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FLINT RIDGE DEVELOPMENT CO. v. SCENIC RIVERS ASSOCIATION: LIMITING THE APPLICABILITY OF NEPA

In response to the increasing concern about environmental degradation, Congress enacted the National Environmental Policy Act of 1969 (NEPA).¹ NEPA requires all agencies of the federal government "to the fullest extent possible"² to include in every proposal for legislation and other major federal actions significantly affecting the environment an environmental impact statement (EIS) discussing the consequences and alternatives of the proposed action.³ Congress intended NEPA to

1. National Environmental Policy Act of 1969 (NEPA), §§ 101-105, 201-207, 42 U.S.C. §§ 4321-4347, (1970 & Supp. V 1975). For an excellent general discussion of NEPA, see F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (1973) [hereinafter cited as ANDERSON]. For the legislative history of NEPA, see H.R. REP. NO. 91-378, 91st Cong., 1st Sess. (1969); SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S.REP. NO. 91-296, 91st Cong., 1st Sess. (1969); 2 U.S. CODE CONG. & AD. NEWS 2751-73 (1969).

NEPA is a Congressional statement of environmental policy setting forth the need to achieve and preserve harmony in man's relationship to his physical surroundings, and to promote efforts which will prevent environmental degradation. See NEPA § 101, 42 U.S.C. §§ 4321, 4331 (1970). NEPA directs that all federal agencies consider the environmental consequences of their activities and incorporates action-forcing procedures designed to assure that agencies adhere to the policies and goals of the Act. NEPA § 102, 42 U.S.C. § 4332 (1970). See note 2 and accompanying text *infra*. In addition, NEPA created and defined the duties of the Council on Environmental Quality. See NEPA §§ 42 U.S.C. §§ 4341-4347 (1970).

Section 101 of NEPA, 42 U.S.C. § 4331 (1970), reads in part:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures, . . . in a manner calculated to foster and promote the general welfare, [and] to create and maintain conditions under which man and nature can exist in productive harmony . . .

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end . . . [that certain broad national goals in the management of the environment may be attained].

For concise statement of the general policies and provisions of NEPA, see 115 CONG. REC. 19008-13 (1969) (statement of Sen. Jackson). See also SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S.REP. NO. 91-296, 91st Cong., 1st Sess. (1969).

2. 42 U.S.C. § 4332 (1970).

3. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970). Section 102(2)(C) provides in pertinent part:

reorder national priorities⁴ and to serve as a broad mandate to federal agencies to consider the environmental consequences of their actions.⁵ Furthermore, the phrase "to the fullest extent possible" was added to insure that each federal agency would comply with the procedural directives of NEPA unless expressly prohibited from doing so by its statutory authorization.⁶

In *Flint Ridge Development Co. v. Scenic Rivers Association*,⁷ the United States Supreme Court jeopardized these goals by allowing practical inconvenience alone to render NEPA's impact statement directive completely inapplicable. Under the Interstate Land Sales Full

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal government shall . . .

(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 implemented.

Prior to making 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 any environmental impact involved. Copies of such statement and the comments and view of the appropriate 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. . . .

"At the very least, NEPA is an environmental full disclosure law." *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749, 759 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972). See *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972). The purpose of the EIS process is to alert both decisionmakers and the general public to the potential environmental effects of proposed action and to minimize adverse effects wherever possible. See 40 C.F.R. § 1500.2 (1975).

The "action-forcing" provision, added in § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970), which requires all agencies to the fullest extent possible to prepare environmental impact statements for all major federal actions, is the keystone of NEPA. It was incorporated late in the legislative process in response to fears that NEPA would be ineffective unless it included procedures designed to ensure implementation of its policies. This requirement has had a fundamental impact on the federal agency decision-making process. See ANDERSON, *Preface* to ANDERSON, *supra* note 1, at vii. See also FISHER, *Foreword* to ANDERSON, *supra* note 1, at v [hereinafter cited as FISHER].

4. See generally 115 CONG. REC. 19009 (1969) (remarks of Sen. Jackson).
5. See S. REP. NO. 91-296, 91st Cong., 1st Sess. 14 (1969).
6. See CONF. REP. ON S. 1075, H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 9 (1969).
7. 96 S. Ct. 2430 (1976).

