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NOTES

THRESHOLD DETERMINATIONS UNDER SECTION 102(2)(C) OF NEPA: THE CASE FOR "REASONABLENESS" AS A STANDARD FOR JUDICIAL REVIEW

*The perception of beauty is a moral test.*¹
—H. Thoreau

Congress enacted the National Environmental Policy Act of 1969 (NEPA)² in response to growing national awareness of environmental degradation and the manifest threat of a technologically oriented society³ to public health and the preservation of natural resources.⁴ Culminating a decade of congressional attempts to protect the environment,⁵ that landmark legislation signaled the nation's formal commitment to "a national policy which will encourage productive and enjoyable harmony between man and his environment [and] to . . . efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man"⁶ To implement the substantive provision, section 101⁷

1. H. Thoreau, *THE BLUE BIRD CARRIES THE SKY ON HIS BACK* 3 (1970).

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

3. The fate of the Cossatot River in Arkansas, one of the last free-flowing streams in that region, presents a disturbing case in point. Presented with a challenge to the Army Corps of Engineers Gilham Dam proposal, the district court recognized that mission-oriented agencies may have a blindered aesthetic view: "To dam builders the structure of the embankment and its mechanical and engineering accoutrements must be the ultimate in beauty." *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 342 F. Supp. 1211, 1223 (E.D. Ark. 1972). See note 80 *infra*.

4. See *Hearings on S. 1075, S. 237 & S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. (1969).

5. See, e.g., Resources and Conservation Act of 1960, S. 2549, 86th Cong., 1st Sess. (1959); The Ecological Research and Surveys Bill, S. 2282, 89th Cong., 1st Sess. (1965); S. 2805, 90th Cong., 1st Sess. (1967).

6. NEPA § 2, 42 U.S.C. § 4321 (1970).

7. NEPA § 101, 42 U.S.C. § 4331 (1970). Congress set forth its declaration of national environmental policy in subsection (a) and, in subsection (b), reaffirmed the continuing responsibility of the federal government to work toward several goals:

- (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 and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national

of Title I of the Act, the procedural mandates in section 102 direct agencies to consider environmental values in their decisionmaking "to the fullest extent possible."⁸ The crucial procedural requirement in section 102 is the "action-forcing" provision⁹ of subsection(2)(C) that requires an agency 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"¹⁰

Despite the statute's enunciation of a national environmental policy, the importance which judicial and administrative bodies attach to the goals declared in section 101 remains unclear. Courts have been reluctant to review an agency's action substantively, once an agency issues an Environmental Impact Statement (EIS) to comply with the section 102 procedural requirement.¹¹ Commentators have

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.

NEPA § 102(b), 42 U.S.C. § 4331(b) (1970).

8. NEPA § 102, 42 U.S.C. § 4332 (1970). The procedural requirements of section 102 mandate that agencies:

(A) utilize a systematic, interdisciplinary approach . . . in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration . . .

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal . . .

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

9. *Hearings on S.1075, S.237 & S.1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969). Having thus characterized the provision in committee, Senator Jackson, the sponsor of NEPA, reemphasized his point on the floor of the Senate: "To insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures." 115 CONG. REC. 40416 (1969). *See also* S. REP. NO. 91-296, 91st Cong., 1st Sess. (1969).

10. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970) (emphasis supplied).

11. Upon finding procedural compliance, the majority of judicial decisions have accorded no substantive review to impact statements. *See, e.g.,* *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401, 1404 (D.D.C. 1971). *But see* *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972). In the latter case the Court of Appeals for the Eighth Circuit rejected the district court's characterization of NEPA as creating no substantive rights. Although affirming the lower court's decision, the appellate tribunal regarded the Act as more than a mere full-disclosure law. *Id.* at 297.

Commentators have been more willing to require substantive review of an EIS. *See generally*, 51 N.C.L. REV. 145 (1972); 51 ORE. L. REV. 408 (1972) (arguing that statutory

noted the courts' even greater reluctance to accord those environmental goals the status of legal or constitutional imperatives.¹² Although plaintiffs routinely plead the fifth, ninth, and fourteenth amendments in environmental claims, no court recognizes the existence of a constitutional or legal right under section 101(B) in third parties not directly involved in a project affecting the environment.¹³ Furthermore, the legislative history of the Act militates against judicial recognition of such a right: the Senate specifically articulated "a fundamental and inalienable right to a healthful environment,"¹⁴ but the conference committee struck this terminology and inserted the less forceful language of section 101(C).¹⁵

Given the compromised effectiveness of the substantive section 101, pursuit of environmental remedies under the Act must lie in judicial review of agency compliance with the procedural requirements in section 102. Without that review, agencies can erode even the minimal statutory purpose of mere disclosure; the agency can conclude that it need not draft an impact statement because the project does not entail major federal actions significantly affecting the environment. Ample evidence exists that agencies now consider a "negative determination" a potent weapon¹⁶ against environmen-

construction supports substantive review); 20 U. KAN. L. REV. 501 (1972). See also note 109 *infra* & accompanying text.

12. See Roberts, *The Right to a Decent Environment; E=MC2: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674, 691 (1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

13. See, e.g., *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061, 1064-65 (N.D.W. Va. 1973) (action under Clean Air Act and Civil Rights Act of 1971 rather than NEPA); *Tanner v. ARMCO Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728, 738-39 (E.D. Ark. 1971).

Professor Reitze advances the constitutional contentions which environmentalists seek. A. REITZE, JR., 1 ENVIRONMENTAL LAW, One-12 through One-17 (2d ed. 1972). The author suggests that courts may accord environmental plaintiffs constitutional status in a manner similar to the assertion of the penumbras of specific guarantees in the Bill of Rights to sustain the doctrine of marital privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In Reitze's view, Justice Goldberg's concurring opinion in *Griswold*, stressing the applicability of the ninth amendment, also would support environmental claims.

14. S.1075, 91st Cong., 1st Sess. § 101(b) (1969).

15. "[T]he compromise language was adopted because of doubt on the part of the House conferees with respect to the legal scope of the original Senate provisions." 2 U.S. Code Cong. & Admin. News 2768-69 (1969).

16. An extreme example of the potency of a negative determination is the *Hanly* series of decisions which resulted in more than two years of litigation and three separate hearings in the Court of Appeals for the Second Circuit before achieving judicial approval of an agency determination that no EIS need be filed. See notes 34-41 *infra* & accompanying text. The latest, and apparently final, chapter in the *Hanly* saga is *Hanly v. Kleindienst*, 484 F.2d 448 (2d Cir. 1973), *cert. denied*, 94 S. Ct. 1934 (1974) [hereinafter cited as *Hanly III*].

talists, whereas to avoid judicial review they previously asserted the threshold defenses of standing,¹⁷ jurisdiction,¹⁸ sovereign immunity,¹⁹ and absence of statutory authority.²⁰ Some federal actions are obviously major²¹ and significant; others, so inconsequential

17. *Sierra Club v. Morton*, 405 U.S. 727 (1972), is the landmark environmental case on standing, requiring a showing by a plaintiff that he is in fact injured by the defendant's action. The explicit ground for the Court's denial of standing led to subsequent acceptance of an amended complaint by the district court, *Sierra Club v. Morton*, 348 F. Supp. 219 (N.D. Cal. 1972). See 57 *SIERRA CLUB BULLETIN*, June, 1972, at 17, for the details of plaintiff's amended complaint. Efforts by plaintiffs to fulfill the *Sierra Club* requirement in later environmental cases apparently will fare well against challenges to standing. See, e.g., *Students Challenging Regulatory Agency Procedure (SCRAP) v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd on other grounds*, 93 S. Ct. 2405 (1973) (upholding standing in a theory of action based on use of the resources, relying partly upon the assertion in the *Sierra Club* amended complaint).

18. Virtually no agency has argued successfully that the courts lack jurisdiction to hear environmental claims. *Natural Resources Defense Council, Inc. v. TVA*, 340 F. Supp. 400 (S.D.N.Y. 1971) (rejecting defendant's claim that the court had no jurisdiction under NEPA). Early administrative unresponsiveness to NEPA provisions was occasionally so flagrant as to constitute a challenge to the authority of the judiciary to enforce the statute. See, e.g., *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). The court's criticism of agency noncompliance there, coupled with Judge Wright's strong indictment of AEC rulemaking, apparently precludes future implied jurisdictional attacks. Recent case law indicates, however, that individual plaintiffs in a class action must demonstrate infringement of an economic or property interest in a sufficient amount to satisfy the requirements for federal court jurisdiction. See *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). See generally, A. REITZE, *supra* note 13, at One-19 to One-20 (discussing problems attending jurisdictional amounts under NEPA).

