderson, NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act 77-79 & nn.90-99 (1973) [hereinafter cited as NEPA in the Courts].


28. NEPA in the Courts 82.

29. Id. at 74.

30. Id. at 74-75.

31. See Hanly v. Kleindienst, 471 F.2d 823, 830-31 (2d Cir. 1972) (attempting to clarify "significantly affecting"); Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972) (commenting on meaning of "major federal action"); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972) (defining both phrases). The court of appeals in Rucker noted four definitional indicia which might also be used to measure if a permit is a "major federal action." These involved (1) the use of federal funds, (2) federal designing or planning involvement, (3) projects carried out "under the auspices of a federal agency," and (4) the qualitative impact on the environment. The court found none of these indicia to be present in Rucker. 484 F.2d at 163. The court held that "the record now indicates" that the Willis project would not significantly affect the environment. Id. Contrary readings of the record are possible, as shown by Judge Craven's dissent. See note 54 infra as to (4) above.
language is "extremely broad and not susceptible of precise definition."\textsuperscript{32} More frequent than efforts to define specifically the "major federal action" and the "significantly affecting" phrases, however, have been attempts on a case-by-case basis to refine and determine the essence of NEPA's mandate in this area. Many cases have placed emphasis on the CEQ guidelines.\textsuperscript{33} The most productive effort, however, has occurred in several judicial attempts to define the scope of an agency's autonomy in making the threshold determination of whether an impact statement is necessary.\textsuperscript{34}

In \textit{S.C.R.A.P. v. United States},\textsuperscript{35} the plaintiffs sought to enjoin an Interstate Commerce Commission (ICC) order allowing railroads temporarily to add a 2.5 percent surcharge to the normal rate charged for freight. S.C.R.A.P. charged that the freight increase constituted a major federal action significantly affecting the environment since the shipping increase boosted the cost of shipping recyclable materials and aggravated the preexisting disparity in shipping costs between these materials and the primary goods with which they compete.\textsuperscript{36} The ICC dismissed the attacks on its actions in one terse sentence: "[T]he involved general increase will have no significant adverse effect on . . . the quality of the human environment within the meaning . . . " of NEPA.\textsuperscript{37} Judge J. Skelly Wright responded to the ICC's actions:

It should be obvious that the NEPA requirement cannot be circumvented by so transparent a ruse. The main purpose of an impact statement is to force assessment of the environmental im-

\textsuperscript{33} 36 Fed. Reg. 7724-29 (1971). The importance of the CEQ guidelines will become evident \textit{infra}. For a common perspective on the CEQ guidelines, see Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) \textit{v.} United States, 346 F. Supp. 189, 200 n.14 (D.D.C. 1972), which notes that "[a]lthough the CEQ guidelines lack the force of law, we should 'not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies "to foster and promote the improvement of the environmental quality," . . . has misconstrued NEPA.'" The CEQ has recently proposed certain amendments to their guidelines. 38 Fed. Reg. 10856 (1973).
\textsuperscript{34} No courts challenge the agency's power to make the threshold determination—as to that power, NEPA is clear. See Citizens for Clean Air, Inc. \textit{v.} Army Corps of Engineers, 349 F. Supp. 696, 706-07 (S.D.N.Y. 1972), \textit{citing} Hanly \textit{v.} Mitchell, 460 F.2d 640 (2d Cir. 1972); Citizens for Reid State Park \textit{v.} Laird, 336 F. Supp. 783, 789 (D. Me. 1972) ("The Act plainly commits this preliminary determination to the agency."); When the agencies' threshold decision is challenged, then the court's role begins. Natural Resources Defense Council, Inc. \textit{v.} Grant, 341 F. Supp. 365, 366 (E.D.N.C. 1972); Scherr \textit{v.} Volpe, 363 F. Supp. 886, 888 (W.D. Wis. 1971).
\textsuperscript{36} 346 F. Supp. at 191.
\textsuperscript{37} \textit{Id.} at 200. \textit{See also id.} at 200 n.16.
pact of a proposed action. Therefore, a statement is required whenever the action arguably will have an adverse impact.\textsuperscript{38}

