The Case for Creating a Special Environmental Court System

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In Title V of the Federal Water Pollution Control Act of 1972, Congress directed the President of the United States through his Attorney General to study the feasibility of an environmental court. Title V, Section 9 provides: "The President, acting through the Attorney General, shall make a full and complete investigation and study of the feasibility of establishing a separate court or court system, having jurisdiction over environmental matters and shall report the results of such investigation and study together with his recommendations to Congress not later than one year after the date of enactment of this Act." ¹ The terms of this mandate are extraordinarily sweeping and general. Although it grants broad authority, it provides little guidance with respect to a number of indispensable questions:

(1) Before considering the feasibility of an environmental court, is it not necessary to establish whether such a special court or system of courts is needed and whether such an innovation would produce significant benefits?

(2) What does Congress mean by the phrase "having jurisdiction over environmental matters?" Does it mean exclusive jurisdiction over the trial and perhaps the review of environmental cases?

(3) Alternatively, would an administrative court system specializing in environmental matters and acting as a kind of special master for the regular federal courts better meet the needs of environmental litigation?

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(4) What relationship should Congress establish between the new environmental machinery (be it a full-fledged court or an administrative court) and such "mission" agencies as the Atomic Energy Commission and the Federal Power Commission? The operations of these and many other such agencies have metamorphosed substantially since enactment of the National Environmental Policy Act (NEPA), which supplemented traditional agency responsibilities with new environmental responsibilities. Additionally, judicial interpretations of NEPA have broadened administrative responsibilities beyond the specific commands of the Act.

(5) Of equal concern is the relationship between the new environmental adjudicatory structure and such recently created "environmental agencies" as the Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA), as well as its relationship with the numerous Executive departments (both existing and proposed) whose actions affect environmental values.

(6) Moreover, what are "environmental matters?" At one end of the spectrum of "environmental matters," there are complex adjudicatory rulemaking proceedings such as the AEC's recent Emergency Core Cooling System hearings conducted by a special ad hoc tribunal established by the AEC preliminary to issuance of highly technical scientific and design regulations for nuclear power generating plants; at the other end, there are the so-called federal common law proceedings presently within the jurisdiction of the regular federal courts.

The foregoing are some threshold questions that must be considered in any response to the highly general congressional mandate. Unfortunately, the legislative history of the Act appears to offer no guidance as to what direction Congress intended this study and investigation should take. The President and his Attorney General thus begin their

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3. CEQ was created by Title II of the National Environmental Protection Act.
7. See U.S. Code Cong. & Administrative News No. 10, at 5288-5433 (Nov. 30, 1972). It does appear, however, that title V section 9 is a House Amendment and that the original Senate bill contained no such provision. Id. at 5451.
study with a broad mandate and a blank slate. This Article will consider the foregoing questions, including the alternatives they present, and reach conclusions as to how the important and increasing volume of environmental litigation can be handled most effectively in our judicial system.

Is an Environmental Court Desirable?

The preliminary question to be resolved is whether some form of environmental court or system of courts is necessary or desirable in the sense that such specialized court or system would produce significant benefits. If some demonstrable need or significant benefits over the status quo are found to exist, then it becomes necessary to determine how the new entity should function and what its structure should be to meet such need or achieve such benefits. In this regard, it also is necessary to consider the feasibility of congressional establishment of such machinery; finally, it is appropriate to discuss the difficult problem of determining the proper relationship of the special environmental court to existing judicial jurisdiction, the functions of the "mission" agencies, the statutory responsibilities of the new "environmental" entities such as EPA and CEQ, and the Executive departments whose actions affect the environment.

Specialized courts are by no means a novel or rare judicial phenomenon in the American experience. A wide variety of specialized courts have been considered by Congress; a lesser number have been tried, and only a few have succeeded. This Article will not undertake to analyze the various specialized courts that have been considered but not established. However, the successful specialized courts may offer produc—

8. The special federal courts proposed prior to 1918 but which were never adopted are described in Rightmore, Special Federal Courts, 13 Ill. L. Rev. 15, 18 (1918), which discusses the proposed Court of Indian Claims, the Court of Pension Appeals, and the Court of Arbitration. Professor Rightmore also discusses the Court of Private Land Claims which existed briefly, between March 3, 1891, and June 30, 1904, to adjudicate claims arising under Spanish and Mexican grants in Arizona, New Mexico, Colorado, Utah, Wyoming, and Nevada. From the outset it was viewed as a temporary court whose raison d'être would cease upon completion of its specialized mission. For an account of the Choctaw and Chickasaw Citizenship Court see Ex parte Bakelete Corp., 279 U.S. 438, 457 (1929), citing Wallace v. Adams, 204 U.S. 415 (1907). For reference to Indian Reservation Courts, see United States v. Clapox, 35 F. 575 (D. Ore. 1888). Several special federal courts have been proposed subsequent to Professor Rightmore's history. Proposals for various types of administrative courts have been perennial, an alternative that will be discussed infra. See also Dix, The Death of the Commerce Court: A Study in Institutional Weakness, 8 Am. J. Legal Hist. 238 (1964).

A number of proposals for special administrative courts advocate a special labor court and a trade court. For separate discussion of a special labor court see Kutner, Due Process
tive analogies, and their failures may reveal caveats that should be considered in connection with the proposed environmental court.

Of the special courts that have succeeded, the United States Tax Court offers the most complete basis for comparative study. It was created as a special adjudicatory tribunal necessary to achieve five basic purposes.\(^9\) First, the complexities of tax adjudication were deemed to require the special expertise that a specialized court could best provide. Next, it was hoped that such a specialized tribunal would free the "regular" courts of a significant and steadily increasing workload. Third, it was envisioned that a specialized court would achieve a degree of uniformity or at least a consistency in its decisions that was lacking in the regular courts. Further, by relegating most tax litigation to a special court, it was anticipated that greater dispatch would be achieved in the resolution of controversies. Finally, it was predicted that an independent tax tribunal would allay public mistrust of a system which previously had combined tax assessment and adjudication within a single

9. The Board of Tax Appeals was created in 1918. (Revenue Act of 1918, ch. 18, § 1301, 40 Stat. 1140-41). It was removed from the Internal Revenue Service by the Revenue Act of 1924 and achieved its present status as technically an independent agency in the executive branch of the government in 1926. It became known as the Tax Court by the Revenue Act of 1942, 56 Stat. 619, Tit. 5, § 504 and has continued through various succeeding Revenue Acts as a distinct judicial entity with national jurisdiction. Brown, The Nature of the Tax Court of the United States, 10 U. Pitt. L. Rev. 298, 309 (1949); Brown & Whitmire, Forum Reform: Tax Litigation, 35 U. Cin. L. Rev. 644 (1966); Del Cotto, The Need for a Court of Tax Appeals: An Argument and a Study, 12 Buff. L. Rev. 5 (1962); Drennan, The Tax Court of the United States, 75 W. Va. Bar Ass'n J. 12 (1959); Griswold, The Need for a Court of Tax Appeals, 57 Harv. L. Rev. 1153, 1154 (1944) ("[T]he Tax Court is in organization, tradition, and function a judicial
The actual experience of the Tax Court has proved that although some of these expectations were chimerical, others were realized to various degrees; generally, the Tax Court has been reasonably successful, albeit not totally free of the need for improvement.

A. The Need for Expertise

In *Dobson v. Commissioner,* Mr. Justice Jackson addressed the question of expertise: The Tax Court "deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer." Apart from the controversial features of other aspects of the *Dobson* case, this statement is unexceptionable.

What then of environmental controversies? Does a comparable complexity exist "as to be the despair of judges?" On March 23, 1971, the Supreme Court specifically addressed itself to this question in *Ohio v. Wyandotte Chemicals Corp.* In that case, the Court ruled on a motion by the State of Ohio seeking to invoke the Court's original jurisdiction against various companies incorporated in Michigan, Delaware, and Canada, to abate an alleged nuisance resulting in pollution of Lake Erie as a result of Wyndotte's dumping of mercury. The Court held that although "Ohio's complaint does state a cause of action that falls within the compass of our original jurisdiction, we have concluded that this Court should nevertheless decline to exercise that jurisdiction." The Court based its decision on three reasons, one of which was that the case would require resolution of complex, technical, and novel questions for which the Court was not sufficiently expert. Specifically, the
Court held that "the notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic." 17 The Court further stated: "[T]his Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. . . . We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum." 18

Mr. Justice Douglas, dissenting, took direct issue with the majority on the question of the Court's expertise to adjudicate the case. After citing prior cases in which the Court had adjudicated complex technical controversies by employing the assistance of special masters, 19 he observed: "[T]he practice has been to appoint a Special Master which we certainly would do in this case. We could also appoint—or authorize the Special Master to retain—a panel of scientific advisers. The problems in this case are simple compared with those in the water cases discussed above . . . . The problem, though clothed in chemical secrecies, can be exposed by the experts." 20

In subsequent environmental pollution cases coming before the Court, Justice Douglas appears to have changed his opinion and joined the majority. In State of Washington v. General Motors Corp., 21 18 states filed a motion for leave to file a complaint (invoking the Court's original jurisdiction under article III, section 2 of the Constitution) against the four major automobile manufacturers alleging a conspiracy, inter alia, to restrain the development of motor vehicle air pollution control equipment. They sought an injunction requiring defendants to undertake an accelerated program of spending, research, and development designed to produce a fully effective pollution control device or a pollution free engine at the earliest feasible date. As in Wyandotte, the Court (this

17. 401 U.S. at 504. The Court noted that Ohio was raising factual questions that were questions of first impression even to scientists.
18. Id. at 504-05.
20. 401 U.S. at 511-12.
time Justice Douglas wrote the opinion), held: "Our jurisdiction over the controversy cannot be disputed." 22 The plaintiffs' argument that the Court should exercise its jurisdiction was plainly based on the rationale of the dissent in Wyandotte, "resort to a Special Master would not place a burden on this Court's time . . ." 23 Nevertheless, the Court declined to exercise jurisdiction, citing three reasons:

(1) The Court must refrain from adjudicating complex matters consuming undue time "lest our ability to administer our appellate dockets be impaired" 24 (citing Wyandotte);

(2) The federal district court is an available alternative forum (despite the decision in Wyandotte that " . . . this particular case cannot be disposed of by transferring it to an appropriate federal district court since this statute by itself does not actually confer jurisdiction on those courts . . ."); 25

(3) "As a matter of law as well as practical necessity corrective remedies for air pollution . . . necessarily must be considered in the context of localized situations." The support adduced for this proposition as it relates to "matters of law" was the simple assertion that the Clean Air Act provides for formulation of local air quality standards. The "practical necessity" consisted of the following "scientific" observations by the Court: "[G]eophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution" and "measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates." 26

This reasoning totally ignores the plain thrust of the plaintiffs' gravamen; they were not asking the Court to prescribe automotive pollution abatement techniques that would be appropriate in each of the 18 states involved. The grievance was that defendants allegedly had conspired to restrain the development of any air pollution control equipment, and accordingly an order compelling defendants to do so was sought; it is

22. Id. at 4438.
23. Id.
24. Id.
25. 401 U.S. at 498 n.3. This holding was criticized in Woods & Reed, The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case, 12 Ariz. L. Rev. 691, 701-02 (1970).
obvious that meteorological conditions vary from place to place, and
with such variations the propensity for air pollution varies. These facts
have not precluded Congress from establishing national air quality
standards while permitting local standards that are stricter, if unique
conditions so require. The General Motors defendants are national
automobile manufacturers. They do not produce one model for use in
San Francisco and another for sale in Phoenix. Nor should they legally
be expected to produce automobiles with pollution abatement devices
or pollution free engines that do more than satisfy national standards.
National standards presumably were devised to achieve air quality ac-
ceptable in all regions regardless of meteorological variations. The
Court's logic might well precipitate a balkanized proliferation of litiga-
tion in the federal district courts involving questions of what abatement
devices are suitable for local meteorological conditions, while leaving the
central issue raised by the plaintiffs unanswered—namely, whether there
was a conspiracy by the automobile manufacturers to restrain develop-
ment of abatement devices and, if so, whether the Court should enjoin de-
fendants to develop and install such devices as would meet national clean
air standards. The suspicion cannot be avoided that the Court in Gen-
eral Motors declined jurisdiction for the same reasons it forthrightly pro-
claimed in Wyandotte—that the issues are too complex and technical to
be handled by the Court even with the help of experts without an ex-
penditure of time incompatible with its other appellate duties.