19. The Supreme Court has emasculated the once potent doctrine of sovereign immunity which agencies employed as a threshold defense. *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (permitting courts to deny judicial review of administrative action only where clear and convincing evidence demonstrates such a legislative intent). Defendants argued sovereign immunity in early NEPA cases, but *Abbott* renders such tactics futile. See, e.g., *Izaak Walton League of America v. Macchia*, 2 BNA ENV. REP. CASES 1661 (D.N.J. 1971); *Izaak Walton League of America v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970) (both holding that the suit was not barred).

20. See *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The environmental challenge in *Scenic Hudson*, not arising under NEPA, avoided the lack of statutory authority as a defense through imaginative pleadings and the fortuitous language of section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a) (1970).

21. An agency determines initially whether an action is "major," but later measurements of time, planning, resources, or fiscal expenditures render this decision susceptible to objective verification. The "major action" requirement has generated little controversy because many agencies, recognizing a notable monetary commitment, concede that a major action exists and argue instead that the proposed projects involve no significant environmental effect. See, e.g., *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971). In *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465 n.3 (5th Cir. 1973), the agency did not concede that the project was "major," but nonetheless relied on its determination that no significant environmental effect would result. But see *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) (grant of a 99-year lease on Indian lands contested, but held "major," requiring an EIS). See generally Council on Environmental Quality (CEQ) Guidelines 5(a)(ii), 36 Fed. Reg. 7724 (1971).

either in scope or in cumulative effects that they require no EIS.²² The vast majority of actions, however, fall into a middle ground requiring construction of the general statutory guidelines,²³ thus inexorably leading to litigation.²⁴

Building upon judicial and administrative response to NEPA, this Note will examine judicial review of administrative compliance with the procedural requirements in section 102. As crucial as the word "significantly" is to constraining administrative discretion in the statutory scheme, existing legislative and judicial guidance suggests the abandonment of attempts to develop an apocalyptic definition of that term in favor of agreement upon an appropriate standard of case-by-case judicial review. An analysis of conflicting case law in conjunction with the broad purposes of NEPA will demonstrate a trend toward intensifying evaluation of procedural compliance, indicating that "reasonableness" is the most advantageous standard for judicial review.

TOWARDS A DEFINITION OF "SIGNIFICANTLY"

Despite the importance of the word "significantly" to NEPA procedures, resort to the statutory context of the term and to its interpretation by the agency charged with application of the Act leaves the definition obscured. The legislative history of NEPA is virtually useless in determining the meaning of the term.²⁵ Although "the infirmity of the phrase,"²⁶ has been noted judicially, Congress apparently has left the initial interpretation to the Council on Environmental Quality (CEQ) and, in turn, to the agencies themselves.

22. See, e.g., *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972) (environmental damage caused by mock amphibious landings on beaches of state park determined insignificant by the Navy; court concurred).

23. See, e.g., *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972). The court of appeals characterized NEPA as "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." 460 F.2d at 642.

24. Asserting that "... NEPA is fashioned in a manner calculated to breed litigation," one commentator accordingly has sought to channel the enormous burden of environmental cases into an environmental court system, thereby combining the virtues of administrative expertise and judicial impartiality. Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473, 489 (1973). See also Whitney, *The Case for Creating a Special Environmental Court System—A Further Comment*, 15 WM. & MARY L. REV. 33 (1973).

25. The legislative history of section 102(2)(C) does not mention the phrase "significantly affecting the . . . environment" in its amplifying remarks. See 2 U.S. Code Cong. & Admin. News 2769 (1969).

26. *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 880 (D. Ore. 1971).

The original CEQ guidelines provided that in construing the phrase "major Federal action significantly affecting the quality of the human environment," agencies were to consider the overall, cumulative effect of the proposed action; an agency was to prepare an EIS where the environmental impact was potential, controversial, or reasonably anticipated in light of cumulative actions.²⁷ The latest CEQ guidelines²⁸ provide little further clarification, as they merely codify the obvious implications of the statutory phrase: the federal action must affect the human environment significantly either directly, or indirectly through adverse effects on the environment.²⁹ These guidelines also recognize delegating to the agencies the initial identification of significant actions.³⁰ They interpret the terms "major" and "significantly" as implying "thresholds of importance and impact" to be met before a statement is required.³¹ Each agency is urged to note its typical actions and to develop specific criteria indicating the need for an environmental statement in any given instance.³² Guidelines, however helpful in assessing legislative purpose, are merely suggestive and lack the force of law.³³ Consequently, while acknowledging the propriety of initial deference to administrative discretion, the quest for clarification requires examining judicial interpretation of the term "significantly."

The Court of Appeals for the Second Circuit made the first serious attempt to define "significantly" in *Hanly v. Kleindienst* (*Hanly II*).³⁴ Judge Mansfield, writing for the majority, reasoned that the

27. 36 Fed. Reg. 7724-25 (1971).

28. 38 Fed. Reg. 20550 (1973).

29. *Id.* at 20552.

30. *Id.* at 20551.

31. *Id.* at 20552.

32. *Id.* That process normally will involve initially assessing the environmental impact associated with an agency's various actions, identifying those actions that need an EIS, and publishing criteria for such threshold decisions.

33. See, e.g., *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 421 (2d Cir. 1972); *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 346 F. Supp. 189, 200 n.14 (D.D.C. 1972), *rev'd on other grounds*, 93 S. Ct. 2405 (1973).

34. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) [hereinafter cited as *Hanly II*]. The protracted litigation centered primarily on the refusal of the Governmental Services Agency (GSA) to draft an EIS for a proposed courthouse annex in midtown Manhattan. The dispute first came before the court of appeals in *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) [hereinafter cited as *Hanly I*]. The court held in *Hanly I* that a terse GSA memorandum that no significant environmental effect would occur was sufficient as to the office building, but was insufficient with regard to the planned Metropolitan Correction Center (MCC). Following the latter ruling, the GSA submitted a 25-page "Assessment of the Environmental Impact" that still sought to avoid the detail of the statement required by section 102(2)(C). *Hanly v. Kleindienst*, 471 F.2d 823, 827 (2d Cir. 1972) (*Hanly II*).

meaning of the term was a question of law and proceeded to examine de novo an administrative determination of no significant environmental effect.³⁵ The court ruled that the agency was required to consider two factors in its threshold determination regarding environmental impact: "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area."³⁶ The panel then remanded the case to the agency for further factfinding on matters inadequately discussed in the agency's environmental assessment.³⁷

Though agreeing that the meaning of "significantly" could be a question of law, Chief Judge Friendly dissented from the court's restrictive definition of the term. He suggested that section 102 required an EIS "whenever the action arguably [would] have an adverse environmental impact,"³⁸ and that "['significant'] covers a spectrum ranging from 'not trivial' through 'appreciable' to 'important' and even 'momentous.'"³⁹ Notwithstanding the semantic differences between the majority and the dissent, *Hanly II* represents the most ambitious judicial attempt to provide objective criteria for courts and agencies.⁴⁰ Neither the majority's test nor Friendly's thoughtful dissent, however, clarifies the latest CEQ guidelines, nor does an administrative threshold determination in practice become less subjective.⁴¹ Consequently, *Hanly II* is more

35. 471 F.2d at 828, citing APA § 10(e), 5 U.S.C. § 706 (1970).

36. 471 F.2d at 830-31.

37. One matter which the court held GSA should have considered was the possibility that the proposed MCC, if used for a drug maintenance program, would increase crime in the area by exposing the neighborhood to drug pushers and "hangers-on." *Id.* at 834.

38. *Id.* at 838, quoting *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 346 F. Supp. 189, 201 (D.D.C. 1972), *rev'd on other grounds*, 93 S. Ct. 2405 (1973).

39. 471 F.2d at 837. Judge Friendly contended that the scheme of NEPA would place the meaning of "significant" at the lower end of the definitional spectrum. *Id.*

40. *Hanly II* generated considerable debate about the propriety of judicial review of administrative threshold determinations. See generally Note, *NEPA, Environmental Impact Statements and the Hanly Litigation: To File or Not to File*, 48 N.Y.U.L. Rev. 522 (1973); Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. Rev. 879 (1973); 51 Tex. L. Rev. 1016 (1973) (argument for requiring "mini" impact statements).

41. The court of appeals ultimately upheld the initial GSA assessment of no significant environmental impact, despite plaintiff's claim that the determination was essentially a recycled version of its predecessors. *Hanly v. Kleindienst*, 484 F.2d 448 (2d Cir. 1973) (*Hanly III*).

notable for its acute articulation of the problem than for any precise definition of "significantly."

CURRENT STANDARDS FOR REVIEW OF THRESHOLD DECISIONS

Other courts, seeking to clarify the statutory term, have contributed only modest improvements that primarily serve to underscore the absence of definitional unanimity.⁴² Those opinions are noteworthy nonetheless because they present a controversy far more basic than the meaning of "significantly." When an agency makes a negative determination under 102(2)(C), courts must decide first the proper standard for judicial review of that decision. Selection of the appropriate standard for judicial review necessitates two interrelated examinations: identification of the kind of question presented by threshold determinations and analysis of the disparate standards developed in recent cases.

