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Elizabeth Gordon McCrodden

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Environmental Law—Kleppe v. Sierra Club: Addressing the Question of Programmatic Impact Statements

Section 102(2)(C)¹ of the National Environmental Policy Act of 1969 (NEPA)² requires federal³ officials to prepare an environmental impact statement (EIS) for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."⁴ Because of the inevitable conflict between the broad language of the Act⁵ and existing agency decisional procedures, a constant stream of litigation concerning the required scope of an EIS has followed NEPA's enactment. One of the questions that has arisen from agency conflict has been: if, within a given region, a federal agency is involved in related projects for which individual impact statements have already been prepared, does NEPA require the agency to prepare a regional (programmatic)⁶ impact statement as well? Reversing a District of Columbia Circuit Court of Appeals decision,⁷ the United States Supreme Court, in *Kleppe v. Sierra Club*,⁸ held that the Department of the Interior was not required by NEPA to prepare a regional EIS for the Northern Great Plains region where the Department was leasing coal mines for development.

The Northern Great Plains region, a rich coal basin covering portions of Wyoming, Montana, North Dakota and South Dakota,⁹ is

1. 42 U.S.C. § 4332(2)(C) (1970).

2. 42 U.S.C. §§ 4321-4347 (1970).

3. *Id.* § 4332(2)(D) (Supp. V 1975), added by the National Environmental Policy Act Amendments of 1975, Pub. L. No. 94-83, 89 Stat. 424, allows, under certain conditions, a state agency or official to prepare an impact statement.

4. *Id.* § 4332(2)(C).

5. The scope of federal activity to be covered by an EIS is broad because of NEPA's requirements that the federal government "improve and coordinate Federal plans, functions, programs, and resources . . . to attain the widest range of beneficial uses of the environment without degradation . . ." *id.* § 4331(b)(3); "utilize a systematic, interdisciplinary approach," *id.* § 4332(2)(A); develop alternatives to recommended projects, *id.* § 4332(2)(E); and "recognize the worldwide and long-range character of environmental problems," *id.* § 4332(2)(F).

6. In this Note, the phrases "programmatic EIS" and "comprehensive EIS" will be used synonymously with "regional EIS." The first two phrases, however, are not always synonymous with "regional" since programs involve several projects that may extend beyond a given region. In *Kleppe*, the phrases were synonymous since all the projects were within the same region.

7. *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975).

8. 96 S. Ct. 2718 (1976).

9. According to the Brief for Petitioners at 4 n.2, *Kleppe v. Sierra Club*, 96 S. Ct. 2718 (1976), the Department of the Interior has divided the Nation's coal lands into six provinces, one of which is the Northern Great Plains province. The Department

owned to a large extent by the United States government. Under the Mineral Lands Leasing Act of 1920,¹⁰ the Secretary of the Interior (Secretary) is authorized to divide and lease for development any coal lands owned by the federal government.¹¹ In 1972, the Department of the Interior (Department) undertook the Northern Great Plains Resources Program (NGPRP), a federal-state, interagency study¹² devoted entirely to environmental concerns of the region.¹³ Further, in 1973, the Secretary announced a complete review of the Department's national coal leasing program, which was designed "to study the environmental impact of the Department's entire range of coal related activities and to develop a planning system to guide the national leasing program."¹⁴

In July 1973, Sierra and other environmental groups brought suit against the Secretary, seeking declaratory and injunctive relief against further coal development within the region¹⁵ pending preparation of

defines that province as including the Dakotas, Montana, Wyoming, Idaho, Nebraska and Colorado.

10. 30 U.S.C. §§ 181-287 (1970).

11. *Id.* § 201(a).

12. The court of appeals noted that the Secretary of the Interior had shown concern over NEPA's effect on development of the Northern Great Plains province and had recognized that NEPA might require comprehensive development of the province and a more comprehensive environmental impact analysis than would be allowed by impact statements for individual mines. The court attributed the NGPRP and an earlier study, the North Central Power Study of 1970, to this recognition on the part of the Secretary. *Sierra Club v. Morton*, 514 F.2d 856, 862-63 (D.C. Cir. 1975).