It would have been too much to expect that the author of the dissent
in Wyandotte would stress the "need for expertise" rationale for de-
clining jurisdiction in the General Motors case; one can sense a subtle
judicial accommodation behind the scenes. In Wyandotte's famous third
footnote, the majority, citing Erie R. Co. v. Tompkins, had proclaimed
"without analysis" that federal district courts did not have jurisdiction
and stated, "... an action such as this, if otherwise cognizable in federal
district court, would have to be adjudicated under state law." 27

On the same day the Court decided General Motors, it also decided
Illinois v. City of Milwaukee. 28 Again without analysis, the Court
summarily stated: "[W]e exercise our discretion to remit the parties to
an appropriate District Court whose powers are adequate to resolve the
issues." 29 Moreover, the Court expressly abandoned its view in Wyand-
dotte that state law would control and relied on Hinderlider v. LaPlata

27. 401 U.S. at 498 n.3.
29. Id. at 4445.
for the proposition that "federal common law" would control instead. The Court solidified this point by noting that "those who maintain that state law governs overlook the fact that the *Hinderlider* case was authored by Mr. Justice Brandeis who also wrote for the Court in *Erie R. Co. v. Tompkins*, . . . the two cases being decided the same day." Thus, the Court completely reversed its holding in *Wyandotte* as to the availability of the federal district courts as an alternative forum for such environmental suits, and Mr. Justice Douglas was prepared to find distinguishing features between the air pollution problem in *General Motors* and the air pollution issue which the Court adjudicated in *Georgia v. Tennessee Copper Co.*, the case that had been the capstone of his dissent in *Wyandotte*. The distinction was strained; indeed, for all relevant purposes, the issue in *General Motors* was indistinguishable from that in *Tennessee Copper*.

The Court in *City of Milwaukee*, as in *General Motors*, denied a motion by a state asking leave to file a complaint, under the Court's original jurisdiction, seeking abatement of a public nuisance which, like *Wyandotte*, consisted of dumping pollution into a lake. This time the pollutant was 200 million gallons of raw or inadequately treated sewage being dumped daily by defendants into Lake Michigan. After substantive analysis reaching the conclusion that it did have jurisdiction, the Court reasoned that because the defendants could be sued in a federal district court, "... our original jurisdiction is not mandatory." It concluded that the term "laws" in 28 U.S.C. § 1331(a) "... embraced claims founded on federal common law." The Court, again in a footnote unsupported by analysis, held: "The contrary indication in *Ohio v. Wyandotte Chemicals Corp.* was based on the preoccupation of that litigation with public nuisance under Ohio law, not the federal common law which we now hold is ample basis for federal jurisdiction under 28 U.S.C. § 1331(a)." As a matter of fact, both the majority and the dissent in *Wyandotte* had discussed Ohio's complaint in terms of the Federal Water Pollution Control Act, and although that Act provides for federal-state cooperation in the formulation of water

30. 304 U.S. 92, 110 (1938).
31. 40 U.S.L.W. at 4444 n.7.
32. 206 U.S. 230 (1907).
33. 40 U.S.L.W. at 4442.
35. *Id.* at 4443 n.3 (emphasis supplied).
36. 62 Stat. 1155.
quality standards, the dissent, relying on a “detailed brief” filed by the Department of Justice, concluded that “. . . there are no barriers in federal law to our assumption of jurisdiction.” 87

Whatever may be said of these decisions as they relate to the question of the Court's obligation to exercise its original jurisdiction, it is evident that one of the primary considerations was the complexity and technical difficulty of the subject matter and its resultant impact on the Court's workload if it exercised jurisdiction. Nothing in General Motors or City of Milwaukee erodes the majority's statement in Wyandotte that such environmental questions are “extraordinarily complex,” that “we have no claim to such expertise,” and that “this court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage.” Such pronouncements are strongly reminiscent of Justice Jackson's characterization of tax issues as being “. . . highly specialized and so complex as to be the despair of judges.” 38 Significantly, neither General Motors nor City of Milwaukee explains how federal district court judges would be any more competent to adjudicate complex and technical environmental questions than the members of the Supreme Court. Thus, there is substantial basis for concluding that environmental litigation does involve technical expertise of at least comparable magnitude and complexity as that required in tax litigation.

B. Workload Considerations

The Supreme Court in Wyandotte was concerned primarily with the impact on its workload if it undertook the time-consuming task of preparing itself to be sufficiently expert to adjudicate the complex issues raised by environmental litigation:

Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.

In our opinion, we may properly exercise such discretion [to decline jurisdiction], not simply to shield this Court from noisome,
vexatious, or unfamiliar tasks, but also, and we believe principally, as a technique for promoting and furthering the assumptions and value choices that underlie the current role of this Court in the federal system.\textsuperscript{39}

Granting the validity of the Court's self-limitation concerning "... the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court," \textsuperscript{40} the question remains whether the Court's workload permits even an appellate role as to environmental litigation. Although its role as an original forum for environmental suits would impose a greater burden on the Court than appellate review, there can be little doubt that, even in an appellate role, the Court would perforce be compelled to familiarize itself with a large corpus of complex and novel concepts outside normal judicial expertise in order to perform its appellate function. This poses the problem of whether the Court's workload permits even appellate involvement in environmental litigation. Before this question is considered, however, it is necessary to appreciate the magnitude and upward trend of that workload.

On June 28, 1972, the Senate Committee on the Judiciary issued its Report on H.R. 7378, a bill to establish a Commission on Revision of the Appellate Court System.\textsuperscript{41} The Report shows that the Supreme Court's docket in 1970 had reached an all-time high of 4,212 cases compared to 2,313 in 1960 and only 1,335 in 1950;\textsuperscript{42} thus, the workload of the Court had trebled in the past 20 years. Moreover, the Court was unable to keep pace with this workload. In terms of the flow of cases during the most recent years considered by the Report, the number of cases remaining on the Court's docket from the previous term had increased from 613 in 1968 to 793 in 1970.\textsuperscript{43} The Report noted that "such an increase in caseload severely tests the capacity of a nine-member Supreme Court to fulfill its paramount responsibilities in our dual court system." \textsuperscript{44}

\textsuperscript{39} 401 U.S. at 498-99.
\textsuperscript{40} Id.
\textsuperscript{42} Id. at 5226. This figure includes cases remaining on docket from previous term and cases filed during current term.
\textsuperscript{43} Id. at 5227.
\textsuperscript{44} Id.
The manner in which this pressure can be relieved is not easily determined. The Report summarily dismisses the possibility of enlarging the Court: "No one seriously considers the addition of more justices as a possible solution to this workload problem." The Report was less than enthusiastic about "... the creation of a fourth tier court to be interposed either between the district courts and the courts of appeals or between the courts of appeals and the Supreme Court." The Report also noted that the problem of increased workload in the Supreme Court is related to the workload of the courts of appeals, which has increased even more substantially than that of the Supreme Court. Between fiscal years 1960 and 1971, the caseload of the courts of appeals had more than trebled (from 3,889 to 12,778). Despite the expansion of circuit judges from 68 to 97, and despite a consequent increase in the number of cases terminated (from 3,713 in 1960 to 12,368 in 1971), it was clear that the courts of appeals were falling badly behind. Whereas the number of cases pending at the end of fiscal 1960 was 2,220, by the end of 1971 it reached the all-time high of 9,232, a more than fourfold deterioration. Moreover, this trend is forecast to worsen:

Projections for 1975 and 1990.—Even more alarming are the forecasts which have been made by the Administrative Office of the U.S. Courts and by the Federal Judicial Center. The Administrative Office, in a report entitled "Judgeship Needs in U.S. Courts of Appeals," published in February 1971, has projected a need for a total of 120 circuit court judges to meet the anticipated volume of appeals in 1975. This would be an increase of 23 judges over the present number of 97 circuit judges. The needs were based on detailed statistical projections of the anticipated 1975 caseloads divided by each circuit's own best record of cases terminated per judgeship. [It should be noted that caseloads projected in this study for 1975 were exceeded in the first and second circuits at the end of fiscal year 1971.]

The Federal Judicial Center in its third midyear report, dated March 1971, predicted that if the trend of filings for fiscal years 1968-70 continued at the same pace, the district court caseload

45. Id.
46. "It may not be desirable to increase from a three tiered to a four tiered system the process by which legal rights are finally adjudicated." Id.
47. Id. at 5223.
48. Id.
49. Id.
would expand from 127,000 new filings in 1970 to 350,000 new filings in 1990. The Center further estimated that 1,129 district judges would be required to handle such a caseload as compared to the present complement of 401 district court judges. Assuming the same ratio of circuit judges to district judges that now exists (97:401), approximately 250 circuit court judges would be needed to handle the workload by 1990.50

While it may be possible to fit 120 circuit judges into the scheme of our present appellate system consisting of 11 circuits, it seems an impossibility to accommodate up to 250 judges without a reorganization or restructuring of the appellate system. To demonstrate: It is said that ideally no circuit court of appeals should consist of more than nine judges. To adhere to this ideal through the year 1990 would require the 50 States to be realigned into a total of 27, nine-judge circuits.51 This, in turn, increases the opportunity for intercircuit disparity of opinion on a question of Federal law, giving rise to an increased burden upon the Supreme Court to resolve such disparity.52

It is apparent that no single sweeping remedy that would cope with the appellate workload problem is available. Undoubtedly, the Commission would deem a number of expedients to be necessary merely to contain this problem within tolerable bounds. One approach that offers some prospect of relieving this mounting pressure is the creation of special courts to free the regular judicial machinery from significant amounts of its present workload.

Environmental litigation possesses two characteristics that tend to aggravate the current and prospective workload problems of the federal courts. First, because it is complex and raises novel issues involving substantial expertise that has not yet been achieved, environmental matters tend to take significantly more judicial time per case than many other kinds of controversy. Second, there has been an exponential increase in the number of such cases with nothing to suggest that this trend will lessen.53 Clearly, creation of a specialized environmental court or

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50. The arithmetic of this report is faulty. Based on the estimate that 1,129 district judges will be required by 1990, the figure for circuit judges, assuming the same ratio (97:401) is 273 not 250.

51. The error on the ratio caused this figure to be incorrect also. Assuming nine judges per circuit, the number of circuits that will be required is 30 and not 27.


53. Judge Wright in Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1111 (D.C. Cir. 1971) stated, "These cases are only the beginning of what promises to be a flood of new litigation—litigation seeking judicial assistance in protect-
court system to handle the environmental litigation presently before the regular federal judiciary would contribute importantly to the relief of this workload problem both in the short and the long term.

C. Uniformity or Consistency of Decisions

With respect to the five previously noted reasons that provided the basis for the creation of the Tax Court, there is little, if any, dispute that the Tax Court has been least successful in achieving uniformity or consistency of decisions. However, this failure is not attributable to the functioning of the Tax Court itself. The inability of the court to produce uniformity or consistency in tax decisions results from two structural problems. The first is that it was not given exclusive jurisdiction. This problem was articulated in the Report of the Senate Judiciary Committee to the 91st Congress:

The existing tax litigation system is not the product of reasoned analysis. . . . At the heart of the problem is the trifurcation of the existing tax litigation structure. Trial of tax disputes is divided among three separate forums: the U.S. district courts, the Tax Court, and the Court of Claims. This division breeds diverse interpretation and application of the tax laws, delays [in] resolution of conflicts, encourages forum shopping, and contributes significantly to the strain on our overburdened judicial system.  