"Action Significantly Affecting the . . . Environment" — A Question of Law or Fact?

Although the language in NEPA has been characterized as "opaque"⁴³ and "woefully ambiguous,"⁴⁴ the initial task of the judiciary should not be to define "significantly," but rather to characterize the definitional problem as embodying a question of either fact or law.⁴⁵ Judicial concurrence in the CEQ directive that significance of an effect should be determined initially on the basis of agency expertise supports the contention that the term partially embodies a question of fact.⁴⁶ An equally meritorious contention is

42. See, e.g., *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd on other grounds*, 93 S. Ct. 2405 (1973) (looking to the CEQ guidelines for support); *Scherr v. Volpe*, 336 F. Supp. 886, 888 (W.D. Wis. 1971) (court required to construe the statutory standards, then apply them to the planned project).

43. *City of New York v. United States*, 337 F. Supp. 150, 159 (E.D.N.Y. 1972), *quoted in Hanly v. Kleindienst*, 471 F.2d 823, 825 (2d Cir. 1972) (*Hanly II*).

44. Voight, *The National Environment Policy Act and the Independent Regulatory Agency*, 5 NATURAL RESOURCES LAW. 13 (1972), *quoted in Hanly v. Kleindienst*, 471 F.2d 823, 825 (2d Cir. 1972) (*Hanly II*).

45. The "Categorization Approach" is set forth in Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970). The concept of categorization, derived from Judge Friendly's analysis in *NLRB v. Marcus Trucking Co.*, 286 F.2d 583 (2d Cir. 1961), is merely an attempt to label a particular conclusion as resolving a question of fact, a question of law, or a mixed question. For a thorough description of the definitional terms employed in this scheme, see Sive, *supra* at 620-24.

46. "Certainly, an administrative agency [such] as the Soil Conservation Service may make a decision that a particular project is not major, or that it does not significantly affect the quality of the human environment, and, that, therefore, the agency is not required to file

that courts must ultimately scrutinize a threshold determination as a matter of law⁴⁷ because of both the breadth of the statutory language and the absence of instructive legislative history. Moreover, the often interrelated functions of judicial and administrative tribunals support the observation that the term may imply a "mixed question of law and fact."⁴⁸ Proper characterization of the definitional question consequently becomes dependent upon the judicial process for distinguishing questions of fact and law.

Two prominent administrative law scholars have proposed distinct theories to resolve the law-fact dilemma, described by Justice Brandeis as one of the "demands" of the "supremacy of law."⁴⁹ Professor Jaffe's analytical approach stresses the layman's understanding of the terms "fact"⁵⁰ and "law."⁵¹ In using the analytical approach, Jaffee has argued that courts seek to define the nature of a given question by looking to the statutory authority of the agency.⁵² Professor Davis, on the other hand, has asserted that the Supreme Court characteristically rejects the analytical approach in favor of the practical approach⁵³ whereby the Court "use[s] the designation 'question of fact' for an administrative determination on which it thinks substitution of judicial judgment undesirable"⁵⁴ Although debate over the correctness of the analytical or

an impact statement." *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 366 (E.D.N.C. 1972). Even the court of appeals in *Hanly II*, holding that the meaning of "significantly" was a question of law, remanded to the GSA for further factual findings on the effects of the proposed correctional center. 471 F.2d at 836.

47. The district court in *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 366 (E.D.N.C. 1972), concluded: "However, when the failure to file an impact statement is challenged, it is the court that must construe the statutory standards of . . . 'significantly affecting . . . ,' and having construed them, then apply them to the particular project, and decide whether the agency's failure violates the Congressional command."

48. K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 30.01, at 545 (3d ed. 1972).

49. *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 84 (1936) (concurring opinion). See Sive, *supra* note 45, at 620, wherein the author describes the issue as "one of the most difficult of all legal problems, involving distinctions as subtle and esoteric as any required of judges, lawyers and legal scholars."

50. "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*, 548 (1965) (emphasis omitted).

51. Professor Jaffe advances a less rigorous definition of "law" although following Holmes' belief that "the application of a rule to a particular case is not fact finding but law making" *Id.* at 554.

52. That tenet is also known as the "Clear Purpose Doctrine." *Id.* at 569-73. The NEPA mandate, as refined in *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), that all agencies consider environmental effects in their decisionmaking, reflects statutory administrative authority under the Clear Purpose Doctrine.

53. DAVIS, *supra* note 48, § 30.01, at 546.

54. *Id.* § 30.03, at 549.

practical approaches proceeds with some invective,⁵⁵ neither thesis satisfactorily explains why courts react to an agency decision as a question of law or of fact. Perhaps, therefore, the controversy persists not because the wrong theories are advanced, but because the wrong questions are posed. Considering the capriciousness of the law-fact dilemma,⁵⁶ a more advantageous approach would avoid the terminology entirely.

The Supreme Court arguably has formulated an alternative approach to the law-fact rhetoric, which both scholars implicitly recognize as valid. Professor Jaffe has contended that "judicial deference is as relevant to procedural as to substantive decisions"⁵⁷ and, discussing administrative expertise, he concluded: "[I]n the absence of a clear legal prescription a *reasonable* procedural decision should withstand judicial interference"⁵⁸ Noting that the Administrative Procedure Act (APA) excepts from review action "committed to agency discretion," he maintained: "A court, therefore, must decide as a 'question of law' whether there is 'discretion' . . . and once the discretion is established, its exercise if '*reasonable*' is free of control."⁵⁹ Although rejecting his colleague's analytical approach, Professor Davis reached a similar conclusion through his approval of *Hardin v. Kentucky Utilities Co.*,⁶⁰ in which the Supreme Court acknowledged judicial deference to the initial administrative findings unless the statutory purpose renders them unreasonable.⁶¹ Davis approved limiting judicial review to the reasonableness of the agency action in regard to the statutory scheme, stating: "Law development would be helped if the courts would resort less

55. Professor Davis criticized Jaffe's approach. *Id.* § 30.02-.03, at 546-49. Jaffe previously had rebutted the criticism which Davis made in his earlier text. JAFFE, *supra* note 50, at 592.

56. "Although all words may be 'chameleons, which reflect the color of their environment,' . . . 'significant' has that quality more than most." *Hanly v. Kleindienst*, 471 F.2d 823, 837 (2d Cir. 1972) (*Hanly II*) (Friendly, J., dissenting), quoting *Commissioner v. National Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948).

57. JAFFE, *supra* note 50, at 566.

58. *Id.* at 567 (emphasis supplied).

59. *Id.* at 570 (emphasis supplied).

60. 390 U.S. 1 (1968).

61. The Court stated:

Given the innate and inevitable vagueness of the 'area' concept and the complexity of the factors relevant to decision in this matter, we think it is more efficient, and thus more in line with the overall purposes of the Act, for the courts to take the TVA's 'area' determinations as their starting points and to set these determinations aside only when they lack reasonable support in relation to the statutory purpose

Id. at 9, quoted in DAVIS, *supra* note 48, § 30.03, at 549.

to the labels and would discuss more the reasons for their choices concerning the scope of review."⁶²

The similarity of the definitional construction in *Hardin* and NEPA supports applying to both a standard of judicial review based on the reasonableness of the agency determination. Partial reconciliation of the two authors' views requires two assumptions: that judicial review of administrative decisions includes initial deference to administrative expertise, and that courts may exercise discretionary judgment based on a variety of factors.⁶³ Starting from those shared assumptions, Jaffe and Davis both recognized the efficacy of a test that avoids the "labeling" of questions, but seeks rather to evaluate an administrative decision by a standard of reasonableness.

Current Case Law Reflecting Disparate Standards for Review

Current standards for judicial review of a negative threshold determination reflect a disparate array of terms confounding courts and commentators alike.⁶⁴ Recent decisions suggest at least five different standards and additional combinations. A brief discussion and analysis of each test points out the distinctions that are integral to the quest for a rational, uniform standard of review.

62. DAVIS, *supra* note 48, § 30.03, at 549.

63. Professor Jaffe included several subjective considerations: the relevance of administrative expertise to rulemaking, the clarity and stability of proposed rules, the importance of the rule to the statutory and administrative scheme, psychological advantage of judicial pronouncement, and ultimate judicial scrutiny to insure administrative integrity. JAFFE, *supra* note 50, at 576. Professor Davis also identified factors influencing judicial discretion, including the comparative qualifications of courts and agencies, judicial impressions of agency thoroughness, the extent of expressly delegated powers, and the perceived need for judicial lawmaking. DAVIS, *supra* note 48, § 30.06, at 552.

64. The district court specifically articulated no standard for procedural review in *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971). Commentators nevertheless have cited the case as asserting the arbitrary-or-capricious standard. See, e.g., Note, *NEPA, Environmental Impact Statements and the Hanly Litigation: To File or Not to File*, 48 N.Y.U.L. Rev. 522, 534 & n.104 (1973). The district court in *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972), appears to have employed the standard of "warrant in the record and a reasonable basis in law." *Id.* at 789. One commentator, however, cited the decision as embracing the arbitrary-and-capricious test. 7 GA. L. Rev. 785, 792 n.40 (1973).

