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Environmental Law - Environmental Impact Statements - Threshold Application of Comprehensive Planning under NEPA

Greg Hennessy

ENVIRONMENTAL LAW—ENVIRONMENTAL IMPACT STATEMENTS—THRESHOLD APPLICATION OF COMPREHENSIVE PLANNING UNDER NEPA

The Sierra Club and other organizations interested in protection of the environment[1] brought suit in federal district court alleging that the Departments of the Interior and Agriculture, along with the Army Corps of Engineers, were violating the National Environmental Policy Act (NEPA) of 1969[2] in allowing coal development in the Northern Great Plains region.[3] The specific charge was that the federal defendants[4] had failed to prepare a detailed, comprehensive environmental impact statement for the region, a systematic interdisciplinary study of coal development, and a study of appropriate alternative courses of action[5] prior to allowing development in the four-state region. The plaintiffs prayed for declaratory relief from the alleged violations, an injunction barring further federal action in the region until compliance with NEPA's provisions, and an order compelling the federal defendants to abide by NEPA's requirements.[6] The United States Court of Appeals for the District of Colum-

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1. The Court of Appeals found that among the plaintiff organizations only the Northern Plains Resource Council had standing to sue since no other plaintiff introduced any evidence on the issue of standing. Sierra Club v. Morton, 514 F.2d 856, 869-70 n.20 (D.C. Cir. 1975). *See* text accompanying notes 37-40 *infra*.

2. 42 U.S.C. §§ 4321-47 (1970) [hereinafter cited as NEPA].

3. The states included within the Northern Great Plains region in issue were North Dakota, South Dakota, Montana, and Wyoming. Brief for appellant at 33, Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975).

4. Sixteen coal mining companies and utility companies joined with the Crow Tribe of Indians to intervene after a showing of their respective interests in coal development. Sierra Club v. Morton, 514 F.2d 856, 867 (D.C. Cir. 1975).

5. A pertinent part of NEPA, 42 U.S.C. § 4332(2) (1970), provides:

> [A]ll agencies of the Federal Government shall—
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
> . . . .
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be impemented.
> Prior to make any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to the environmental impact involved. Copies of such statement and the comments and views of the apropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;
> (D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

6. In deciding whether or not an injunction should issue in NEPA cases, the harm to

bia Circuit *held* that when the federal government attempts to "control development" of a definite region by using it power to approve coal leases, mining plans, rights-of-way, and water option contracts, it is engaged in a comprehensive major federal action within the meaning of NEPA, and therefore must prepare a comprehensive environmental impact statement.[7] The court further noted that when a federal agency chooses not to officially label its attempts at control of coal-related development a "plan" or a "program," it is no bar to the agency's duty to prepare an environmental impact statement for "major federal actions significantly affecting the quality of the human environment. . . ."[8] However, the court also held that since the major federal action was merely "contemplated" by the agencies, an order would issue simply compelling the federal defendants to make the initial decision whether or not to prepare a comprehensive environmental impact statement for the Northern Great Plains and to provide a statement of reasons for the decision.[9] *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975).[10]

Since NEPA became effective on January 1, 1970, it has been the vehicle for a large volume of environmental litigation which has sought to articulate the national demand for environmental protection.[11] Two of the earliest decisions gave the Act a very constricted reading, under the mistaken belief that it created no judicially enforceable rights or duties in federal agencies.[12] However, the trend established has been to interpret NEPA to require federal agencies to consider environmental values "to the fullest extent possible,"[13] rather than to allow them to consider only those values peculiar to the agency's expertise.

To ensure that the broad substantive policies expressed in NEPA[14]

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be enjoined is sufficiently mature at the time an environmental impact statement becomes necessary, but is not filed. Jones v. District of Col. Redev. Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974).

7. Sierra Club v. Morton, 514 F.2d 856, 878 (D.C. Cir. 1975).

8. *Id.*, *citing* 42 U.S.C. § 4332(2)(c) (1970), quoted at length in note 5 *supra*.

