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ENVIRONMENTAL LAW GROWING APACE: AN INTRODUCTORY COMMENT

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The decade of the 1960's achieved remarkable results in the area of environmental reform. Change occurred on several levels as society awakened to the consequences of the increasing degradation of our environment. The voice of an aroused scientific community was heard warning of impending dangers, and its study and documentation of the impact of non-circumspect technology upon the environment had its effect. Quickly the media began to publicize such now-familiar dangers as the sudden accretion of toxic wastes in the air and water, the presence of dangerous metals such as mercury in the food chain, the imminent shortages of potable water and food supplies, the increasingly rapid deterioration of the inner cities, the psychological and physiological harm resulting from constant noise assault and increasing population density, the growing stockpile of deadly radioactive wastes, the pollution of the soil with pesticides and herbicides, the peril of thermal imbalance, and the presence of oil and other pollutants in the oceans.

The decade of the sixties also saw marked growth on the part of environmental organizations. Such old and established conservation organizations as the Sierra Club were able to expand their membership and commit resources to environmental reform on an expanded national basis.¹ These conservation societies were joined by newly formed environmental organizations, such as the Environmental Defense Fund, which were founded to play an active role in defending the environment

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¹ The impact of the Sierra Club's activities on environmental reform is evident in such cases as *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970); *Sierra Club v. Mason*, — F. Supp. —, 4 E.R.C. 1686 (D. Conn. 1972); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 235 (D.D.C.), *aff'd per curiam*, — F.2d —, 4 E.R.C. 1815 (D.C. Cir. 1972), cert. granted, 41 U.S.L.W. 3392 (U.S. Jan. 15, 1973).

through litigation and lobbying efforts as well as by pursuing traditional avenues of redress.² Together with the scientific community, these organizations played a significant part in developing a public consciousness of environmental danger which aroused the concern of the ordinary citizen. Public support for ecological reform led to the introduction of environmental protection bills in Congress and state legislatures, and several significant statutes were enacted at the close of the decade.³

If the environmental movement was characterized during the 1960's by a growing public awareness of the extent to which we as a nation have despoiled the ecosystems in which we live and work, the decade of the 1970's is destined to be characterized by the development of what is loosely termed "environmental law."⁴ This growth is occurring on two levels: heightened public consciousness has already led to the enactment of significant new statutes on both the federal and state levels⁵ and has nurtured an enormous increase in environmental litigation. Almost weekly a court decision preventing or delaying proposed public and private action is handed down, and both federal and state judges have come to accept environmental cases as appropriate actions pursuing legitimate citizen concerns. This change in the judicial outlook, which reflects a departure from the deference traditionally accorded administrative determinations, augurs well for the future of environmental lawsuits.⁶ There is little doubt that, if environmental law has not yet become an officially recognized branch of the law, it will certainly attain this status during the decade of the seventies.

The *Boston College Industrial and Commercial Law Review* has made significant contributions to the development of environmental law. It was one of the earliest reviews to explore in depth the problems of

² See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 342 F. Supp. 1211 (E.D. Ark.), aff'd, 470 F.2d 289 (8th Cir. 1972).

³ See, e.g., *National Environmental Policy Act of 1969 (NEPA)*, 42 U.S.C. §§ 4321 et seq. (1970); *Environmental Quality Improvement Act of 1970*, 42 U.S.C. §§ 4371-74 (1970). As a result of these statutes the Environmental Protection Agency (EPA) was created.

⁴ The titular designation "environmental law" is a misnomer since it implies that a properly delineated body of legal and scientific principles exists. The implication is improper since environmental problems and their solutions are multidisciplinary in structure and content. Environmental pollution or degradation does not emanate from a single cause or series of causes which can be classified under one scientific or academic discipline. Rather, the nature of any and all environmental abuses of the so-called western or industrial societies transcends many of the physical and social sciences into which the various educational disciplines have been divided.

⁵ See, e.g., *Clean Air Amendments of 1970*, 42 U.S.C. §§ 1857-571 (1970); *Federal Water Pollution Control Act Amendments of 1972*, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified with minor exceptions at 33 U.S.C. §§ 1251 et seq. (Supp. 1973)); *Mich. Environmental Protection Act of 1970*, Mich. Comp. Laws Ann. §§ 691.1201-.1207 (Supp. 1972).