Professor Sive writes of the "substantial evidence-rational basis test," apparently referring to the reasonable basis test of *Reid Park*. Sive, *supra* note 45. He has evidently exchanged the phrase "warrant in the record" for "substantial evidence," thereby restricting the test to the more stringent limits of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (substantial evidence when viewed on the record as a whole). The substantial evidence rule presents a virtually insurmountable barrier to environmentalists challenging the vast resources of administrative bodies. Large, *Is Anybody Listening? The Problem of Access in Environmental Litigation*, 1972 Wis. L. Rev. 62; Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. Rev. 879, 879 n.2 (1973).

(1) Arbitrary, Capricious

The Court of Appeals for the Second Circuit in *Hanly II* gave lengthy consideration to the proper standard for judicial review of an agency's threshold determination under NEPA.⁶⁵ Noting the Supreme Court's acceptance in *Citizens to Preserve Overton Park v. Volpe*⁶⁶ of section 10(e) of the Administrative Procedure Act⁶⁷ as controlling, the *Hanly II* court reiterated the statutory declaration that administrative decisions are subject to judicial review when "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."⁶⁸ In addition to its precedential authority, the panel embraced the reasoning underlying that Supreme Court enunciation as manifesting an appropriate balance between substitution of judicial judgment and deference to administrative expertise.⁶⁹ Considerable commentary, however, has questioned whether the arbitrary-and-capricious standard for judicial review is proper in NEPA cases.⁷⁰

The different statutory bases for *Overton Park* and *Hanly II* distinguished the cases and raise the question of the applicability of the arbitrary-and-capricious standard to section 102 disputes. Involving neither the preparation of an EIS nor any other NEPA provision, the *Overton Park* litigation arose from the refusal of the

65. 471 F.2d at 828-30. For a general discussion of the case, see notes 34-41 *supra* & accompanying text.

66. 401 U.S. 402 (1971).

67. 5 U.S.C. § 706(2)(A) (1970).

68. 471 F.2d at 828-29.

69. 471 F.2d at 828. Dictum by the Court of Appeals for the District of Columbia Circuit in *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971), also may have swayed the *Hanly II* court. 471 F.2d at 829. Discussing NEPA, the *Calvert Cliffs'* court stated that "reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." 449 F.2d at 115. The court in *Calvert Cliffs'*, however, was appraising substantive review under section 101; the *Hanly II* court faced procedural review under section 102. The inapplicability of the *Calvert Cliffs'* dictum to the *Hanly II* controversy is evinced further in Judge Wright's admonition that "procedural duties, the duties to give full consideration to environmental protection, are subject to a much more strict standard of compliance . . ." *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1128 (1971) (emphasis in original).

70. See, e.g., Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. REV. 879 (1973). See also Note, *NEPA; Environmental Impact Statements and the Hanly Litigation: To File or Not to File*, 48 N.Y.U.L. REV. 522 (1973); 51 TEX. L. REV. 1016 (1973). For detailed analyses of the *Overton Park* standard, see *The Supreme Court, 1971 Term*, 85 HARV. L. REV. 37, 315 (1971); Note, *Environmental Law and the Scope of Judicial Review*, 24 STAN. L. REV. 1117 (1972); Note, *Administrative Law—Extending the Authority of the Judiciary to Review Administrative Agency Decisions*, 1972 WIS. L. REV. 613.

Secretary of Transportation, in apparent disregard of two federal acts,⁷¹ to assess adequately the alternatives to a planned highway. Distinguishing between the relatively specific directives of these two acts and the broad language of NEPA, in *Calvert Cliffs' Coordinating Committee v. AEC*⁷² Judge Wright stated: "[NEPA] makes environmental protection a part of the mandate of every federal agency and department. . . . [Agencies are] not only permitted, but compelled, to take environmental values into account. . . . [T]he requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be vigorously enforced by the reviewing courts."⁷³ The marked differences between the statutory bases of *Overton Park* and *Hanly II* suggest that *Overton Park* does not control cases arising under NEPA and that courts are at liberty to select a reviewing standard calculated to ensure that the invocation of administrative expertise does not defeat the essential purposes of the Act.

Although the strict *Overton Park* standard may be inapplicable to section 102 determinations, the court of appeals in *Hanly II* may have perceived a flexibility in that standard. Several commentators have argued persuasively that *Overton Park* poses a bifurcated test that, in practice, confines judicial review less than the arbitrary-and-capricious standard.⁷⁴ The initial step is inquiring whether the agency has considered all relevant factors. Courts would reach the second phase, the application of the arbitrary-and-capricious standard, only upon a showing by the agency that its decision resulted from the consideration of all relevant factors. Whether perceiving

71. Department of Transportation Act of 1966 § 4(f), 49 U.S.C. § 1653(f) (1970); Federal-Aid Highway Act of 1968 § 18(a), 23 U.S.C. § 138 (1970). See 401 U.S. at 404-05.

In rejecting the arbitrary-and-capricious standard for section 102 determinations, the Court of Appeals for the Tenth Circuit expressed the distinction resulting from different statutory authority: "In assessing the adequacy of the impact statement, we are not here reviewing, as we said above [referring to *Overton Park*], agency action within the meaning of § 706 of the APA. Rather, we are concerned with the NEPA requirement which is, to be sure, a prerequisite for agency action but is not agency action itself." *National Helium Corp. v. Morton*, 486 F.2d 995, 1001 (10th Cir. 1973).

72. 449 F.2d 1109 (D.C. Cir. 1971). Virtually every court hearing environmental claims arising under NEPA has cited that landmark decision with approval. See, e.g., *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972); *Montgomery v. Ellis*, 364 F. Supp. 517 (N.D. Ala. 1973); *Anaconda Co. v. Ruckelshaus*, 352 F. Supp. 697 (D. Colo. 1972); *Northside Tenants' Rights Coalition v. Volpe*, 346 F. Supp. 244 (E.D. Wis. 1972).

73. 449 F.2d at 1112, 1114.

74. See generally Note, *NEPA; Environmental Impact Statements and the Hanly Litigation: To File or Not to File*, 48 N.Y.U.L. REV. 522, 535-36 (1973); Note, *Environmental Law and the Scope of Judicial Review*, 24 STAN. L. REV. 117 (1972). For a discussion of environmental cases raising additional "relevant factors," see Sive, *supra* note 45, at 632-39.

the arbitrary-and-capricious standard as strict or flexible, an apparent majority of courts initially employed this standard when compelled to scrutinize administrative threshold decisions under NEPA.⁷⁵ The high standards articulated in *Calvert Cliffs*⁷⁶ for administrative decisions and the judicial reluctance to accept the more extensive procedural review implicit in the bifurcated *Overton Park* test, however, challenge the suitability of the arbitrary-and-capricious standard for reviewing procedural compliance.

(2) *Substantial Evidence—Relevant Factor*

The Court of Appeals for the Second Circuit had set forth in *Scenic Hudson Preservation Conference v. FPC*,⁷⁶ an earlier standard for reviewing environmental disputes. The standard appears to be a judicial hybrid, composed of the traditional substantial evidence rule,⁷⁷ and the first half of the bifurcated *Overton Park* test.⁷⁸ Believing that it will open up the process of judicial review, at least one commentator has endorsed the test,⁷⁹ but the great majority of environmental decisions have overlooked it. Perhaps the most grievous shortcoming of the standard, from the environmentalist position, is that it virtually precludes the possibility of a judgment for a plaintiff on the merits, due to the potentially vast documentary resources of an administrative agency.⁸⁰

75. See, e.g., *First Nat'l Bank v. Richardson*, 484 F.2d 1369 (7th Cir. 1973) (relying unabashedly upon *Harly II*); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 342 F. Supp. 1211 (E.D. Ark. 1972); *Echo Park Residents Comm. v. Romney*, 3 BNA ENV. REP. CASES 1255 (C.D. Cal. 1971).

76. 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

77. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). See generally DAVIS, *supra* note 48, § 29.02, at 527-30.

78. See note 64 *supra* & accompanying text.

79. Sive, *supra* note 45, at 638-39. See generally Note, *Scenic Hudson Revisited: The Substantial Evidence Test and Judicial Review of Agency Environmental Findings*, 2 ECOL. L.Q. 837 (1972).