Disclosure Act,⁸ a disclosure statement will automatically become effective within thirty days of filing unless the Department of Housing and Urban Development (HUD) finds that the statement is inaccurate or incomplete *on its face*.⁹ Justice Marshall, in a unanimous opinion, declared that HUD was not required to prepare an EIS prior to allowing a disclosure statement to become effective because there would be a clear and fundamental conflict between HUD's statutory deadline under the Disclosure Act and the inherent delay caused by preparation of an EIS.¹⁰ The decision advances a theory of statutory conflict as a means of circumventing NEPA's procedural mandates.

In *Scenic Rivers*, environmental groups concerned with potential water pollution from a housing development along the Illinois River¹¹

8. 15 U.S.C. §§ 1701-1720 (1970). The Interstate Land Sales Full Disclosure Act was passed in 1968 to prevent misrepresentation, deceit and other abusive practices in the sale of land by requiring developers to make full public disclosure of information needed by potential buyers. Under the Disclosure Act, before a developer can lawfully "make use of any means or instruments of transportation or communication in interstate commerce, or of the mails . . . to sell or lease any lot" he must have an effective disclosure statement on file with HUD. *Id.* §§ 1703(A)-1703(A)(1).

The disclosure statement, or "Statement of Record" as it is referred to in the Act, *id.* § 1705, is to include various information concerning the property such as: names of the interested parties, condition of title, price and terms of sale; sub-division description; access to sewage, electricity, gas, other municipalities, and "such other information . . . as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers." *Id.* § 1705(12). By regulation, a Statement of Record must include a Property Report. 24 C.F.R. § 1710.20(a)-.20(e), .110 (1976). The Property Report contains such of the information included in the Statement of Record as the Secretary deems necessary, and "such other information as the Secretary may . . . require as being necessary or appropriate *in the public interest* or for the protection of purchasers." 15 U.S.C. § 1707(a) (1970) (emphasis added). For general commentary on the Disclosure Act, see CONF. REP. NO. 1785, 90th Cong., 2d Sess. (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 3053, 3066; Coffey & Welch, *Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth*, 21 CASE W. RES. L. REV. 5 (1969); Ellis, *Land Sales Full Disclosure Laws: Federal and Illinois*, 60 ILL. B.J. 16 (1971); Note, *S. 275—The Interstate Land Sales Full Disclosure Act*, 21 RUTGERS L. REV. 714 (1967); Note, *Interstate Land Sales Regulation: The Case For an Expanded Federal Role*, 6 U.MICH. J.L. REF. 511 (1973); 27 ARK. L. REV. 65 (1973).

9. 15 U.S.C. § 1706 (1970) (emphasis added).

10. 96 S. Ct. at 2439.

11. Flint Ridge Development Co., one of the appellants, organized a housing development covering 7,000 acres of land adjacent to the Illinois River in northeastern Oklahoma. The river had been designated as a "scenic river" by the state and respondents were non-profit corporations designed to protect the river and its environs which many of their members use for outdoor recreation. If all 3,000 lots in the appellant's subdivision were sold and developed there would be 3,000 septic tanks disposing refuse into the Illinois River. Because of the porous nature of the soil in this area, the septic tank seepage would pollute the river and destroy the environmental quality of the basin. Respondents were concerned about this potential situation and sought to enjoin HUD's

brought suit against HUD for failing to suspend the effective date of the developer's disclosure statement pending preparation of an EIS.¹² The district court and the Tenth Circuit held that HUD's decision to allow a disclosure statement to become effective constituted a "major Federal action"¹³ within the meaning of NEPA and that HUD, therefore, was required to prepare an EIS prior to taking such action.¹⁴ On appeal to the Supreme Court, appellants asserted that even if HUD's decision was a major federal action, it would be impossible¹⁵ for HUD

approval of the developer's disclosure statement. *See Scenic Rivers Ass'n v. Lynn*, 382 F. Supp. 69, 71-73 (E.D. Okla. 1974), *aff'd*, 520 F.2d 240 (10th Cir. 1975), *rev'd sub nom. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 96 S. Ct. 2430 (1976).

12. 96 S. Ct. at 2435.

13. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970). Under this section there must be a major federal action significantly affecting the human environment before NEPA's impact statement requirement is applicable. Courts have construed this category to include a wide range of agency activities. *See, e.g.,* Scientists Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) (AEC's research and development program as a whole); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) (approval of a lease on Indian lands); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (sale of off-shore oil lands); *Greene County Planning Bd. v. Federal Power Comm'n*, 455 F.2d 412 (2d Cir. 1972) (granting of a license to construct high voltage power line); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1972), *cert. denied*, 409 U.S. 849 (1972) (construction of highways); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 337 F. Supp. 287 (D.D.C. 1971) (construction of a dam); *Izaak Walton League of America v. Schlesinger*, 325 F. Supp. 749 (E.D. Ark. 1971) (issuing of interim operating license for nuclear power plant). For an excellent discussion of the kinds of activities that have been found to be major federal actions, see ANDERSON, *supra* note 1, at 56-105. *See also* Note, *Major Federal Actions Under the National Environmental Policy Act*, 44 FORDHAM L. REV. 580 (1975); 7 CONN. L. REV. 733 (1975); 29 OKLA. L. REV. 165 (1975); 124 U.P.A. L. REV. 250 (1975); 1975 WASH. U.L.Q. 485.

14. Both the district court and the court of appeals, based their decisions on *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) and *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973), which held that where a federal license or permit is involved, or where Congress has exercised its plenary power of regulation under the commerce clause, or other constitutional authority, federal approval constitutes major federal action. The lower courts found NEPA's impact statement requirement to be applicable because the approval of a filing under the Disclosure Act is in the nature of a federal license or permit to lawfully engage in sales in interstate commerce. *See Scenic Rivers Ass'n v. Lynn*, 520 F.2d 240, 243-44 (10th Cir. 1975), *aff'g* 382 F. Supp. 69, 75 (E.D. Okla. 1974), *rev'd sub nom. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 96 S. Ct. 2430 (1976).

15. Preparation and circulation of an impact statement is a notoriously lengthy process. Impact statements on simple projects may take from three to five months to complete, even by experienced personnel. COUNCIL ON ENVIRONMENTAL QUALITY, SIXTH ANNUAL REPORT 639 (1976). Impact statements on complex projects prepared by inexperienced personnel may take up to 18 months to draft. Once the drafting is completed, the statements are submitted to other agencies for comments. Those agencies have 45 days to make their comments. For the Council on Environmental Quality (CEQ) timetable of the impact statement process, see 40 C.F.R. § 1500 (1973).

to comply with both NEPA's impact statement directive and the Disclosure Act's deadline.¹⁶ The Supreme Court agreed and reversed, holding that the inconsistency between NEPA and the Disclosure Act excused HUD from preparation of an EIS.¹⁷

NEPA generally requires that a federal agency prepare an environmental impact statement prior to taking action that constitutes a major federal action significantly affecting the environment.¹⁸ There are, however, instances where the preparation of an EIS will not be required because the mandate need only be complied with "to the fullest extent possible."¹⁹ In the uncertainty surrounding early efforts to implement NEPA, courts generally gave a narrow reading to the phrase "to the fullest extent possible," requiring only limited adherence to NEPA.²⁰ This trend was reversed by the forceful opinion in *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*.²¹ Courts have since construed the phrase to demand strict compliance with NEPA.²² In *Calvert Cliffs'*, the Court of Appeals for the District of Columbia stressed that this language "does not provide an escape hatch for footdragging agencies"²³ but demands that procedural duties imposed by NEPA be complied with to the utmost unless they clearly conflict with other statutory authority applicable to the agency.²⁴ The court noted that agencies are not to construe their authorizing

16. 96 S. Ct. at 2437.

17. *Id.* at 2439.

18. See note 13 *supra*.

19. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

20. See *Daly v. Volpe*, 326 F. Supp. 868, 870 (W.D. Wash. 1972); *Sierra Club v. Hardin*, 325 F. Supp. 99, 125-26 (D. Alas. 1971). In *Daly* no impact statement had been submitted prior to approval of a highway location, but there had been hearings and meetings about the project. In addition two studies of proposed routes had been undertaken. The court held this to be substantial compliance with NEPA. 326 F. Supp. at 870. In *Sierra Club v. Hardin*, informal environmental studies performed by applicants for Forest Service projects were held to be sufficient to meet the service's duty to prepare an impact statement under NEPA. 325 F. Supp. at 125-26. See also ANDERSON, *supra* note 1, at 52.