13. 96 S. Ct. at 2724. The court of appeals described the purpose of the NGPRP as follows: "to assess the potential social, economic, and environmental impacts that development of the Province would cause." 514 F.2d at 863.

14. 96 S. Ct. at 2725. The study resulted in a "Coal Programmatic EIS" that was finalized in September 1975. From the study came a proposed leasing program based on the Energy Minerals Activity Recommendation System and an evaluation of the possible environmental impact of the national program as well as alternatives to the program. While the study was being conducted, the Secretary put into effect a "short term leasing policy" to restrict new leasing during the review. *Id.* The District of Columbia Circuit Court of Appeals later found large loopholes in the restrictions imposed upon development of the province allowing federal activity to proceed:

(1) [T]he short-term leasing program applies only to new leases and does not interfere with the Department's ability to approve mining plans for pre-existing leases in the area; (2) some leases may be issued under the short-term leasing policy itself; and (3) federal activity in the Province is not really suspended pending issuance of the NGPRP, but rather can continue upon approval of the Under Secretary.

514 F.2d at 864-65. In fact, between the time restrictions were imposed in February 1973 and the June 1975 decision of the court of appeals, at least four mining plans were approved and approval of four more mines in the Eastern Powder River Coal Basin was pending. *Id.* at 865.

15. For a discussion of the activity in the province, see 514 F.2d at 864-66.

a regional EIS.¹⁶ The district court found no regional federal action within the meaning of NEPA and held that a regional impact statement is not necessary for individual projects related only by geography. After oral argument on appeal by Sierra Club,¹⁷ the Court of Appeals for the District of Columbia Circuit granted a motion for a limited injunction pending its decision: the Secretary was ordered to take no further action regarding mining plans and railroad rights-of-way in the Eastern Powder River Coal Basin.¹⁸ Thereafter, the court of appeals reversed and remanded,¹⁹ concluding that

when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to "control development" of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, whether it labels its attempts a "plan," a "program," or nothing at all.²⁰

The court of appeals believed that a comprehensive major federal action was "contemplated" in the Northern Great Plains; therefore, a balancing of four factors²¹ used in an earlier decision²² would be necessary to determine the time during the program when the EIS would be required.²³ The temporary injunction was continued,²⁴ however, to allow the Department to determine its future role in the region and,

16. Jurisdiction was asserted under 5 U.S.C. §§ 701-706 (1970) and 28 U.S.C. §§ 1331(a) & 1361 (1970).

17. The district court had found that the region identified by Sierra Club was not "an entity, region or area which has been defined by the Federal Government by statute or executive action" for purposes of any Federal program, project, or action." 514 F.2d at 867. It had further concluded that "[t]here is no existing or proposed Federal regional program, plan, project, or other regional "federal action" within the meaning of NEPA Section 102(2) for the development of coal or other resources' in the Northern Great Plains region." *Id.* Having so determined, the court held that "in the absence of regional federal action, multiple applications for individual federal action in connection with individual private projects which are unrelated to one another except geographically do not either constitute regional federal action or mandate a regional impact statement." *Id.*

18. *Id.* at 868.

19. *Id.* at 884.

20. *Id.* at 878.

21. The four factors were: (1) How likely and how soon is the program to come to fruition? (2) To what extent is valid information now available on the effects of implementation of the program and of alternatives? (3) To what extent are irretrievable commitments being made and options being precluded as the proposal progresses? (4) How severe will the environmental effects of program implementation be? *Id.* at 880.

22. *Scientists' Inst. for Pub. Info., Inc. (SIPI) v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

23. 514 F.2d at 880.

24. *Id.* at 883.

based upon that role, to determine whether an impact statement was necessary.²⁵

In early 1976, the Supreme Court stayed the injunction and granted the Secretary's petition for certiorari.²⁶ Noting that the Secretary agreed that NEPA section 102(2)(C) required both individual impact statements for the single leases involved and a Coal Programmatic EIS to accompany the new national leasing program,²⁷ the Court agreed with the Secretary: NEPA did not require the Secretary to prepare an EIS on the entire Northern Great Plains region because there had been no report or recommendation on a proposal for major federal action with respect to that region.²⁸ In addition, the Court specifically agreed with the district court that the NGPRP was not a recommendation or report on a proposal for major federal action and, hence, did not fall within NEPA's section 102(2)(C).²⁹