⁶ See J. Sax, *Defending the Environment: A Strategy for Citizen Action*, at xviii-xix, 57, 58, 60, 62, 63 (1st ed. 1971).

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environmental degradation, beginning in 1968 with a symposium treating water pollution,⁷ and subsequently it has focused considerable attention on other aspects of environmental problems.⁸ Its commitment to environmental research and scholarship continues in this issue, which focuses on concerns at the forefront of environmental law today.

The issues that must be faced in the seventies are complex and extremely difficult, as is evidenced by the round of litigation under the National Environmental Policy Act (NEPA)⁹ and the Clean Air Act Amendments of 1970.¹⁰ The difficult NEPA issues which will have to be resolved, perhaps even at the congressional level, include the extent

⁷ Water Use—A Symposium, 9 B.C. Ind. & Com. L. Rev. 531 (1968).

⁸ See, e.g., Bagge, The Federal Power Commission, 11 B.C. Ind. & Com. L. Rev. 689 (1970); McDaniel & Kaplinsky, The Use of the Federal Income Tax System to Combat Air and Water Pollution: A Case Study in Tax, 12 B.C. Ind. & Com. L. Rev. 351 (1971); Franzen, Weather Modification: Law and Policy, 12 B.C. Ind. & Com. L. Rev. 503 (1971); Donovan, The Federal Government and Environmental Control: Administrative Reform on the Executive Level, 12 B.C. Ind. & Com. L. Rev. 541 (1971); Muskie, A Legislator's View of Impending Amendments to the Water Pollution Control Act, 13 B.C. Ind. & Com. L. Rev. 629 (1972); Reis, Environmental Activism: Thermal Pollution—AEC and State Jurisdictional Considerations, 13 B.C. Ind. & Com. L. Rev. 633 (1972); Cohen & Warren, Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969, 13 B.C. Ind. & Com. L. Rev. 685 (1972); Rodgers, The National Industrial Pollution Control Council: Advise or Collude?, 13 B.C. Ind. & Com. L. Rev. 719 (1972); Comment, State Air Pollution Control Legislation, 9 B.C. Ind. & Com. L. Rev. 712 (1968); Comment, The Clean Air Amendments of 1970: Better Automotive Ideas From Congress, 12 B.C. Ind. & Com. L. Rev. 571 (1971) (National Award Winner in the 1971 Annual Environmental Law Essay Contest of the American Trial Lawyers Association and winner of second prize in a competition sponsored by American Society of Planning Officials and the U.C.L.A.-Ford Foundation Program and Planning of Environmental Control Law); Comment, Standing of Conservation Organizations to Challenge Federal Administrative Action in Federal Court, 12 B.C. Ind. & Com. L. Rev. 637 (1971); Comment, Constitutional Problems in Environmental Legislation—the Mason Law, 12 B.C. Ind. & Com. L. Rev. 657 (1971); Comment, Federal Pollution Legislation: Current Proposals to Achieve More Effective Enforcement, 13 B.C. Ind. & Com. L. Rev. 749 (1972); Comment, The Scope of State and Local Government Action in Environmental Land Use Regulation, 13 B.C. Ind. & Com. L. Rev. 782 (1972).

⁹ See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 342 F. Supp. 1211 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972); *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972); *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971); *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir. 1971); *Ely v. Veld*, 451 F.2d 1130 (4th Cir. 1971); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Durnford v. Ruckelshaus*, — F. Supp. —, 5 E.R.C. 1007 (N.D. Cal. 1973); *Anaconda Co. v. Ruckelshaus*, 352 F. Supp. 697 (D. Colo. 1972); *Kisner v. Butts*, — F. Supp. —, 4 E.R.C. 1692 (N.D.W. Va. 1972); *Sierra Club v. Mason*, — F. Supp. —, 4 E.R.C. 1686 (D. Conn. 1972); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970); *cf. Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