Soon after \textit{S.C.R.A.P.}, the Second Circuit in \textit{Hanly v. Mitchell}\textsuperscript{39} was given the opportunity to pass on the sufficiency of a General Service Administration (GSA) determination that an impact statement was not needed prior to the construction of a detention center in an area of lower Manhattan. The court in \textit{Hanly I} determined that the "peculiar" environmental impact of the jail project was not sufficiently detailed in the short GSA "Environmental Statement." The GSA then compiled a twenty-five page "Assessment" of the environmental impact of the proposed jail. The district court found the assessment to be adequate, but the Second Circuit in \textit{Hanly II} again reversed.\textsuperscript{40} The decision in \textit{Hanly II} is presently the most refined—and demanding—inquiry into the adequacy of an agency's threshold impact statement determination.

There were two bases for the reversal in \textit{Hanly II}—the substantive inadequacy of the assessment itself in considering the environmental effects of the jail, and the procedural inadequacy of the GSA's administrative process in determining those effects. Two elements caused the court's finding of substantive inadequacy. The first element was the assessment's failure to deal conclusively with the possibility of a drug maintenance program at the detention center, which the appellant's charged would increase the risk of crime in the area. The second element was an affidavit received by the district court that challenged certain findings of fact in the assessment.\textsuperscript{41} The \textit{Hanly II} court found that these two factors conclusively established the assessment's substantive inadequacy. This holding represents an unquestionably strict review of any agency's threshold determination that an impact statement is unnecessary. The appellant's presentation of two factual issues that went unanswered by the assessment was sufficient to

\textsuperscript{38} \textit{Id.} at 201 (emphasis in original). The Supreme Court's subsequent reversal of the district court in \textit{S.C.R.A.P.} left intact the essence of Judge Wright's impact statement requirements. The Court did find, however, that NEPA did not limit the ability of the ICC to set rates, for rate setting was found to be an exclusive ICC function due to the Interstate Commerce Act. Thus, the basis of the reversal was primarily jurisdictional, and did not reach the question of the adequacy of the ICC's threshold impact statement process. "We need not reach the issue whether the District Court was justified in issuing a preliminary injunction, because we have concluded that the court lacked jurisdiction to enter an injunction in any event." \textit{S.C.R.A.P.} v. United States, 93 S. Ct. 2405, 2417 (1973).

\textsuperscript{39} \textit{Hanly v. Mitchell}, 460 F.2d 640 (2d Cir.), \textit{cert. denied}, 409 U.S. 990 (1972) (\textit{Hanly I}).

\textsuperscript{40} \textit{Hanly v. Kleindienst}, 471 F.2d 823 (2d Cir. 1972), \textit{cert. denied}, 93 S. Ct. 2290 (1973).

\textsuperscript{41} \textit{See} 471 F.2d at 834-36.
convince the court of the incompleteness of the study. In this light, one must broadly construe the *Hanly II* observation that "an agency, in making a threshold determination as to the 'significance' of an action, is called upon to review in a general fashion the same factors that would be studied in depth for preparation of a detailed environmental impact statement . . ."  Hanly II seems to require that all disputed factual issues and asserted concerns presented by a plaintiff must be at least generally responded to in a threshold statement. This conclusion is consistent with the *Hanly I* finding that "the essential point is that GSA [the agency] must actually consider [the plaintiff's concerns]."