9. Sierra Club v. Morton, 514 F.2d 856, 882 nn.38 & 40 (D.C. Cir. 1975).

10. *Cert. granted sub nom.* Frizzell v. Sierra Club, Inc., 44 U.S.L.W. 3389 (U.S. Jan. 12, 1976) (No. 75-552), *cert. granted sub nom.* American Elec. Power Sys. v. Sierra Club, 44 U.S.L.W. 3389 (U.S. Jan. 12, 1976) (No. 75-561).

11. For an overview of the demand for environmental legislation and a discussion of the legislative history of NEPA, see F. ANDERSON, NEPA IN THE COURTS 1-14 (1973) [hereinafter cited as ANDERSON]; H. Yarrington, *The National Environmental Policy Act*, 4 B.N.A. ENVIRONMENT REPORTER MONOGRAPHS No. 36 at 4-6 (1974) [hereinafter cited as Yarrington]. *See also* ENVIRONMENTAL QUALITY: THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 221-24 (Aug., 1972).

12. McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); Bucklein v. Volpe, 2 E.R.C. 1082 (N.D. Cal. 1970).

13. Calvert Cliff's Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). *See also* Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Environmental Def. Fund v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972).

14. NEPA's substantive provisions, particularly 42 U.S.C. §§ 4331(a) & (b), represent a challenge to courts interpreting them because the language speaks in terms of general policy. The Eighth Circuit Court of Appeals has found that:

> The language of NEPA, as well as its legislative history, make it clear that

are implemented by federal planners, certain action-forcing procedures were included by Congress.[15] In particular, federal agencies are required to "include a detailed evnironmental impact statement in every recommendation or report on proposals for legislation and other major federal actions. . . ."[16] To date, the courts have tended to enforce and explain the procedural requirements, but the substantive meaning, while receiving a great deal of explanation, has generally received a minimum of enforcement.[17]

The courts' preference for interpreting the procedural requirements derives from both the role of the courts as overseers of administrative agencies[18] and the relative ease of ruling upon procedural matters as questions of law.[19] When ruling upon questions of fact which have been committed by statutes to agency expertise and discretion, the judiciary is keenly aware of the limited review power it may exercise.[20]

The evidence in *Sierra Club v. Morton* showed that the Secretary of the Interior had recognized the applicability of NEPA's environmental impact statement requirements to the region *qua* region, because he had initiated a number of studies of the Northern Great Plains region, in addition to an inventory of coal resources.[21] One study in particular, the Northern Great Plains Resource Program[22] was an effort to coordinate ongoing federal activities and to build a policy which might guide future resources decisions by agencies in that area.[23] In the Northern Great Plains Resource Program implementing order from the Secretary to his staff in the interior Department, the Secretary declared:

> the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decision making. § 4331(b) of the Act states that agencies have an obligation "to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to preserve and enhance the environment". To this end, § 101 sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment. . . .

Environmental Def. Fund v. Corps of Eng'rs, 470 F.2d 289, 297 (8th Cir. 1972). For further discussion of substantive duties imposed by NEPA upon the courts and agencies, *see* ANDERSON, *supra* note 11, at 258-65.

15. 42 U.S.C. § 4332 (1970), quoted at length in note 5 *supra*. *See also* Yarrington, *supra* note 11, at 4-6.

16. 42 U.S.C. § 4332(2)(c) (1970), quoted at length in note 5 *supra*.

17. *See* Robie, *Recognition of Substantive Rights Under NEPA*, 7 NATURAL RESOURCES LAWYER 387 (1974); Yarrington, *supra* note 11, at 37-40; Note, *Threshold Determinations Under Section* 102(2)(c) *of NEPA*, 16 WM. AND MARY L. REV. 107, 108 (1974). *Compare* Environmental Def. Fund v. Hardin, 325 F. Supp. 1401, 1404 (D.D.C. 1971) *with* Environmental Def. Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297 (8th Cir. 1972), in which the Eighth Circuit Court of Appeals found that NEPA created substantive rights and is more than a full disclosure law.

18. K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 29.02, at 527, 30.03, at 548 (3d ed. 1972).

19. *Id.* § 30.03, at 548.

20. *Id.*, *see* ANDERSON, *supra* note 11, at 258.

21. Sierra Club v. Morton, 514 F.2d 856, 875-76 (D.C. Cir. 1975).

22. NORTHERN GREAT PLAINS RESOURCE PROGRAM, STAFF DRAFT REPORT (Washington, D.C., and Denver, Colo., Sept. 27, 1974).

23. *Id.* at I-4, I-5.