¹⁰ See, e.g., *Natural Resources Defense Council v. EPA*, — F.2d —, 4 E.R.C. 1945 (D.C. Cir. 1973); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972); *Anaconda Co. v. Ruckelshaus*, 352 F. Supp. 697 (D. Colo. 1972); *Riverside v. Ruckelshaus*, — F. Supp. —, 4 E.R.C. 1728 (C.D. Cal. 1972).

to which environmental agencies, especially the Environmental Protection Agency (EPA), will be subject to the mandatory procedures of section 102 of NEPA,¹¹ as well as whether, and the extent to which, the federal judiciary will review administrative determinations for substantive compliance with the policies and goals set forth in section 101 of that statute.¹² The significance of the former problem, which first surfaced in the 1971 decision *Kalur v. Resor*,¹³ is portrayed in a recent district court decision, *Anaconda Co. v. Ruckelshaus*,¹⁴ holding that NEPA applies to EPA action under the Clean Air Act despite the latter statute's specific directions to the Administrator to accomplish stated objectives within prescribed time periods, and despite language in section 104 of NEPA which seemingly relieves environmental agencies of this task.¹⁵ With respect to the latter problem, courts originally adhered to the position that their jurisdiction over administrative action under NEPA was restricted to the review of agency action in order to make sure that environmental impact statements fully complied with the procedural requirements set forth in sections 102(2)(C) and (D).¹⁶

¹¹ 43 U.S.C. § 4332 (1970).

¹² 43 U.S.C. § 4331 (1970).

¹³ 335 F. Supp. 1 (D.D.C. 1971). It was this decision that undermined the permit system established by federal regulations (Permits for Discharges or Deposits Into Navigable Waters, 33 C.F.R. § 209.131 (1971)) promulgated by the Army Corps of Engineers pursuant to Executive Order No. 11574, 35 Fed. Reg. 19627 (1970).

¹⁴ 352 F. Supp. 697 (D. Colo. 1972); cf. *Kennecott Copper Corp. v. EPA*, 462 F.2d 349 (3d Cir. 1972).

¹⁵ Section 104 of NEPA provides in pertinent part that "[n]othing in Section 102 or 103 shall in any way affect the specific statutory obligations of any federal agency (1) to comply with criteria or standards of environmental quality" 42 U.S.C. § 4334 (1970). For a discussion of the significance of § 104, see *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). After the decision in *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971), Congress specifically provided, in § 511(c) of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified with minor exceptions at 33 U.S.C. §§ 1251 et seq. (Supp. 1973)), that "no action of the administrator taken pursuant to this Act shall be deemed major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1972."

¹⁶ See, e.g., the district court opinion in *Environmental Defense Fund v. Corps of Engineers*, 342 F. Supp. 1211 (E.D. Ark.), aff'd, 470 F.2d 289 (8th Cir. 1972). The relationship between § 102(2)(D) and § 102(2)(C) of NEPA is explained in the following excerpt from the Eighth Circuit opinion:

This provision [§ 102(2)(D)] follows and is in addition to the § 102(2)(C) requirement of a detailed statement discussing, *inter alia*, alternatives to the proposed action. This is not to suggest, however, that the more extensive treatment of alternatives required by § 102(2)(D) cannot be incorporated into the EIS [Environmental Impact Statement]. Indeed, "it is the essence and thrust of NEPA that the pertinent statement serve to gather in one place a discussion of the relevant environmental impact alternatives." *National Resources Defense Council v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972). So too, the guidelines to the federal agencies issued by the CEQ [Council on Environmental Quality] ex-

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More recently, however, some circuit court decisions, principally those in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*¹⁷ and *Environmental Defense Fund v. Corps of Engineers*,¹⁸ indicate that courts not only will examine environmental impact statements for compliance with the procedural formalities of section 102, but also will evaluate the decisions of federal administrators in determining whether the substantive objectives of NEPA stated in section 101 are complied with.¹⁹ Although these decisions indicate that the scope of this review may well be limited to application of the arbitrary and capricious standard,²⁰ there is some suggestion that a broader review might yet be obtainable.²¹ Environmentalists may be expected to adopt the suggestion and urge a broader scope of review. It may also be assumed that environmentalists will not remain content with the rulings of recent cases suggesting that the public is not entitled to fully unbiased and completely objective environmental impact statements.²² Continued litigation on these issues, then, is to be anticipated.

plain the import of § 102(2)(D) under the general heading "Content of Environmental Statement." 36 Fed. Reg. 7724, 7725 (1971).