The procedural grounds for the decision in *Hanly II* are also significant. The court made the finding that the procedural mandates of sections 102(2)(A), (B), and (D) of NEPA apply not only to actions which the agency finds to be significant, but also to actions under review even at the threshold impact statement level. The court then determined that section 102(2)(A) and (D) had been met by the assessment, but that (B) had not. Holding that section 102(2)(B) required that "some rudimentary procedures be designed to assure a fair and informed preliminary decision," the court expanded *Hanly I*'s mandate that federal agencies must "affirmatively develop a reviewable environmental record . . . even for purposes of a threshold section 102(2)(C) determination." The expansion was achieved by requiring that public notice of the proposed federal action be given by the agency before a determination of "significance" is made, and by suggesting that provision for public hearings on the action may in some instances be advisable.

The stringent procedural and substantive standards established in *Hanly II* may attract substantial adherents. The tone and strictness of *Hanly II* are already matched by the language of *Citizens for Clean Air, Inc. v. Army Corps of Engineers*, which, like *Rucker*, involved the granting of a Corps' dredge and fill permit. At issue was the possible air pollution caused by Consolidated Edison's construction of an elec-

42. Id. at 835.
43. 460 F.2d at 648.
45. 471 F.2d at 834-35.
46. Id.
47. Id. at 835.
48. 460 F.2d at 647.
49. See note 59 infra, as to how these procedural holdings apply to *Rucker*.
trical generating plant in New York City. The Corps granted the permit without filing an impact statement.\textsuperscript{51} The district court responded:

Without making its own analysis of the impact of the construction, it [the Corps] merely cited the fact that state permits were given and the Department of the Interior did not object, and the EPA "offered no objection . . . ." [T]his perfunctory listing of other agencies' conclusions is an inadequate record to support the Corps' threshold determination, and legally constitutes arbitrary and capricious action . . . .\textsuperscript{52}

The fact that no one explicitly attacked two environmental features of the project . . . alone cannot serve as a basis alone for the Army Corps' finding that there would be no significant impact on the environment . . . . Negative evidence of environmental impact . . . cannot be substituted for the Corps' affirmative determination, independently made, that the impact is insignificant.\textsuperscript{53}

The court held that the permit previously issued was void.

**THREE DEFECTS IN RUCKER v. WILLIS**

Judged against this background,\textsuperscript{54} the decision in *Rucker* is subject to three defects that cast doubt on its correctness.

a. *The Scope of the Agency Discretion Permitted by Rucker.* One defect in *Rucker* involves the burden an agency must sustain to support its threshold determination that an impact statement is not necessary. This issue is crucial in *Rucker* for several reasons. First, the Corps "is-

\textsuperscript{51} The similarities between *Rucker* and *Citizens* are clear. One point of distinction between the cases, however, was that in *Citizens* the factor of major federal action was conceded by the Corps; the same concession was also made in the Hanly dispute.

\textsuperscript{52} 349 F. Supp. at 707. This quote was preceded by the finding that "The Corps has the duty of making clear its threshold decision, the rationale for the decision, and the means of arriving at that determination . . . ." *Id.* This is exactly what was lacking in *Rucker*.

\textsuperscript{53} *Id.* at 707 n.18 (emphasis in original).

\textsuperscript{54} Within the NEPA phrase, the "major federal action" question can be discussed independently of the "significantly affecting the . . . environment" phrase due to the dual test used by the Fourth Circuit. See Natural Resources Defense Council v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972). *See also* the Second Circuit's statement in *Hanly I,* "We agree . . . that the two concepts are different . . . ." 460 F.2d at 644. There is apparently some overlap in the tests even in the Fourth Circuit, however; by using the "qualitative impact" on the environment as an indicia for determining major federal action, note 31 supra, the *Rucker* court implicitly holds that if the environmental effect of any project is significant, it will always be a major federal action, regardless of the project's size. This coincides with the conclusion that "[w]hile the cases favor a two-test standard, they have never held that the small size of a federal project will exempt it from NEPA if its environmental effects are significant." NEPA IN THE COURTS 74. A more complete review of the dual test as opposed to the one test standard is beyond the scope of this note.
sued no written findings. Neither did it specifically state that an impact statement was not necessary. This defect is by no means fatal, yet the failure to file any written findings raises the precise objections that were voiced by the courts in Hanly I and II and Citizens for Clean Air involving the insufficiency of the agencies' investigation in support of its threshold impact statement determination.

