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Environment—NEPA—The Purpose and Scope of the Duty to Discuss Alternatives

NEPA—THE PURPOSE AND SCOPE OF THE DUTY TO DISCUSS ALTERNATIVES

On June 14, 1971, President Nixon, in anticipation of a possible energy crisis, directed the Secretary of the Department of the Interior to offer for lease land on the Outer Continental Shelf for offshore oil drilling.[1] In response to the President's action, the Natural Resources Defense Council, Friends of the Earth, and the Sierra Club sought and obtained an injunction barring the proposed lease because the Department had failed to discuss some alternatives to the proposed action, had only superficially discussed others, and had not discussed the environmental impact of any of the alternatives in its environmental impact statement as required by the National Environmental Policy Act of 1969 (NEPA).[2]

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1. 117 CONG. REC. 18049-53 (1971) (President's Energy Message).

2. National Resources Defense Council, Inc. v. Morton, 337 F. Supp. 165 (D.D.C. 1971). The National Environmental Policy Act, 42 U.S.C. § 4332(2) (1969), states in part that all 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 decisionmaking which may have an impact on man's environment;
>
> (B) ....
>
> (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 the plan be implemented.
> Prior to making any detailed statement the responsible Federal official shall consult with and obtain 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 views of 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 process;
> (D) study, develop, and describe appropriate alternatives to recommended

In *Natural Resources Defense Council, Inc. v. Morton*,[3] the court of appeals affirmed the district court's ruling, focusing on the scope of the duty to discuss alternatives to the proposed action in the impact statement.[4] In response to the court of appeals decision that the Department's impact statement did not conform to the mandate of NEPA, the Department of the Interior prepared an addendum to its statement discussing the alternatives to the proposed lease in detail. The district court, however, refused to dissolve the injunction, stating that the Department had not circulated the addendum to other concerned agencies for comment, as required by section 102 (2) (C) of NEPA.[5]

Section 102 (2) (C) requires that an environmental impact statement be prepared for all major federal actions significantly affecting the environment and that the impact statement include a discussion of the alternatives to the proposed action.[6] The court of appeals in *Morton* directed its attention to the required comprehensiveness of the agency's discussion of these alternatives and their environmental impact.[7] Relying primarily on congressional intent, the court stated that the impact statement was designed to provide Congress, the executive branch, and the federal agencies with a basis for evaluating the environmental consequences of the proposed action, and additionally, to provide a comparison of the consequences of this action with the environmental risks presented by alternative courses of action.[8] With this congressional mandate in mind, the court broadly construed the agency's obligation under section 102 (2) (C) (iii) of NEPA to discuss alternatives. This broad interpretation is evidenced by the most significant aspect of the *Morton* decision, the court's response to the Secretary of the Interior's contention that the statement need not discuss those alternatives which require congressional action to

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courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.

3. 458 F.2d 827 (D.C. Cir. 1972).

4. *Id.*

5. National Resources Defense Council, Inc. v. Morton, 337 F. Supp. 170 (D.D.C. 1972).

6. 42 U.S.C. § 4332(2)(C) (1969).

7. 458 F.2d at 834.

initiate, specifically, the alternative of increasing the energy supply by lifting import quotas on foreign produced oil. The court stated that even if an alternative was beyond the agency's power to implement, it must be included in the impact statement because the statement was intended to be circulated to the executive branch and to Congress since each may have the power to initiate the alternative course of action.[9] The court stated that even if a prior legislative determination had been made concerning import quotas, the agency was not precluded from including this alternative in the impact statement because Congress contemplated that there be a continuing review of these decisions in NEPA.[10] Because of this continuing review process, the court found that Congress did not intend a full discussion of alternatives which are remote or speculative, especially if they require basic changes in statutes and policies. NEPA, the court concluded, did not require a "crystal ball" inquiry.[11]

The court stated that it was the essence of NEPA that the statement serve to gather in one place a discussion of the relative environmental impacts of the alternatives,[12] but the court also suggested that in addition to the discussion of the environmental impact, the agency must include a weighing of economics, foreign policy, and national security when pertinent to a comparative evaluation of alternatives.[13] The court concluded that the discussion must be sufficient to permit a reasonable choice of alternatives, and that an alternative must not be excluded from the impact statement because it does not offer a complete solution to the problem.[14]

In *Morton* the court not only re-examined, but reaffirmed the breadth of the NEPA requirement to discuss alternatives.[15] When

8. *Id.* at 833.

9. *Id.* at 834 n.15; note that the President did suspend oil import quotas as of May 1, 1973. Exec. Order No. 11,712, 3 C.F.R. — (Supp. 1973).

10. 458 F.2d at 836. *See also* Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971), which held that even if Congress authorized and appropriated for a nuclear test on Amchitka Island it did not bar a judicial inquiry into the sufficiency of the agency's impact statement.