In response to the court of appeals' opinion, the Supreme Court concluded that the Secretary had not contemplated a regional plan or proposal³⁰ and that, even if he had contemplated such a plan, NEPA does not require an impact statement prior to "the time at which it makes a recommendation or report on a *proposal* for federal action."³¹ According to the Court NEPA requires no balancing test such as was promulgated by the court of appeals.³² Before the Supreme Court, the Sierra Club contended³³ that a regional impact statement is required

25. The court of appeals was unable, due to an incomplete record, to conclude an analysis of the four balancing factors; it therefore remanded to allow the Department to complete the NGPRP. Based on the NGPRP, the Department was to determine its role in the region and the necessity for a programmatic EIS. *Id.* at 882.

26. 96 S. Ct. at 2714. The Court noted that shortly after the injunction was stayed, the Secretary approved the four mining plans in the East Powder River Coal Basin. *Id.*

27. *Id.* at 2726.

28. *Id.* at 2726-27.

29. *Id.* at 2726. The Court, relying on a statement by the Secretary, found irrelevant, for purposes of a regional EIS, the NGPRP. Such a study, according to the Secretary, is a "prelude to informed agency planning and provide[s] the data base on which the Department may decide to take specific actions for which impact statements are prepared." *Id.* at 2731.

30. *Id.* at 2727.

31. *Id.* at 2728 (quoting *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 320 (1975) (*SCRAP II*)).

32. *Id.* at 2729.

33. Sierra Club had decided not to support the court of appeals' decision for obvious reasons: *SCRAP II*, 422 U.S. 289 (1975), and *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), were both decided in June 1975. *SCRAP II* essentially silenced the court of appeals' opinion since it clearly held that an EIS is necessary only at the time an agency makes a recommendation or report on a proposal for major federal action. After that, by order of the Supreme Court the Second Circuit Court of Appeals

on all coal-related projects in the region "because they are intimately related."³⁴ The Court considered this argument susceptible of two interpretations.³⁵ The first interpretation imposed upon Sierra's contention was that the individual impact statements were inadequate. The Court refused to consider this interpretation since the case was not brought as a challenge to a particular EIS and there was no EIS in the record. Second, the Court considered that Sierra's contention could be interpreted as an attack on the Secretary's decision not to prepare one regional EIS. The Court agreed with this second view that section 102(2)(C) may require a comprehensive EIS in limited situations in which several proposed actions are pending at the same time; the decision to prepare a comprehensive EIS, however, was considered to be one for the agency. Accordingly, the Court refused to reverse the agency's decision unless it could be shown to be arbitrary and capricious.³⁶ In *Kleppe*, the Court found nothing arbitrary in the Secretary's decision not to prepare a regional EIS;³⁷ therefore, in a seven-two split,³⁸ the Supreme Court reversed the court of appeals' decision.

The first involvement of the Supreme Court in the chain of cases leading to *Kleppe* was *Aberdeen & Rockfish Railroad v. SCRAP (SCRAP II)*.³⁹ There the Court answered, at least superficially, the question of when, in the life of a project, a final EIS is required. The Court interpreted section 102(2)(C) literally: an agency must prepare the final EIS at the "time at which it makes a recommendation or report on a *proposal* for federal action."⁴⁰ Subsequently the *SCRAP II* analysis was applied to a programmatic impact statement case in

in *Conservation Soc'y, Inc. v. Secretary of Transp.*, 531 F.2d 637 (2d Cir. 1976) (*per curiam*), was required to apply *SCRAP II* to a highway segmentation case. The court found that, since there was no comprehensive program, no comprehensive EIS was required. The Sierra Club, therefore, relied upon another argument made before the court of appeals but not reached by that court.

34. 96 S. Ct. at 2730.

35. *Id.*

36. *Id.* at 2731.

37. *Id.*

38. Justice Marshall, with whom Justice Brennan joined, concurred in part and dissented in part. His disagreement with the majority was based on his belief that although a final EIS is due at the time at which an agency makes a recommendation or report on a program for federal action, preparation of that statement must be commenced early in the process. *Id.* at 2734. This approach is necessary, Marshall reasoned, to comply with the mandate of NEPA that early consideration of environmental consequences be made possible through production of the EIS. *Id.* Marshall found that the test devised by the Second Circuit was an effective remedy. *Id.* at 2735.