The absence of written findings takes on added significance in Rucker because the Corps' decision not to prepare an impact statement "was based on the fact that no Federal, State, or local agencies certified to [it] that the permit would have a significant and adverse effect on the human environment." Despite the fact that the Corps is the lead agency on the project and must comply with NEPA "to the fullest extent possible," the agency relied not on its own independent examination but on the absence of certification by others. Aside from the fact that this places the agency with primary responsibility for federal action in deference to other agencies and groups who were merely asked for comments on an application for a permit, it also appears that the Corps was subtly delegating what should be its overall responsibility to other agencies. The court in Citizens for Clean Air unequivocally rejected this procedure: "[T]his perfunctory listing of other agencies' conclusions is an inadequate record to support the Corps' threshold determination . . . ."

55. Rucker v. Willis, 484 F.2d 158, 159 n.2 (4th Cir. 1973). The court continues: "From the issuance of the permit, however, the necessary inference is a finding that no impact statement was necessary, since the statute, 42 U.S.C. § 4332(2)(C), and the applicable regulation, 37 Fed. Reg. 2525 (Feb. 2, 1972), para. 11(c), both require a statement if their conditions are met, but do not require a negative finding or statement." Id. The court's reading of the regulations is rather dated and selective, as argued by Judge Craven's dissent. The Corps' new guidelines require written findings setting forth the reasons for not preparing an impact statement. Reg. No. 1105-2-507, §§ 4(b)(2), 5(g)(2). 38 Fed. Reg. 9243-44 (1973). However, the effectiveness of these new guidelines is put into question by the Rucker decision. Even if the new regulations do effectively end the tactics the Corps used in Rucker, the issue is still alive for most other federal agencies affected by NEPA.

56. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 409 (1971), where the Court states that "formal findings were not required." Judge Craven notes in his dissent the extenuating circumstances in Overton Park, and concludes that the new Corps' regulations should be applied to Rucker. 484 F.2d at 164.

57. 358 F. Supp. at 429.

58. Such an independent examination was required in Hanly I and II, supra notes 39-49, and Citizens for Clean Air, supra notes 50-53.

59. 349 F. Supp. at 707. In concluding this discussion of the procedural aspects of Rucker, it is helpful to compare the procedure of Rucker to the procedural mandate given in Hanly II, supra notes 47-49. Since the public notice was given in Rucker the first procedural complaint of Hanly II was satisfied. However, the second procedural suggestion (but not requirement) of Hanly II, the use of a public hearing, is especially intriguing when applied to Rucker. Hanly II noted that the public hearing was
Although the Corps merely relied on the lack of adverse comments to determine that no impact statement was necessary, they convinced the Rucker court that the agency had made a "wide-ranging, good-faith assessment . . . of the potential environmental impact of the proposed project." At no point, however, is there evidence that the Corps or any other agency addressed many of the substantial adverse effects which the plaintiffs alleged. The manner in which the Corps did deal with problems they characterized as "essentially matters of local zoning" was similarly superficial. It is obvious that the Corps’ threshold procedure did not, as Hanly I and II required, cover generally all the substantive areas that a full impact statement would more specifically describe. The Rucker procedure, which required no written findings by the Corps itself, did not allow the plaintiffs an opportunity to determine if the Corps had even considered many of their substantive concerns.

b. The CEQ "Cumulative Impact" Guideline. The second major defect of the Rucker decision involves the court’s failure to respond ade-

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60. The Corps did receive quite a few adverse comments—one of which was a petition signed by 70 landowners. The United States Department of the Interior, Fish and Wildlife Service commented by recommending that the permit should be denied unless their modifications were incorporated into the permit. One of these modifications was that dredging be limited to 5 feet—due to a turbidity problem—for the boat basin. The district court noted that the Department of the Interior proposal was made a part of the permit. Yet, the permit actually issued allows dredging to 7 feet for the boat basin. The discrepancy is unexplained in the record. 358 F. Supp. at 429.