470 F.2d at 296.

¹⁷ 449 F.2d 1109 (D.C. Cir. 1971).

¹⁸ 470 F.2d 289 (8th Cir. 1972).

¹⁹ See, e.g., *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971), where the court stated:

We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The 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 [Emphasis added.]

See *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297 (8th Cir. 1972), where the court concluded:

The language of NEPA, as well as its legislative history make it clear that the Act is more than an environmental full disclosure law. NEPA was intended to effect substantive changes in decision making. . . . To this end, § 101 sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment.

The court further reasoned that "an agency obligation [existed] to carry out the substantive requirements of the Act. [Accordingly] . . . courts have an obligation to review substantive agency decisions on the merits." *Id.* at 298. See also *North Carolina Conservation Council v. Froehke*, — F.2d —, 4 E.R.C. 2039 (4th Cir. 1973); *Sierra Club v. Froehke*, — F. Supp. —, 5 E.R.C. 1033, 1061 (S.D. Tex. 1973).

²⁰ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), for a discussion by the Supreme Court of arbitrary and capricious standards.

²¹ Cf. *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 299 n.15 (8th Cir. 1972).

²² See, e.g., *id.* at 295, where the court stated:

We agree . . . that NEPA "requires the agencies of the United States Government to objectively evaluate their projects." However, we do not agree with the view implicit in the contentions of appellants that NEPA requires agency officials to be subjectively impartial. . . . Thus NEPA assumes as inevitable an

Subsidiary NEPA issues awaiting final resolution relate to situations where an agency claims that an environmental impact statement need not be prepared and filed because its activity does not constitute "major Federal action significantly affecting the quality of the human environment."²³ Recent decisions have approved the practice, adopted in EPA guidelines,²⁴ of permitting the agency to prepare only an informal and less detailed "environmental assessment" statement regarding this threshold inquiry.²⁵ And while it appears that the statutory language describes two distinct issues within the area of inquiry—first, whether the proposed activity constitutes "major Federal action"; second, whether it "significantly affect[s] the quality of the human environment"—so that the challenging complainant must succeed on two issues if he is to forestall or prevent agency action,²⁶ the relevant criteria for making this assessment remain to be settled.²⁷

institutional bias within an agency proposing a project and erects the procedural requirements of § 102 to insure that "there is no way [the decision-maker] can fail to note the facts and understand the very serious arguments advanced by plaintiffs if he carefully reviews the entire environmental impact statement." An institutional bias will most often be found when the project has been partially completed. . . .

The test of compliance with § 102, then, is one of good faith objectivity rather than subjective impartiality. [Citations omitted.]

²³ 42 U.S.C. § 4332(C) (1970).

²⁴ 37 Fed. Reg. 879-85 (1972).

²⁵ *Durnford v. Ruckelshaus*, — F. Supp. —, 5 E.R.C. 1007 (N.D. Cal. 1973); *Kisner v. Butz*, — F. Supp. —, 4 E.R.C. 1692 (N.D.W. Va. 1972); *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972); cf. *Sierra Club v. Mason*, — F. Supp. —, 4 E.R.C. 1686 (2d Cir. 1972).

²⁶ See, e.g., *Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir. 1972), where the court held:

Plaintiffs argue that if a federal action is "major," as defendants now concede this one is, it must have a "significant" effect on the environment. Defendants claim that the term "major Federal action" refers to the cost of the project, the amount of planning that preceded it, and the time required to complete it, but does not refer to the impact of the project upon the environment. We agree with the defendants that the two concepts are different and that the responsible federal agency has the authority to make its own threshold determination as to each in deciding whether an impact statement is necessary.