21. 449 F.2d 1109 (D.C. Cir. 1971).

22. ANDERSON, *supra* note 1, at 49. See, e.g., *Louisiana v. Federal Power Comm'n*, 503 F.2d 844, 874-77 (5th Cir. 1974); *Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142, 150-51 (5th Cir. 1973); *Silva v. Romney*, 473 F.2d 287, 292 (1st Cir. 1973); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972); *Davis v. Morton*, 469 F.2d 593 (3d Cir. 1972); *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164, 1175-77 (6th Cir. 1972); *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971); *Natural Resources Defense Council, Inc. v. SEC*, 389 F. Supp. 689, 695, 700 (D.D.C. 1974); *Daly v. Volpe*, 350 F. Supp. 252, 257 (D. Wash. 1972).

23. 449 F.2d at 1114.

24. *Id.* at 1115. The *Calvert Cliffs'* court relied on the legislative history of NEPA.

legislation narrowly so as to avoid compliance with NEPA²⁵ and that considerations of administrative difficulty or delay will not suffice to deny NEPA's "action-forcing" provisions their intrinsic importance.²⁶ The *Calvert Cliffs*' approach has been widely accepted as the definitive judicial stance on NEPA.²⁷

When faced with statutory conflict questions involving NEPA, courts have examined the underlying purposes and practical applications of the two ostensibly irreconcilable acts to determine whether a real conflict, within the confines of the *Calvert Cliffs*' doctrine, is presented.²⁸ NEPA's impact statement requirement has been upheld when courts have found the conflict to be nonexistent.²⁹ In *Ely v. Velde*,³⁰ the Fourth Circuit was confronted with an apparent conflict between preparation of an EIS and the Law Enforcement Assistance Administration's (LEAA) obligations under the Organized Crime Control and Safe Streets Act.³¹ The Act provides block grants to states for various law enforcement purposes. Funds are to be allocated with a minimal number of federal conditions attached.³² LEAA argued that under the Safe Streets Act's "hands off" policy it was precluded from requiring submission of environmental information by the states to enable the agency to draft an impact statement.³³ The court held that there was no antagonism between the policies of NEPA and the Safe Streets Act because Congress intended the "hands off" provision only to prevent the creation of a federal police force and not to preclude consideration of environmental consequences.³⁴ Thus, the court found

The guidelines issued by the Council on Environmental Quality (CEQ) contain similar language. 40 C.F.R. § 1500.4 (1973).

25. 499 F.2d at 1115. The court here quoted from the language of the drafters of the "fullest extent possible" phrase. The drafters stated in pertinent part:

The purpose of this new language is to make it clear that each agency of the Federal government shall comply with [the procedural directions of NEPA] *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance impossible . . . and . . . no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance. CONF. REP. ON S.1075, H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 9 (1969).

26. 449 F.2d at 1115.

27. ANDERSON, *supra* note 1, at 247. *See, e.g.*, note 22 *supra* and cases cited therein.

28. *E.g.*, *Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142 (5th Cir. 1973).

29. *E.g.*, *Louisiana v. Federal Power Comm'n*, 503 F.2d 844, 873-77 (5th Cir. 1974); *Ely v. Velde*, 451 F.2d 1130, 1134-37 (4th Cir. 1971).

30. 451 F.2d 1130 (4th Cir. 1971).

31. 42 U.S.C. §§ 3701-3795 (1970).

32. *See* 42 U.S.C. §§ 3733, 3757, 3766(a) (1970).

33. 451 F.2d at 1135.