11. 458 F.2d at 837.

12. *Id.* at 834. *See also* 1 A. REIGTER, ENVIRONMENTAL LAW, 102-05 (1972) for a general discussion on including foreign policy considerations in the impact statement.

13. 458 F.2d at 837.

14. *Id.*

15. THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 243 (1972) [hereinafter cited as THIRD ANNUAL REPORT].

studied in light of congressional intent and prior judicial decisions, *Morton* provides a relatively comprehensive guide to the alternative aspect of section 102(2)(C) statements. Even though *Morton* may be limited in its general application by the unusually wide implications of the facts of the case, evidenced by the significance of lifting oil import quotas on economics and foreign policy, the decision provides agencies with a clear judicial guide as to how comprehensive their discussion of alternatives must be. Congress made it clear that NEPA was to be complied with in the strictest sense, that no agency was to "utilize an excessively narrow construction of its statutory authorizations to avoid compliance,"[16] and further directed the agencies to "develop information and provide descriptions of alternatives in adequate detail for subsequent reviewers and decisionmakers, both within the executive branch and Congress."[17] Having termed NEPA an environmental "full disclosure law,"[18] Congress clearly contemplated a discussion of alternatives to the "fullest extent possible."[19] *Morton* provides a concrete example of what Congress meant by "action forcing and full disclosure procedure."[20]

Since the inception of NEPA, courts have played a significant role in the Act's enforcement and interpretation, even though the court's duties are limited to insuring procedural compliance with NEPA.[21] Considering the vast amount of litigation concerning NEPA,[22] it

16. U.S. CODE CONG. & ADM. NEWS, 91st Cong., 1st Sess. 2770 (1969).

17. 115 CONG. REC. 40420 (1969) (remarks of Senator Jackson). *See also* S. REP. No. 91-296, 91st Cong., 1st Sess. (1969) (report of the Committee on Interior and Insular Affairs) for a general discussion of the overall congressional intent of NEPA.

18. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

19. 115 CONG. REC. 40418 (1969) (remarks of Senator Jackson). Congress intended that the language "to the fullest extent possible" apply to all of § 102(2) of NEPA. *Id.*

20. 115 CONG. REC. 19010 (1969) (report of the Committee on Interior and Insular Affairs).

21. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971). Courts have consistently held that NEPA requirements provide only procedural remedies instead of substantive rights. The function of the court is to insure that the requirements are met, and therefore the court cannot substitute its opinion as to whether the project should be undertaken or not. For a discussion of the court's general role in environmental litigation see J. SAX, DEFENDING THE ENVIRONMENT (1971).

22. According to 18 PRAC. LAW. 78, 82 (May 1972) [hereinafter cited as 18 PRAC. LAW.], since 1970 NEPA has generated 2,500 environmental impact statements, 47 federal district court decisions and 3 Supreme Court dissents.

is surprising that *Morton* is the first detailed analysis of section 102 (2) (C) (iii). Earlier decisions dealt more with other aspects of section 102 (2) (C) or with the general purposes behind the alternative requirement, rather than with the actual content of the alternative aspect of the impact statement. As a result, the question of the extent to which the agency must discuss the alternatives to the proposed action was an area of generally unsettled case law when the issue was presented to the court in *Morton.*

In *Calvert Cliff's Coordinating Committee, Inc. v. AEC,*[23] the court reaffirmed the congressional mandate that alternatives must be discussed to the "fullest extent possible" so that the decision maker has before him all possible approaches to the proposed action.[24] In reviewing the adequacy of the AEC's guidelines for implementing NEPA, the court did not limit the alternatives to be discussed,[25] but imposed on the agencies a "strict standard of compliance" with NEPA.[26] In *Environmental Defense Fund, Inc. v. Corps of Engineers,*[27] the court reiterated the rule of *Calvert Cliff's,* but extended the agency's duty by requiring it to discuss the alternative of taking no action at all in relation to a proposed project.[28]

Morton has both reaffirmed these prior decisions and expanded them by discussing the "full disclosure" requirement in relation to alternatives.[29] *Morton* makes it clear that all relevant considerations are to be discussed, including those alternatives that require executive or legislative implementation.[30] Consequently, *Morton* has provided a statement as to the comprehensiveness in which the alternatives to the proposed action must be discussed.

One month after the *Morton* decision, a North Carolina district court chose not to follow the broad construction of section 102 (2) (C)

23. 449 F.2d 1109 (D.C. Cir. 1971).

24. *Id.*

25. 18 PRAC. LAW. 94.

26. 449 F.2d at 1114.

27. 325 F. Supp. 749 (E.D. Ark. 1971).