> The vast reserves of coal in the Fort Union region of Montana, North Dakota, South Dakota, and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resource development with proper regard for environmental protection. It is important that we not lose this opportunity by engaging in *single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.*[24]

When the massive Draft Report of the Program was issued however, it contained the statement that "[t]*he . . . coal development profiles* [within the Program] *do not represent plans for development. . . .*"[25] In comparing these statements, the court discerned an inconsistency between the Interior Department's prior policy statements and its later actions.[26]

The Interior Department demonstrated further appreciation of the practical effect that it continues to exert upon regional development when it proclaimed a coal leasing moratorium pending completion of a national environmental impact statement on proposed federal coal leasing policies.[27] Notwithstanding the moratorium, some federal activity in the Northern Great Plains continued, either through loopholes in the Interior Department's policy or through the exercise of other agencies' jurisdiction over national forests and navigable rivers.[28]

In a footnote before reaching the merits, the court readily disposed of two preliminary defenses raised by the defendant agencies.[29] First, the rule that a NEPA challenge against an individual project presents a justiciable controversy only after final agency approval[30] was found inappropirate in this case. The decision in *Scientist's Institute for Public Information v. Atomic Energy Commission*,[31] upon which the court relied, held that a comprehensive program is itself a proper subject for challenge, regardless of whether a program-related individual project has begun to significantly af-

24. Sierra Club v. Morton, 514 F.2d 856, 863, 876 (D.C. Cir. 1975) (emphasis added).
25. NORTHERN GREAT PLAINS RESOURCE PROGRAM, STAFF DRAFT REPORT, at I-5 (Sept. 27, 1974) (emphasis in original).
26. Sierra Club v. Morton, 514 F.2d 856, 876 (D.C. Cir. 1975).
27. *Id.* at 863-64 (D.C. Cir. 1975). For a discussion of proposed amendments to the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-263 (1970), and an argument by former Speaker of the House John McCormick that coal gasification will better serve the national economy by relying on Eastern and Central states' coal reserves, see 121 CONG. REC. 14564 (daily ed. July 31, 1975).
28. Sierra Club v. Morton, 514 F.2d 856, 864 nn.8-10 (D.C. Cir. 1975). The court commended the federal defendants for the amount of restraint they had demonstrated in allowing development up to that time, but expressed its alarm at the variety of available leasing loopholes and the increasing pressure for private development to begin immediately upon completion of the Northern Great Plains Resource Program Final Report. *Id.* at 866 & 883.
29. *Id.* at 868 n.20.
30. *See, e.g.*, Comm. to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972).
31. 481 F.2d 1079 (D.C. Cir. 1973).

fect the environment.[32] Similarly, in *Sierra Club* the plaintiffs were held to have stated a case or controversy in alleging an irretrievable commitment of resources, a reasonable basis for treating such commitments cumulatively, and a present requirement for filing a comprehensive environmental impact statement.[33] Since NEPA expressly mandates preparation of an environmental impact statement where any irreversible and irretrievable commitment of resources is about to occur,[34] plaintiffs' claim was deemed clearly within the Act. Additionally the ruling in *Calvert Cliff's Coordinating Committee v. Atomic Energy Commission*,[35] that NEPA's enforcement is a matter of judical jurisdiction, taken in conjunction with the *Scientist's Institute* decision that courts must intervene sufficiently early to prevent improper consideration of cumulative impacts,[36] provided the grounds necessary for immediate review.

The question of standing was resolved through the court's application of the rather liberal criteria developed by the United States Supreme Court in *Sierra Club v. Morton*,[37] the leading case on environmental plaintiffs' standing to sue. Under those criteria,[38] a showing by one of the plaintiff organizations that it was composed of residents from within a proposed mine site clearly demonstrated that it would suffer at least minimal injury in fact if any member's land was mined.[39] The plaintiffs' standing to sue was found to be perfected since their immediate injury was within the zone of interests which NEPA seeks to protect.[40]

The threshold question posed by NEPA's impact statement requirement is: when does a major federal action exist for the purposes of the impact statement requirement?[41] The case at bar is

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32. *Id.* at 1086-87.