34. *Id.*

that filing an EIS was obligatory.³⁵

In *Louisiana v. Federal Power Commission*,³⁶ the Fifth Circuit reconciled the Natural Gas Act³⁷ with NEPA.³⁸ The Natural Gas Act requires the Federal Power Commission (FPC) to promulgate permanent curtailment plans to allocate scarce natural gas supplies in a manner that protects consumers from discriminatory practices by gas companies.³⁹ The court rejected the FPC's claim that a plan constructed to meet the agency's duty under the Natural Gas Act would not be predictable enough to lend itself to analysis by impact statement⁴⁰ and held the impact statement directive was applicable, noting that NEPA only requires the FPC to prepare the best impact statement possible.⁴¹

In a variety of cases, however, courts have determined the conflict between agency duties under NEPA and under their primary statutory authority to be clear and unavoidable.⁴² In these instances conformance with the impact statement mandate has not been required. Courts have found such irreconcilable conflicts to exist in cases involving emergency legislation or other laws calling for prompt or temporary agency action in order to protect the public welfare.⁴³ The courts have determined that the congressional purposes underlying the acts in-

35. *Id.*

36. 503 F.2d 844 (5th Cir. 1974).

37. 15 U.S.C. §§ 717-717w (1970).

38. 503 F.2d at 876.

39. *See* 15 U.S.C. 717(d) (1970).

40. 503 F.2d at 876.

41. *Id.*

42. *See, e.g.,* *Milo Community Hosp. v. Weinberger*, 525 F.2d 144 (1st Cir. 1975); *Gulf Oil Corp. v. Simon*, 502 F.2d 1154 (Emer. Ct. App. 1974); *Dry Color Mfg. Ass'n v. Department of Labor*, 486 F.2d 98 (3d Cir. 1973); *Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142 (5th Cir. 1973); *Cohen v. Price Comm'n*, 337 F. Supp. 1236 (S.D.N.Y. 1972).

43. *See, e.g.,* *Milo Community Hosp. v. Weinberger*, 525 F.2d 144 (1st Cir. 1975) (an impact statement was not required prior to termination of the federally assisted status of a hospital due to noncompliance with fire safety regulations, under the Health Insurance for the Aged Act, 42 U.S.C. §§ 1395-1395pp (1970)); *Gulf Oil Corp. v. Simon*, 502 F.2d 1154 (Emer. Ct. App. 1974) (no impact statement was required prior to the institution of mandatory crude oil allocations under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-756 (Supp. III 1973) (amended 1975)); *Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142 (5th Cir. 1973) (the impact statement requirement was held inapplicable to promulgation, during a gas shortage, of interim gas curtailment plans under the Natural Gas Act, 15 U.S.C. §§ 717-717w (1970)); *Cohen v. Price Comm'n*, 337 F. Supp. 1236 (S.D.N.Y. 1972) (authorization of a subway and bus fare increase under the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (Supp. I 1971) was not required to be preceded by the drafting of an impact statement).

volved would be frustrated by the implementation of the time consuming impact statement directive.⁴⁴ In *Dry Color Manufacturers' Association v. Department of Labor*,⁴⁵ the Third Circuit declared that the duty imposed on the Department of Labor by the Occupational Safety and Health Act (OSHA) was inconsistent with preparation of an impact statement.⁴⁶ Under OSHA, the Department of Labor is obligated to protect employees from health hazards and is authorized to promulgate temporary standards toward this end.⁴⁷ The court held that the Department of Labor need not complete the lengthy impact statement process prior to issuing emergency temporary standards under the Act, limiting employee exposure to possible carcinogens because to do so would be contrary to the expressed intent of OSHA.⁴⁸

In another group of cases the impact statement mandate has been held inapplicable because the allegedly conflicting act requires the functional equivalent of NEPA's environmental assessment procedures.⁴⁹ For example, under the Clean Air Act⁵⁰ the Environmental Protection Agency (EPA) is to promulgate standards of performance

44. See, e.g., *Milo Community Hosp. v. Weinberger*, 525 F.2d 144 (1st Cir. 1975) (the court held that Congress in the Health Insurance for the Aged Act intended a hospital's federally assisted status to be terminated promptly upon a finding of noncompliance with fire standards, and without consideration of environmental effects of termination); *Gulf Oil Corp. v. Simon*, 502 F.2d 1154 (Emer. Ct. App. 1974) (where it was determined that Congress' purpose in enacting the Emergency Petroleum Act of 1973 was to authorize immediate agency action to avoid the paralyzing results of a nationwide shortage of crude oil); *Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142 (5th Cir. 1973) (the court held that the Natural Gas Act required immediate interim curtailment action in the emergency situation presented by a national gas shortage); *Cohen v. Price Comm'n*, 337 F. Supp. 1236 (S.D.N.Y. 1972) (the purpose of the Economic Stabilization Act was found to be the prompt stabilization of the nation's troubled economy).