39. 422 U.S. 289 (1975).

40. *Id.* at 320.

Conservation Society, Inc. v. Secretary of Transportation.⁴¹ The district court⁴² had required a comprehensive impact statement for an entire highway despite the absence of a federal plan for the entire route, because it found that the three states through which the highway passed were looking toward development of the entire corridor into a super-highway.⁴³ On the basis of *SCRAP II*⁴⁴ the Supreme Court reversed and remanded, and on remand the Second Circuit held that a comprehensive EIS could not be required since there was "no overall federal plan."⁴⁵

The purpose of an environmental impact statement is "to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action."⁴⁶ The initial determination to prepare an environmental impact statement, the so-called threshold decision, rests with the agency responsible for the federal action. NEPA requires that impact statements be prepared for major federal actions "significantly affecting the quality of the human environment."⁴⁷ Before *Kleppe*, the standard of judicial review of threshold determinations had varied among the federal courts.⁴⁸ The majority of courts had adopted

41. 508 F.2d 927 (2d Cir. 1974), *vacated and remanded sub nom.* *Coleman v. Conservation Soc'y, Inc.*, 423 U.S. 809 (1975), *rev'd per curiam sub nom.* *Conservation Soc'y, Inc. v. Secretary of Transp.*, 531 F.2d 637 (2d Cir. 1976).

42. *Conservation Soc'y, Inc. v. Secretary of Transp.*, 362 F. Supp. 627 (D. Vt. 1973).

43. *Id.* at 636.

44. The Court also reversed in light of the National Environmental Policy Act Amendments of 1975, Pub. L. No. 94-83, 89 Stat. 424 (adding 42 U.S.C. § 4332(2)(D) (Supp. V 1975), which allows state agencies and officers, under certain conditions, to prepare an EIS).

45. Based on *SCRAP II* and *Conservation Society*, the result in *Kleppe* comes as no surprise. In fact, those two opinions appear to render the *Kleppe* opinion unnecessary. A closer consideration of *Kleppe*, however, yields two reasons for which the Court decided the case. First, on the issue of timing, the Court rejected specifically the four factor balancing test first promulgated by the District of Columbia Circuit in 1973 and revived by the same lower court in this case. Second, on the issue of the scope of an EIS, the Court provided some guidance as to the circumstances under which a programmatic EIS will be necessary even in the absence of a proposal. This Note will focus only on the latter issue and will analyze the Court's treatment of programmatic impact statements.

46. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). See also *Environmental Defense Fund, Inc. v. Corps of Engineers*, 348 F. Supp. 916 (N.D. Miss. 1972); *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972).

47. 42 U.S.C. § 4332(2)(C) (1970).

48. For discussions of judicial review of agency determinations, see Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 238, 356-62 (E. Dolgin & T. Guilbert eds. 1974); Comment, *Environmental Law: Judicial Review of Federal Agency Actions under NEPA*, 28 OKLA. L. REV. 866 (1975).

an extremely lenient standard: an agency's decision would not be overturned unless deemed arbitrary and capricious. Other courts had required that an agency's threshold determination be reasonable—an approach that allows a closer examination of an agency decision than does the arbitrariness standard.⁴⁹ A third standard adopted by some courts was de novo review, a strict standard by which the court construed the relevant statutory terms⁵⁰ and then applied them to the facts in the case.⁵¹

The arbitrary and capricious standard adopted by the *Kleppe* Court has not been a clearly defined standard in environmental law cases; even among courts that agreed that arbitrariness is the standard, there was little agreement on the meaning of the term. Some courts have looked at an agency's decision with closer scrutiny than an arbitrariness standard requires. In *Hanly v. Kleindienst*,⁵² for example, the Second Circuit, having already required a "reviewable environmental record,"⁵³ also set forth procedural requirements for the threshold determination⁵⁴ that, in the long run, might make the impact statement itself the less arduous alternative.⁵⁵

In determining whether an EIS is necessary, federal officials have little guidance in the broad language of NEPA. The Act does not set forth factors to be considered in making the determination, and courts have reached no consensus as to what those factors should be. At least one attempt to establish procedures to be followed and factors to be considered has led to criticism that the threshold determination would itself become a mini-impact statement.⁵⁶ Due to the scale of federal action potentially necessitating a programmatic EIS, the threshold determination for a programmatic statement is not likely to be any easier than for a project EIS. Furthermore, the programmatic statement is designed to achieve something beyond that which is achieved by a single project statement so that an agency's determination of the necessity of a programmatic EIS should involve other considerations.