80. The Environmental Defense Fund challenge to the Gilham Dam Project proposed for the Cossatot River in Arkansas graphically illustrates the problem. The Army Corps of Engineers, the "action agency" involved, initially filed a 12-page EIS that was found to be little more than a recast of information already held in defendant's files. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749 (E.D. Ark. 1971). Upon the granting of a temporary injunction, the Corps returned with a voluminous report, exceeding two hundred pages, with more than one thousand pages in the appendix, at a cost to taxpayers of more than a quarter of a million dollars. Predictably, the Corps reached virtually identical conclusions, but when faced with the sheer weight of evidentiary documents, the district court felt compelled to concede that the EIS was sufficient to alert decisionmakers to the desirability of preserving the Cossatot as a free-flowing river. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 342 F. Supp. 1211 (E.D. Ark. 1972). Although affirming the district court's findings

(3) Reasonable Basis

The Supreme Court formally articulated a third standard for review of agency action known as the rational basis test⁸¹ or the "doctrine of *Gray v. Powell*,"⁸² in *NLRB v. Hearst*.⁸³ Construing the meaning of "employee" under the National Labor Relations Act,⁸⁴ the Court rejected the position that newsboys were independent contractors under principles of common law, and held that "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."⁸⁵ The Court further noted: "[W]here the question is one of the specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."⁸⁶ The latter language could impose upon environmental plaintiffs a difficult burden, particularly in challenges to administrative expertise. It is evident, however, that courts routinely apply the reasonable basis test to mixed questions of law and fact, enabling the appellate court to isolate questions of law and thus permitting greater freedom to substitute judicial judgment for that of the agency than does the arbitrary-and-capricious standard.⁸⁷ Several courts and commentators considering section 102 procedures have approved the reasonable basis standard.⁸⁸ By facilitating a more thorough

of EIS sufficiency, the court of appeals provided the Corps a pyrrhic victory. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972). In what may represent a landmark decision in substantive review, the court asserted that NEPA is more than just a full disclosure law and noted that compliance with section 102 is based upon good faith objectivity rather than subjective impartiality. *Id.* at 296.

81. DAVIS, *supra* note 48, § 30.07, at 549-50; JAFFE, *supra* note 50, at 575.

82. 314 U.S. 402 (1941).

83. 322 U.S. 111 (1944).

84. 29 U.S.C. § 152(3) (1970).

85. 322 U.S. at 131.

86. *Id.*

87. Under the *Hearst* approach, a reviewing court may intervene whenever a clear rule of law is involved, thereby exhibiting greater freedom of action than under the substantial evidence test or arbitrary-and-capricious standard. Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. Rev. 879, 896 (1973). Professor Davis' comments are especially pertinent on the degree to which courts indulge in the often critical task of characterizing questions of law and fact: "In reviewing administrative action which is reviewable, a court always has power to decide questions of law and the realism is that to a great extent a court has power to convert questions of discretion and questions of fact into questions of law by making law about them. Questions of fact are constantly turned into questions of law" DAVIS, *supra* note 48, § 30.07, at 554.

88. See, e.g., *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1095 (D.C. Cir. 1973); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 789 (S.D. Me. 1972); Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. Rev. 879, 896 (1973).

basis for review of a threshold decision, that standard complements the proposition that the extent of administrative procedural compliance generally merits strict judicial scrutiny.⁸⁹

The inherent subtlety of the law-fact distinction renders the reasonable basis test, as traditionally applied to mixed questions, difficult to use in reviewing threshold determinations. After judicial determination that an issue embodies questions of law and fact, a court's resolution of the relevant law need not be determinative, because a court can permit an agency's factual finding to stand.⁹⁰ Further, although the test affords some freedom for appellate review, the reasonable basis standard attaches as a condition subsequent to judicial identification of a mixed question, foreclosing an opportunity for greater judicial latitude on a question of law alone.⁹¹ However wielded by appellate courts, application of that standard necessarily entails embroilment in the law-fact controversy, and thereby fails to resolve the confusion surrounding the assessment of a threshold decision under section 102(2)(C).

(4) *Review De Novo*

The fact-law dilemma also underlies review de novo,⁹² a standard

89. See *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1128 (D.C. Cir. 1971); Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. Rev. 879 (1973).

90. The most recent chapter in the *Hanly* litigation underscores this contention. Pursuant to two remands for insufficiency, the GSA returned to the court of appeals with a third negative declaration and the court permitted the factual findings to stand. *Hanly v. Kleindienst*, 484 F.2d 448 (2d Cir. 1973). The *Hearst* case, the formal proponent of the standard, provides further support. Having ruled on the question of "employee" as a matter of law, the Court effectively deferred to the initial administrative determination, by reversing the lower court ruling. *NLRB v. Hearst*, 322 U.S. 111 (1944). But see *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), in which the Court, construing the same statutory term, agreed with the Board's determination, but did not mention the *Hearst* standard and appeared to rule as a matter of law.

91. A comparison of the Supreme Court responses in *Hearst* and *Packard* aptly illustrates the distinction between judicial latitude in reviewing mixed questions and questions of law. See note 90 *supra*. Seeking to resolve that evident complexity, Professor Jaffe asserted that the Court viewed *Packard*, unlike *Hearst*, as raising a significant legal issue. JAFFE, *supra* note 50, at 561. Davis, on the other hand, appears content to avoid analyzing the reasons for the two approaches, having argued instead that the two cases, taken together, demonstrate that in practice the Court frequently "substitutes judgment" on mixed questions. DAVIS, *supra* note 48, § 30.05, at 551.

92. The distinction between review de novo and trial de novo is helpful in understanding the role of the reviewing court. Section 10(e) of the APA authorizes trial de novo. 5 U.S.C. § 706 (2)(F) (1970). The concept refers to those narrow areas of jurisdictional facts, determining constitutional rights, to which courts must direct full judicial scrutiny and for which an administrative tribunal may not afford final adjudication. *Crowell v. Benson*, 285 U.S. 22 (1932). Although significantly eroded, the doctrine retains currency at least when applied to

expressly provided in section 10(e) of the APA⁹³ that acknowledges the reviewing court's powers to "decide all relevant questions of law." Accordingly, judicial review de novo would seem to apply in environmental controversies, when the court can find a question of law. Courts in three recent cases appear to have evaluated administrative findings afresh and reversed negative EIS determinations as a matter of law.⁹⁴ Commentators have disputed the extent to which these decisions demonstrate the viability of review de novo; all three involved extreme factual situations and the administrative determination would have fallen under even the arbitrary-and-capricious standard.⁹⁵ Although providing uncertain authority, those cases nonetheless suggest a judicial tendency to reject previously articulated standards of environmental review in the search for a more appropriate guide for resolving disputes arising under the broad mandate of NEPA.

Under close scrutiny, however, the review de novo standard stumbles into three pitfalls when applied in environmental cases. First, courts must isolate a question of law, a task that may prove exceed-

a deprivation of liberty or a "loss of both property and life; or of all that makes life worth living." DAVIS, *supra* note 48, § 29.08, at 539. Subsequent decisions have carved so many exceptions from the *Benson* doctrine that the case no longer may be good law. However, *Ng Fung Ho v. White*, 259 U.S. 276 (1922), holding that the Government could not deport residents claiming American citizenship without a judicial determination of citizenship, still stands as a bulwark of the trial de novo doctrine.

Despite the apparent relationship between the criteria noted by Davis and the cry for a healthful environment, the essential requirement of an infringement of a constitutionally protected right probably will preclude trial de novo from assisting environmentalists. See notes 12-15 *supra* & accompanying text. A few courts, however, have analogized the threshold determination to a jurisdictional fact and thereby have justified liberalizing the scope of procedural review. See, e.g., *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973), discussed, notes 97-101 *infra* & accompanying text.

93. 5 U.S.C. § 706 (1970).

94. *Scherr v. Volpe*, 336 F. Supp. 882 (W.D. Wis. 1971), *aff'd on other grounds*, 466 F.2d 1027 (7th Cir. 1972) (court required to construe the statutory standards, then apply them to the particular project); *National Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972) (same reasoning as in *Scherr*); *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd on other grounds*, 93 S. Ct. 2405 (1973) (unstated standard that suggested review de novo).

95. One commentator analyzed *Scherr* as asserting review de novo. Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. Rev. 879 (1973). The better view, however, is that the extreme factual situation removed the necessity for such an extensive review. The affirmance on other grounds by the court of appeals suggests that the district court's language about a more searching standard was dictum. A second commentator questioned the precedential value of either *Scherr* or *Grant* for review de novo. 7 Ga. L. Rev. 785, 792 n.40 (1973). Similarly, although the unstated ground in *SCRAP* inferentially was review de novo, the court suggested that it might have ruled differently if the record had revealed a detailed study by the agency. 346 F. Supp. at 201 n.17.

ingly difficult given the statutory breadth of "significantly" and the essential interplay of administrative expertise with judicial review. Utilization of that standard also would foist an intolerable burden on a judicial system already laden with rapidly proliferating environmental lawsuits. Finally, review de novo would appear to contravene the entire administrative decisionmaking scheme and effectively vitiate the need for an administrative threshold decision.

(5) Reasonableness

In the judicial consideration of various standards for reviewing NEPA threshold decisions, the standard of "reasonableness" almost inevitably garners attention. Although an argument for appellate review based on the formless criterion of reasonableness to aid an examination of the vacuous term "significantly" creates no small irony, judicial willingness to use a standard of reasonableness is not altogether surprising in the context of inexplicit statutory guidelines for review, potentially contradictory standards promulgated by the APA,⁹⁶ and uncertainty among courts and commentators.