The second obstacle to uniformity and consistency in tax decisions is the appellate process: Tax Court decisions are reviewed in 11 different circuit courts of appeals, a system that tends to foster conflicts and diverse rulings even in the relatively precise and ascertainable field of knowledge it controls. Moreover, discretionary review of only a few court of appeals decisions can be undertaken by the Supreme Court. In addition, the scope of permissible review of Tax Court decisions by the

courts of appeals is the subject of extensive controversy. This dispute has focused upon what issues comprise questions of law (and are hence reviewable) and what ones comprise fact (and are the unreviewable province of the Tax Court).

Several reform programs have been advanced to cope with these structural deficiencies in the existing tax litigation system. The most sweeping proposal would have vested both refund and deficiency cases exclusively in the Tax Court (then called Board of Tax Appeals), thereby eliminating the trifurcation at the trial court level. Moreover, the same proposal would have vested all appellate jurisdiction in a single Court of Tax Appeals. Decisions of this court would be reviewable only by the Supreme Court on certiorari.

A more limited reform was proposed by Dean Griswold, who recommended the creation of a single court having exclusive appellate jurisdiction over all civil decisions in federal tax cases (except criminal appeals). Such a system would not only eliminate the diversity emanating from review by 11 courts of appeals but also would lighten the workload of the Supreme Court by eliminating the need to resolve these conflicts. Furthermore, there would be more consistency and greater certainty in tax law by virtue of the enhanced precedential value of decisions rendered by the Court of Tax Appeals. Finally, such a system would expedite final decision.

The lesson of the experience of the Tax Court appears to be that if Congress decides to create a special environmental court system, it will be necessary, if uniformity is to be achieved, to grant exclusive trial and appellate jurisdiction over environmental litigation to the specialized system of environmental courts and to narrow the grounds for appeal to the Supreme Court to the smallest ambit consistent with the Constitution and American judicial tradition. In this connection, Dean Griswold's observations on the scope of Supreme Court review of the proposed Court of Tax Appeals is suggestive: “The decisions of the Court of Tax Appeals should of course be reviewable by the Supreme Court in all cases involving constitutional questions. The construction and application of the Constitution is the chief of the high functions of


56. Id.


that Court, and it must be the final arbiter of Constitutional questions in the tax field as in all other fields of law." 59 As to matters such as statutory construction and application and other questions of law, Griswold observed: "... there is no reason why all cases have to be reviewable by the Supreme Court and there have been long periods in our history when many decisions were not subject to such review.... It could be argued that the decisions of the Court of Tax Appeals must be final on all except constitutional questions unless we are to perpetuate the difficulties which now plague us." 60 Although it would be legally possible to narrow Supreme Court review to constitutional issues (indeed, when the Court of Customs Appeals was established, its decisions were absolutely final—there was no review whatsoever by the Supreme Court), 61 Griswold concluded that broader Supreme Court review power was probably desirable since "... the Supreme Court could be counted on to respect the purpose and function of the Court of Tax Appeals, and to recognize that its decisions should as a matter of practice be final in all but exceptional cases." 62

With respect to the scope of Supreme Court review of decisions of a possible Court of Environmental Appeals, the Court's evident distaste for grappling with technical environmental details and its concern for the impact of such time-consuming litigation on its workload (manifest in the Wyandotte, General Motors and City of Milwaukee cases), strongly suggest that the Supreme Court could be relied upon to respect the purpose and function of a Court of Environmental Appeals and to grant certiorari sparingly. Yet even the determination of whether to grant certiorari requires deliberative time. The Congress, if it decides to create an environmental court system including a Court of Environmental Appeals, should give careful consideration to the scope of review by the Supreme Court in view of its increasingly onerous workload.

It is important to consider whether environmental litigation has manifested anything approaching the conflicts and diversity that gave rise to the creation of the Tax Court. Decisions construing and applying the National Environmental Policy Act (NEPA) 63 span a period of only

59. Id. at 1166-67.
60. Id. at 1167.
61. 36 Stat. 91, 106 Ch. 6 §§ 28-9 (1909); Judicial Code of 1911, 36 Stat. 1087, 1145 Ch. 231 § 195 (1911).
62. Griswold, supra note 9, at 1168.
three years—1970 through 1972. During this period, NEPA has been the
cynosure of a substantial part of environmental litigation, although such
litigation also has arisen from other statutory and common law bases. NEPA,
therefore, is likely to continue to be the source of prolific liti-
gation in decades to come.

By declaring the national environmental policy in broad and general
terms that invite interpretational dispute, NEPA is fashioned in a man-
er calculated to breed litigation. Section 101(a) declares that “it is
the continuing policy of the Federal Government, in cooperation with
State and local governments, and other concerned public and private
organizations, to use all practical means . . . to create and maintain con-
ditions under which man and nature can exist in productive harmony,
and fulfill the social, economic, and other requirements of present and
future generations of Americans.” Section 101(b) is perhaps some-
what less general: “[I]t is the continuing responsibility of the Federal
government to use all practicable means, consistent with other essential
considerations of national policy . . .” to achieve six stated environ-
mental objectives, which are in themselves quite general. For example,
the third objective seeks to “attain the widest range of beneficial uses of
the environment without degradation, risk to health or safety, or other
undesirable and unintended consequences.”

It would be difficult to devise a more effective way to stimulate litiga-
tion, and, given the general tone (some would say, vagueness) of the
policies, reasonable judges in the various district courts and courts of ap-
peal would almost inevitably read these policy objectives to mean dif-
ferent things in differing factual contexts and accordingly would require
differing standards of conduct. If these six enumerated “policies” are
transformed into “substantive rights” as a recent decision in the Eighth
Circuit holds, then the tendency of the quoted portion of section
102(1) to proliferate litigation would be enhanced.

NEPA contains no enforcement provisions as such, but as a result

64. It is noted in 3 COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 249 (1972) that
at that point in time: “The lawsuits brought under NEPA since its enactment now
number over 200.”

65. See Hanly v. Mitchell, 4 E.R.C. 1152, 1153 (2d Cir. 1972), in which Judge Fein-
berg noted that NEPA is “a statute whose meaning is more uncertain than most, not
merely because it is relatively new, but also because of the generality of its phrasing.”

66. For a complete statement of the six objectives see note 97 infra.

Cir. Nov. 28, 1972).
of the public outcry resulting from the ill-famed 1969 oil blowout of the offshore wells in the Santa Barbara Channel, Congress added the so-called "action forcing" provisions of section 102.68 This section directs that "to the fullest extent possible: [T]he policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act. . . ." 

Section 102(2) requires all agencies of the federal government to perform eight categories of complex environmental duties. To date, the duty to prepare a detailed impact statement has been the most prolific stimulant of litigation. Section 102(2)C requires all agencies of the federal government to "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." This statement must include the nature of the environmental impact, adverse effects which cannot be avoided, alternatives to the proposed action, the short term uses versus long term productivity of the environment, and any irreversible and irretreivable commitments of resources involved. Although these requirements are slightly more specific than the stated environmental objectives of NEPA, courts have adopted markedly different philosophies in construing the meaning of these prerequisites—differences which by no means have definitively resolved the question in a uniform manner. Calvert Cliffs' Coordinating Committee v. AEC69 is perhaps the most celebrated early environmental decision that considered what was sufficient to constitute an adequate impact statement under the NEPA. Judge Wright not only undertook to determine the legal adequacy of the Atomic Energy Commission's initial regulatory response to the requirements of NEPA in its nuclear licensing proceedings,70 but also went beyond the immediate dispute in order to write an essay which purported to interpret "NEPA's 

68. The Senate report provides: "A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow specific procedures for implementation. But if goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain 'action-forcing' provisions and procedures which are designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment." S. Rep. No. 91-296, 91st Cong., 1st Sess. 9 (1969). See also 3 COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 222 (1972).

69. 449 F.2d 1109 (D.C. Cir. 1971).

structure and approach." The decision is replete with dicta having the tendency to expand the impact of the application of NEPA to the agency licensing process. For example, the statutory phrase "to the fullest extent possible" was construed by the court as follows: "[W]e must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary,'" but rather "sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." 72

The court remanded the case for further AEC proceedings because, inter alia, the AEC, pursuant to its published regulations, 73 had accepted at face value a certification that the proposed plant would conform to the standards established by the Water Quality Improvement Act of 1970 (WQIA). 74 The AEC made no independent reappraisal of that certification but, pursuant to its regulations, considered it "dispositive" as to the environmental impact on water. The court characterized this AEC action as "abdicating entirely to other agencies' certifications." 76 It reasoned that because WQIA did not forbid a further evaluation of impact on water including "the NEPA balancing analysis," that therefore AEC "... must conduct the obligatory analysis under the prescribed procedures." 76 The court's view was expressly contrary to the statements of Senators Jackson and Muskie, and Congress subsequently has statutorily contradicted this aspect of Calvert Cliffs' in Section 511 of the Federal Water Pollution Control Act of 1972. 77 The decision has been strongly criticized as so excessive that the agency licensing procedure has been rendered virtually "impossible to perform," and the environmental review mandated by the decision "is not viable" absent extensive congressional intervention. 78

(1970) to apply NEPA to agency licensing proceedings will be discussed more fully infra.

71. Judge Wright set the tone of the D.C. Circuit's philosophy of interpretation of NEPA at the outset: "[T]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action." 449 F.2d at 1122 (emphasis supplied).

72. Id. at 1114 (emphasis supplied).


75. 449 F.2d at 1123.

76. Id. at 1125.

77. § 511(c)2.

78. Murphy, The National Environmental Policy Act and The Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace, 72 COLUM. L. REV. 963, 981-82
By contrast, the federal district court in *Environmental Defense Fund v. Army Corps of Engineers* expressed a considerably less rigorous and expansive philosophy of interpretation of NEPA’s impact statement requirements. Judge Eisele held that “the NEPA sets up certain requirements which, if followed, will insure that the decision-maker is fully aware of all pertinent facts, problems and opinions with respect to the environmental impact of the proposed project. . . . Although the impact statement should, within reason, be as complete as possible, there is nothing to prevent either the agency involved, or the parties opposing agency action, from bringing new or additional information, opinions and arguments to the attention of ‘upstream’ decision-makers even after the final EIS has been forwarded to CEQ. So it is not necessary to dot all the I’s and cross all the T’s in an impact statement.”

The Court of Appeals for the Eighth Circuit upheld the decision of the district court to dissolve the injunction against continued construction of the Gilham Dam and specifically concurred in the district court’s holding: “[I]t is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed could come up with a perfect environmental impact statement in connection with any major project.” The Eighth Circuit also quoted with approval the language of *Natural Resources Defense Council v. Morton* that “the statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation’s needs are not infinite.”