61. 484 F.2d at 162.

62. The following adverse effects were alleged by the plaintiffs, but were virtually ignored by the court: increased erosion, susceptibility to damage of Bogue Bank during hurricanes, destruction of the natural beauty of Bogue Bank, interference with eel grasses on Bogue Sound (also a concern of the Department of the Interior), destruction of shellfish and fish life on the bottom of the sound, elimination of habitat of distinctive birds, increased pollution from fishing on the piers and use of the marina by boats, overloading of sanitary sewage systems, and overcommercialization and overcrowding of the island. See Brief for Appellants at 3, Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973).

63. Letter from Albert C. Costanzo to Mr. Edward E. Willis, March 22, 1973. The Corps characterized many of the criticisms expressed as problems of local zoning and referred these criticisms to the Carteret County Planning Board. The Planning Board responded that there was no zoning of the Willis property (plaintiff’s expert testimony showed that residential zoning was imminent for the area). The Corps used the fact that there was no zoning of the area to conclude that no objection from the Planning Board was given. See Appendix to Brief for Appellants at 36, Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973).
quately to one component of the CEQ's agency guidelines regarding the NEPA "major federal action—significantly affecting" clause. The guidelines note that a project "is to be construed by agencies with a view to the overall, cumulative impact of the action proposed . . . . [s]uch actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the [impact] statement is to be prepared." In *Rucker* it appears that this "cumulative impact" guideline was used by the court to bolster the merits of the project. The court used the fact that piers already existed to support its decision on the new pier and not to point to the cumulative ill-effects of pier after pier.

This reverse use of the cumulative clause is unusual, yet it is not as great an error as the court's failure to note the possible cumulative effect of the marina and the project as a whole. The complaints of the plaintiffs that raised these issues were ignored by the court. In addition to ignoring the marina's cumulative effect, the court also ignored the CEQ guidelines concerning the "potential" for significant environmental damage. This factor is significant in light of the plaintiff's expert testimony that the project may result in the "[b]reaking of Bogue Bank during a storm, caused by the stabilized area on which the improvements are located focusing the storm energy on the unprotected areas of the Bank on either side." Since no impact statement will now

65. Judge Craven in his dissent recognized this infirmity in the court's decision by noting:

"I do not know how many fishing piers are too many, but I think that too many may substantially alter the environment of North Carolina's priceless Outer Banks. It is, of course, true that the issuance of a permit by the Corps to construct a boat dock on an island waterway for a private homeowner is not major federal action requiring the preparation of an impact statement. But what about the 500th such permit, or the 10,000th one? At some point, "zoning" and environmental impact merge. Ecology is largely a matter of land use.

484 F.2d at 164 (Craven, J., dissenting).

Judge Craven found himself in agreement with the Corps' own regulations which favor the threshold test of whether the action "could have a significant adverse effect on the quality of the environment, not whether it would have such an effect." *Id.* See also 37 Fed. Reg. 2525 (1972). Judge Craven felt "the construction of such a fishing pier and marina could adversely affect" Bogue Bank. 484 F.2d at 164 (emphasis in original). See also Hanly v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972). The district court that decided *Rucker* was aware of the cumulative impact guideline, for the court had used it previously in Natural Resources Defense Council v. Grant, 341 F. Supp. 356, 367 (E.D.N.C. 1972) ("The cumulative impact . . . must be considered.") *Contra,* Kisner v. Butz, 350 F. Supp. 310 (N.D.W. Va. 1972).