45. 486 F.2d 98 (3d Cir. 1973).

46. *Id.* at 108.

47. *Id.* at 101, 108.

48. *Id.* at 108. The court also noted that although this is a sacrifice of NEPA's policy it is mitigated by the fact that emergency standards must be replaced by permanent standards within six months and those would have to be preceded by preparation of an impact statement.

49. See, e.g., *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839 (7th Cir. 1975); *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973); *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973). With regards to the Clean Air Act, the question of the application of NEPA is no longer one of judicial determination. The Energy Supply and Environmental Coordination Act of 1974 specifically says: "No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the environment within the meaning of [NEPA]."

15 U.S.C. § 793(C)(1) (Supp. IV 1974).

50. 42 U.S.C. §§ 1857a-1857d (1970).

governing emission of air pollutants by stationary sources. The Clean Air Act requires the regulations to reflect the "best system of emission reduction" and orders EPA to weigh the costs of attaining such reduction.⁵¹ In *Portland Cement Association v. Ruckelshaus*,⁵² the District of Columbia Circuit held that this process was procedurally and fundamentally equivalent to the environmental impact statement process and served the same purpose of alerting the public and Congress to the environmental implications of proposed agency action. Thus an EIS was not required.⁵³

The Supreme Court considered *Scenic Rivers* in light of this background. The Court first chose to avoid the "major Federal action" issue and concentrated on the alleged statutory conflict.⁵⁴ Recognizing that NEPA is to be strictly applied unless there is an unavoidable conflict, the Court construed the Disclosure Act to permit HUD to suspend the effective date of a disclosure statement only to allow the

51. *Id.* § 1857c-6.

52. 486 F.2d 375 (D.C. Cir. 1973) (plaintiffs challenged promulgation of stationary standards for portland cement plants on the grounds of failure to prepare an impact statement).

53. *Id.* at 386.

54. A finding of "major Federal action" is necessary in order for the impact statement requirement to apply, *see* note 3 and accompanying text *supra*. In fact the lower courts had decided the case on this issue, *see* notes 13-14 and accompanying text *supra*. To many this was the significance of the case, *see* [1976 Current Dev.] ENVIR. REP. (BNA) 2143 (Apr. 23, 1976) (*Scenic Rivers* was referred to as presenting the Supreme Court with the question of what constitutes a major federal action).

There are a number of probable reasons for the Supreme Court's decision to avoid the major federal action question. Traditionally "major Federal action" has been defined by the lower courts. A holding in *Scenic Rivers* based on major federal action would have had wide implications. If the Court had decided that this was a major federal action, the concept of major federal action would have been expanded almost to the point of including *any* federal action. This would have been highly undesirable from a public policy standpoint, for the resulting administrative burden would have been crushing. Not only would HUD have had to prepare impact statements for the 7,000 filings it had on record at the time, *see* [1976 Current Dev.] ENVIR. REP. (BNA) 2143 (Apr. 26, 1976), but, in addition, due to the similarity of actions under the Securities Act of 1933, the Securities and Exchange Commission would also have been required to comply. Furthermore, as a result of this expanded definition of major federal action, it is probable that many similar non-discretionary federal actions would have required preparation of an impact statement.

Had the Court held there was no major federal action, it would have created the first barricade to the broadening lower court definition of "major federal action." In so doing, some federal actions which have a tremendous effect on the environment might have been effectively removed from the realm of NEPA if they could be likened to HUD's action under the Disclosure Act.

By deciding the case on the statutory conflict basis the Court may have felt that it could limit its holding to the facts of *Scenic Rivers* and thereby avoid an upheaval of the evolving major federal action doctrine.

developer to remedy inadequacies in the statement and concluded that NEPA did not implicitly grant HUD the power to suspend an adequate disclosure statement pending preparation of an EIS.⁵⁵ In addition, the Court noted that it was inconceivable that the impact statement process of drafting, commentary and revision could be completed within thirty days.⁵⁶ Since HUD could not simultaneously comply with its duties under both statutes,⁵⁷ the Court held NEPA to be inapplicable.⁵⁸