33. Sierra Club v. Morton, 514 F.2d 856, 869 n.20 (D.C. Cir. 1975).

34. 42 U.S.C. § 4332(2)(c)(v) (1970), quoted at length in note 5 *supra.*

35. 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). In this case the court held that NEPA's procedural requirements were enforceable on the merits. By way of dictum, the court expressed its view that the substantive provisions are enforceable also. *Id.* at 1111 & 1115.

36. Scientist's Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1094 (D.C. Cir. 1973).

37. 405 U.S. 727 (1972). *See also* United States v. SCRAP, 412 U.S. 669 (1973); Scientist's Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973).

38. Sierra Club v. Morton, 405 U.S. 727, 738-40 (1972). The Court there held that aesthetic, conservational, recreational, and economic interests may each suffer an injury sufficient to confer standing, but that the party in suit must itself suffer that injury. The party's mere organizational interest is not sufficient, although once injury-in-fact is demonstrated the injured party may then assert the public's interest in support of its claim for equitable relief. *Id.* at 738-40 n.15.

39. *See* notes 1 & 33 *supra.*

40. *See* Data Processing Service v. Camp, 397 U.S. 150, 153-54, 157 (1970). NEPA seeks to protect each person's interest in a healthful environment by diffusing or preventing impacts from resource exploitation, population growth, and industrial expansion. 42 U.S.C. § 4331(a) & (c) (1970).

41. Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908; *cf.* Natural Res. Def. Council v. Morton, 388 F. Supp. 829 (D.D.C. 1974); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Natural Res. Def. Council v. Grant, 341 F. Supp. 356, 367 (E.D.N.C. 1972).

part of the attempt at judicial resolution of that question in the face of federal agencies' prerogative to construct individual definitions of the term. The initial judicial response to the federal agencies was that an individual project could be "major," depending, for example, on the degree of federal expenditure of time, money, or effort which it received.[42] The second stage of response was that the cumulative effect of federal actions, individually too "minor" to require an impact statement, could cumulatively have an effect significant enough to amount to a major federal action, therefore triggering the requirement of a statement.[43] The third response in the progression was that the cumulative effect of a series of federal actions which admittedly were individually major could require a comprehensive environmental impact statement.[44] The "comprehensive" criterion was added to the second and third responses because the cumulative effect itself had a significant impact which was distinct from those of the individual acts, and because that impact would not receive consideration in the statements prepared for individual actions.[45] Since the courts must implement consideration of environmental values where the agencies fail to do so, the burden upon them is to ensure that foreseeable environmental impact is considered before a point of no return is reached in impractical, inexpedient use of our nation's resources.[46]

The court in the present *Sierra Club* action looked to the prior responses and viewed its threshold question to be whether its *Scientist's Institute* ruling should be extended to require a comprehensive environmental impact statement where the responsible federal agency *denies* its involvement in an all inclusive program.[47] The court's view apparently places this case within the third level of responses to the broader threshold question of NEPA's application previously discussed.[48] *Scientist's Institute* held that the impact statement requirement directly applies to a comprehensive program which is admittedly a major federal action.[49] In *Scientist's Institute*, the

42. *See* Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972).

43. *See* Minnesota PIRG v. Butz, 358 F. Supp. 584 (D. Minn. 1973); Enewetak v. Laird, 353 F. Supp. 811 (D. Hawaii 1973); Natural Res. Def. Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972).

44. Scientist's Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973). *See also* Conservation Soc'y of S. Vermont v. Secretary of Transp., 508 F.2d 927 (2nd Cir. 1974); Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Natural Res. Def. Council v. Morton, 388 F. Supp. 829 (D.D.C. 1974).

45. *See* ANDERSON, *supra* note 11, at 290-92.

46. [T]he harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental facts into account in the way that NEPA mandates.

Jones v. Dist. of Col. Redev. Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974).

47. Sierra Club v. Morton, 514 F.2d 856, 871 (D.C. Cir. 1975).

48. *See* note 44 and accompanying text *supra*.