66. Expert testimony of Orrin H. Pilkey in Appendix to Brief for Appellant at 16. The fact that the court ignored these and other complaints of the plaintiffs', see note 62 supra, is especially interesting in light of the *Hanly I* statement at text accompanying note 43 supra.
be compiled, no further study of that potential danger will be undertaken. Thus the accuracy of the expert testimony can only be tested in one singularly imprudent way—by waiting for a winter storm to occur.

c. The CEQ "Controversial" Guideline. The CEQ guidelines dictate that environmental impact statements should be prepared with respect to "[p]roposed actions, the environmental impact of which is likely to be highly controversial." The court in Rucker chose a narrow interpretation of that guideline by rejecting the idea that "‘controversial’ must necessarily be equated with opposition." The term, said the court, “should properly refer to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use.”

This perspective flies in the face of the natural meaning of the words. The argument that "substantial dispute [must] exist as to the effect of the action, rather than to the existence of opposition to it" would seem to be based on a play on words, the unmistakable intention of which is to "raise the floor" for the use of the “controversial” test by any plaintiff.

In resorting to such a narrow interpretation of the “controversial” guideline, the Rucker court erred in two respects. First, when the guidelines are narrowly interpreted, their effect is unnecessarily limited—and thus their underlying policies are negated. The strength of the policy to encourage the use of impact statements should mandate a broad interpretation of the guidelines. Particularly as to the “contro-

68. 484 F.2d at 162.
69. Id.
70. 471 F.2d at 830 n.9A.
71. Id. at 839 (Friendly, C.J., dissenting). Judge Friendly also thought that the "likely to be highly controversial" limitation in the guideline answered the plaintiffs' fears of surrendering the determination to the opponents of a major federal action.
72. Brief for Appellants at 9, Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973). Hanly II notes that controversial “apparently refers to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use, the effect of which is relatively undisputed.” 471 F.2d at 830.
versial” guideline, it should be recognized that controversial projects invite lawsuits,73 and preparing a sound and thorough impact statement may avoid resort to the courts by agency opponents. The final effect of a broad interpretation of the guidelines would be the encouragement of a policy of impact statement preparation that would be beneficial to the agency, the project’s opponents, and the environment.74 Secondly, it is not at all clear that the plaintiff’s allegations and the facts in the administrative record fail to meet even the narrow test. Not only was there “opposition” to the Willis project, but the opposition was almost entirely directed at the adverse effects of the project. Controversy for the sake of controversy did not appear to be the plaintiff’s intention.75

TWO SUGGESTIONS TO PREVENT FUTURE “RUCKERS”

The Rucker decision raises doubt as to the future effectiveness of

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73. This factor has been noted by Judge Friendly in his Hanly II dissent, 471 F.2d at 839. See also Nolop v. Volpe, 333 F. Supp. 1364, 1368 (D.S.D. 1971) (“The mere existence of this lawsuit shows that organized opposition has occurred.”) The Hanly II majority rejected the suggestion that “‘controversial’ must be equated with neighborhood opposition.” 471 F.2d at 830.

74. Impact statement preparation would be good for the Corps, for it has been a consistent victim of environmental criticism; beneficial to the environment by possibly providing new information making reconsideration of the project’s effects appropriate; and good for the opponents by “allowing opponents to blow off steam and giving them the sense that their objections have been considered— an important purpose of NEPA.” 471 F.2d at 839 (Friendly, C.J., dissenting).