Clearly *Scenic Rivers* does not present the type of statutory conflict commonly accepted to excuse an agency from preparation of an EIS. The Disclosure Act is neither functionally equivalent environmental

55. 96 S. Ct. at 2439. The Court refused to accept plaintiffs' argument that HUD has the inherent power under the Disclosure Act to suspend the effective date of a disclosure statement past the 30 day deadline in order to allow time to prepare an impact statement. This argument had been accepted by the Tenth Circuit, where the court based its conclusion on the fact that no provision of the Disclosure Act *prohibited* the agency from suspending a statement pending preparation of an impact statement. The Supreme Court, in rejecting plaintiffs' contention, relied on *United States v. SCRAP*, 412 U.S. 669 (1973), which held that NEPA was not meant to impliedly repeal any other act.

56. 96 S. Ct. at 2438. *See* note 15 *supra*.

57. 96 S. Ct. at 2439. The Court did suggest that HUD might have some duties under NEPA that could be carried out within the confines of the Disclosure Act. *Id.* at 2439-40. For, under 15 U.S.C. § 1705(12)(1970) and 15 U.S.C. § 1707(a) (1970) HUD was empowered to require the inclusion of environmental information in the developer's disclosure statement if it was deemed to be necessary for the protection of purchasers and in the public interest. *See generally* note 8 *supra*.

In *Natural Resources Defense Council, Inc. v. SEC*, 389 F. Supp. 689 (D.D.C. 1974), plaintiffs brought suit to direct the Securities and Exchange Commission to require each corporation within its mandate to provide the Commission with information concerning the environmental consequences of its corporate action. Under the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970), SEC has authority to include in registration statements "such other information as the Commissioner deems necessary or appropriate in the public interest or for the protection of investors." The court held that superimposed on this grant of broad rule making authority to the Commission is the over-riding congressional mandate of NEPA to protect and enhance the environment. The court found a congressional resolve that dissemination of environmental information is important to the purposes of NEPA, and therefore, ordered the Commission to modify its regulations in accordance with that principle.

The Disclosure Act was fashioned after the Securities Act of 1933. 96 S. Ct. at 2433. In fact, the provision on which *Natural Resources Defense Council, Inc.* was based is almost identical to 15 U.S.C. § 1707(a) (1970). This suggests that, had the *Scenic Rivers* plaintiffs chosen to be a bit more conservative in their approach to the suit, they might have been more successful. Had they challenged HUD's failure to require disclosure of the environmental effects of a developer's project, instead of seeking the preparation of an impact statement, the Court may have been more willing to act in their favor. HUD might then have been required to at least partially comply with NEPA; as it stands now, HUD's actions under the Disclosure Act are exempted from NEPA's mandate. In fact, the *Scenic Rivers* Court recognized this deficiency in plaintiffs' complaint when it inferred that HUD *might* have *some* obligations under NEPA.

58. 96 S. Ct. at 2438.

legislation⁵⁹ nor does it require emergency agency action.⁶⁰ Although a cursory reading of the Disclosure Act lends support to the Court's conclusion that the statutory duties thereunder are inconsistent with preparation of an EIS,⁶¹ the background and practical applications of the two acts involved in *Scenic Rivers* demonstrate the superficiality of the Court's approach.

Had the Court scrutinized the congressional purposes and realistic effects of the Disclosure Act and NEPA in the light of the widely accepted maxim that two ostensibly conflicting statutes should be reconciled if at all possible,⁶² it could have reached the contrary conclusion that there was no real conflict of duties. Congress intended strict adherence to NEPA's procedural directives, including the EIS requirement, in order to force each federal agency to consider the environmental effects of its actions "to the fullest extent possible" and to disclose that information to other federal officials and the public.⁶³ The primary goal of the Disclosure Act is to protect purchasers from fraudulent practices by developers in the interstate sale of land.⁶⁴ The thirty-day deadline was designed to shield developers from costly delays that might result from the need to register with HUD,⁶⁵ although in actual practice few disclosure statements become effective within thirty days of filing despite the statutory deadline.⁶⁶

The Court could have avoided a finding of statutory conflict by adopting either of two possible statutory constructions. It could have interpreted the Disclosure Act to allow HUD to suspend the effective date of the disclosure statement pending preparation of the EIS. The primary goal of the Disclosure Act, the protection of purchasers,

59. See notes 49-53 and accompanying text *supra*.

60. See notes 43-48 and accompanying text *supra*.

61. The Disclosure Act literally gives the Secretary of HUD the power to suspend only inaccurate or incomplete statements. See note 8 *supra*.