49. 481 F.2d 1079, 1081 (D.C. Cir. 1973).

defendant Atomic Energy Commission had been receiving a large annual appropriation for its nuclear research and development program which was to site and construct a number of nuclear reactors. The defendant Commission had also declared its intention to file an environmental impact statement upon commencing construction of each reactor, and thus had formally recognized NEPA's applicability. The court found that the large federal appropriation alone made the program sufficiently major, and that the public controversy about the potential risks surrounding nuclear reactors showed an imminent significant effect. Since the cumulative overlap of any environmental effects produced by the reactors was not to be considered in any phase of the program, the court ordered the defendant agency to file a comprehensive environmental impact statement as a condition precedent to continuing its program.[50]

The federal defendants in the case at bar had prepared impact statements for a few individual projects within the Northern Great Plains,[51] but unlike the defendant in *Scientist's Institute,* they denied any involvement in a comprehensive regional program. This fact prompted the court to expressly reserve the right to probe the substance of the agencies' denial.[52] The court's reservation was made with reliance upon *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation.*[53] In that case, the court held that the present improvement of a twenty mile stretch of U.S. highway within the State of Vermont was an irretrievable commitment of resources requiring preparation of a comprehensive impact statement.[54] The court found that federal expectations were to eventually convert the improved stretch into a two-hundred-eighty mile interstate highway, as annual federal funding became available. In *Conservation Society,* as in the case at bar, the federal defendants had no present plan which set forth the full program in its entirety. If such a plan had been clearly present in either case, then the respective courts could have directly applied the impact statement requirement.[55] Instead, those courts found that portions of the *de facto*

50. *Id.*

51. Sierra Club v. Morton, 514 F.2d 856, 865 n.15 (D.C. Cir. 1975). One of the impact statements prepared by the federal agencies involved in the suit had actually included comprehensive consideration of four mine sites and two railroad routes within the Eastern Powder River Basin in northeastern Wyoming. The close geographical proximity of the six developments and their cumulative environmental impact was the apparent constraint in considering them at a somewhat regional level. Although this was not a point of contention on review, the federal agencies seem to have practically conceded the question at issue: whether a regional impact merits regional assessment by means of NEPA's impact statement provision. *Id.*

52. *Id.* at 874.

53. 508 F.2d 927 (2d Cir. 1974).

54. *Id.* at 935.

55. Both the *Conservation Society* and the *Sierra Club* courts took a hard look at the facts presented to find that de facto programs existed. Were the programs formally declared, they would manifestly have been "major federal actions" causing "irreversible

program which were about to be undertaken were irretrievably committing resources. Also, the agencies involved expected the full program itself to become a major federal action of significant effect. Thus, the remaining threshold question was whether the time was ripe for preparing the comprehensive statement for the program. In *Conservation Society*, ripeness was sufficient because enough highway routing decisions had occurred so that a definite proposal for major federal action existed within NEPA's meaning.[56]

The unique question of ripeness arising in the present case was whether a court could require the filing of a comprehensive environmental impact statement "if it found that a comprehensive program *should be* under way."[57] The court first looked to the Guidelines of the Council on Envoronmental Quality[58] in responding to this question. As a part of its functions, the Council is specifically directed to issue guidelines for preparation of impact statements by federal agencies.[59] The Guidelines have been interpreted to require a degree of deference from the courts since the Council is charged with appraising agency compliance with NEPA and also because the Council's interpretation of compliance was issued soon after NEPA's enactment.[60] The fact that the Guidelines specified coal development as an example of cumulative impact upon a geographical region led the court to accept the plaintiff's theory that comprehensive planning should be required of the agencies where cumulatively related effects are shown.[61]

But the court's final position was that the practical problems of imposing a duty to plan comprehensively upon agencies would entangle the judiciary in the daily affairs of government and infringe upon administrative discretion. The court thus held that it is for the agencies to initially decide whether a comprehensive plan is required.

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and irretrievable commitments of resources," or, put differently, "major federal actions" *per se*.

> In the context of long-range programs such as those discussed above . . . compliance with NEPA is necessary at stages at which significant resources are being committed lest the statute's basic purpose be thwarted.

Scientist's Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1078, 1087 n.29 (D.C. Cir. 1973).