49. *E.g.*, *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

50. *See* text accompanying note 47 *supra*.

51. *E.g.*, *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972).

52. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (*Hanly II*).

53. *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972) (*Hanly I*).

54. 471 F.2d at 835.

55. *See* Anderson, *supra* note 48, at 358 for an analysis of *Hanly II*.

56. 471 F.2d at 837 (Friendly, J., dissenting).

Prior to *Kleppe*, there had been a split of authority on the question of the necessity of a programmatic impact statement.⁵⁷ Even when a program has been proposed by a federal agency, thereby meeting *SCRAP II* requirements, the courts have failed to agree on the question of requiring a programmatic EIS. The majority approach, derived from a case involving one segment of a highway program,⁵⁸ has applied an "independent utility" test. Generally, the independent utility test mandates "so long as each major federal action is undertaken individually and not as an indivisible integral part of an integrated . . . system, then the requirements of NEPA are determined on an individual major federal action basis."⁵⁹ Cases applying the independent utility test⁶⁰ generally have involved highway projects, multi-phased dam systems or reservoir systems.⁶¹ Rarely, however, in cases involving resource development, have the courts required a comprehensive EIS.⁶²

57. While NEPA does not specifically mandate a detailed statement to cover geographically related major federal actions, various sections of the Act, when read together, may be interpreted to require such statements. See note 5 *supra*. The Council on Environmental Quality has issued guidelines stating that "[i]ndividual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement." Council on Environmental Quality, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), *quoted in* Scientists' Inst. for Pub. Info., Inc. v. AEC, 481 F.2d 1079, 1087 (D.C. Cir. 1973). Furthermore, the foremost authority on NEPA has interpreted the Act as rejecting an incremental approach to planning and as depending upon programmatic impact statements for its success. Anderson, *supra* note 48, at 321.

58. *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir. 1973). The court balanced the need for long-range planning and the advisability of considering long-range environmental effects of a state highway system against the practical necessities of project completion and concluded that the EIS must, at a minimum, cover the length of a federally funded highway that is "supportable by logical termini at each end." *Id.*

59. *Environmental Defense Fund, Inc. v. Armstrong*, 356 F. Supp. 131, 139 (N.D. Cal.), *aff'd*, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

60. The "independent utility" test was originally a standard used to determine minimum project size but was soon adopted as a measure of the need for a programmatic EIS. One student author has criticized the latter application of the test, stating that, as applied, it means: "[s]o long as a project has some independent justification, its role as part of a larger program of interrelated, although not completely interdependent, units is usually ignored." Comment, *Planning Level and Program Impact Statements under the National Environmental Policy Act: A Definitional Approach*, 23 U.C.L.A. L. Rev. 124, 142 (1975).

61. See, e.g., *Daly v. Volpe*, 514 F.2d 1106 (9th Cir. 1975) (highway segment); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974) (two-phased dam system); *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974) (system of reservoirs); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973) (interstate highway projects); *Sierra Club v. Froehlike*, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd sub nom.* *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974) (system of reservoirs); *Environmental Defense Fund, Inc. v. Armstrong*, 356 F. Supp. 131 (N.D. Cal.), *aff'd*, 487 F.2d 814 (9th Cir.), *cert. denied*, 416 U.S. 974 (1973).