In *Save Our Ten Acres v. Kreger*,⁹⁷ the Court of Appeals for the Fifth Circuit, rejecting a General Services Administration (GSA) determination that the construction of a federal office building would have no significant environmental effect, concluded: "To best effectuate the Act this decision should have been court-measured under a more relaxed rule of reasonableness, rather than by the narrower standard of arbitrariness or capriciousness."⁹⁸ Evaluating the sufficiency of the agency's threshold decision, the court analogized that administrative action to determination of a jurisdictional fact,⁹⁹ a situation justifying trial de novo.¹⁰⁰ The court further linked the GSA's preliminary decision to the statutory scheme of NEPA and therefore deemed the decision to merit critical review pursuant to the manifest purposes of the Act.¹⁰¹ Through its well-reasoned call for a "more searching standard" of review, *Kreger* implicitly ex-

96. See *Large*, *supra* note 64, at 104.

97. 472 F.2d 463 (5th Cir. 1973).

98. *Id.* at 465.

99. The court noted: "However, this usual fact determination review rule [substantial evidence rule] ought not to be applied to test the basic *jurisdiction-type conclusion* involved here." *Id.* at 466 (emphasis supplied).

100. See note 92 *supra*.

101. The court declared: "The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." 472 F.2d at 466.

panded the scope of review permitted under *Hanly II* and *Overton Park* and arguably provided a landmark decision.

The *Kreger* standard of reasonableness soon received acclaim in *Wyoming Outdoor Coordinating Council v. Butz*,¹⁰² where the Court of Appeals for the Tenth Circuit rejected the district court's reliance upon the arbitrary-and-capricious test in deciding whether two timber sales in Teton National Forest required an EIS.¹⁰³ Observing that NEPA virtually compels procedural compliance,¹⁰⁴ the court was:

. . . persuaded that the general reference to discretion in § 706 (2)(A) of the Administrative Procedure Act, although applicable to some other reviewable administrative decisions, . . . does not apply here to the agency's determination under NEPA. Under the specific terms of NEPA we feel that the proper standard . . . is *whether the negative determination was reasonable* in the light of the mandatory requirements and high standards set by the statute so as to be "in accordance with law"—another ground of review . . . which may be applied consistently with the procedural demands of NEPA.¹⁰⁵

Building upon *Kreger* and other recent cases,¹⁰⁶ the *Wyoming*

102. 484 F.2d 1244 (10th Cir. 1973).

103. Under the arbitrary-and-capricious standard, the district court found that an EIS was not required. *Wyoming Outdoor Coordinating Council v. Butz*, 359 F. Supp. 1178 (D. Wyo. 1973). The two sales involved 7,330 and 8,410 million board feet of timber from forty-six "clearcuts," a method whereby all standing timber is removed in a specified area. Arguably the district court ruling would have merited reversal even had the appellate court chosen to accept the arbitrary-and-capricious standard. The district court apparently reasoned that drafting an EIS would quash the proposed sales, with foreseen disastrous results to the Wyoming residents dependent upon the wood and pulp industries. Manifestly, that interpretation was unduly restrictive and contrary to the statutory purpose, even assuming that NEPA is only a full disclosure law. Furthermore, agencies should not be allowed to defend a negative declaration on the ground that mere publication would lead to the abandonment of a proposed project.

104. "NEPA's specific requirements in § 102 clearly speak in mandatory terms, and do not leave the determination to administrative discretion." 484 F.2d at 1249, *citing, inter alia*, *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783, 788 (D. Me. 1972).

105. 484 F.2d at 1249 (emphasis supplied).

106. *E.g.*, *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) (rule of reason implicit in NEPA, but that statement was intended to apply to substantive review); *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 424 (5th Cir. 1973) (reasonable standard for threshold review). *Wyoming Council* also cited *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973); *Scherr v. Volpe*, 336 F. Supp. 882 (W.D. Wis. 1971), *aff'd on other grounds*, 466 F.2d 1027 (7th Cir. 1972); *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972).

Council opinion is especially noteworthy for its demonstrated concern for the "high standards" set by NEPA and its distinction between the searching review of threshold determinations and the less rigorous scrutiny of substantive issues after an agency files an EIS.¹⁰⁷ *Wyoming Council* arguably goes beyond even the *Kreger* rationale for asserting broad powers of judicial review of threshold decisions in its declaration that NEPA contains mandatory procedural requirements. Against the background of the *Hankly* litigation and the apparent expansion of *Overton Park*, the approach of the Courts of Appeals for the Fifth and Tenth Circuits suggests a trend toward broadening the standard for procedural review under NEPA.

THE CASE FOR MORE INCLUSIVE PROCEDURAL REVIEW

Since judicial notions of the proper limits for judicial scrutiny currently range from virtual deference to administrative expertise¹⁰⁸ to review de novo,¹⁰⁹ the critical task becomes the fashioning of a reviewing standard that best complements the broad purposes and aspiring rhetoric of NEPA. As the "broadest and perhaps most important of the recent [environmental] statutes,"¹¹⁰ NEPA suggests several compelling arguments for close examination of procedural compliance under section 102(C). The interrelationship of the statute with certain considerations regarding environmental law provides the basis for fashioning a broad, searching standard for proce-

107. *Wyoming Council* apparently suggests a judicial preference for requiring an EIS when an agency's decision not to draft one is challenged. Requiring the agency to file an EIS forces the agency to analyze and decide numerous specific issues. Once such issues are considered in detail by the agency, review by a court is facilitated because it can determine easily the specific factors which led to the agency's conclusion. The Court of Appeals for the Seventh Circuit demonstrated a similar preference for requiring the drafting of an EIS in *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972). That preference first appeared in *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1128 (D.C. Cir. 1971).

Wyoming Council, however, relied on cases that turned upon the construction of phrases other than "significantly." See, e.g., *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), in which the agency conceded that the action was significant, but argued that a lease of Indian lands was not a major action. The court of appeals reversed the district court's affirmance of a negative determination. *Davis* also was noteworthy for its apparent preference for an EIS and its collection of a broad spectrum of prior case law. The same court of appeals subsequently evinced a strong preference for an EIS: "[I]f the impact statement is to be meaningful the requirement must be virtually absolute." *National Helium Corp. v. Morton*, 486 F.2d 995, 1000 (10th Cir. 1973). That endorsement, however, provides environmentalists little assistance, as the case technically did not focus upon the NEPA procedural requirements, and the statement was dictum.

108. See, e.g., *Morningside Renewal Council, Inc. v. AEC*, 482 F.2d 234 (2d Cir. 1973).

109. See cases cited note 94 *supra*.

110. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

dural review. Those elements include the alleged expertise of administrative agencies, the breadth of the NEPA procedural mandate, the minimal NEPA purpose of full disclosure, and the irrevocability of administrative actions affecting the environment.

In the first instance, the traditional doctrine of deference to administrative expertise¹¹¹ may be particularly inappropriate in environmental disputes, since many questions involve judgments that intrinsically do not afford a ready basis for technological or scientific measurement.¹¹² Thus, even though an adverse cost-benefit analysis in an EIS may terminate a proposed project,¹¹³ the judiciary and the

111. See, e.g., *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 414 (1958): "If the Commission has decided the question, its discretionary determination should not be overturned in the absence of a patent abuse of discretion."

112. Mr. Justice Douglas most eloquently stated the essence of that proposition in his dissenting opinion in *Life of the Land v. Brinegar*, 94 S. Ct. 558, 559 (1973) (Douglas, J., dissenting), where he argued against the Court's dissolution of an injunction temporarily halting construction of an airport reef runway in Honolulu:

NEPA embodies the belated national recognition that we have been "brought to the brink" by myopic pursuit of technological progress and by a decision-making mechanism resting largely on the advice of vested interest groups. A long standing policy of listening only to those with enough money to be heard has left our country scarred with a continuum of environmental abscesses. . . .

. . . NEPA was designed to correct in part the information void underlying our national decision-making mechanism. Congress knew what happens when we heed the counsel only of those who measure national advancement by GNP and the Dow Jones Industrial average. Congress knew that we can trust them to supply us with voluminous economic data, but it also knew that we cannot trust them to supply us with an improved quality of life. They are not advocates of the interests of mountains, forests, streams, rivers, oceans, and coral beds, or of the wildlife that inhabit them or the people who enjoy them.