62. See note 28 and accompanying text *supra*.

63. See notes 1-6 and accompanying text *supra*.

64. SEE CONF. REP. NO. 1785, 90th Cong., 2d Sess. (1968); 114 CONG. REC. 15272 (1967) (remarks of Sen. Williams).

65. See 96 S. Ct. at 2439.

66. More than 90% of disclosure statements receive suspension notices deferring their effective dates. Chasnow, *Compliance with NEPA in Interstate Land Sales*, URB. LAND 12, 13 (May 1975). In fact the developer in *Scenic Rivers* first filed his disclosure statement on February 5, 1974 and it did not become effective until May 4, 1975. *Scenic Rivers Ass'n v. Lynn*, 520 F.2d 240, 242 (10th Cir. 1975), *rev'd sub nom. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 96 S. Ct. 2430 (1976). Thus, here, as in many cases, HUD would have had sufficient time to complete the impact statement process.

would not have been thwarted by such a suspension.⁶⁷ Such a delay would harm only the secondary purpose of safeguarding the economic interests of the developer. Given this background and the express legislative goal that NEPA be widely applied,⁶⁸ it is doubtful that Congress intended a developer's economic interest to override the public interest in a healthful environment.

In the alternative, the Court could have interpreted NEPA to require only that HUD prepare the best possible EIS in the time the agency was allowed under the Disclosure Act. Since public disclosure to the public of the potential impact of human activities on the environment is one of the principal purposes of NEPA, the Court should not have limited its options to either a complete EIS or no EIS but should have considered a partially complete EIS. Some environmental information could be collected within the initial thirty day period. In fact, since most disclosure statements require at least sixty days to become effective,⁶⁹ detailed consideration of environmental impacts would be possible in most situations.

In failing to reconcile the two statutes in *Scenic Rivers*, the Court created a new category of exemptions under which an agency may be excused from compliance with NEPA when performance of its statutory duties *might* conflict with the preparation of an EIS. Therefore NEPA may be held inapplicable despite the fact that the statutory conflict is merely administrative inconvenience. After *Scenic Rivers*, any agency could argue that NEPA's EIS requirement is inapplicable whenever the agency is subject to a statutory deadline designed to expedite agency action.⁷⁰ The ultimate effect of *Scenic Rivers*, of course, remains undetermined. The decision may be treated as an aberrant interpretation of NEPA, with its impact limited to the facts of

67. In fact the full disclosure purpose of the legislation might be enhanced by requiring disclosure of environmental information. This type of data may be of major value to "ethical" purchasers who are concerned with preservation of the environment.

68. See note 25 *supra*.

69. See note 66 *supra*.

70. See, e.g., 42 U.S.C. § 5304(f) (Supp. IV 1974) (where an application for a grant under the Housing and Community Development Act of 1974 is to be considered approved within 75 days after receipt unless Secretary informs applicant of reasons for disapproval); *id.* § 2182 (1970) (where the Commissioner of Patents is allowed to issue patents on inventions for use and production of nuclear materials to private applicants unless within 90 days after receipt of a copy of the application the Atomic Energy Commission directs the Commissioner to issue the patent to the Commission instead because of public interest in the invention); 15 U.S.C. § 77h(a), (b) (1970) (where a registration statement filed pursuant to the Securities Act of 1933 is deemed effective within 20 days of filing unless found to be inaccurate or incomplete on its face).

the case. The decision may, however, effectively narrow the applicability of the action-forcing EIS requirement which is the "heart of NEPA."⁷¹ Such an interpretation would be particularly severe since the principal goals of NEPA have been accomplished through the impact statement requirement.⁷² Without a mandate for strict compliance with the EIS directive, it is possible that NEPA will cease to have an effect on agency decisionmaking and will become, as the drafters once feared, "a mere noble statement of purpose."⁷³

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71. FISHER, *supra* note 3, at v.

72. ANDERSON, *supra* note 1, at vii.

73. FISHER, *supra* note 3, at v.