75. Regardless of these arguments, however, perhaps the only way to conclude successfully the “controversial” dispute would be for the CEQ to simply omit this proposal from their agency guidelines. The “controversial” guideline is especially inappropriaite in threshold impact statement disputes. In Rucker, all the project opponents had was a “public notice” of an application which noted that only four weeks were available for comment. Many opponents may have been waiting for a more appropriate stage—perhaps on circulation of the draft impact statement—to comment. In waiting, however, the opponents were foreclosed completely from commenting except in the context of a lawsuit against the Corps for its failure to consider more fully the project’s adverse effects. Controversy often takes months to brew, and in its seminal stages it may either be dismissed as temporary and spontaneous opposition or go unnoticed altogether. Yet, the courts may use the initial lack of controversy to restrict severely NEPA’s reach. The misuse of this guideline—or a too restrictive interpretation of it—may also be used subtly to shift the NEPA burden off the lead agency and onto a project’s opponents, for the guideline has the clear potential of placing an additional burden on environmental plaintiffs. In the case of disputed projects that are not large enough to be obviously “major” or “significant,” the project’s opponents have, under this guideline, the responsibility to raise a squabble large enough to convince the agency that a controversy exists and that therefore an impact statement is required. Yet the degree to which NEPA is utilized should not depend on a count of the voices raised calling for its use. The NEPA burden is on the lead agencies, not on citizen groups.

Finally, there is something inherently bizarre about a court facing two antagonistic adversaries arguing before it in a ripe dispute and concluding that there is not enough controversy outside the courtroom to allow the plaintiffs to win once they get in.
NEPA in dealing with private projects that require federal permits.\textsuperscript{76} Two responses to this uncertainty are available.

First is the possible development of per se categories under NEPA. The application of this concept to the question of major federal actions would, in some instances, effectively insure that NEPA's safeguards would attach. Little case law dealing with this approach exists.\textsuperscript{77} Some courts are openly hostile to the per se idea,\textsuperscript{78} yet one has "expressed qualified optimism that 'it may be possible in the future to develop some per se categories of major federal actions . . . .' \textsuperscript{79} The activities of several agencies suggests that a per se process has already developed in regard to their projects.\textsuperscript{80} However, there is a danger, in the initial development of the per se idea, of thinking too much in terms of agencies rather than in terms of specific projects. A shift to thinking in terms of geographical and ecological areas and activities in those areas should evolve. Not everything a particular agency does should be per se a major federal action, but everything that any federal agency does in such an area involving specified destructive activities (\textit{i.e.}, dredging and filling in an estuary, or construction in a flood-plain) should be per se a major federal action.

One frustration for the project's opponents in \textit{Rucker} was the realization that the fragile nature of the estuarine area around Bogue Bank might have been overlooked by the Corps. The delicacy and uniqueness of the estuarine ecosystem is well documented, especially the degree to which an action in one locale may have disastrous consequences perhaps miles away.\textsuperscript{81} With this realization, it seems appropriate that NEPA should apply to federal action in an estuarine area on a per se

\textsuperscript{76} There is already some hostile commentary on applying NEPA to the permitting activities of various agencies. See 3 \textit{ENVIR. REP.} 1434 (March 30, 1973) (NEPA's effectiveness will be "voided" if courts do not recognize that "NEPA was designed to deal with the large, federally financed projects" and not with "governmental regulations of essentially private activities . . . .").

\textsuperscript{77} For an excellent discussion of the per se concept under NEPA, see \textit{NEPA IN THE COURTS} 84-87.

\textsuperscript{78} Transcontinental Gas Pipeline Corp. v. Hackensack Meadowlands Dev. Comm., 464 F.2d 1358, 1366 (3d Cir. 1972).


\textsuperscript{80} See \textit{NEPA IN THE COURTS} 84-87.

basis. NEPA’s impact statement process need not be followed whenever any federal agency did anything anywhere in an estuary. Nevertheless, a more intensive review of how a project is to be done, and what it involves, could be utilized when the project was undertaken in an area such as an estuary, or a redwood forest, or a national park. Especially the more “physically destructive actions” in these areas—such as dredging and filling—could be classified as per se major federal actions. The per se classification would then not develop arbitrarily, but would develop rationally in relation to delicate areas and especially destructive methods in those areas. Resort to an entire estuarine area is certainly not necessary—delineation of specific areas within an estuary would be more realistic. This delineation might easily be accomplished in North Carolina.