56. Conservation Soc'y of S. Vermont v. Secretary of Trans., 508 F.2d 927, 935 (2d Cir. 1974).

57. Sierra Club v. Morton, 514 F.2d 856, 874 (D.C. Cir. 1975) (emphasis by the court).

58. Exec. Order No. 11,514, § 3(h), 3 C.F.R. 902 (1966-70 Comp.), 42 U.S.C. § 4321 (1970). For the full text of the Guidelines, see 40 C.F.R. § 1500 (1974). The Council on Environmental Quality was created by Title II of NEPA, 42 U.S.C. § 4344 (1970). Its basic responsibility is to review and appraise agency compliance with NEPA. *Id.* at § 4344(3).

59. *Id.*

60. The doctrine of judicial deference to administrative interpretation is enhanced in this instance since Congress designated this particular agency, The Council of Environmental Quality, to promote the statute's efficiency, and also because the Council was probably informed directly of the Congressional intent at the time the duty was created. *See* Udall v. Tallman, 380 U.S. 1, 16 (1965); Power Reactor Dev. Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961).

61. Sierra Club v. Morton, 514 F.2d 856, 875 (D.C. Cir. 1975).

It stated that "the agencies . . . are supposed to organize the various federal projects throughout the country, not litigants. . . ."[62] The role of the court was ostensibly limited to deciding whether an agency must file a regional environmental impact statement for a comprehensive plan which is in actual operation.[63]

The court's reluctance to intrude upon administrative jurisdiction was tempered by its firm rejection of complete agency discretion in deciding when an action is a "program."[64] This prompted the court to leave open the possibility of imposing a duty to plan comprehensively upon the agencies.[65] The power to require systematic, interdisciplinary studies would allow the courts to reach administrator's decisions during their formulation at the highest policy level. Such a power would thereby enable enforcement of environmental consideration to the fullest extent possible and greatly strengthen NEPA's substantive sections.[66]

The overwhelming amount of federal time and effort which was expended to produce a regional treatment of coal development in the Northern Great Plains compelled the court to conclude that the resulting "proposal" for regional development would require the present filing of a comprehensive impact statement.[68] The court then applied a balancing test for ripeness which it had developed in *Scientist's Institute*,[69] but found the test inconclusive because of the federal defendants' failure to define their long-term position in allowing development.

The inconclusive result of the test is due principally to the fact that the defendants acted inconsistently toward the Northern Great Plains Region, and leaves the test's usefulness somewhat jeopar-

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62. *Id.* at 875.

63. For a thorough discussion of "action" as a definitional tool which would trigger the impact statement requirement, thereby decreasing the uncertainty in timing and scope of the statement, *see* Comment, *Planning Level and Program Impact Statements Under the National Environmental Policy Act: A Definitional Approach*, 23 U.C.L.A. L. REV. 124 (1975).

64. Sierra Club v. Morton, 514 F.2d 856, 873 (D.C. Cir. 1975). The court specified six circuits holding that injunctive relief is a proper remedy for substantive violations of NEPA. *Id.* at 874 n.25.

65. *Id.* at 874.

66. For discussion of administrative decision-making generally and as applied to NEPA, *see* ANDERSON, *supra* note 11, at 246-74; Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511 (1973); Comment, *NEPA Applied to Policy-Level Decisionmaking*, 3 ECOL. L.Q. 799 (1974).

67. Sierra Club v. Morton, 514 F.2d 856, 874-75 (D.C. Cir. 1975).

68. *Id.* at 875.

69. 481 F.2d 1079 (7th Cir. 1972). The agency, or the reviewing court, should inquire as follows:

> How likely is the program to come to fruition, and how soon will that occur?
> To what extent is meaningful information available on the efects of implementation of the program, and of alternatives and their effects?
> To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses?
> How severe will be the environmental effects if the program is implemented?