²⁷ Compare *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), *Sierra Club v. Mason*, — F. Supp. —, 4 E.R.C. 1815 (D.C. Cir. 1972), and *Kisner v. Butz*, — F. Supp. —, 4 E.R.C. 1692 (N.D.W. Va. 1972). Although in *Hanly* the Second Circuit agreed that "[T]he term 'major Federal action' refers to the cost of the project, the amount of planning that preceded it, and the time required to complete it . . .," 460 F.2d at 644, it indicated broader criteria for determining whether the project would "significantly" affect the environment, stating:

The National Environmental Policy Act contains no exhaustive list of so-called "environmental considerations," but without question its aims extend beyond sewage and garbage and even beyond water and air pollution. The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion, and even

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The severity and complexity of the Clean Air Act issues are exemplified by the appellate decision in a recent motor vehicle emission standards case²⁸ and in the resultant action of the EPA Administrator granting a one-year extension for the attainment of emission limits originally set for 1975,²⁹ despite the success of two Japanese firms in solving the technological problems inherent in reducing automotive emissions.³⁰ Other examples of the complexities of the issues arising under the Act are developed in the articles and comments presented in this issue. Perhaps this complexity is most vividly seen in the article by Ms. Schachter, which evaluates state and local air pollution control regulations and points out many of the inadequacies of the implementation plans adopted under the Clean Air Act, and in Mr. Luneburg's examination of federal-state interaction under the same statute. Subsidiary issues of statutory construction, covering the relationship between the appeal provisions of section 307 and the citizen suit provisions of section 304, are explored in the comment on developments under the Clean Air Act. Last year, in *Illinois v. City of Milwaukee*,³¹ the Supreme Court resurrected old precedents³² and reestablished a federal common law of nuisance as an appropriate remedy for pollution control. In so doing, the Court provided support for a lower court decision proceeding upon a federal common law theory in a public nuisance context³³ and dispelled any possible contrary implications arising from its opinion in another case decided the previous year.³⁴ The impact of *City of Milwaukee* has been swift and dramatic. In recent decisions, two federal district courts have extended the doctrine beyond the scope of the Supreme Court decision and seemingly authorized its use as a means of evading the strictures of express legislative remedies.³⁵ The problems engendered by this case and the danger it poses for carefully

availability of drugs all affect the urban "environment" and are surely results of the "profound influences of . . . high-density urbanization [and] industrial expansion." Section 101(a) of the Act, 42 U.S.C. § 4331(a).

Id. at 647 (citations omitted).

²⁸ *International Harvester Co. v. Ruckelshaus*, — F.2d —, 4 E.R.C. 2041 (D.C. Cir. 1973).

²⁹ *Wall Street Journal*, April 12, 1973, at 1, col. 6.

³⁰ Id. at 3, col. 1.

³¹ 406 U.S. 91 (1972).

³² *New Jersey v. City of New York*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Missouri v. Illinois*, 200 U.S. 496 (1906); *Pennsylvania v. Wheeling Bridge Co.*, 54 U.S. (13 How.) 556 (1851).

³³ *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971).

³⁴ In *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493 (1971), the Court, in declining to accept original jurisdiction, suggested that public nuisance was grounded in state rather than federal law.

³⁵ *United States v. United States Steel Corp.*, — F. Supp. —, 5 E.R.C. 1125 (N.D. Ill. 1973); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D. Vt. 1972).

formulated and limited statutory remedies are explored herein in the casenote on *United States v. Ira S. Bushey & Sons, Inc.*⁸⁶

Perhaps the most significant recent development was the passage of the Federal Water Pollution Control Act Amendments of 1972⁸⁷ over the President's veto on October 18, 1972. As one congressman has remarked, these amendments have "totally restructur[ed] the water pollution program" and constitute "a far-reaching national commitment to clean water."⁸⁸ This development has not been overlooked, and an exhaustive comment analyzing the amendments appears herein.

At this juncture, then, with environmental law growing apace, we have endeavored in this issue of the *Review* to present essays highlighting recent developments and explaining current problems which, it is hoped, anticipate the bases of significant future litigation. I take pride in recommending the issue to your attention.

⁸⁶ 346 F. Supp. 145 (D. Vt. 1972).

⁸⁷ Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified with minor exceptions at 33 U.S.C. §§ 1251 et seq. (Supp. 1973)).

⁸⁸ 118 Cong. Rec. H2481 (daily ed. March 27, 1972) (remarks of Rep. Blatnik).