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## Review Under NEPA

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to review the agencies' substantive decisions?

In one of the earliest and still most cited NEPA cases, Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F2d 1109 (D.C. Cir. 1971), Judge Skelly-Wright, while not expressly recognizing that NEPA creates substantive rights, did state that NEPA's procedural provisions do require "a finely tuned and 'systematic' balancing analysis in each instance," Id. at 1113, and that a court could reverse a decision on its merits if it were "shown that the actual balance of costs and benefits that was struck down was arbitrary or clearly gave insufficient weight to environmental matters." Id. at 1115. Thus, substantive review is available under the "arbitrary and capricious" standard of the Administrative Procedures Act, 5 USC 706.

In Environmental Defense Fund v. Corps of Engineers, 470 F2d 289 (8th Cir. 1973) the Eighth Circuit relied on Calvert Cliffs, but went one step further, explicitly holding that "there is an agency obligation to carry out the substantive requirements of the Act" Id. at 298. Even in this view, however, the standard of review is a narrow one, but it does impose substantive duties.

The Second Circuit has adopted a standard which will allow for a very limited amount of substantive review. In Scenic Hudson Preservation Conference v. Federal Power Commission, 453 F2d 463 (2d Cir. 1971), the Court states that if "the Commission has considered all relevant factors, and where the challenged findings ... are supported by substantial evidence, we will not allow our personal views as to the desirability of the result to influence us in our decision." Id. at . Accord, I-291 Why? Assoc. v. Burns, 517 F2d 1077 (2d Cir. 1974); and Chelsea Neighborhood Assoc. v. U.S. Postal Service, 516 F2d 378 (2d Cir. 1975).

The Fourth Circuit, after some initial wavering, has come down on the side of the more searching standard of review, expressly agreeing with the Eighth Circuit in Conservation Council of North Carolina v. Froehke, 473 F2d 664 (4th Cir. 1973).

#### REVIEW UNDER NEPA

While the Environmental Impact Statement process of §102(2)(c) of the National Environmental Policy Act of 1969, 42 USC 4321 et seq., would seem to insure that agency decision-makers will take environmental considerations to heart when making their decisions, NEPA, unlike other environmental legislation, contains no provisions for judicial review or enforcement of its mandate. Likewise, the legislative history of the Act provides little guidance on the subject of review. As long as decision makers pay lip service to environmental question, will the courts be willing

In another Environmental Defense Fund v. Corps of Engineers, 492 F2d 1123 (5th Cir. 1974), the Fifth Circuit reviewed the state of the law and changed its course, stating that despite dicta in their earlier decisions indicating that agency substantive decisions were not reviewable, "the majority and better reasoned rule favors such substantive review." Id. at 1139.

Two Circuits, the Ninth and Tenth, have held that courts can review compliance with NEPA's procedural requirements only. Cady v. Morton, 627 F2d 786 (9th Cir. 1975), and National Helium Corp. v. Morton, 455 F2d 650 (10th Cir. 1971).

The Supreme Court has never ruled squarely on the subject of substantive judicial review of the Environmental Impact Statement process. However, in Aberdeen and Rockfish R.R. Co. v. SCRAP, 422 U.S. 289 (1975), where the Court declined to resolve the question, Justice Douglas, in his dissent, appeared to favor a more searching standard of substantive review. NEPA, he says, "is more than a technical statute of administrative procedure. It is a commitment to the preservation of our natural environment. The statute's language conveys the urgency of that task..." Id. at 331. Regarding the case before him, in which the lower court had found the Interstate Commerce Commission's Impact Statement inadequate on substantive grounds, Douglas said that he would affirm the judgement of the District Court which, "following the spirit of NEPA, told the Commission to do better. Id.