Apart from such divergent judicial philosophies as to how liberally NEPA should be interpreted, virtually every term and criterion of NEPA, and especially its impact statement requirements, are the subject of litigation; even the question of when in the decisional process the impact statement is required has received various treatment.
After the decision in *Calvert Cliffs*, the AEC issued new regulations to meet the requirements imposed by the Court's interpretation of NEPA. These regulations provide, *inter alia*, that "each applicant for a permit to construct a nuclear power reactor—shall submit with his application three hundred (300) copies—of a separate document, entitled 'Applicant's Environmental Report—Construction Permit Stage'. . . ." 84 Implicit in this rule is that an impact statement will be supplied prior to beginning any act of construction. Indeed, no act of construction can begin until after the AEC final detailed impact statement and adversary hearings are completed. However, this requirement has been challenged by environmentalists as being inadequate for various reasons. The Scientists' Institute has contended 85 that such an impact statement was required before the AEC legally could undertake research and development concerning the feasibility of the Liquid Metal Fast Breeder Reactor. The AEC took the position, upheld by the district court, that an impact statement was not required by NEPA until the stage of constructing the demonstration plant was reached. The court held that "[a] decision to proceed with the proposed LMFBR demonstration plant is not an action of the Federal government which will commit the Nation to the construction of large numbers of LMFBR's." 86 Indeed, the court would not impose the requirement for an impact statement until a commercial applicant had filed its application for a permit to construct an LMFBR. 87

In *Gage v. Commonwealth Edison*, 88 plaintiffs (farmers and concerned citizens of Brookfield, Illinois) sought an injunction against Commonwealth Edison (CE) to preclude CE from exercising its powers of condemnation under Illinois law to appropriate farmland for use as a cooling pond for a proposed nuclear power reactor. Plaintiffs argued that a NEPA impact statement is required prior to acquisition of land for power plant sites. The court rejected this argument and held that "until the AEC receives notice by an application for a permit it cannot

86. 4 E.R.C. at 1519. AEC Chairman Schlesinger commented on the futility of postponing an R & D project "... until the [impact] statement can be made to contain the very answers which the R & D effort is seeking." AEC News Release No. S-2-72 (March 3, 1972).
87. 4 E.R.C. at 1519.
88. 4 E.R.C. 1767 (N.D. Ill., Nov. 27, 1972).
begin its environmental survey." 89 In *Lathan v. Volpe,* 90 however, the Ninth Circuit, reversing the district court, prohibited further property acquisition for a proposed highway until completion of an adequate impact statement. On remand, the federal district court noted that "a sufficiently detailed final impact statement, which appends the comments received on the draft impact statement, provides the court with an administrative record which is reviewable." 91

The different results in *Lathan* and *Gage* may be accounted for in part by the fact that *Lathan* involved a highway project, for which no adjudicatory proceeding is held prior to construction, whereas the AEC does compile an evidentiary record in an adversary proceeding prior to issuing a construction permit; nevertheless, in both instances the impact on the landowners—their land had become the target of condemnation proceedings—would appear to be the same regardless of the point in time that is fixed for completion of the draft impact statement. This impact arises from the fact that land acquisition is an important, perhaps irreversible step in the total process, and even if it does not start an irresistible bureaucratic momentum toward ultimate construction, it cannot avoid tainting the value and quiet enjoyment of the property involved.

In *Greene County Planning Board v. FPC,* 92 the FPC sought to file its impact statement after conclusion of hearings involving a licensing under section 4(e) of the Federal Power Act. 93 The FPC relied on section 7 of the CEQ Guidelines 94 which provides for publication of a draft environmental statement at least 15 days prior to hearing, "... except where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by

89. Id. at 1770. AEC has sought authority to regulate site selection. AEC supported the introduction of H.R. 9286, 92d Cong., 1st Sess. (1971) and S. 2152, 92d Cong., 1st Sess. (1971) which provide for a hearing on an application for a site authorization before any construction activity. Hearing on the construction permit would be optional and only if demanded; no hearing would be held for the operating permit. See also H.R. 5277 & H.R. 11056, 92d Cong., 1st Sess. (1971), proposing siting legislation which would require utility applicants to develop long-range plans including disclosure of site plans two years before construction is programmed to begin. Hearings authorizing sites would be held as long as five years prior to construction. See also 9 New York State Atomic and Space Development Authority, Ann. Rep. (state siting considerations).

90. 3 E.R.C. 1362 (9th Cir., Nov. 15, 1971).
92. 455 F.2d 412 (2d Cir. 1972).
adequate public notice and information to identify the issues and obtain the comments provided for in Sections 6-9 of these guidelines." 95 The Commission argued that the applicant had submitted a preliminary impact statement that supplied "adequate public notice and information to identify the issues...." The court held that the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement. The decision is silent as to how long before the hearing the staff's draft impact statement is required, although CEQ guidelines provide for making the draft impact statement available to the public at least 15 days prior to the time of the relevant hearings. 96 Thus, even with respect to such a fundamental mechanical detail as the timing of the impact statement, considerable diversity has resulted between the different forums that have ruled on the question.

Even more direct conflict has arisen on the important question whether the six objectives set forth in section 101(b) of NEPA 97 constitute substantive environmental rights or mere policy goals. The issue first arose in two widely separated federal district courts that were reviewed in the Tenth and Eighth Circuits. *McQueary v. Laird* 98 was a class action brought by persons residing adjacent to the Rocky Mountain Arsenal to challenge storage of chemical and biological warfare agents. The Court of Appeals for the Tenth Circuit affirmed the federal district

96. Id.
97. Section 101(b) provides: "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 the nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

98. 449 F.2d 608 (10th Cir. 1971).
court's decision dismissing the complaint on the basis of sovereign immunity. At oral argument on appeal, plaintiffs raised for the first time the argument that section 101 of NEPA provided a substantive basis for granting an injunction. The Tenth Circuit disagreed, holding that "...NEPA does not create substantive rights in the plaintiffs-appellants here to raise the environmental challenge in regard to the Rocky Mountain Arsenal." 99 Environmental Defense Fund, Inc. v. Corps of Engineers 100 arose in a federal district court in Arkansas and involved plaintiff's contention that NEPA creates some substantive rights in addition to its procedural requirements. Specifically, sections 101(b)2 and 4 were said to be substantive in nature. 101 The court held: "The Act appears to reflect a compromise which, in the opinion of the Court, falls short of creating the type of 'substantive rights' claimed by the plaintiffs. . . . It is true that the Act required the government 'to improve and co-ordinate Federal plans, functions, programs, and resources,' but it does not purport to vest in the plaintiff, or anyone else, a 'right' to the type of environment envisioned therein." 102 The court concluded that "...the plaintiffs are relegated to the 'procedural' requirements of the Act." 103

Before the Eighth Circuit completed its review of this decision, the Seventh Circuit in Bradford Township v. Highway Authority 104 affirmed the dismissal of a complaint against a state-financed highway extension on the ground, inter alia, that NEPA section 101 did not create a substantive right providing a basis for federal jurisdiction. The Seventh Circuit, relying on both the McQueary and the EDF decisions, held that NEPA section 101 was merely a statement of policy and created no substantive rights. 105

Subsequently, the Eighth Circuit expressly reversed the district court, holding in EDF v. Corps of Engineers. 106 "The district court found that NEPA 'falls short of creating the type of substantive rights claimed by the plaintiffs', and therefore 'plaintiffs are relegated to the procedural requirements of the Act.' We disagree. The language of NEPA, as well as its legislative history, make it clear that the Act is

99. Id. at 612.
101. Id. at 755.
102. Id.
103. Id.
104. 4 E.R.C. 1301 (7th Cir., June 22, 1972).
105. Id. at 1302-03.
106. 4 E.R.C. 1721 (8th Cir., Nov. 28, 1972).
more than an environmental full-disclosure law. NEPA was intended
to effect substantive changes in decisionmaking.”

The court proceeded to cite various portions of section 101 as constituting such sub-
stantive provisions.

This conflict was compounded in the Fourth Circuit. A district court
ruled with respect to NEPA in Conservation Council v. Froehlke
that, “[c]ourts that have discussed these requirements have consistently
held that these requirements provide only procedural remedies instead
of substantive rights . . . .” The court relied, inter alia, on the dis-

107. Id. at 1725.
109. Id. at 225.
111. 340 F. Supp. at 228.
112. The Tenth Circuit in National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir.
1971), held that no review on the merits is available: “The decisions are also clear
that the mandates of the NEPA pertain to procedure and do not undertake to control
decision making within the departments.” Id. at 656.
113. 449 F.2d 1109, 1115 (D.C. Cir. 1971). This view was followed in Natural Re-
The Second Circuit in *Scenic Hudson Preservation Conference v. FPC*\(^{114}\) specifically addressed itself to the contention that “different standards ought to prevail with respect to issues arising in an environmental context.”\(^ {115}\) The court rejected this view, concluding that “to read these cases as sanctioning a new standard of judicial review for findings on matters of environmental policy is to misconstrue both the holdings in the cases and the nature of our remand in *Scenic Hudson.*”\(^ {116}\) The court cited the holding in *Citizens to Preserve Overton Park, Inc. v. Volpe* that “although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”\(^ {117}\)

Under this line of cases,\(^ {118}\) the reviewing court can extend its review to ascertain whether the agency acted in an arbitrary or capricious manner (e.g., gave no consideration or demonstrably inadequate consideration to environmental issues) and whether the findings of the agency are supported by substantial evidence. The court in *Scenic Hudson* noted that the possibility of drawing inconsistent conclusions from the evidence does not detract from the agency’s finding being supported by substantial evidence and cited the *Gainesville*\(^ {119}\) holding: “Congress ordained that that determination should be made, in the first instance, by the Commission, and on the record made in this case, the Court of Appeals erred in not deferring to the Commission’s expert judgment.” In practice, *Scenic Hudson* appears to sanction a limited review for purposes of establishing whether the agency’s findings are supported by substantial evidence.\(^ {120}\)

Unfortunately, these “traditional” tests of the scope of judicial review become blurred and perhaps, eroded depending on the reviewing officials and agencies have taken the ‘hard look’ at environmental consequences mandated by Congress, the Court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken.” (citing *Calvert Cliffs*).

114. 453 F.2d 463 (2d Cir. 1971).

115. Id. at 468.

116. Id.


118. See also Udall v. FPC, 387 U.S. 428, 450-51 (1967).


120. The Council on Environmental Quality has interpreted these decisions to mean that: “The Courts have uniformly said that, after an agency has considered environmental effects, its decision to act is subject to the limited judicial review afforded by the traditional arbitrary-or-capricious and substantial evidence tests.” 3 COUNCIL ON ENVIRONMENTAL QUALITY, supra note 64.
court's view as to how far it must go to determine whether the evidence is "sufficient," and also as to whether NEPA is strictly a procedural, full-disclosure statute or whether section 101 creates substantive rights. The Eighth Circuit in *EDF v. Corps of Engineers*\(^{121}\) while impliedly recognizing these "traditional" tests, nonetheless held that "the trial court's opinion is in error insofar as it holds that courts are precluded from reviewing agencies' decisions to determine if they are in accord with the substantive requirements of NEPA."\(^{122}\) The court upheld the agency and found that "we have reviewed the record thoroughly and are convinced that even if all factual disputes are resolved in favor of the plaintiffs, the decision of the Corps to complete the dam cannot be set aside as arbitrary or capricious . . . . We have reached this conclusion after a serious consideration of the arguments in favor of and against completion of the project. In large part this has necessitated a balancing, on the one hand, of the benefits to be derived from flood control, and on the other, of the importance of a diversified environment."\(^{123}\) In this regard, the court conducted a detailed factual analysis that amounted to a judicial cost-benefit analysis. The danger of this approach is obvious. Even if the facts had been different or the court more environmentally "liberal," it is clear that the court felt empowered to conduct its own cost-benefit analysis and reach a conclusion opposite that of the agency. Indeed, this is precisely the approach taken by Judge Oakes in the dissent in *Scenic Hudson*:

> If this case came to us without environmental overtones, . . . I would be constrained to take the viewpoint of the majority. For, whether or not I agreed with the weight given by the Federal Power Commission to alternative sources of power, . . . the court would be conclusively bound . . . by findings supported by "substantial evidence," particularly when the Commission is acting within its own field of "expertise and judgment."\(^{124}\)

Judge Oakes, acting on the apparent premise that the "traditional" scope of review is inappropriate because of "environmental overtones," proceeded to analyze minutiae of evidence in a detailed 12-page dissent and to "second-guess" the agency with respect to geological matters, aesthetics, whether sufficient alternatives were considered to constitute

\(^{121}\) 4 E.R.C. 1721 (8th Cir., Nov. 28, 1972). See note 81 supra.
\(^{122}\) 4 E.R.C. 1721, 1728 (emphasis supplied).
\(^{123}\) Id. (emphasis supplied).
\(^{124}\) 453 F.2d at 482.
a good faith effort by the agency, and the details of air pollution impact. Apart from the different conclusions reached and the length and detail of the balancing analysis, Judge Oakes’ approach is not distinguishable from the “balancing” by the Eighth Circuit in the EDF case.