28. *Id.* at 761. *See also* 115 CONG. REC. 40420 (1969) (remarks of Senator Jackson): "The language of section 102(2)(C) has been explained in the Senate as requiring a discussion of the alternative ways of accomplishing the objectives of the proposed action and the results of not accomplishing the proposed action."

29. Council on Environmental Quality Memorandum to Federal Agencies on Procedures for Improving Impact Statements 85 (1972) [hereinafter cited as CEQ Memorandum].

30. *See* 18 PRAC. LAW. 94.

that the *Morton* court had relied on. In *Conservation Council v. Froehlke*,[31] the court construed NEPA to require that the impact statement need only "identify" the alternatives. Plaintiff argued that the Army Corps of Engineer's impact statement did not present a complete analysis of alternatives to the proposed dam project. Holding that only a "mere identification" was necessary,[32] the court did not provide a definition of "identification" and relied on *Committee for Nuclear Responsibility, Inc. v. Seaborg*[33] as precedent for this standard. *Seaborg* required that the agency state opposing views when analyzing the environmental effects of the proposed action.[34] Identifying opposing views to the proposed actions in *Seaborg* was stated not in reference to the alternatives to be discussed, but in reference to the various views concerning the proposed action. Even with this possible misinterpretation of *Seaborg* on the part of the *Froehlke* court, it appears that the two cases used different approaches in analyzing section 102 (2) (C); *Morton* construing NEPA in light of congressional intent, and *Froehlke* relying on unsettled case law. *Morton* would agree with *Froehlke* only in that an alternative need only be identified when it has little or no environmental impact.[35]

The effect of this apparent inconsistency between the two federal district courts has had a nominal effect on the credibility of *Morton*. Assuming that the identification of alternatives precludes a full discussion of such alternatives, *Froehlke* appears to be contrary to federal regulations which require a "rigorous exploration and objective evaluation of alternative actions,"[36] and to congressional intent as stated by *Morton*:

> Congress contemplated that the Impact Statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant decisions .... The impact statement provides a basis for (a) evaluation of the benefits of the proposed project

31. 340 F. Supp. 222 (M.D.N.C. 1972).

32. *Id.* at 227.

33. 463 F.2d 783 (D.C. Cir. 1971).

34. *Id.*

35. 458 F.2d at 834. *See also* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), where the court compared section 102(2)(C)(iii) with section 102(2)(D) and concluded that section (D) is not limited to those alternatives significantly affecting the environment but that section 102(2)(C)(iii) is so limited.

36. 35 Fed. Reg. 7390, 7392 (1970).

> in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action.[37]

The Council on Environmental Quality adhered to *Morton* when it stated, after both decisions had been handed down, that the analysis of alternatives must be "sufficiently detailed and rigorous to permit independent evaluation of the benefits and costs and environmental risks of the proposed action and each of the alternatives."[38] This directive requires not a "mere identification" of alternatives,[39] but a full evaluation of alternatives under section 102 (2) (C).

Some commentators fear that the discussion of non-environmental factors will destroy the focus and go beyond the purpose of the Act.[40] Other critics have argued that the *Morton* decision will not only result in delays in implementing the proposed project,[41] and excessive paper work,[42] but the requirement to discuss the full range of alternatives will put a great burden on the decision maker because of the necessity that he explore the consequences and balance the individual alternatives now presented in detail in order to arrive at a decision.[43]

NEPA, however, was not intended to make the decision maker's burden lighter; rather, its purpose was to add a new factor to his decision—the environment.[44] Part of the "full disclosure and action

37. 458 F.2d at 833.

38. CEQ Memorandum at 85.

39. 340 F. Supp. at 227.

40. THIRD ANNUAL REPORT at 245. *See also* 3 ERC 1374 (1972), where Bruce Blanchard of the Department of the Interior Office of Environmental Project Review states that requiring economic and social factors runs counter to incorporating environmental factors and early decision-making. He concludes that the trend will be to turn the environmental impact statement into a justification statement.

41. 3 ERC 521 (1972). According to the Senate Interior Committee, the impact statement requirement has caused delays of up to one year in bringing power plants into operation. *Id.* at 542. Richard Hills, assistant advisor on site problems for the Federal Power Commission, states that the NEPA requirement that all alternatives be discussed presents an untenable problem to planners. *Id.*

42. *Id.* at 592.

43. *See* 18 PRAC. LAW. 94.

44. THIRD ANNUAL REPORT at 225. *See also* Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 749, 759 (E.D. Ark. 1971), where the court stated:

> At the very least, NEPA is an environmental full disclosure law. The Congress, by enacting it, may not have intended to alter the then existing decision-making responsibilities or to take away any then existing freedom of decision-making, but it certainly intended to make such decisionmaking more responsive and more responsible.

Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir.

forcing process"[45] of NEPA is to insure that the decision maker is aware of all known alternatives and their possible consequences at the time the decision is made.[46] Critics may have overlooked the fact that once the agency has complied with the procedural requirements of NEPA the decision maker may choose to ignore the environmental factors in the actual making of the decision.[47]

Although Congress did not intend the preparation of an impact statement to cause delay in implementing the proposed project,[48] such delay may be an incident to "full and good faith" compliance with NEPA.[49] As the court in *Calvert Cliff's* noted in refuting the Atomic Energy Commission's contention that a discussion of the full range of alternatives would unduly delay implementation of the project: "It is far more consistent with the purposes of the Act to delay operations at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible."[50] The court concluded that some delay was inherent in the full compliance with NEPA.[51] In light of the purposes of NEPA, any delay in the agency's attempt to comply with the Act can hardly be considered undue or unnecessary.

The criticism that consideration of economics, foreign policy, and national security consequences will destroy the focus of NEPA and is contrary to congressional intent must be answered by considering the factual context of *Morton*. Surely not every situation to which NEPA applies will necessitate such a wide range of considerations as did the oil import quota alternative in *Morton*. In such an unusually broad problem these factors could easily be considered significant in

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1971), stated that NEPA requires that the agencies consider environmental issues.

45. 115 CONG. REC. 19010 (1969) (report of the Committee on Interior and Insular Affairs).

46. Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

47. Conservation Council v. Froehlke, 340 F. Supp. 222, 225 (M.D.N.C. 1972); Environmental Defense Fund v. Corps of Eng'rs, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

48. U.S. CODE CONG. & ADM. NEWS, 91st Cong., 1st Sess. 2769 (1969).

49. THIRD ANNUAL REPORT at 253.

50. 449 F.2d at 1128. *See also* Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972), which held that alternatives must be determined early in the planning of demolition of buildings because implementing the rehabilitation alternative would be impossible once the buildings were razed.

51. 449 F.2d at 1128.

a "rigorous exploration and objective evaluation" of an alternative,[52] especially where the decision maker is to be provided with a full discussion of all reasonable alternatives to the proposed plan. *Morton* made it clear that these factors were to be discussed where relevant in weighing an alternative,[53] and the Council on Environmental Quality has stated that:

> A detailed discussion of each of these subjects could require as much space as the environmental analysis itself, destroying the focus of the statement and undercutting the purpose of NEPA. What is necessary is a succinct explanation of the factors to be balanced in reaching a decision, thus alerting the agency decision maker, as well as the President, Congress and the public to the nature of the interests that are being served at the expense of environmental values.[54]

The court in *Morton* also pointed out that the essence of NEPA remains that of considering the environmental impact of the proposed action and the alternatives.[55]

The most significant aspect of the *Morton* decision, the court's conclusion that alternatives reasonably available to the Government as a whole must be discussed, even if some of the alternatives are outside the control of the agency, was adhered to by the Council of Environmental Quality when it stated:

> [I]n view of the importance of the *Morton* decision . . . it seems preferable to expand the reference to "alternatives" in agency NEPA procedures at least to the extent of indicating that all reasonable alternatives will be evaluated, even though they may not be within the agency's control.[56]

The duty of the courts under NEPA is to see that the purposes of Congress are not lost or misdirected in the federal bureaucracy.[57] *Morton* has insured that the agencies conform to the congressional purpose behind the requirement to discuss alternatives to the proposed action. The future viability of *Morton* and NEPA depends on

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52. 35 Fed. Reg. 7390, 7392 (1970).

53. 458 F.2d at 834.

54. CEQ Memorandum at 85.

55. 458 F.2d at 834.

56. CEQ Memorandum at 85.

57. Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

whether the strict enforcement of the Act as evidenced by *Morton* will be sacrificed in an effort to halt the expanding energy crisis. Hopefully the goals of NEPA will not be lost under the ever increasing demand for new energy sources. Barring any congressional revision of NEPA,[58] the courts will be faced with the dilemma of whether or not to abdicate their strict adherence to NEPA in the face of an energy crisis. Some courts have already yielded to the demand for energy at the expense of the Act.[59] Hopefully, environmental considerations will continue to be a primary factor in decisions like *Morton* that affect both our energy supply and our environment.

Steven Sunde

58. Leonard Birchwet, Staff Counsel of the Senate Commerce Committee, states that Congress probably will not amend NEPA in 1973. 3 ERC 1374 (1972).

59. Alabama Gas Light Co. v. Federal Power Comm'n, 476 F.2d 142 (5th Cir. 1973), held that the F.P.C.'s interim suspension order that approved the pipeline company's curtailment of gas deliveries in order to protect natural gas suppliers does not require an impact statement because the preparation of the statement would violate the Commission's duty to act quickly to prevent gas shortages.