94 S. Ct. at 559-61.

113. Unfortunately, the opposite philosophy appears to be the generally accepted view at present. See, e.g., *Ecos, Inc. v. Volpe* 5 BNA ENV. REP. CASES 2024, (4th Cir. 1973) (per curiam) (no abuse of discretion found in federal district court's refusal to issue preliminary injunction when the agency prepared no final EIS and an evident finding was that costs clearly outweighed the benefits of continuing construction on a federal-aid highway). Another case, however, may somewhat erode that position. Drawing upon the reasoning in *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972), see note 80 *supra*, the Court of Appeals for the Fourth Circuit apparently reversed its philosophy in *Conservation Council v. Froehlke*, 473 F.2d 664 (4th Cir. 1973). The district court first had denied a preliminary injunction in a challenge to a proposed dam. *Conservation Council v. Froehlke*, 340 F. Supp. 222 (M.D.N.C. 1972). In its summary affirmance, the court of appeals held that NEPA provided procedural remedies rather than substantive rights and that the Government could build the dam despite an adverse cost-benefit analysis in the EIS. *Conservation Council v. Froehlke*, 4 BNA ENV. REP. CASES 1044 (4th Cir. 1972) (per curiam). Subsequent to the denial of the injunction, the court of appeals reversed and held: "'District Courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA' [and the] . . . District Court must engage in a 'substantial inquiry' to determine 'whether there has been a clear error of judgment.'" *Conservation*

bureaucracy should not use only compilations of data when making decisions that affect the complex interrelationship of environmental factors and the intertwined subjectivity of human feelings.¹¹⁴ Moreover, NEPA imparts upon all agencies an affirmative duty to integrate environmental considerations into the decisionmaking process through a systematic, interdisciplinary approach.¹¹⁵ The broad command of the Act extends an agency's consideration of environmental factors beyond a narrow cost-benefit analysis. Such a requirement of utilization of an interdisciplinary approach also lends support to a searching standard of judicial review, because courts are at least equally capable of assessing factors outside an agency's expertise.

Commentators have contended more vigorously than courts that the concept of administrative expertise does not apply to environmental concerns.¹¹⁶ Even those administrative law scholars who emphasize initial deference to such expertise recognize the limits of the concept. Professor Jaffe, for example, acknowledges that "in its field of expertness the agency's decisions are final if 'reasonable'; and conversely that there is a field of general law in which the courts are, as it were, experts."¹¹⁷ Including numerous factors that do not

Council v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973) (per curiam) (citations omitted). In directing the district court to issue a preliminary injunction pendente lite, the court apparently responded affirmatively to scholarly criticism of the earlier district court case and to the broader topic of substantive review under NEPA. For a critical analysis of the early *Froehlke* case, see 51 N.C.L. REV. 145 (1972). See generally *Judicial Review: NEPA and the Courts*, 1973 DUKE L.J. 301; Note, *Substantive Review Under the National Environmental Policy Act: EDF v. Corps of Engineers*, 3 ECOL. L.Q. 173 (1973) (suggesting three critical areas that courts may examine in evaluating administrative decisions on the merits).

114. The monitoring and compilation of technological data is indeed a proper pursuit in the broad field of environmental law. The Clean Air Act, 42 U.S.C. § 1857 (1970), for example, mandates complex monitoring and recording devices to meet attainment schedules for emission limitations. The numerous studies of improper resource allocation and residue statistics demonstrating the grievous need for improved recycling techniques are further examples of the need for empirical evidence on the misuse of the environment. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 700-01 nn.1 & 2 (1973) (Douglas, J., dissenting). The core of the problem, however, is that frequently basic factors which determine whether to construct a proposed project are incapable of quantification in terms of aesthetic, cultural, social, or perhaps even psychological values.

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

116. Professor Sive has asserted: "[T]he bulk of the important questions in environmental cases call more for the talents and training of the courts and judges than for those of the administrative agencies and administrators. The basic reason is the very breadth of the questions, the requirement of balancing opposing economic and social interests. Such balancing and weighing require more art than science." Sive, *supra* note 45, at 629.

117. JAFFE, *supra* note 50, at 579.

lend themselves to ready quantification, environmental controversies arguably fall into the area of "general law," for which courts are more appropriate arbiters than are agencies. Professor Jaffe further observed: "Expertness is in any case a matter of emphasis or degree . . . *In judicial review, the court must evaluate the relevance and weight of expertness.* . . . Courts also should remain wary of expert opinion which really only *seeks to advance the expert's conception of policy*, cloaking it in the concept of expertise."¹¹⁸

Under that analysis, a court should evaluate the particular agency determining not to file an EIS.¹¹⁹ Although that approach may be more relevant to substantive review after the filing of an EIS, possible grounds for reversing a negative threshold decision could include lack of good faith¹²⁰ or lack of expertise on a matter of crucial environmental and aesthetic value.¹²¹ Moreover, when an

118. *Id.* (emphasis in original).

119. Administrative law scholars routinely acknowledge the relative degrees of competency of various agencies and argue that courts should consider that factor as one of several subjective elements in their evaluations. See notes 63, 64 *supra*. Moreover, agencies have varied greatly in their compliance with NEPA. The response by the Atomic Energy Commission, culminating in Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), and Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973), demonstrates a notorious instance of foot dragging. When one study ended on May 24, 1971, the Atomic Energy Commission had yet to deny a single construction or licensing permit after a hearing. Large, *supra* note 64, at 92 n.135. The Soil Conservation Service, on the other hand, appears to have implemented its regulations with a minimum of reticence. See, e.g., *Simmans v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974).

120. Arguments calling for substantive review of an EIS have raised the question of good faith. See, e.g., *Greene City Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir. 1972) (holding an EIS inadequate because defendant had abdicated a significant part of its responsibility under NEPA by substituting the statement of the Power Authority of the State of New York (PASNY) for its own). According to *Greene*, the rationale in such case is that "[t]he danger . . . is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions." *Id.* at 420. But see *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973) (compliance with NEPA as to the preparation of an EIS based upon good faith objectivity rather than subjective impartiality; hence, an EIS prepared in significant part by a consulting firm having a large financial interest in construction of the proposed airport reef runway held not violative of the letter or spirit of NEPA). For a decision that apparently raises a question of good faith compliance with procedural requirements, see *Morningside Renewal Council, Inc. v. AEC*, 482 F.2d 234 (2d Cir. 1973). The court denied review of an agency decision to license a Triga Mark II nuclear reactor at Columbia University in New York City since the license issuance did not constitute major federal action "significantly affecting the environment." The court used the arbitrary-and-capricious standard to review the threshold determinations, but a strong dissent by Judge Oakes raised serious claims of bad faith by the agency. *Id.* at 241.

121. For example, agencies charged with promotional and developmental responsibilities might lack the practical ability to evaluate the impact of the Storm King hydroelectric project on the natural beauty of Storm King Mountain, Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), or the impact of the

agency is evidently reticent in its response to NEPA's procedural requirements, a searching standard of review also would include an investigation of the agency's attitude and expertise.¹²²

Beyond the question of administrative expertise in environmental controversies, the case for broad, more extensive procedural review also rests upon the breadth of the statutory mandate. Cases arising under NEPA's encompassing procedural requirements are clearly distinguishable from cases based upon other statutes, such as those in *Overton Park* where the Supreme Court applied the arbitrary-and-capricious standard.¹²³ Hence, because of the differing statutory provisions, *Overton Park* appears to be of dubious precedential value in reviewing the procedural requirements of section 102. Careful analysis of the *Overton Park* standard reveals the necessity of an initial searching inquiry into the scope of an agency's authority, an examination that appears analogous to that conducted under *Hardin*¹²⁴ to discern the statutory purpose. The breadth of the procedural mandate in section 102 also appears similar to what Professor Davis calls "determinations of fact [that] are fundamental or 'jurisdictional,' in the sense that their existence is a *condition precedent to the operation of the statutory scheme*."¹²⁵ Although the difficulties in applying the doctrine of trial de novo to environmental litigation are manifest,¹²⁶ the rationale underlying the right to trial de novo analogously supports an inclusive procedural review under NEPA to avoid the possibility that a negative EIS determination could subvert the Act's action-forcing scheme.

A negative EIS determination also can thwart a minimal, judicially recognized purpose of NEPA, that is, its value as a "full disclosure law."¹²⁷ Since the most widely accepted purpose of an EIS

Gilham Dam project on one of the last free-flowing wild rivers in the Southwest, *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972).

122. Senator Jackson, Senate sponsor of NEPA, has stated: "We expected Section 102 of the act . . . to force the agencies to move. . . . We did not anticipate that it would be private parties through the courts that would force the compliance. This is what has made it work." *Christian Science Monitor*, Feb. 28, 1973, at 12, in *United States v. Students Challenging Regulatory Agency Procedure (SCRAP)*, 93 S. Ct. 2405, 2426 n.5 (1973) (Douglas, J., dissenting).