Judge Timbers also dissented from the court’s denial of reconsideration en banc on the ground that “... a substantial question of unusual importance is presented by the panel’s application of the substantial evidence test in reviewing the FPC’s determination that the benefits of the project outweigh the environmental damages.” Judge Timbers’ view was echoed by Mr. Justice Douglas in his dissent to the Supreme Court’s denial of certiorari: “I share Judge Timbers’ doubts that under § 101 the balance struck by an agency unskilled in environmental matters should be reviewed only through the law of the ‘substantial evidence’ test.”

Whatever the appropriate scope of judicial review of environmental issues, whether they arise under NEPA or some other statute, it is essential to have a consistent rule and to know what that rule is. Moreover, if judicial review is to be “liberalized” in environmental cases, and agency cost-benefits analyses are to be supplanted by judicial cost-benefit determinations, it becomes even more important that the court on review possess an authentic expertise. Otherwise, not only the scope of review will vary from court to court, but the degree and nature of judicial “second-guessing” of agency determinations will vary with the court’s largely non-expert and subjective judgment concerning environmental values. From the foregoing, which by no means exhausts the examples of conflict and varying interpretations of NEPA by the courts, it is apparent that environmental decisions issuing from the

125. Id. at 494.
126. 92 S. Ct. 2455 (1972). See also International Harvester Co. v. Ruckelshaus, No. 72-1517 (D.C. Cir. Feb. 10, 1973) in which the court remanded a decision by EPA that technology was available to comply with Clean Air Act standards. The court noted, “It is not without diffidence that a court undertakes to probe even partly into technical matters of the complexity of those covered in this opinion. It is with even more diffidence that a court concludes that the law, as judicially construed, requires a different approach from that taken by an official or agency with technical expertise.” Id. at 56. The court thus by inference seems to characterize its “probe” into “technical matters” as a ruling on the law rather than what it really seems to be, i.e., a difference of opinion on whether the facts establish that technology exists to meet Clean Air Act standards.
127. Naturally what constitutes a major federal action and what constitutes a significant effect on the quality of the human environment are susceptible of substantially different interpretations. This has been so despite publication by the Council on Environmental Quality of Guidelines for Statements on Proposed Actions Affecting the Environment, 36 Fed. Reg. 7724 (April 23, 1971). Virtually all major federal agencies
existing federal courts are achieving far less consistency than is desirable, and indeed necessary, to cope with national environmental reform objectives. As a result, agency action is being seriously impeded for lack of consistent judicial interpretation having precedential value.

D. The Problem of Delay and Its Relationship to Agency “Credibility”

The problem of delay is an important factor in considering the creation of a new environmental court. In this regard, analogy to the experience of the U.S. Tax Court again is instructive. Delay does not appear to be a serious problem so far as litigation before the Tax Court itself is concerned, but unduly long intervals elapse between the time when a tax case first arises and when it is finally decided if it proceeds through the entire gamut of review. Dean Griswold has strongly criticized the delay inherent in tax litigation: “It took from seven to eight years for an estate tax question to get through the Supreme Court. . . . It took from six to seven years to get a gift tax question before the Supreme Court.” Isolated cases required variously 22, 17, and nine years to resolve. Griswold concludes, “on the whole, it may be said that in the cases decided by the Supreme Court in the calendar year 1943 it was on the average of at least ten years from the time the point was first raised until it was finally authoritatively determined.” More recently, the Senate Judiciary Committee has criticized delays in definitively resolving tax cases. These delays result from the same causes that have created the conflicting decisions—the trifurcation of trial jurisdiction and the review of Tax Court decisions by 11 courts of appeals rather than a single Court of Tax Appeals. Presumably, the grant of exclusive trial jurisdiction to the tax courts and exclusive appellate jurisdiction to a Court of Tax Appeals would obviate this problem.

Substantial delays have resulted in adjudication of environmental cases. Litigation of environmental cases under NEPA began in 1970, and it have published counterpart guidelines. See 36 Fed. Reg. 2366 et seq. (1971) for a list of the agencies involved and a compilation of these procedures. These guidelines are updated periodically to meet changing conditions. These guidelines are sometimes the subject of intense controversy, e.g., the Atomic Energy Commission issued for comment a proposed Guide to the Preparation of Environmental Reports for Nuclear Power Plants in August, 1972. Voluminous comments have been received both in writing and at conferences held to discuss suitable guidelines. At this writing no final guidelines have been determined.

128. 1971 COMM'r OF INTERNAL REVENUE ANN. REP. 50.
129. Griswold, supra note 9.
130. SENATE SUBCMM. ON IMPROVEMENTS, supra note 54.
is too early to make useful observations about delay in these cases except to note that the amount of conflicting and diverse interpretations of NEPA and the rapidly increasing volume of such litigation suggest that significant delay is likely to develop. Pre-NEPA environmental litigation does suggest that delay is a serious problem. Scenic Hudson, though perhaps an extreme example, demonstrates the potential for delay with respect to non-NEPA as well as NEPA environmental litigation. Scenic Hudson set aside three orders issued by the FPC between March 9 and May 6, 1965, for failure to meet certain environmental standards that the court held to be implicit in the Federal Power Act with respect to licensing a power plant on the Hudson River. On remand, the FPC deliberated five additional years and on August 19, 1970, reissued the license to construct the plant. Scenic Hudson involved a further environmentalist challenge of this license, this time invoking, inter alia, provisions of NEPA as a basis for denial. The court denied these petitions with the observation: "We do not consider that the five years of additional investigation which followed our remand were spent in vain." Thereafter, the Supreme Court denied certiorari. Thus, insofar as federal litigation is concerned, the case was resolved in seven years, but subsequently the environmentalists in Scenic Hudson Preservation Conference v. State Commissioner of Environmental Conservation succeeded in getting a state court to set aside the water quality certification issued by the New York State Department of Environmental Conservation despite the fact that the project had been considered fully on the federal level.

It is evident that the delay in Scenic Hudson resulted in part from judicial activity and in part from agency activity. It is therefore necessary to identify how delay arises and what stages of the total adjudicatory process are most prone to delay before it is possible to determine whether special environmental courts could significantly reduce it.

1. Agency Delay

Agency delay in environmental matters appears to result from a variety of factors:

131. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).
132. 453 F.2d 463 (2d Cir. 1971).
133. Id. at 481.
134. 92 S. Ct. 2453 (1972).
(a) The necessarily comprehensive scrutiny that the typical "mis-
mission" agency must accord to complex and voluminous tech-
nical matters, frequently involving several specialized fields
of knowledge, multiple parties, and types of questions that are
not readily susceptible of definitive "yes or no" answers, con-
sumed substantial time even before enactment of NEPA;\(^{136}\)

(b) This already time-consuming agency process has been vastly
complicated by the imposition by NEPA of additional envi-
ronmental considerations which must be factored into
agency deliberations in the form of a cost-benefit analysis not
only of the proposal at issue, but for all reasonable alternatives
to that proposal as well;

(c) The precise nature and scope of the new environmental con-
siderations as interpreted by the courts are at best general and
often conflicting or inconsistent, with the result that agencies
tend, in order to avoid reversal, to err on the side of excessive
deliberation;

(d) In agency proceedings requiring trial-type hearings, the
agency is slowed by the multiplicity of parties, the dilatory
tactics of parties who are so disposed,\(^{137}\) lengthy records, and
the inevitably long lead times that occur between the time of
application, staff analysis, notice of hearing and prehearing

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\(^{136}\) It must be remembered that independent agencies were created to handle com-
plex matters that were not suitable for resolution in conventional courts. See J. LANDIS, THE ADMINISTRATIVE PROCESS 1-3 (1938).

\(^{137}\) There can be little doubt that some environmental intervenors doubt or pretend to
doubt that existing agency process offers a full and fair opportunity to assert and develop
their point of view.

Accordingly they resort to dilatory and obstructionist tactics, a kind of "no win"
holding action, while they wage a campaign in the media for institutional "reform." It is
probably true in a number of cases that litigants really don't try to use the trial-type
hearing for the purpose it was intended, i.e., to resolve issues on the merits, but rather
to exploit its potential for delay. See Ellis & Johnston, Licensing of Nuclear Power
Plants by the Atomic Energy Commission, printed in Hearings on AEC Licensing Pro-
cedure and Related Legislation Before the Subcomm. on Legislation of the J. Comm.
on Atomic Energy, 92d Cong., 1st Sess., pt. 2, at 556 (1971). See also Like, Multi-Media
Confrontation--The Environmentalists' Strategy For a "No Win" Agency Proceeding,
printed in Hearings, supra, pt. 3, at 1402.

One of the reasons for the establishment of an independent Tax Court was the public
outcry against the combination within a single agency of the power to assess taxes and
adjudicate the legality of the assessment. Any comparable public mistrust of environ-
mental adjudication probably is focused upon the agencies rather than the courts. Of course
it is generally recognized that long delay in the federal courts is a basis for loss of
public confidence (especially with respect to criminal cases), but that problem as yet
does not exist in environmental litigation, largely because environmentalist parties regard
delay as a factor that serves their cause.
conference, preparation of exhibits by intervenors and rebuttal thereto, conduct of hearings before examiners or hearing boards, briefing, preparation of initial decision, exceptions thereto, briefing to the agency, and agency review and decision;

(e) Some agencies provide for multiple licensing proceedings which simply repeats the delay implicit in (d). AEC licensing, for example, involves two steps—construction permits and operating licenses—and may involve anti-trust hearings.138

2. Judicial Delay

Judicial delay in environmental litigation tends to result from two sources: The general slowdown that results from an overloaded docket, and the technical nature and volume of the subject matter of the litigation, which is comparatively more time-consuming than most other types of cases, especially for judges who have not developed specialized expertise.

It is evident that special environmental courts could help reduce both causes of judicial delay (and by lessening the workload of the regular federal courts, contribute to more expeditious decision of the remaining caseload). To the extent that a system of environmental courts would be capable of devising rational and consistent interpretations of NEPA, the delay in the agency process related to compliance with the Act could be reduced. The extent to which other causes of delay in the agency process could be reduced by special environmental courts will be discussed in a later section of this Article.139

THE ENVIRONMENTAL COURT’S RELATIONSHIPS WITH EXISTING REGULATORY BODIES

Before Congress can conclude that an environmental court system is necessary or would produce important benefits, it must determine how such a system would function vis-à-vis the independent regulatory agencies, various departments of the executive branch of government, and the recently created special environmental agencies.140


139. See infra p. 513 et seq.

140. These agencies are the Environmental Protection Agency and Council on Environmental Quality.
A. Independent "Mission" Agencies—Licensing as "Major Federal Actions Significantly Affecting the Quality of the Human Environment"

NEPA does not mention federal licenses or permits. Its language and the procedures it requires appear more applicable to federal agencies and departments seeking legislative authorization for projects or appropriations to fund such projects. Nothing in the legislative history of NEPA suggests that Congress gave any detailed consideration to the consequences of the application of NEPA to the licensing processes of the various federal independent agencies, and the legislative history is devoid of any guidelines to any regulatory agency as to the application of NEPA in licensing or any other type of administrative proceeding.

From the outset, however, both the President and CEQ took the position that NEPA did in fact apply to licensing and inferentially acknowledged that licensing constituted a "major federal action." It is doubtful, however, that Congress, the President, or CEQ contemplated the broad impact on licensing that subsequently has resulted from the court's interpretation of NEPA in *Calvert Cliffs*, *Kalur v. Resor* and other decisions. Indeed, Congress has enacted three provisions which undertake to reverse aspects of *Calvert Cliffs* and *Kalur*. These

144. Section 511(c)2 of the Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 provides that "nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—(A) authorize any Federal Agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under Section 401 of this Act; or (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this Act." Congress also enacted Pub. L. No. 92-307 (June 2, 1972) which empowers AEC until October 30, 1973, to issue temporary operating licenses under abbreviated environmental procedures if the facility is necessary to meet urgent power needs.
145. *Kalur* held, inter alia, that the Corps of Engineers in issuing discharge permits under the Refuse Act of 1899 could not rely on the determination of EPA as conclusive with respect to the effect of the discharge on water quality but must prepare a detailed statement of environmental impact before issuing any permit.