Id. at 880.

dized.[70] The court found that meaningful information on the effects of coal development and the alternatives to such development would be available for consideration in a comprehensive statement.[71] Also, it found that the environmental effects from coal development will clearly be severe because "a region isolated from urban America, sparsely populated and virtually unindustrialized will be converted into a major industrial complex."[72] The further findings that the federal government would probably approve development in the near future, but that it was substantially avoiding irretrievable commitments of coal and water until such approval, left the court with mixed inclinations toward the ripeness issue.[73]

Although the court found that the time was not yet ripe for a comprehensive impact statement for coal development in the Northern Great Plains region, it did find that the federal defendants would be free to approve further development in the region upon completion of the Northern Great Plains Resource Program Final Report.[74] The court then correlated the agencies' freedom of action with a duty to decide what their respective roles would be in relation to NEPA. In so doing, it reinforced the degree of good faith compliance with NEPA's procedure which the federal defendants had exhibited through the leasing moratorium and the Northern Great Plains Resource Program. To bolster further compilance, the court con-

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70. *See* Comment, *supra* note 63, at 152. The author there states that the criteria borrowed from *Scientist's Institute* merely invites bureaucratic obfuscation by allowing the agencies to define their own role. But, the point made is that the federal duty to administer federal lands will inevitably require the agencies to respond to increasing development pressures by preparing a comprehensive plan as a result of systematic interdisciplinary studies mandated by NEPA. *Id.*

71. Sierra Club v. Morton, 514 F.2d 856, 880 (D.C. Cir. 1975). The Interior Department through its Northern Great Plains Resource Program had stated:

> Considerable uncertainty remains regarding the impacts of coal development in the Northern Great Plains. It is extremely difficult to estimate or assess cumulative impacts. However, these impacts may be critical. Is the impact of two mines or power plants in the same area twice as great as the impact of one, or is it larger?

NORTHERN GREAT PLAINS RESOURCE PROGRAM, STAFF DRAFT REPORT at V-2 (Sept. 27, 1974). Despite the seeming lack of answers to its questions in regard to air quality impacts the Interior Department was already aware from its own previous North Central Powers Study, that:

> Once the proposed coal-burning power plants begin operation at their enormous generating capacity, the region's air-quality—now almost pure and containing little industrial pollution—will be seriously degraded. Based on an operating capacity of only 53,000 megawatts—which may be only a portion of their ultimate capacity—and upon full compliance with the New Stationary Source Emission Standards of the Environmental Protection Agency, these plans will produce annual emissions of 2,730,000 tons of sulfur oxides, 1,879,000 tons of nitrogen oxides and 94,500 tons of particulates (fly ash). These amounts represent approximately *four times* the present combined emissions of New York City and Los Angeles. . . .

Brief for Appellants at 151-6, Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975), *citing* North Central Power Study, City of New York Air Resources Department, and County of Los Angeles Air Pollution Control District.

72. Sierra Club v. Morton, 514 F.2d 856, 880 (D.C. Cir. 1975).

73. *Id.* at 881.

74. *Id.*

tinued the limited temporary injunction it had earlier issued.[75] Injunctive relief, the court noted, would preserve the status quo in that portion of the region most immediately subject to irretrievable commitment of its resources.

Sierra Club v. Morton is potentially a trend-setting case for a number of reasons. Because of its broad application to inter-agency actions which are linked either programatically, geographically, or environmentally, the *Sierra Club* ruling may exert significant constraint upon such actions at the highest policy-making levels. The ruling should implement systematic, inter-disciplinary studies of cumulative impacts among agencies regardless of whether an agency has originated an individual plan in the seculsion of its own bureaucracy. In the context of this case, a comprehensive environmental impact statement should embrace the Northern Great Plains, and should focus upon leasing, mining, rights-of-way, and water rights in order to confront decision-makers with the full range of impacts and alternatives. Such a confrontation is clearly needed to prevent the easy, but fatally myopic, answers proposed in response to a questionable energy crisis.[76] Ultimately, if a particular mine site is chosen by this process, it should yield a long-term net benefit to the region and to the nation, not merely the immediate landowner or municipality. Such a choice will go far toward implementing NEPA's substantive meaning and the most environmentally sound development of natural resources.

GREG HENNESSY

75. *Id.* at 883.

76. In the field of electric utilities, the Environmental Protection Agency allows those utilities to find low sulfur coal and then use no sulphur oxide scrubbing devices to take the remaining sulphur out of the coal. And the result is that utilities all over the country . . . are going to Montana and Wyoming to find low sulphur coal so that they will not have to use technology to take out sulphur from coal as they must when using a higher sulphur-content coal.

Terris, *Environmental Critique*, 7 NATURAL RESOURCES LAWYER 217 (1974).