123. See notes 65-71 *supra* & accompanying text.

124. See notes 60-61 *supra* & accompanying text.

125. DAVIS, *supra* note 48, § 29.08, at 539, quoting *Crowell v. Benson*, 285 U.S. 22 (1922) (emphasis supplied).

126. See notes 12-15 *supra* & accompanying text.

127. The decision of the Court of Appeals for the Eighth Circuit in *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972), and that of the Court of Appeals for the Fourth Circuit in *Conservation Council v. Froehle*, 473 F.2d 664 (4th Cir. 1973),

is to inform Congress, the public, and the agencies themselves¹²⁸ about foreseeable environmental consequences of proposed administrative actions, the achievement of reasoned decisionmaking warrants strict scrutiny of a threshold decision. The observation that courts traditionally examine questions of procedure more carefully than those of substance¹²⁹ further buttresses that conclusion. The legislative history of the Act also may support a broad scope of judicial review, by requiring compliance "to the fullest extent possible"¹³⁰ with the substantive goals of section 101 taken together with the procedural imperatives of section 102.¹³¹

A final argument in favor of more searching procedural review concerns the problem, implicit in all environmental litigation, that any administrative action is irrevocable from an environmental standpoint. To prevent activity having irrevocable consequences, an environmental plaintiff, whether an individual or an organization, first must seek to enjoin action on a project before attempting to assail the myriad of other procedural defenses erected by the invariably self-interested agency.¹³² Since Congress evidently did not intend the agencies to disregard totally their functional mandate when preparing an EIS,¹³³ agencies created to construct certain pro-

suggest a discernible trend toward expanding the full disclosure concept. See notes 80, 113 *supra*.

128. Congressman Dingell, the House sponsor of NEPA asserted:

The success of the environmental impact statements is not so much that they were used as we intended they should, but that citizens have been able to use the process as a [way] to get into court The impact statement itself is not important. The important thing is that proper judgments are made reflecting environmental considerations in the decision-making process. The impact statement should be . . . a process by which the public can be informed and brought into the decision-making process.

Cahn, *Can Federal Law Help Citizens Save Nature's Fragile Beauty?*, Christian Science Monitor, Feb. 28, 1973, at 12, in *United States v. Students Challenging Regulatory Agency Procedure (SCRAP)*, 93 S. Ct. 2405, 2429 n.10 (1973) (Douglas, J., dissenting).

129. See, e.g., *Philco Corp. v. FCC*, 293 F.2d 864 (D.C. Cir. 1961); *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959).

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

131. For a cogent argument for substantive review based upon NEPA's legislative history, see Sive, *supra* note 45, at 645-48. Another commentator reaches the same conclusion by applying the principles of statutory construction to both sections 101 and 102. Comment, *Judicial Review of Factual Issue Under the National Environmental Policy Act*, 51 ORE. L. REV. 408, 413-16 (1972).

132. Large, *supra* note 64, at 89.

133. *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir.), *injunction vacated*, 94 S. Ct. 558 (1973); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 296 (8th Cir. 1972), *aff'g* 342 F. Supp. 1211 (E.D. Ark. 1972); *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1342 (S.D. Tex. 1973).

jects gradually lose the ability to place their responsibilities in a larger perspective and refrain from construction.¹³⁴ Consequently, a challenge to the inherent administrative self-interest that can generate irreparable environmental damage requires, at a minimum, the opportunity to be heard, the reasonable exploration of all available alternatives, and the publication of a cost-benefit analysis. Because of the environmentally irrevocable nature of a claim arising under NEPA, courts should apply a broad, searching standard of procedural review to realize the goals enunciated in the Act.¹³⁵

THE THRESHOLD DECISION: THE PROPER STANDARD FOR REVIEW

From the muddled current status of procedural review under NEPA, a trend apparently is emerging toward abandonment of the arbitrary-and-capricious standard which courts initially applied. Although similarities among the various tests being used might indicate that any conflict between tests is purely semantic, the present applications of the standards reflect varying degrees of judicial scrutiny. Decided advantages appear to exist in the employment of a standard of "reasonableness," which, if uniformly applied, would best complement the roles of both courts and administrative agencies alike.

Reasonableness, underlying each reviewing standard to some degree, appears to be the lowest common denominator of all the present tests. By considering the scope of administrative authority in general, and in particular, whether the agency's decision discusses all relevant factors, the bifurcated *Overton Park* test, if applied strictly, addresses the reasonableness of the agency's decision.¹³⁶ Reflecting in part the *Overton Park* standard, the substantial evidence-relevant factor test of *Scenic Hudson* similarly addresses administrative reasonableness. Judicial review under the reasonable basis standard also addresses the reasonableness of the exercise of administrative discretion.¹³⁷ Likewise review de novo reflects the

134. The alternative not to construct a proposed project first arose in a context other than NEPA, but its appropriateness to considerations reached in an EIS appears manifest. See *Udall v. FPC*, 387 U.S. 428 (1967). See generally Sive, *supra* note 45, at 634-37.

135. NEPA § 101(b), 42 U.S.C. 4331(b) (1970).

136. *Until Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973), however, courts seemed reluctant to recognize the bi-level approach of *Overton Park*; they appeared to apply merely the arbitrary-and-capricious standard of the APA without pursuing an initial searching inquiry into all relevant factors, including the scope of administrative authority.

137. The reasonable basis test necessarily involves the law-fact dilemma and applies only

reasonableness standard to the extent that both seek to measure the totality of the administrative determination in relation to the court's construction of the NEPA mandate.

Moreover, the proper realization of the statutory mandate and purpose of NEPA requires that "reasonableness" become the decisive criterion in judicial review of administrative threshold determinations, rather than a mere subordinate and often ignored¹³⁸ factor. Uniform judicial employment of the reasonableness standard would avoid the law-fact dilemma and provide the basis for broad judicial review which the unique factors in environmental disputes dictate. Administrative law scholars have indicated support for a standard of reasonableness; Professor Davis specifically prefers the standard of reasonableness in *Hardin* to the fact-law imbroglio.¹³⁹ Professor Jaffe, although subscribing to a different rationale to explain judicial selection of a particular standard, apparently endorses the reasonableness measure as well.¹⁴⁰

Judicial review premised upon the reasonableness of administrative decisions should prove advantageous to court and administrative agencies alike. The reasonableness reviewing standard would encourage administrators to fashion rules,¹⁴¹ pursuant to the CEQ guidelines, to identify those actions likely to require environmental impact statements. Judicial evaluation of threshold decisions then could assess the reasonableness of the rules themselves and the relationship of an agency's factual findings to its own guidelines, rather than use the ad hoc approach which courts presently employ to evaluate the determinations of each agency. Such a method of judicial review would preserve the domain of administrative discretion without rendering it impenetrable to judicial review. A reasonableness standard, therefore, would enable a reviewing court to set aside an unreasonable administrative determination and substitute its judgment without becoming embroiled in the law-fact controversy.

where courts clearly find a mixed question. See notes 81-91 *supra* & accompanying text. "Reasonableness," on the other hand, affords a reviewing court greater flexibility because it need not become embroiled in the law-fact controversy. The court instead simply may evaluate the reasonableness of the administrative determination taken as a whole, as in *Kreger* and *Wyoming Council*.

138. See note 136 *supra*.

139. See notes 60-62 *supra* & accompanying text.

140. See notes 57-59 *supra* & accompanying text.

141. Both Jaffe and Davis apparently sanction a concept of judicial review that provides an impetus for administrative rulemaking. DAVIS, *supra* note 48, § 6.03, at 142-43, § 6.05, at 147-48, § 29.01, at 525-27; JAFFE, *supra* note 50, at 563-64, 569-73. See also Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U.L. Rev. 879, 893-95 (1973).

CONCLUSION

Considering the conspicuous absence of informative legislative history and the respective administrative and judicial tasks, courts should not attempt to define the precise bounds of the term "significantly," but logically should grant initial deference to an administrative determination that is itself subject to the agency's own prescribed criteria. When called upon to review an administrative threshold determination under section 102, courts should apply an inclusive standard of reasonableness both to realize the broad NEPA mandate and in recognition of particular considerations inherent in environmental law disputes. Some courts admittedly are moving toward the standard of reasonableness, but the judicial trend away from the initially articulated arbitrary-and-capricious standard remains incomplete. Uniform application of the reasonableness review standard would preserve judicial consistency in environmental decisionmaking and help dispel the evident confusion about the intended effect of the statute as it relates to Congress, the agencies, and the public.

Based upon the reasonableness standard, searching judicial review of an agency's decision whether to file an EIS can avert the emasculation of NEPA. The end result, nevertheless, may be merely to breed "a race of impact statement writers"¹⁴² who quickly embrace the form of an EIS, effectively subvert the goal of reasoned consideration through massive compilation of documents, and thereby present environmentalists a paperwork argument difficult to refute substantively. Consequently, even the achievement of inclusive judicial review of an administrative threshold determination, like the environmentalist successes in the earlier controversies of standing and jurisdiction, may be only another incremental success in the campaign for a healthful environment.

142. The words are those of Representative Dingell, House sponsor of the Act. Cahn, *Can Federal Law Help Citizens Save Nature's Fragile Beauty?*, Christian Science Monitor, Feb. 28, 1973, at 12, in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 93 S. Ct. 2405, 2429 n.10 (1973) (Douglas, J., dissenting).