Section 402 of the Federal Water Pollution Control Act of 1972 discontinued the discharge permit system of the Corps of Engineers under the Refuse Act. Instead EPA will issue permits, after opportunity for hearing, if the applicant meets the applicable requirements of this Act. Applications pending before the Corps need not be resubmitted. Where states have established water quality programs that comply with EPA guidelines and the provisions of this Act, the state can issue the permit subject to EPA veto.
legislative actions indicate that Congress had not anticipated the broad application of NEPA that courts would adduce from the highly general legislative language, nor the far reaching practical consequences on the administrative licensing agencies, especially those whose jurisdiction affects the nation's power supply. At best, these three legislative attempts by Congress to curb judicial application of NEPA have done little more than to provide partial or interim relief from the delay and confusion that has resulted to the licensing process.

Congress also provided that until December 31, 1974, any applicant with a pending application who has furnished all information reasonably requested can discharge without violation of either the Refuse Act or this Act. In addition, discharges into previously "non-navigable" waters will not be a violation if a permit application is filed within 180 days after enactment of these amendments.

Moreover, Section 511(c)(1) provides: "Except for the issuance of a permit under Section 402 of this Act for the discharge of any pollutants by a new source as defined in Section 306 of the Act, no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969..." (emphasis supplied).

146. The Senate Interior Committee held hearings to evaluate the effects of Calvert Cliffs on the domestic nuclear power industry and the national power supply and determined that the decision would affect 65 pending applications for construction permits and operating licenses involving 97 nuclear power reactors with a total generating capacity of 87 million kilowatts which represent approximately 25 percent of the installed generating capacity of the entire electric utilities industry (nuclear, fossil and hydro) at the end of 1970, which was then 340 million kilowatts. Senate Comm. on Interior and Insular Affairs, A National Fuels and Energy Policy Study, Serial No. 92-28, 92d Cong., 2d Sess. 23 [hereinafter cited as Policy Study]. The Policy Study also notes that "...possible additional delays caused by an application of NEPA reviews are likely to adversely affect the adequacy and reliability of electricity supply..." (R)eliability may also be adversely affected by the prolonged use of obsolete equipment... Continued use of older equipment beyond scheduled retirement dates also would be less efficient in use of fossil fuels, for the older equipment requires more coal, oil or gas per kilowatt-hour of electricity produced [and] older plants may not be as well equipped with means to reduce air pollution as their modern counterparts." Id. at 7. There is the further problem that delays in AEC and FPC licensing inevitably tend to force utility companies to elect to use fossil fueled generators and thereby tend to distort the "trend of technological development in the power utility industry."

147. The impact on independent agency licensing and other regulatory activity has not been confined to the AEC and FPC power licensing. The Civil Aeronautics Board in March, 1972, was compelled to postpone indefinitely Phase II of its Northeast Corridor VTOL Investigation (an investigation of high density air service needs begun October 5, 1967), because the NEPA requirements for information to prepare an adequate impact statement as set forth in 14 C.F.R. Subpart J, § 399.110 (1972) of the Board's Economic Regulations and various FAA reports (FAA-No. 68-34, 69-2, 70-7, 70-8, and 70-9) were beyond the resources of the parties (both private and governmental) to supply. CAB, Prehearing Conference Report—N.E. Corridor VTOL Investigation Phase II, Doc. 19078 et al., app. B, at 8-9. Cf. Aberdeen R.R. v. Scrap, 93 S. Ct. 1 (1972), involving
Actually, events subsequent to enactment of the water legislation indicate that the congressional effort to relieve AEC of a duty to reassess impact on water-quality, despite the issuance of a water permit by EPA (or by a state pursuant to EPA approval), may have complicated matters and set the stage for still further dilatory litigation. After the Calvert Cliffs' decision, the AEC sought to develop expertise on thermal pollution of water in order to comply with the court's mandate. Meanwhile, prominent Senate sponsors and supporters of NEPA, chaffing at the near paralysis that Calvert Cliffs' had imposed on AEC licensing, planned action to correct what they viewed as judicial misapplication of NEPA. The Baker Amendment sought to employ the Federal Water Pollution Control Act, then being drafted in the Senate Public Works Committee, as the vehicle to provide relief that was thought to be necessary lest AEC licensing grind to a permanent halt. Senators Baker and Muskie agreed that: "[T]here is no reason for the AEC to evaluate independently the thermal or other water-pollution effects, established by a state or EPA, associated with nuclear power plants...." Accordingly, the Baker Amendment was engrafted to the Water Bill; it provided simply that NEPA water-quality requirements would be satisfied by certification under the existing Refuse Act permit system or under the new water-quality permit system being created by the bill, both systems to be controlled by EPA. However, Senator Baker's floor statement seemed to nullify much of the relief

environmental impact of ICC rate increase on recyclable commodities. See also SEC disclosure regulations concerning financial impact of environmental regulations and litigation. Statement of William J. Casey, Chairman of The Securities and Exchange Commission, before Subcommittee on Fisheries and Wildlife Conservation of the House of Representatives Committee on Merchant Marine and Fisheries. On February 11, 1972, the Natural Resources Defense Council and the Project on Corporate Responsibility filed with the SEC a rule-making petition seeking the requirement of disclosure in registration statements of:

1. The nature or extent of any pollution or environmental injury resulting from the corporate activity;
2. The feasibility of curbing the impact under current technology;
3. Plans and prospects for improving that technology;
4. Existing and projected expenditures for curbing pollution;
5. Applicable legal environmental compliance with environmental protection standards.

Memorandum on the Natural Resources Defense Council Project on Corporate Responsibility NEPA Petition to SEC. (undocketed).

148. Notably involved were Senators Muskie and Baker.
150. Id.
his amendment would have granted. He endorsed that part of Calvert Cliffs' that required a case-by-case balancing judgment on the part of federal agencies and stated: "My amendment should not in any way be construed to mean that water-quality considerations do not play a role in such a 'balancing judgment.'" Critics of Calvert Cliffs' in both the House and Senate were alarmed by this statement; in Conference they abandoned the amendment and substituted, inter alia, the present version of section 511(2)C. When the new version returned from Conference (without any explanation in the Conference Report) to the Senate floor, Senator Baker remained silent and the sole elucidation resulted from questions put to Senator Muskie. In the course of this colloquy, Senator Muskie assented to the proposition that section 511(2)C would "preclude the right of the other agencies to insist on other standards, or the rights of in-depth environmental groups to go to court and insist that the AEC maintain standards more strict than those employed by EPA..." Before a month had elapsed after enactment, the problem of the extent of AEC responsibility to review water-quality arose with respect to the Indian Point, New York, Nuclear Plant. Paradoxically, AEC, having developed water pollution expertise since Calvert Cliffs', takes the position that despite section 511(2)C, EPA or state-issued permits are not dispositive. AEC Commissioner Doub has stated: "Anything short of zero discharge causes some environmental degradation, and we must weigh that negatively in the balance...[W]e shall have to retain a large capacity and expertise in water quality matters no matter how the jurisdictional questions are resolved." Subsequently, EPA and AEC have published a joint interagency accord, the substance of which is that AEC will defer to EPA in the establishment of effluent limitations for nuclear power plants, but until these are established AEC will continue to exercise all the jurisdiction imposed by Calvert Cliffs'. Even after effluent limitations are prescribed, it appears that EPA will defer to AEC to decide what technology is required to facilitate compliance. Given the clear language of section 511(2)C and the floor statements of Senator Muskie, it would appear that if AEC seeks to impose the vastly more expensive closed-cycle

151. Id.
152. Id. at 132.
153. Id.
154. Id. at 133.
cooling technology on nuclear utilities, further litigation to determine AEC\'s precise powers and duties under the new language may result.

It is apparent that an agency with any prospect that its regulatory duties will entail environmental consequences must revise and adapt its modus operandi to comply with the broadest judicial extension of NEPA or encounter the risk that its regulatory action will be stalled or reversed on judicial review. The reaction of AEC to Calvert Cliffs\' best illustrates the transformation that has occurred to greater or lesser extent throughout the agency establishment. On August 4, 1971, the AEC announced, "The Commission is studying how best the Court of Appeals\' decision can presently be implemented in pending licensing cases." Although judicial review was considered, the AEC did not seek review; rather, it revised its regulations to recognize the AEC\'s direct responsibility for evaluating the total environmental impact, including thermal effects, of nuclear power plants, and for assessing this impact in terms of available alternatives and the need for electric power.

Initially, AEC took action to (1) reevaluate NEPA environmental statements prepared for pending cases and to prepare supplemental statements to meet the requirement of the court\'s decision; (2) begin NEPA environmental review of both facilities that were licensed after January 1, 1970, and pre-NEPA construction permits such as that in issue in Calvert Cliffs, and (3) issue new regulations to implement the court-imposed standards for ongoing and future projects. These new regulations, as of November, 1971, envisioned two basic substantive changes in AEC procedures—an independent evaluation and balancing of the benefits of licensing against the environmental costs of various alternatives, and independent substantive review of environmental matters even in uncontested as well as contested proceedings before the AEC Atomic Safety and Licensing Board. Under revised AEC procedures prescribing the requirements of NEPA review, applicants for a permit or license were required to provide detailed information with respect to three new aspects of nuclear power generation:

155. Additional cost for such technology ranges between $50-75 million per cooling system. Id.
157. Id. at Attachment, Interim Guidance on Modification of Environmental Reports and AEC Statements under NEPA.
Information was required regarding all transportation of nuclear fuel elements from the fuel fabrication plant to the power plant, of used fuel from the plant to the fuel reprocessing plant, and of operating wastes to the burial ground; (2) With respect to transmission lines, the applicant must describe their environmental impact, the impact of alternative routes, ways and means of clearing rights-of-way, erosion control and impact on wildlife; (3) AEC requires detailed information on the probabilities of various types of accidents including predicted frequency of occurrence and probable consequences.\textsuperscript{159}

Except with respect to transmission lines,\textsuperscript{160} the foregoing did not allay environmental protest and litigation. Subsequently, in November of 1972, AEC issued for comment a voluminous study entitled \textit{Environmental Survey of the Nuclear Fuel Cycle} which encompasses the progress of nuclear fuel from the mine to its ultimate disposition. This \textit{Survey} was prepared to facilitate generic rulemaking so as to avoid numerous duplicative and minute considerations of these vast, complex problems in each individual licensing proceeding. A pre-hearing conference on the rulemaking was held in February, 1973. Similarly, AEC held more than 100 days of hearings before a special \textit{ad hoc} panel of experts to determine what generic regulations should be devised with respect to the emergency core cooling system (ECCS), a fail-safe device to prevent nuclear "blow-outs." Upon the conclusion of these hearings in which environmental intervenors participated and which were adversary in nature, AEC prepared a draft impact statement on the consequences of promulgating ECCS rules;\textsuperscript{161} as yet these rules have not been forthcoming. Moreover in August, 1972, the AEC—apparently

\textsuperscript{159} Id. \textit{See Policy Study}, \textit{supra} note 146, at 26.