62. In one case, *Minnesota PIRG v. Butz*, 358 F. Supp. 584 (D. Minn. 1973),

Generally, three approaches have been used in refusing to require programmatic statements in resource development cases:⁶³ (1) an independent utility test;⁶⁴ (2) a test of interdependence so refined that a programmatic EIS would be required only if the projects are essentially indivisible;⁶⁵ (3) a federal funding test, meaning that separate funding of a project is interpreted as evidence showing independence.⁶⁶

While the *Kleppe* opinion did not refer to the independent utility test or to any other test, the language used by the court may be read to spell the demise of such tests, at least as sole determinants of whether a programmatic statement is necessary.⁶⁷ The test, it appears, for determining whether, in the absence of a federal program, a programmatic impact statement is necessary, is whether the federal agency can meet its duty under section 102(2)(C) to "assure consideration of the environmental impact of their action in decisionmaking."⁶⁸ The Supreme Court stated:

A comprehensive impact statement may be necessary in some cases for an agency to meet this duty. Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be consid-

aff'd, 498 F.2d 1314 (8th Cir. 1974), a federal district court did require a comprehensive statement for a resource development plan. The United States Forest Service, pursuant to a plan adopted prior to NEPA's effective date, was administering timber sales in the Boundary Waters Canoe Area (BWCA) of the Superior National Forest. A Minnesota federal district court found that the cumulative effect of timber sales by the Forest Service since NEPA's effective date constituted a major federal action requiring a programmatic EIS.

After the BWCA EIS and Management Plan were published by the Forest Service, plaintiffs filed another action claiming, *inter alia*, that the EIS and Management Plan were procedurally and substantively inadequate under NEPA. The federal district court agreed. *Minnesota PIRG v. Butz*, 401 F. Supp. 1276 (D. Minn. 1975). In 1976, the Eighth Circuit Court of Appeals reversed, finding the EIS prepared by the Forest Service adequate for past actions in the BWCA. Citing *Kleppe*, the court of appeals, however, did continue the injunction as to future timber sales since it found that the Forest Service had not completed its plan for such sales and that, upon its completion a comprehensive EIS would be necessary. 9 ENVIR. REP. (BNA) 1220, 1232 (8th Cir. 1976). See note 86 *infra*. The distinction between this case and *Kleppe* is that here the Forest Service did have a plan for further timber sales.

63. Comment, *supra* note 60, at 144-46.

64. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

65. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

66. *Sierra Club v. Froehlike*, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd sub nom.* *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

67. 96 S. Ct. at 2730.

68. *Id.* (quoting Conference Report on NEPA, 115 CONG. REC. 40416 (1969) (Senate)).

ered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.⁶⁹

While the Court would impose programmatic impact statements only in narrow circumstances when there is not a federal program, the Court appears aware of the value of such statements.

The value of programmatic impact statements has been attributed to their practical contributions to the planning process.⁷⁰ A programmatic EIS is especially helpful in providing information to analyze (1) alternatives to individual major federal actions and (2) cumulative and synergistic environmental effects of a number of federal projects. Generally, the alternatives to a major federal action that must be considered are those "reasonably related to the purpose of the project."⁷¹ The question of the extent to which environmental consequences of alternatives to a given federal project must be considered was addressed by *Natural Resources Defense Council, Inc. v. Morton (NRDC)*.⁷² In *NRDC*, the District of Columbia Circuit held inadequate an EIS prepared by the Department of the Interior on its proposed sale of offshore leases because the EIS failed to consider the environmental consequences of alternative courses of action, even though those alternatives were available not to Interior, but to other federal agencies. Despite the result, *NRDC's* contribution to the issue of alternatives consideration has been attributed to its rule of reasonableness. The *NRDC* court stated that "[i]n the last analysis, the requirement as to alternatives is subject to a construction of reasonableness Where the environmental aspects of alternatives are readily identifiable by the agency, it is reasonable to state them" ⁷³

Another reason for programmatic impact statements is to provide a clearer basis for understanding cumulative and synergistic impacts of the various projects at a time that is meaningful for the decision process. The Council on Environmental Quality has stated that the phrase "major Federal actions" of NEPA section 102(2)(C)

69. *Id.* at 2730-31 (footnotes omitted).

70. The Council on Environmental Quality has issued guidelines stating the advantages of a programmatic EIS: "it provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It insures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic quality questions." Council on Environmental Quality, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), *quoted in* Scientists' Inst. for Pub. Info., Inc. v. AEC, 481 F.2d 1079, 1087-88 (D.C. Cir. 1973).

71. *E.g.*, *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974).

72. 458 F.2d 827 (D.C. Cir. 1972).