A second suggestion to prevent further decisions like Rucker grows from the realization that in some instances NEPA may be extended too far. NEPA was clearly not intended—and cannot be expected—to cover every federal action affecting the environment. An overextension of NEPA might retard the progressive development of the statute. To avoid overburdening NEPA, alternatives may be utilized to bolster NEPA’s broad environmental scope.

In North Carolina, significant state legislation exists that can be used not only to supplement but also to supplant NEPA. Dredge and fill laws, sand dune regulations, and the state Environmental

82. Brown, supra note 6. Brown’s notation of Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1972), is interesting in its relation to the per se idea.

83. The need to resort to a more specific delineation is apparent in North Carolina with its 2,200,000 acres of estuaries. The delineation in North Carolina might be accomplished by resort to anticipated 1974 legislation in North Carolina. The North Carolina Coastal Area Management Act of 1973 (H.B. 949; S.B. 614) was carried over by the General Assembly for consideration in 1974. There is some expectation that the bill will pass in 1974 in some form. A central facet of the bill requires the designation of “Areas of Environmental Concern.” Such areas might easily be used by federal agencies to represent areas in which federal activity would be subject to a per se categorization for NEPA impact statement purposes.

84. In spite of two commentators’ premature conclusion that under NEPA it is already apparent that “‘major’ means ‘any’ and that ‘significantly affecting’ means ‘affecting,’” Cramton & Berg, supra note 5, at 518, the cases referred to in note 26 supra, show otherwise.

85. N.C. GEN. STAT. § 113-229 (Supp. 1973). The dredge and fill law allows riparian owners to object to the granting of a dredge and fill permit to the Department of Conservation and Development. The statute only allows the permit applicant or any state agency the right to review of their objections before an agency Review Board, with appeal to the superior court of the county where the land is situated. In not granting adjacent riparian owners similar rights to agency and judicial review, the statute seems to be open to constitutional attack.

86. N.C. GEN. STAT. §§ 104B-3 to -16 (1972). The sand dune law, unlike the
Policy Act\textsuperscript{87} can regulate activities that are perhaps beyond NEPA's reach. Notice of such state regulation has already been taken by the Fourth Circuit.\textsuperscript{88} The plaintiffs in \textit{Rucker} could have resorted to these state laws to enjoin the "leveling of the dunes" and the grant of the state dredge and fill permit. With responsible local action, the state EPA could have been enacted to force the compilation of an impact statement for the \textit{Rucker} project.\textsuperscript{89}

The maturation and future vitality of NEPA may be endangered by irritating retrogressions caused by unsuccessful attempts to apply it in areas where it perhaps should not be used at all. Only in developing and using the supplements and alternatives to NEPA, which already exist in many states, can a truly comprehensive and unified body of environmental law—both state and federal—mature and gain strength. By realizing that NEPA need not be alone, future \textit{Ruckers} may be prevented, and judicial determinations of whether NEPA does or does not apply can be rendered less critical in many upcoming environmental disputes.

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**Federal Estate Tax—“Incidents of Ownership” in Group Life Insurance, A Phrase Searching for Definition**

Under section 2042(2) of the Internal Revenue Code of 1954 insurance on the life of a decedent is taxable to the extent that he possessed, at the time of his death, any "incidents of ownership" in the

\textsuperscript{87} N.C. GEN. STAT. §§ 113A-1 to -10 (Supp. 1973).
\textsuperscript{88} Civic Improvement Comm. v. Volpe, 459 F.2d 957, 958 (4th Cir. 1972) (per curiam).
\textsuperscript{89} See N.C. GEN. STAT. §§ 113A-8, -9 (Supp. 1973). By vote of the local governing body, the "action forcing" requirements of the state EPA, id. § 113A-4(2) (Supp. 1973), can be applied to local projects that are greater than two contiguous acres in extent.