\textsuperscript{160} In \textit{Calvert Cliffs}\textsuperscript{2} the Court suggested that AEC should consider seriously a temporary halt in construction of nuclear power plants pending completion of sufficiently broadened NEPA review. Thereupon, AEC required holders of construction permits and operating licenses to show cause why their permit or license should not be suspended. By March 1, 1972, when joint hearings of the Senate Committees on Public Works and Interior were held to determine the status of NEPA compliance, some 53 nuclear power plants had responded. Subsequently, AEC suspended non-nuclear construction (primarily transmission lines) by several plants in California, Florida, North Carolina, Pennsylvania, and Virginia. \textit{See Policy Study}, \textit{supra} note 146, at 29.

motivated by misgivings about the adequacy before a reviewing court of the revisions heretofore noted in their regulations—issued for comment a Guide to the Preparation of Environmental Reports for Nuclear Power Plants. The comments, both oral and written, were not only voluminous, but highly polarized—environmentalists demanding more information and restrictions, utilities complaining that many of the proposed guidelines are pointlessly detailed and impossibly onerous, time consuming, and expensive to meet.

The foregoing regulatory response as it manifests itself in AEC functions has been developed in detail to illuminate the difficulties that existing administrative structures face in order to comply with court interpretations of NEPA requirements and to perform their licensing mission within acceptable time-cost limits. The principal problems can be summarized in three categories:

(1) Licensing proceedings which are conducted in traditional adjudicatory format cannot resolve definitively the totality of issues that must be decided to comply with current judicial interpretations of NEPA requirements. A few sample issues that resist adequate adjudicatory disposition will suffice to demonstrate this point. Calvert Cliffs requires "individualized balancing analysis to insure that . . . the optimally beneficial action is finally taken." What constitutes the "optimally beneficial action" involves a judgmental process applicable to

of other documents admitted as exhibits. This transcript has been certified to the AEC, which must extract from this mass of material conclusions as to what changes, if any, should be made with respect to ECCS Acceptance Criteria.

162. Even prior to publication for comment of the AEC Guide to the Preparation of Environmental Reports for Nuclear Power Plants (which would expand substantially the submissions presently required by 10 C.F.R. § 50, App. D), delay in the licensing lead time was forecast . . . "to take an extra year to resolve these issues." Policy Study, supra note 146, at 34. Overall delay of one year in bringing on nuclear capacity sufficient to generate 91,000 megawatts was forecast to cost $5-6 billion. Id. at 45. On an individual plant basis, delay of a completed plant otherwise available for operation ". . . would cost approximately $4 million per month—$3 million for cost of replacement power and $1 million for carrying charges of the fully constructed plant." Id. Apart from delay, environmental review may result in about five percent additional cost to the consumer. Id.

The delay in fact turned out to be greater than that anticipated. The AEC Director of Regulation testified on February 6, 1973, before the Joint Committee on Atomic Energy that as a result of the Calvert Cliffs' decision there had been a 17-month hiatus during which no major licensing actions were taken by the AEC. Nuclear Industry, February 1973, Vol. 20, No. 2, p. 13.

163. 449 F.2d. at 1123 (emphasis supplied).
questions that are not susceptible of scientifically precise determination, such as the probability of nuclear accident under numerous alternative and varied reactor design assumptions, the optimum location of a nuclear facility in relation to the location of the consumer district, the qualitative impact on aesthetic values of a proposed project, and the like. Given the complexity and volume of the material, the number of intervenors involved and the intensely subjective judgmental standard the agency must satisfy, it is doubtful that court-developed litigation techniques and the format of the traditional adversary proceeding is a viable method to resolve many essential questions.

Most of the elements and distinctive features of the trial-type proceeding evolved in circumstances markedly different from those in which they are now applied in the agency licensing process. Cross examination developed in the context of a two-party controversy seeking to adduce the truth or falsity of a limited number of issues based on a finite and usually small number of facts, chiefly dealing with events and subject matter comprehensible by the average judge. In this kind of adjudicatory scenario, cross examination can be one of the most important instruments for reaching an accurate and just decision. Extensive cross examination, however, is ill-suited for use in multi-party cases (sometimes as many as 20 or more parties and intervenors) involving an immense volume of highly complex data, often expressed in thousands of pages of exhibits spanning several specialized technical disciplines, and calling for subtle judgmental determinations by the hearing officer, often involving large degrees of subjective values and nearly always involving forecasting of future conditions. The potential for dilatory tactics in such a system is obvious; it has resulted in hearings that require some 122 days to conduct and produce more than 32,000 pages of transcript and exhibits.

(2) The environmental standards the agency and the applicant must meet in the preparation of their detailed environmental statements and in the licensing proceedings are vague under the statute. Instead of clarifying these criteria, the courts simply have underscored the duty to enforce them "rigorously," regardless of whether the issues in the proceeding are contested. Even prior to enactment of NEPA, the quasi-judicial aspect of agency functioning has long been criticized as falling short of ideal. One of the most fundamental criticisms has been that the agencies, either because of the vagueness of their statutory mandate or the failure to develop consistent adjudicative standards
within the agency, produce decisions which lack consistent, coherent substantive policy. Judge Friendly criticizes the Federal Communications Commission for employing "spurious criteria, used to justify results otherwise arrived at," and for its use of "... an arbitrary set of criteria whose application ... is shaped to suit the cases of the moment." Similar criticism is levelled against other agencies, and in each instance the difficulty arises from the failure to act on the basis of known adjudicative standards that inject predictability and rationality into the decisional process. It is paradoxical that the agencies exhibiting the greatest inclination toward ad hoc determinations unguided by comprehensible adjudicatory policy standards tend to indulge in the most prolix judicial window-dressing, presumably, to use Judge Friendly's phrase, "masking a decision reached on other grounds."

The imposition of the opaque and general standards of NEPA on the already troubled agency licensing process has compounded confusion. There is thus an urgent need to remove from issue in individual licensing proceedings as many questions as possible and resolve them once and for all in generic rule-making proceedings. This is necessary not only to cope with the vagueness and generality of standards that inhere in the pre-NEPA agency process and which have been compounded by NEPA, but also to resolve a large class of problems that are not susceptible of efficient handling in individual adjudicatory trial-type licensing proceedings. Given the diversity and conflict evident in the federal appellate courts, it appears highly doubtful that this objective will be achieved if such hybrid proceedings are subjected to the existing system of judicial review.

(3) The various independent agencies that issued licenses and permits at the time NEPA was enacted were highly specialized—AEC handled nuclear licensing (in a two-step procedure, not counting antitrust review); FPC handled hydro licensing and licensing of transmission lines from hydro generating plants; and the Corps of Engineers handled both permits to discharge "refuse" into navigable streams under section

165. Id. at 54.
166. Id. at 72.
167. For a detailed discussion of the prospective advantages of the "hybrid" adjudicatory generic rulemaking proceeding see Murphy supra note 78, at 997-1005. Even in such generic proceedings it will be important to curb dilatory trial tactics by improvements in agency rules of practice. Consideration should be given to the problem of the extent to which agency apprehension of court reversal has resulted in lax enforcement of procedural rules against dilatory tactics in licensing hearings.
13 of the 1899 Rivers and Harbors Act and construction permits under section 10 of the 1899 Act to build any structure in navigable waters. In addition, various state and local permits, licenses, and approvals were required. Moreover, government regulation of utilities extends far beyond transmission lines and generating facilities. The FPC has jurisdiction over interstate wholesale of electricity, and together with the SEC and various state commissions, the Commission regulates utility financial practices. State commissions regulate intrastate utility rates, now recognized to have environmental consequences.

Thus, the regulatory structure at the time NEPA was enacted was already a potpourri of fragmentary and overlapping jurisdictions. Costly duplications and time-consuming multiple licensing already existed. The imposition of NEPA requirements, however, greatly magnified the inefficiency and delay of at least the federal portion of this regulatory and licensing process. The duty under NEPA to consider a broad range of alternatives is particularly ill-suited to this fragmentary and overlapping regulatory structure. To discharge this requirement adequately, it is now clear that an agency must consider alternatives outside its jurisdiction. Natural Resources Defense Council v. Morton held that an impact statement that failed to analyze all reasonable available alternatives, even though the agency lacks the jurisdiction and power to implement those alternatives, does not comply with NEPA. Yet it appears counterproductive to compel a specialized agency with limited jurisdiction such as the AEC to consider a whole range of alternatives such as fossil fuel, hydro, or no plant at all. To do so imposes upon the agency the duty to make a partial determination as to a single plant in a single licensing proceeding of what is essentially a national fuel policy issue.

A growing consensus advocates the consolidation into a single agency of the authority to plan, develop, and license all modes of power generation. Such a unified agency would at least be able to consider fuel mode and siting alternatives in the context of a rational frame of reference of national scope. This agency also would have the power to streamline procedures by elision of overlap and duplication, at least at

168. 3 E.R.C. 1473 (D.D.C. Dec. 16, 1971). The Justice Department appealed the decision, but the U.S. Court of Appeals for the District of Columbia Circuit denied the motion. 3 E.R.C. 1558 (D.C. Cir. Jan. 13, 1972). Subsequently, the bids for the oil leases at issue expired, and on February 1, 1972, the district court dismissed the case as moot.

the federal level or wherever a federal-state collaboration exists by statute (as in the case of water and air quality programs). However, even such a unified national power agency would still be faced with paring back a bewildering range of alternatives. It seems reasonably clear, however, that a unified national power agency could come to grips more effectively with the aforementioned problems; it could more readily conduct hybrid rulemaking proceedings to establish generic standards, thereby removing from the adjudicatory arena the numerous questions that are not susceptible of resolution in such a format, and it could more rationally explore reasonable alternatives to that proposed in the hearing application.

Another institutional approach to unifying the fragmented and duplicative regulatory structure that presently exists would be some version of the administrative court, a proposal which has been prescribed intermittently as the antidote to the ills of the independent agency process.

170. The proposed AEC, Guide to the Preparation of Environmental Reports for Nuclear Power Plants (Aug. 1972) suggests, inter alia, the following exploration of alternatives:

a. The analysis of alternative means of meeting power requirements without any new power construction, e.g., purchased energy, reactivation of older plants, base load operation of an existing peaking facility.

b. Identification and appraisal of geographical regions, including regions outside the applicant's service area, which may contain potential site locations. These regions are to be screened on the basis of appraisal of each region with respect to power network considerations, environmental considerations and energy type and source considerations. Matters to be considered are specified in very extensive detail.

c. In each "candidate" region that has survived the screening test, the applicant is to identify practicable potential sites and the associated energy source considered suitable for each, considering coal, oil, gas, hydro and other alternatives. From these "candidate" site-plant combinations, those that are most suitable are to be selected, applying the selection criteria now in greater depth and balancing in each case benefits against environmental and other costs.

d. Next a comparison is to be made in tabular form of the surviving candidate site-plant combinations with respect to "relevant factors", ending in the selection of the preferred site-plant alternative in each energy source category.

e. Finally, a further tabular presentation is to demonstrate the balanced preference of the proposed site with nuclear fuel over the best fossil fuel site alternative and other alternatives, including the alternative of constructing no new plant at all.

The chief argument for the administrative court is that the agencies are doing a poor job as to their quasi-judicial function because they are burdened with conflicting and diversionary executive, policy, investigatory, enforcement, and developmental duties. By removing the quasi-judicial function (and the investigatory and enforcement duties under some plans), the agency is supposed to be better able to execute its executive, policy, and developmental mission while the specialized administrative court would achieve higher judicial standards and greater dispatch in handling regulatory litigation.\(^2\)

If it is true that a significant number of environmental questions at the regulatory level can be disposed most efficiently and rationally in hybrid generic rulemaking proceedings conducted by an expert national power agency or some similar body, which would thereupon establish announced and rational policies to be applied in specific licensing proceedings, then there is little justification for creating a whole new structure of specialized administrative courts simply to apply these policies, standards, and criteria in individual licensing proceedings. Moreover, if the administrative courts did not possess specialized expertise in en-


172. But see B. Schwartz, French Administrative Law and the Common-Law World (1954). Professor Schwartz notes:

Anglo-American jurists who have advocated the setting up of administrative courts in the common-law world have often pointed to the great delays involved in litigation before the ordinary courts as one of the main reasons for their proposals. Judicial justice, they say, is dispensed ever so slowly, though it may be dispensed exceedingly well. The vesting of administrative-law jurisdiction in specialized administrative courts would both relieve the work load of the law courts and enable the administrative-law cases themselves to be disposed of more speedily.