73. *Id.* at 837.

is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. . . . [A]n environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action.⁷⁴

Despite a vague realization by some courts that a programmatic EIS will provide a better understanding of cumulative environmental impacts and, thus, a better basis upon which to make decisions about individual projects,⁷⁵ no case has dealt specifically with its planning value insofar as cumulative impacts are concerned. A comprehensive EIS allows the planner to select among alternative projects in a manner that will maximize resource development while maintaining an "acceptable" cumulative level of adverse environmental impacts. This result is, of course, consistent with NEPA section 101(b)(3),⁷⁶ which makes it the responsibility of federal agencies to "attain the widest range of beneficial uses of the environment without degradation"⁷⁷ In many cases, a comprehensive EIS is necessary if the federal agency, according to the NEPA mandate, is to "utilize a systematic . . . approach"⁷⁸ in making decisions affecting the human environment.

Under the *Kleppe* formulation, there are two possible situations in which a programmatic statement will be required when there is in fact no program. First, the federal agency itself may determine its necessity. The Court seemed optimistic about this possibility, noting that the Secretary had recently adopted an approach that would require, in certain situations, the preparation of a single EIS instead of multiple statements.⁷⁹ The Court, however, overlooked the premise of NEPA that environmental concerns are likely to be secondary considerations to agencies whose goals are nonenvironmental.⁸⁰ With a history of emphasis on agency goals as opposed to agency planning processes, agencies may be expected to skirt additional steps in order to

74. 40 C.F.R. § 1500.6(a) (1975), quoted in Note, *Major Federal Actions under the National Environmental Policy Act*, 44 *FORDHAM L. REV.* 580, 593-94 (1975).

75. See, e.g., *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *Minnesota PIRG v. Butz*, 358 F. Supp. 584 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974).

76. 42 U.S.C. § 4331(b)(3) (1970).

77. *Id.*

78. *Id.* § 4332(2)(A).

79. 96 S. Ct. at 2731. To environmentalists this approach will still be insufficient in some cases in which both a programmatic EIS and individual statements are necessary for NEPA purposes. See, e.g., F. ANDERSON, *NEPA IN THE COURTS* 122 (1973).

80. For a statement of that premise, see Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 *U. PA. L. REV.* 509, 515 (1974).

achieve agency aims.⁸¹ Second, the threshold decision of an administrator not to prepare a comprehensive EIS may be attacked as arbitrary and capricious. This standard of judicial review is the most lenient of the approaches used previously by federal courts; as applied by some of the courts in EIS cases, however, the arbitrariness standard has required stricter procedures than in other cases.⁸² Perhaps some stricter procedure will also be expected when courts review the threshold decision in programmatic EIS cases.

The *Kleppe* opinion contains unclear signals to administrators on the issue of factors that must be considered in determining whether the programmatic statement is necessary. The Court suggested that evaluation of "different courses of action" might prompt the need for a programmatic statement;⁸³ the Court, however, did not discuss the extent to which an agency must consider alternatives to a program, thus appearing to leave *NRDC*⁸⁴ as the leading case on that question. The Court also stated that "[c]umulative environmental impacts are, indeed, what require a comprehensive impact statement."⁸⁵ This flat assertion and the Court's treatment of the timing issue in *SCRAP II* combined, suggest that the Court did not understand the impact NEPA was intended to have on the planning process. When a programmatic EIS is considered for separate major federal actions already requiring individual impact statements, each one of those separate projects, by definition, has an environmental impact and, consequently, a cumulative impact. It is, therefore, difficult to understand what the Court meant in its statement that such impacts necessitate a comprehensive EIS.⁸⁶ The purpose of requiring a programmatic EIS is twofold: first, it provides an agency with sufficient information to evaluate the program against alternative programs; second, it provides data by which individual projects and combinations of projects within the program may be evaluated against the other individual projects and combinations.

81. See generally Comment, *supra* note 60.

82. See text accompanying notes 53-56 *supra*.

83. 96 S. Ct. at 2731.

84. 458 F.2d 827 (D.C. Cir. 1972). See text accompanying notes 72-73 *supra*.

85. 96 S. Ct. at 2732.