The experience of the Council of State indicates, however, that the mere establishment of separate administrative courts will not of itself solve the problem of delay in the dispensation of justice. The administrative court may take as long in deciding cases as the law court, whether because of the inadequacies of the administrative tribunal itself or, as in the Council of State, because of the number of cases brought before it.

\(^{172}\) Id. at 45-46.
environmental matters, they would have all of the disadvantages that have been noted with respect to the regular federal courts' handling of environmental litigation. If, on the other hand, the administrative courts were specialized and expert in environmental matters, they would not be an adequate substitute for a system of environmental courts that would pre-empt the existing jurisdiction of the regular federal district courts and 11 courts of appeals; if the jurisdiction of the regular judiciary were retained, then all of the problems of conflicting decisions by non-expert courts and all of the workload problems with their attendant delay would remain unsolved. Nor would it make any sense to adopt both the environmental court system and special administrative courts. It would be difficult to identify any benefit such administrative tribunals could provide that could not be achieved more simply by a combination of a national power agency and the environmental court system heretofore described.

Whatever direction Congress may take to solve these complex institutional agency problems, the resulting agency system will be subject to judicial review in numerous important sectors of its operations. It has been noted that the questions under review will be highly complex, which presupposes the need for expert appraisal. Furthermore, the penalties of delay are great, which presupposes the need for comprehensible and consistent judicial precedent upon which agencies can reliably act. With reference to the penalties of delay, it is evident that special environmental courts would not be slowed by any extraneous workload of nonenvironmental matters such as those that slow the regular federal courts.

B. The "Environmental" Agencies, CEQ and EPA—The Relationship of Executive Departments to a System of Environmental Courts

1. The purpose and function of CEQ

In May, 1969, the President established the first entity to exercise a broad national overview of environmental problems—the Environmental Quality Council (EQC), a cabinet-level body chaired by the President. Subsequently, Title II of NEPA created the Council on Environmental Quality (CEQ), and the EQC was superseded by the Domestic Council in the Executive Office of the President.

Thereafter, the CEQ was strengthened by enactment of the Environmental Quality Act of 1970,175 which created the Office of Environmental Quality, an organization providing staff support to CEQ. On March 5, 1970, the President issued Executive Order 11514.176 The combined effect of these enactments was to vest in CEQ several duties, including recommending priorities in environmental programs to the President and to federal agencies, promoting the development and use of indices and monitoring systems to measure environmental degradation, and assisting in achieving international environmental cooperation subject to Presidential approval and foreign policy guidance by the Department of State. In addition, CEQ on April 30, 1970, issued Interim Guidelines for preparation of NEPA impact statements which required each federal agency to establish internal procedures for implementing NEPA compliance by June 1, 1970.177 The President, in various environmental messages, has directed CEQ to initiate (in collaboration with relevant federal agencies) studies of a wide range of environmental problems—agricultural pollution, recycling of solid wastes, ocean dumping, air and water pollution, pesticides, noise, and numerous others. In Executive Order 11507, the President directed federal agencies to reassess their functions and to bring them in line with statutory air and water quality standards as a part of a three-year program under CEQ review which is intended to exhibit federal leadership in cleaning up the environment. From the beginning, CEQ established three advisory committees; one to advise on the impact of federal, state and local tax structures on the environment, another to provide advice as to environmental legal questions, and a third to assist in developing a pollution free automobile engine.

NEPA provides that environmental impact statements shall be made available, *inter alia*, to CEQ as the designated environmental adviser to the President. However, the Act is silent as to what CEQ is supposed to do with such statements. In practice, CEQ has no power to decide whether any given action covered by a statement will go forward. Lacking veto power over agency proposals, it necessarily confines itself to advising the President with reference to such proposals; this is particularly true as to decisions by executive agencies (as distinguished from the adjudicatory decisions of the independent agencies

which are not subject to review by the President). As a practical matter, the CEQ staff is inadequate to provide in depth review and advice on all impact statements. Accordingly, it must operate selectively,\textsuperscript{178} in its advisory capacity, CEQ has focused on key environmental issues and has undertaken to influence decisions by the President and the agencies and to suggest and support needed legislation. Since any given agency under the present organization of the government tends to have narrow expertise as a result of narrowly defined jurisdiction and missions, the CEQ has provided helpful overview of issues which exceed the expertise and authority of any single agency.

CEQ has a statutory duty to prepare an annual report which is a useful device to provide progress reports on important environmental issues. It also assists in the preparation of the legislative and administrative action program submitted to Congress by the President, which in 1972 contained 16 major environmental proposals.\textsuperscript{179} The Council has also published environmental studies such as \textit{The Economic Impact of Pollution Control},\textsuperscript{180} \textit{The Quiet Revolution in Land Use Control},\textsuperscript{181} and \textit{Predator Control–1971},\textsuperscript{182} which have been important in shaping policy and influencing legislation.\textsuperscript{183}

2. \textit{The purpose and functions of EPA}

Prior to 1970, programs for environmental protection were scattered throughout the government on a fragmentary basis. In 1969, the President directed the Advisory Council on Executive Organization to analyze the federal environmental programs and to recommend organizational reforms. One of the results of this effort was the creation of the Environmental Protection Agency (EPA).\textsuperscript{184} Reorganization Plan

\textsuperscript{178} As of May 31, 1973, CEQ had received draft or final impact statements relating to 2,933 proposed agency actions. At that time, CEQ had a total staff of less than 60. 3 COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 246-47 (1972).

\textsuperscript{179} Id. at 151.

\textsuperscript{180} COUNCIL ON ENVIRONMENTAL QUALITY, DEPT OF COMMERCE, & ENVIRONMENTAL PROTECTION AGENCY, \textit{The Economic Impact of Pollution Control—A Summary of Recent Studies} (1972).

\textsuperscript{181} COUNCIL ON ENVIRONMENTAL QUALITY, \textit{The Quiet Revolution in Land Use Control} (1971).


\textsuperscript{183} See, e.g., Exec. Order No. 11,643, 37 Fed. Reg. 2875 (1972), which stopped use of poisons for predator control on all federal lands.

\textsuperscript{184} Reorganization Plan No. 3 (1970). See U.S. GOVT. ORGANIZATIONAL MANUAL 1972-73. Another result was the creation of the National Oceanic and Atmospheric Administration (NOAA), Reorganization Plan No. 4 (1970). Id.
No. 3 organized, under the aegis of one agency, programs that previously had been scattered in five separate federal agencies. EPA, like NASA or the AEC, is independent of any cabinet agency. Its primary role is to establish and enforce standards, monitor and analyze the environment, conduct research and demonstrations, and assist state and local government pollution abatement programs.

The Second Annual Report summarizes the intended respective roles of CEQ and EPA:

Although EPA and the Council on Environmental Quality work closely, there are significant differences between the two. The Council is a small, staff agency in the Executive Office of the President. Its responsibility is to provide policy advice to the President and to review and coordinate the environmental impact and environmental control activities of all Federal agencies. EPA is an operating line agency. Its responsibility is to administer and conduct Federal pollution control programs. While EPA's activities focus on pollution control, the Council's concern is with the whole spectrum of environmental matters, including parks and wilderness preservation, wildlife, natural resources, and land use.

3. The purpose and function of the Department of Natural Resources

In order to streamline, coordinate, and unify the federal executive organizations which deal with the use of natural resources, the Advisory Council on Executive Organization recommended the establishment

185. Federal Water Quality Administration, formerly in the Department of Interior; National Air Pollution Control Administration and Solid Waste Management, formerly in HEW; Radiation Exposure Guidelines and Standards, formerly in the Federal Radiation Council (also EPA assumed AEC authority to set standards for radiation hazards in the general environment); Pesticides, formerly in the Department of Agriculture (also EPA assumed Food and Drug Administration authority over pesticide research and standard setting). EPA subsequently has received a kind of collaborative jurisdiction with the Federal Aviation Administration over aircraft noise and a broader jurisdiction over other categories of noise. Noise Control Act of October 27, 1972 Pub. L. No. 92-574, 1972 U.S. Code Cong. & Administrative News, No. 11, at 6053, 6050-61. EPA also has replaced the Corps of Engineer's jurisdiction over the discharge permit system based on Section 13 of the 1899 Rivers and Harbors Act with a Federal-State water permit system. See Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 402, 86 Stat. 816.


of a Department of Natural Resources (DNR) to cope with such problems as energy, water, land management, and recreation resources. The proposed Department would consist of five parts: land and recreation; water resources; energy and mineral resources; oceanic, atmospheric, and earth sciences; and Indian and territorial affairs. These various divisions of the proposed DNR would encompass most of the agencies now in the Department of Interior; the Forest Service and Soil Conservation Service from the Department of Agriculture; the civil works planning functions of the Army Corps of Engineers; the civilian power functions of the Atomic Energy Commission; and NOAA from the Department of Commerce.

4. CEQ, EPA, DNR, and the Proposed Environmental Court System

Since enactment of NEPA, the proposed decisions of numerous executive departments and agencies have been reviewed and not infrequently halted by courts invoking various provisions of NEPA. A very extensive range of the functions of the Executive branch of government has been subjected to judicial scrutiny. Moreover, there is no reason to believe that the volume of this litigation will decline regardless of whether the DNR is created and other reorganizations effected.

The paramount reason for centralization and unification of the environmental reform and planning apparatus in the executive branch was


189. For a schematic diagram of DNR’s proposed organization see Council on Environmental Quality, supra note 187, at 7.

190. Id. at 8. It is not part of this inquiry to discuss what the structure of the executive departments or agencies should be; rather, it concerns how those entities would relate to a system of environmental courts. Yet it is obvious that if civilian atomic power functions and the Corps of Engineers’ section 10 licensing were assimilated into the DNR, but not FPC licensing, then a national unified power licensing agency discussed supra would not be realized.

191. Environmental suits have been heard involving, inter alia, the following Departments: Agriculture; Commerce; Defense (including also the Department of the Army and the Army Corps of Engineers); Interior; Housing and Urban Development; Health, Education and Welfare; Justice; the Postal Service; Transportation; and Treasury. In addition, the following agencies and entities have been involved in environmental litigation: AEC, EPA, FPC, FTC, ICC, the Law Enforcement Assistance Administration, the National Capital Planning Commission, the Price Commission, and TVA.
to achieve the nation's declared environmental goals more effectively, promptly, and economically. Therefore, it would appear that these executive branch entities have a strong interest in a judicial review system conducted by a specialized and expert judiciary able to review environmental decisions promptly against a frame of reference of clear, consistent adjudicatory standards and to render decisions having some substantial precedential value, free to the greatest extent possible of conflict and contradiction.

CONCLUSION

The foregoing suggests that Congress should create a system of environmental courts. Environmental issues are probably more complex and specialized than tax issues, and hence courts having special expertise appear to be highly desirable, if not absolutely necessary. Existing and predicted workload in all the federal courts indicates that we have reached a crisis which could be relieved to some extent by assigning the large and increasing volume of uniquely time-consuming environmental cases to these special courts.

Congress should profit from the experience of the tax court and provide both federal trial courts with exclusive jurisdiction over environmental issues and a Court of Environmental Appeals. Supreme Court review should be narrow so as to reduce the workload and assure expertise. This structure would tend to avoid the conflicting decisions that have plagued tax litigation and which presently exist to a serious degree in environmental matters. Such a system of environmental courts would be likely to function more expeditiously than regular courts and maximize public confidence in the soundness and promptness of environmental decisions. Finally, substantial reform of the agency process and the Executive branch is urgently needed. Possibilities have been discussed, but such reform is not the main concern of this study. What is clear is that regardless of whatever agency-executive branch changes are made, the resulting process will function more efficiently if review is conducted by expert courts applying a coherent body of nonconflicting legal principles.