86. The Court in another place refers to "cumulative or synergistic" impact of multiple projects. 96 S. Ct. at 2730. See text accompanying note 69 *supra*. "Synergistic" certainly makes more sense.

One federal court has already cited *Kleppe* as recognizing that a comprehensive EIS will be necessary where proposed federal actions will have a cumulative or synergistic impact upon an area. The court in that case further stated that the requirement for a programmatic statement will depend upon the facts of each case. *Minnesota PIRG v. Butz*, 9 ENVIR. REP. (BNA) 1220, 1232 (8th Cir. 1976).

In the latter case, the ultimate plan will be a selection of the projects that will maximize development while minimizing the cumulative adverse environmental impacts. The Court's analysis of these factors—alternatives and cumulative impacts—indicated a failure to understand this twofold purpose.

Furthermore, any consideration of factors relevant to programmatic statements is meaningless unless such considerations are made at a time early enough for the choice of alternatives to be more than an academic exercise. Natural resource planning and development require sophisticated and systematic assessments of alternative resources, alternative sources of the same resource, and the environmental impacts of all comparable resources and of all alternative sources. That job as envisioned by the founders of NEPA was not intended to be easy, but as supplies of resources have decreased, the job has become more necessary; as information technology has increased, the job has become more possible.

The analysis in *Kleppe* may have dealt a serious blow to the future impact of NEPA. With a narrowly drawn exception⁸⁷ programmatic impact statements are not necessary unless there is a "recommendation or report on proposals" for programs, a prerequisite that may be avoided easily enough by federal officials whose primary goals are often in conflict with environmental concerns. In the absence of a program, there is the possibility, albeit remote, of showing that the federal official acted arbitrarily and capriciously in refusing to require a programmatic EIS for projects pending at the same time.

The Court, therefore, has made an exception to *SCRAP II* by requiring an EIS under certain circumstances even in the absence of a proposed program. Although the Court successfully escaped the literalism of that opinion, it fell into a different trap: it succumbed to agency pressures and restricted the planning mandate of NEPA by narrowly construing the necessity of a programmatic environmental impact statement. Instead of imposing that restriction, the Court should have begun the long and difficult formulation of standards that will force agencies, before the fact, to develop comprehensive national and regional plans and impact statements that will allow maximum

87. The exception is that when several project proposals having cumulative or synergistic impacts upon a region are pending concurrently before an agency a programmatic EIS is necessary. In the absence of a federal program, therefore, programmatic impact statements, according to the Court, do not cross regional boundaries and are confined to projects pending at the same time and before the same agency.

resource development with minimal environmental impacts. Long-range planning is the mandate of NEPA that has been ignored because of the initial high cost to governmental agencies in traditional terms of agency output. In the long run, however, this command of NEPA should provide the impetus for the most effective resource management program possible.

ELIZABETH GORDON MCCRODDEN

Interstate Commerce—A Shipper's Remedy for Discrimination Prohibited by the Motor Carrier Act

Section 216(d)¹ of the Motor Carrier Act of 1935² (Part II of the Interstate Commerce Act) makes it unlawful for a regulated³ carrier to subject a shipper "to any unjust discrimination."⁴ There have been few cases in which the federal judiciary has been required to interpret the nondiscrimination language contained in section 216(d)⁵ and thus it has remained a relatively obscure provision of a major federal regulatory act. However, the recent decision by the United States Court of Appeals for the Fourth Circuit in *Hubbard v. Allied Van Lines, Inc.*⁶ may signal the emergence of section 216(d) as an important weapon in the legal arsenal of shippers. In this case of first impression, the Fourth Circuit, relying exclusively on the reasoning of cases interpreting a similar provision⁷ of the Federal Aviation Act of

1. 49 U.S.C. § 316(d) (1970).

2. *Id.* §§ 301-327.

3. Some motor carriers, including school busses, taxicabs and farm vehicles, are excluded from the Act's coverage. *Id.* § 303(b).

4. *Id.* § 316(d). This section provides, in pertinent part:

It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever

5. See note 33 *infra* for a discussion of the cases that have interpreted section 216(d)'s prohibition of discriminatory conduct.

6. 540 F.2d 1224 (4th Cir. 1976).

7. 49 U.S.C. § 1374(b) (1970). This section provides:

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality,