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ENVIRONMENTAL PROTECTION: CITIZEN ACTION FORCING AGENCY COMPLIANCE UNDER LIMITED JUDICIAL REVIEW

MARY ELLEN ENDRES

The prevailing standards of judicial review will hardly admit effective adjudication of environmental issues raised by challenges to administrative agency action. In reviewing agency decisions or actions under attack, the judicial forum has been constrained under traditional administrative law to accord great weight to administrative findings, to limit its scope of review to a determination of the reasonableness of the agency's conclusions, and thereby to avoid realistic consideration of the merits of the environmentalists' cause of action. Judicial review within the existing framework is inadequate to decide whether or not an agency proposal should be carried through; however, the courts are capable of providing short-term relief to plaintiffs while insisting upon statutory compliance on the part of the agency before allowing it to proceed with its project. Rather than abdicate their responsibility by rubberstamping agency proposals, the courts will at least enforce legislative policies of environmental protection binding upon agency action. As a result, the citizen suit may effect the implementation of strong environmental measures which otherwise might not be initiated by irresponsible administrative officials. Therefore, a continuing fervor of citizen challenges to agency action is a necessary requisite for an efficacious program of environmental protection. The following discussion will analyze the prevailing confines of judicial review of administrative action and the adequacies as well as inadequacies of the judicial forum as the arbiter of environmental controversies.

JUDICIAL REVIEW IN GENERAL

In reviewing administrative agency actions, different standards have been adopted which provide for varying scopes of review, ranging from a narrow approach providing no effective review, to a more liberal position in which judicial judgment is substituted for that of the agency.[1] The limited scope of review involves three different categorizations—the substantial evidence rule, the arbitrary and capricious test, and the rational basis test——with the slight distinctions among them elicited by the nature of the particular agency action under review. This limited function, under any of the three

1. K. DAVIS, ADMINISTRATIVE LAW TEXT 525 (3d ed. 1972).

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labels, is to be primarily distinguished from the broad position of de novo review. De novo scope of review allows a court to hear new evidence and to use its independent judgment on matters of law as well as of fact, policy, and discretion.[2] De novo review is usually applied where the agency procedure is quasi-judicial, that is, where the agency has heard the facts, allowed cross-examination, and rendered a judgment based upon legal conclusions from the facts.[3] Particularly where a case involves enforcement of a constitutional right, the court on review must necessarily make an independent determination of all questions, both of fact and law.[4] The Administrative Procedure Act (APA)[5] provides that courts are to conduct de novo review of agency findings which are unwarranted by the facts of the record.[6] In interpreting this provision of the APA, the Supreme Court has stated that "*[d]e novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate."[7] Thus, the broad de novo scope of review is to be applied only in specific cases involving a narrow set of circumstances.

The limited scope of review, under its three different forms, is the prevailing approach to administrative action. Most frequently this view has been applied in the form of the substantial evidence rule. As defined by the Supreme Court, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] Under this standard the reviewing court decides all relevant questions of law but limits itself to the test of reasonableness in reviewing findings of fact.[9] The scope of review is restricted to the agency's administrative record, which is comprised of formal fact findings produced during a public adjudicatory hearing, and which provides the basis of the agency's action or decision.[10] As long as the agency's determinations are supported by substantial evidence in the record, they will not be disturbed on review. The substantial evidence rule does not require that the fact findings be predicative of only one conclusion. Therefore, although an agency's findings may be found to be inconsistent, the substantial evidence rule still precludes their being disturbed.[11] This

2. *Id.* at 538.
3. *Id.* at 157.
4. Crowell v. Benson, 285 U.S. 22, 46 (1932). For example, in a confiscation controversy the ultimate conclusion almost invariably depends upon questions of fact, and the complaining owner is entitled to a fair opportunity for submitting that issue to the judicial tribunal for its independent judgment.
5. 5 U.S.C. § 706 (1970).
6. 5 U.S.C. § 706(F) (1970).
7. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).
8. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).
9. K. Davis, Administrative Law Text 525 (3d ed. 1972).
10. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); *see* 5 U.S.C. § 557 (1970).
11. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

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principle inheres in the court's viewing of all reasonable inferences drawn from the record in the light most favorable to the findings of the agency, on the presumption that the agency as a specialized tribunal has carefully and most knowledgeably considered the problems involved. If contradictory conclusions may be drawn from the evidence, it remains within the province of the agency to reach the ultimate conclusion, and the reviewing court will be bound by that finding. This principle is warranted on the ground that the court must not become another administrative tribunal; neither must the court allow a miscarriage of justice when the agency has not adequately considered all the issues involved.

Another form of limited judicial review is the rational basis test, which may be utilized when a reviewing court is confronted with mixed questions of law and fact, as in the interpretation of statutory terms. In formulating this principle, the Supreme Court asserted that it is not the court's function to substitute its own inferences of fact for the agency's when the latter's are supported by the record; rather, the court is to determine if such facts can be reasonably inferred from the statute.[12] Therefore, where the agency has made an initial determination of a broad statutory term, the agency's conclusion will be accepted as a correct statement of the law if it has a reasonable basis in law and warrant in the record.[13] This scope of review, like the substantial evidence rule, enables the court to avoid substituting its own judgment for the fact findings of the agency. Again, however, if the agency has been negligent in its findings, the court would not be providing adequate judicial review by uncontestably accepting the agency's conclusions. The rational basis test and the substantial evidence rule are similarly based on the requirement that the reviewing court need only draw "reasonable" conclusions from the record produced by the agency. The difference between the two tests lies in the former's greater facility of application to a situation involving law-fact intricacies, as it affords the court a less analytical determination by simply requiring that there be a reasonable inference of law to support the agency's findings.

The third standard employed in the limited scope of administrative review is the "arbitrary and capricious" test. This means that where the agency proceeding was quasi-legislative,[14] that is, more in the nature of policymaking than of adjudication, the reviewing court is to be guided by the test of whether the agency action was "arbitrary, capricious, an abuse of discre-

12. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944).

13. *Id.* at 131-32. In this case the Court accepted the NLRB's determination that semi-independent newsboys are to be included as "employees" under the National Labor Relations Act.

14. An example of a quasi-legislative, nonadjudicatory proceeding is a public hearing on a highway construction project for the purpose of informing the public of the proposed project and eliciting its views on design and route.

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tion, or otherwise not in accordance with law."[15] *Citizens to Preserve Overton Park, Inc. v. Volpe*[16] is the leading decision involving the application of the arbitrary and capricious standard of review. An environmental case, *Overton Park* involved a citizens' appeal of a decision by the Secretary of Transportation to route a federal highway through public parkland. Petitioners contended that the Secretary's approval of the project should be subjected to the substantial evidence rule, or alternatively, to broad de novo review to determine if it was unwarranted by the facts. In a strict construction of the guidelines of the Administrative Procedure Act, the Supreme Court stated that *neither* standard was applicable since the case did not fall within the narrow set of circumstances providing for application of substantial evidence or de novo review.[17] Instead, the Court held that proper action for the reviewing court would be a "substantial inquiry" into the Secretary's decision, based on the full administrative record.[18] In order to facilitate the lower court's "substantial inquiry," the Supreme Court set forth several issues upon which such determinations must be made: (1) whether the administrator acted within the scope of his authority; (2) whether the choice made by the administrator was neither arbitrary, capricious, nor an abuse of his discretion; and (3) whether the administrator followed the necessary procedural requirements.[19] In making its inquiry into the arbitrariness and capriciousness of the administrator's decision, the court must consider whether his decision was based on a "consideration of the relevant factors and whether there has been a clear error of judgment."[20] Judicial review here is to be carefully confined to the facts, and the court may not substitute its judgment for that of the agency. The arbitrary-capricious test is thus similar in scope to the substantial evidence and rational basis tests: the court will not interfere with an agency's findings unless the agency's conclusions, unsupported by the record, are unreasonable and can only be the product of arbitrariness.

The arbitrary-capricious and the substantial evidence tests often overlap in application. For example, in *Scenic Hudson Preservation Conference v. Federal Power Commission*,[21] a case challenging the Commission's licensing of a proposed hydroelectric storage plant, the Court of Appeals for the Second Circuit followed the reasoning of *Overton Park* underlying the requirement of the arbitrary-capricious test, and looked to substantial evidence to determine whether the Commission properly performed its function:

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15. 5 U.S.C. § 706(A) (1970).
16. 401 U.S. 402 (1971).
17. *Id.* at 414.
18. *Id.* at 415. The litigation affidavits of the agency officials were not sufficient alone for review.
19. *Id.* at 415-17.
20. *Id.* at 416.
21. 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

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> Where the Commission has considered all relevant factors, and where the challenged findings, based on such full consideration, are supported by substantial evidence, we will not allow our personal views as to the desirability of the result reached by the Commission to influence us in our decision.[22]

Thus, there seems to be little difference in result between the substantial evidence and the arbitrary-capricious standards, particularly where the court is careful to render due deference to the agency's determinations of fact. The two standards are, however, differentiated by the nature of the judicial appeal. If the complainants allege arbitrariness and capriciousness, the question becomes one of due process, in that it must be shown that the agency has failed to meet the procedural requirements of providing a fair hearing prior to making its decision. The court will then review both the administrative record and the evidence to determine if the agency abused its discretion. If the petition is for a substantial evidence review, the court may focus mainly on the sufficiency of the fact findings in the agency's record to determine whether there exists a reasonable basis for the agency's conclusions.

So strong has been the judicial preference for the limited position of the substantial evidence and the arbitrary and capricious tests that one or the other standard often has been applied even though a statute may prescribe a broader scope of review.[23] One reason that courts have not favored the broad de novo scope of review lies in judicial deference to the expertise accorded the agency in technical matters. Judges are reluctant to substitute their own views for the agency's expert analysis of the facts. This principle prevails particularly in environmental litigation, which often involves complex scientific issues.

REVIEW OF AGENCIES' NONCOMPLIANCE WITH FEDERAL STATUTES

Courts have generally not deferred to the agency's expertise when the question involves the construction of a statute, since ultimate responsibility for interpreting statutes rests in the judiciary. The role of the reviewing court is often to ensure that the agency charged with obligations under a statute complies fully with its mandate, and the court will scrutinize the agency's action or decision in light of the specific statutory terms of authorization and regulation.

Prior to enactment of the National Environmental Protection Act (NEPA),[24] environmentally concerned citizens could sue an agency for al-

22. 453 F.2d at 468.

23. For example, the Texas Supreme Court has declared unconstitutional a state statute providing for de novo review and determined instead that the applicable standard is the substantial evidence rule. Chemical Bank & Trust Co. v. Falkner, 369 S.W.2d 427, 433 (Tex. Sup. 1963).

24. 42 U.S.C. §§ 4321-4335 (1970).

leged violation of the appropriate statute which applied to the agency action in question. Without reaching the environmental issues involved, the reviewing court would restrict its review to a determination of whether the agency had conformed to the directives of the statute. In *Citizens Committee for Hudson Valley v. Volpe*,[25] for example, the Court of Appeals for the Second Circuit enjoined the Army Corps of Engineers from issuing a permit to dredge and fill the Hudson River for a highway construction project because the Corps had acted in excess of its statutory authority. Specifically, the Corps had no authority to grant a causeway construction permit without the consent of the Secretary of Transportation pursuant to the Department of Transportation Act.[26] In addition, under the Rivers and Harbors Act of 1899[27] the Corps was unauthorized to construct a dike without obtaining the consent of Congress.[28]

Both the Department of Transportation Act[29] and the Federal-Aid Highway Act[30] provide that the Secretary of Transportation shall not approve any highway construction project requiring the use of publicly owned park or recreation area unless there is no "feasible and prudent alternative" to the use of such land, and the project includes "all possible planning to minimize harm" to the area. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[31] the Supreme Court construed this language as "a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted."[32] In order for the exemption to apply, "the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route."[33] On remand to the district court for an inquiry into the Secretary's conclusion that no feasible alternatives existed, the trial judge concluded, upon review of the full administrative record and further testimony of the agency officials, that the Secretary failed to fulfill his statutory duties, and the case was remanded to the Secretary to make a valid determination concerning

25. 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).
26. 49 U.S.C. § 1655(g) (1970).
27. 33 U.S.C. § 401 (1970).
28. In other cases reversal or remand was based solely on the agency's nonconformance with statutory directives. Examples include: Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973) (Mineral Lands Leasing Act); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972) (Department of Transportation Act); Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dept., 446 F.2d 1013 (5th Cir. 1971) (Department of Transportation Act); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (Fish and Wildlife Coordination Act).
29. 49 U.S.C. § 1653(f) (1970).
30. 23 U.S.C. § 138 (1970).
31. 401 U.S. 402 (1971).
32. *Id.* at 411.
33. *Id.* at 411.

all reasonable and prudent alternatives.[34] *Overton Park* was a major success for environmental litigants in setting forth the requirement that the record contain an adequate explanation of the agency's decision on a proposed project at the time the challenged decision was made.[35] Mere litigation affidavits, that is, *post hoc* rationalizations, of the agency officials are inadequate bases for the arbitrary and capricious standard of review, and do not constitute the "whole record" compiled by the agency as required by the Administrative Procedure Act.[36]

The obligation of the administrative official "to articulate the criteria that he develops in making each individual decision"[37] was further underscored in *Environmental Defense Fund, Inc. v. Ruckelshaus*,[38] a case involving review of the Secretary of Agriculture's decision refusing to suspend registration of DDT pesticide. That case dealt with a determination of proper administrative procedure under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),[39] and Judge Bazelon's majority opinion is evidence of judicial concern that standards set by the administrative agencies be sufficient to effectuate legislative intent. The statutory scheme of FIFRA, as interpreted by the court, requires that in the event of a substantial question about the safety of a registered pesticide, the Secretary must initiate the administrative process providing for public hearings on the issue. The public hearings not only "bring the public into the decision-making process" but also "create a record that facilitates judicial review."[40] In this case the court was willing to leave inferences of fact to the Secretary, but could not excuse the Secretary's failure to adequately explain his conclusion that the evidence did not warrant summary suspension of the registration of the pesticide. Judge Bazelon announced the beginning of a "new era" in the history of judicial review of administrative agency action.[41]

34. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873 (W.D. Tenn. 1972).

35. Since hearings for proposed highway projects are non-adjudicatory in nature, the substantial evidence rule does not apply, and formal findings, *i.e.* the record that is to be the basis of the agency action, are not required. *See* 5 U.S.C. § 557 (1970).

36. 5 U.S.C. § 706 (1970).

37. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 596 (D.C. Cir. 1971).

38. *Id.* at 596.

39. 7 U.S.C. §§ 135-135k (1970). The Act provides for pesticides to be registered with the Secretary of Agriculture, in conformance with statutory standards for safety. The registration is subject to cancellation when the product fails to conform to the safety standards. The administrative process requires that a notice of cancellation be issued to the registrant and that the matter be referred to a scientific advisory committee, followed by a public hearing; or, the Secretary may summarily suspend the registration when "necessary to prevent imminent hazard to the public." *Id.* § 135b(c).

40. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 595 (D.C. Cir. 1971).

41. *Id.* at 597.

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The courts, then, are no longer as quick as they once were to approve agency action via the substantial evidence test, but are demanding first a full articulation of the factors upon which agencies base their decisions.[42] The protection of the public's "fundamental personal interests in life, health, and liberty" from "administrative arbitrariness"[43] requires that the administrators provide a framework—findings of fact and reasoned opinions—for uniform principles of decision-making. One effect of this development is to diminish the role of the courts by placing a greater burden on the agency in order to enhance the integrity of the administrative process. By the same token, however, the requirement of a complete record from the agency strengthens the reviewing standards of the substantial evidence and arbitrary-capricious tests by exacting from the agency a thorough analysis upon which the court can base a meaningful review.

Although the courts have placed a greater emphasis on the agency to provide a full hearing and record, the need for judicial scrutiny has not diminished. Since the enactment of the National Environmental Protection Act,[44] numerous suits have been brought seeking review of agency decision or action in the light of NEPA's general mandate calling for administrative measures for environmental protection. In a way, adjudication of NEPA-involved suits has shifted the empahsis back to the courts to effect agency cooperation. Since NEPA does not provide a standard for judicial review, however, the courts are not in agreement as to what should be the extent of their scrutiny into the actual environmental issues involved. Generally, the resolution of those issues is left to the agency, which must support its decision with expert factfindings, while the courts remain the arbiters of whether there has been full compliance with the statute.

NEPA demands that federal agencies perform certain procedural duties in order to implement its broad mandate of environmental protection. Chief among these duties is the requirement that a detailed environmental impact statement be filed whenever an agency project involves major federal action "significantly affecting the quality of the human environment . . . ."[45] An agency's threshold decision that a proposed action will not significantly affect the environment, and therefore that no impact statement is necessary, is one issue that has been litigated; the courts, however, have not agreed on which test to apply when considering the "threshold decision." For example, in *Hanley v. Kleindienst*[46] the question confronting the Court of Appeals for the Second Circuit was what standard of review should be applied to the agency's decision that a proposed jail and office annex would not signifi-

42. *Id.* at 595.
43. *Id.* at 598.
44. 42 U.S.C. §§ 4321-4335 (1970).
45. 42 U.S.C. § 4332(C)(i) (1970).
46. 471 F.2d 823 (2d Cir. 1972), *cert. denied,* 412 U.S. 908 (1973).

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cantly affect the surrounding neighborhood. The issue involved both a question of law, that is, the statutory meaning of the word "significantly," and a question of fact, that is, whether the action would have a significant adverse environmental impact. In deciding this mixed question of law and fact, the court rejected the rational basis test and applied the arbitrary and capricious test "since the meaning of the term 'significantly' . . . can be isolated as a question of law."[47] The court reasoned that this standard would allow the agencies "some leeway in applying the law to factual contexts in which they possess expertise."[48] Thus, in the absence of a specific statutory definition of the term "significantly," the court proceeded to provide practical criteria which the agencies could apply in assessing how significantly the proposed project would affect the environment. The agency must, at the very least, consider the factors which would result in adverse environmental consequences in excess of those created by the existing uses of an area, as well as the cumulative effects which these factors would cause when added to the adverse conditions due to the existing uses of the area.[49] The court also held that the agency, before making its threshold determination as to environmental significance, must give notice to the public of the proposed federal action and provide the public with an opportunity to submit relevant facts which might influence the agency's decision.[50] The holding in *Hanley* thus posits with the agency the primary responsibility of considering all of the facts necessary to resolve the environmental issues raised by a proposed agency action. If the agency concludes that the project will not involve any significant environmental effects, thus making an impact statement unnecessary, then the reviewing court will determine, on the basis of the agency's findings, only whether the decision was arbitrary or capricious.

A different conclusion was reached by the Court of Appeals for the Fifth Circuit in *Save Our Ten Acres v. Kreger*.[51] The plaintiffs sought to enjoin construction of a federal office building in downtown Mobile, Alabama, attacking the agency's decision not to file an environmental impact statement. The court rejected the narrow arbitrary-capricious standard in favor of the "more relaxed rule of reasonableness," which test would allow for a more searching inquiry into the agency's threshold decision.[52] The holding is based on the premise that the plaintiff has alleged facts which raise substantial environmental issues concerning the proposed project. Where the plaintiff has made such allegations:

47. 471 F.2d 823, 829 (2d Cir. 1972).
48. *Id.* at 829-30.
49. *Id.* at 830-31.
50. *Id.* at 836.
51. 472 F.2d 463 (5th Cir. 1973).
52. *Id.* at 465-66.

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> [T]he court should proceed to examine and weigh the evidence of the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality. This inquiry must not necessarily be limited to consideration of the administrative record, but supplemental affidavits, depositions and other proof concerning the environmental impact of the project may be considered if an inadequate evidentiary development before the agency can be shown.[53]

While the court adopted a standard of review broader than the arbitrary and capricious test of the substantial evidence rule, it was not willing to adopt the liberal approach which provides de novo review on the merits of the desirability *vel non* of the project. The court limited the scope of its review to merely ensuring that the agency action was sufficient to effectuate the mandate of NEPA, and placed the burden upon the plaintiff to establish the unreasonableness of the agency's conclusion as to the environmental significance of its project. In a subsequent circuit court case, *Hiram Clarke Civic Club, Inc. v. Lynn*,[54] the court reaffirmed its holding on the taking of new evidence by the reviewing court:

> *Only* if the plaintiff can show an inadequate evidentiary development before the agency should the District Court supplement the deficient administrative record by taking evidence on the environmental impact of the project.[55]

Thus, reliance is placed principally upon the administrative record, balanced against whatever evidence the plainitff may be able to introduce.

In the recent case of *Scientists Institute for Public Information, Inc. v. AEC*,[56] the reviewing court adopted yet another approach in its review of the agency's threshold decision that the time was not yet ripe for an environmental impact statement on its projected research and development program. The plaintiffs alleged that the Commission's program for development of a liquid metal fast breeder reactor was a major action significantly affecting the environment and required the filing of an impact statement. While granting that the expertise of the Commission placed it in a better position than the court to balance the economic feasibility of the project against resulting adverse environmental effects, the court concluded from the Commission's record that there was no rational basis for the decision that the time was not yet ripe for drafting an impact statement.[57] As did *Han-*

53. *Id.* at 467.
54. 476 F.2d 421 (5th Cir.1973).
55. *Id.* at 425 (emphasis added). Here the district court, in a full evidentiary hearing of the controlling factors, had concluded that the proposed low income housing project in Houston was not a major federal action significantly affecting the quality of the human environment within the meaning of NEPA.
56. 481 F.2d 1079 (D.C. Cir. 1973).
57. *Id.* at 1094-95.

ley v. Kleindienst,[58] this case posed a mixed question of law and fact for judicial determination, but in *Scientists Institute* it was deemed irrelevant whether the rational basis test or the arbitrary-capricious standard of review was applied, as the two are merged by the fact that the Commission's discretion is narrowed by the statutory purpose of timely and meaningful impact statements.[59] In this and other decisions the Court of Appeals for the District of Columbia Circuit has verbalized the rational basis test out of respect for the agency's expertise and has accorded a presumption of validity to the agency's findings.[60] The court does require, however, that the agency "spell out its reasoning"[61] for its decision, although it is not necessary under the rational basis test that the findings of fact support the agency's quasi-legislative judgments. As major emphasis is placed on the stipulation that the agency disclose the reasons behind its decision, it is immaterial in the final analysis of a case like *Scientists Institute* which technical theory is applied. By requiring an articulation of reasons the court has insisted on a substantial record from which it can determine whether the agency had no rational basis in fact for its decision or acted arbitrarily in the case in question.

A federal agency's obligations under NEPA are not discharged by the mere filing of an environmental impact statement on a proposed agency project. The provisions of the Act[62] have prompted the courts to demand good faith compliance by the agencies, firmly requiring that the statement provide a detailed analysis of all relevant factors,[63] and that it be fully considered at every stage of the administrative process.[64] Although the liberal de novo standard in reviewing impact statements has not been adopted, it has been generally required that the statement be specific enough to "form the basis for responsible evaluation and criticism,"[65] and must set forth in-

58. 471 F.2d 823, 828 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

59. Scientists Institute for Pub. Information v. AEC, 481 F.2d 1079, 1095 n.68 (D.C. Cir. 1973).

60. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 647 (D.C. Cir. 1973); Citizens Assoc. of Georgetown, Inc. v. Zoning Comm'n of Dist. of Columbia, 477 F.2d 402, 408 (D.C. Cir. 1973); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 592 (D.C. Cir. 1971).

61. Citizens Assoc. of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402, 408 (D.C. Cir. 1973).

62. Section (2)(C) of NEPA, 42 U.S.C. § 4332 (1970), requires the statement analyze not only the environmental impact of the proposed action, but also possible alternatives to the proposal and the depletion of resources involved.

63. *See generally*, Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972); Monroe Co. Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 348 (8th Cir. 1972); Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).

64. Greene Co. Planning Bd. v. Federal Power Comm'n, 455 F.2d 412, 420 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1117 (D.C. Cir. 1971).

65. Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 348 (8th Cir. 1972).

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formation "in form suitable for the enlightenment of the others concerned."[66] Without this stipulated detail the courts cannot ascertain whether or not the administrative action was arbitrary and capricious.[67]

In addition to the requirement of a detailed impact statement, when the sufficiency of an impact statement is challenged, the courts require a reviewable administrative record. An illustrative case is *Silva v. Lynn*,[68] in which the plaintiffs challenged the sufficiency of the impact statement for a low income housing project financed by HUD. The district court reviewed the final impact statement, the draft statement with addendum of comments from other agencies and the public, and certain testimony taken in court, and then concluded that the impact statement submitted by HUD complied fully with NEPA. The Court of Appeals for the First Circuit reversed, and held that the entire administrative record must be produced for review, including "the more detailed studies and background of deliberation which form the basis of the final EIS [environmental impact statement]."[69] The court stated that a complete record of the expert views, technological data and other relevant material diminishes the need for taking additional evidence in court.[70] The judiciary's objective, then, is to have the agency produce a sufficient administrative record upon which to base a "substantial inquiry" into whether the agency decision or action was based on "a consideration of the relevant factors and whether there has been a clear error of judgment."[71] Thus in reviewing the sufficiency of an environmental impact statement under the arbitrary and capricious standard, courts have required that the record of the agency provide the reasons for the agency decision, as well as proof that the agency has balanced all the costs and benefits of its project.[72] As was stated in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,[73] "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,"[74] the reviewing courts probably cannot reverse an

66. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).

67. Brooks v. Volpe, 350 F. Supp. 269, 276 (W.D. Wash. 1972).

68. 482 F.2d 1282 (1st Cir. 1973).

69. *Id.* at 1283.

70. *Id.* at 1284.

71. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971). The Supreme Court's decision has prompted the lower courts to utilize the arbitrary, capricious test in reviewing an agency's impact statement and the agency decision or action taken thereon.

72. Sierra Club v. Froehlke, 486 F.2d 946, 953 (7th Cir. 1973); Conservation Council v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973); Environmental Defense Fund Inc. v. Froehlke, 473 F.2d 346, 353 (8th Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 298 (8th Cir,), *cert. denied*, 409 U.S. 1072 (1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

73. 449 F.2d 1109, 1115 (D.C. Cir. 1971).

74. *Id.* at 1115.

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agency's substantive decision to proceed with a proposed project. This approach is consistent with the prevailing view that courts will not provide a forum for trial on the merits of the issue of whether or not the project should be undertaken, but will restrict themselves to the role of ensuring that the agency has fully complied with NEPA by filing a sufficient impact statement.

While the arbitrary and capricious test is the prevailing standard employed in reviewing the sufficiency of an agency's impact statement, it is not universally followed. In *National Helium Corp. v. Morton*,[75] for example, the Court of Appeals for the Tenth Circuit deviated from this standard, holding that the rule of reason is the more appropriate test.[76] This rule is even more limited than the arbitrary and capricious test because it accords an even greater presumption of validity to the agency's compiled statement: "[t]he courts should not second-guess the scientists, experts, economists, and planners who make the environmental statement."[77] Under the "rule of reason" test review is restricted to whether the agency, acting in good faith, conducted a reasonable discussion of the subject matter involved in the five areas required under NEPA.[78] This standard is hardly acceptable since it not only forecloses judicial consideration of the environmental issues involved, which de novo review would provide, but it neither admits of a substantial inquiry, under the arbitrary and capricious test, into the conclusions of the agency. Such a narrow scope of review virtually precludes the success of a challenge to the sufficiency of an impact statement.

JUDICIAL REMEDIES

Generally, when an environmental advocate plaintiff successfully challenges an action or decision of an administrative agency, his remedy will be only a temporary delay of the project until the agency has fully complied with NEPA or other applicable statute to the satisfaction of the court.[79] A judicial remand to the agency to conduct further deliberations pursuant to

75. 486 F.2d 995 (10th Cir. 1973), *appeal docketed*, No. 73-1120, 42 U.S.L.W. 3444 (Feb. 2, 1974).

76. *Id.* at 1002. The court probably would apply the arbitrary-capricious standard if the agency had failed altogether to follow the procedure required by NEPA.

77. *Id.* at 1006 (concurring opinion).

78. *Id.* at 1002.

79. *See, e.g.*, Lathan v. Volpe, 350 F. Supp. 262, 265-66 (W.D. Wash. 1972). In this case the plaintiffs called themselves "Citizens Against Freeways," prompting the court to add as a final word that it was "fully aware that environmental laws may be misused by those who would like to see, not merely compliance by government officials with the law, but the disruption, delay and destruction of highway projects in general." The court went on to make the point that "whether highways are good or bad as a general rule is not of concern to this court; that is a legislative matter. The court is concerned only that defendants be required to comply with the law as it now exists; that they have not done." *Id.* at 269.

a statutory mandate rarely results in the agency's changing its original decision. The plaintiff, however, can look to the court to force more favorable agency action via fuller administrative consideration of environmental concerns. The agency may frequently be ordered to make burdensome modifications of its plans, at increased cost and delay. Thus, a citizen suit against an agency can elicit more responsible agency action where judicial review, although limited in scope, seeks to ensure full statutory compliance by the agency.

If the project is ongoing at the time suit is brought against the agency, the plaintiff should seek preliminary injunctive relief pending hearing of the case on its merits. In such a situation the trial court must balance the probability of success of the plaintiff's case on the merits against the probable injury which either or both parties would suffer from either a refusal to enjoin or issuance of the injunction.[80] The trial judge is typically presented with only an abbreviated set of facts upon which he must base the delicate balancing process, and his determination will not be disturbed on appeal in the absence of a clear abuse of discretion.[81] Generally, the plaintiff must specify the harm to be avoided by the preliminary injunction he seeks.[82] If, however, he can show that the *risk* of significant adverse impact on the environment will outweigh any injury caused by the delay of the agency's project, he may be granted injunctive relief until alternatives to the proposal are fully considered.[83] Upon the filing of a proper impact statement, the injunction will be dissolved absent any indication that the agency will not abide by the assurances it has made in its statement.[84]

Where the challenge to the agency has resulted in a court order to file the necessary impact statement or to supplement a statement already submitted, the court must also balance the costs and benefits in determining whether or not the project may proceed pending completion of the statement. In *Environmental Defense Fund, Inc. v. Froehlke*,[85] the trial court granted limited injunctive relief pending filing of a final impact statement. Rather than halt all work on the Corps of Engineers' river channelization

80. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 832 (D.C. Cir. 1972); Natural Resources Defense Council, Inc. v. Grant, 355 F. Supp. 280, 289 (E.D.N.C. 1973); Brooks v. Volpe, 350 F. Supp. 269, 283 (W.D. Wash. 1972).

81. Scherr v. Volpe, 466 F.2d 1027, 1030 (7th Cir. 1972), *aff'g*, 336 F. Supp. 882, 886 (W.D. Wis. 1971). The trial judge concluded that the plaintiffs could reasonably prevail on the merits of their contention that the highway officials' determination not to file an impact statement was arbitrary and unreasonable; a preliminary injunction was issued to preserve the subject matter of the controversy in its existing condition pending full hearing.

82. Sierra Club v. Mason, 351 F. Supp. 419, 427 (D. Conn. 1972).

83. *Id.* at 427.

84. Sierra Club v. Mason, 365 F. Supp. 47, 50 (D. Conn. 1973).

85. 348 F. Supp. 338, 353 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033, 1037 (8th Cir. 1973).

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project, the court permitted the defendants to continue certain ongoing construction, on the grounds that the work going forward would have minimal environmental impact on the area and that the defendants were endeavoring in good faith to bring the project into compliance with NEPA. In addition, it was concluded that the defendants would incur substantial costs if forced to discontinue and restart the project at a later date. The economic factor may weigh heavily in the balancing of the probable environmental damage and the agency's existing expenditure on the project. For example, if the cost of abandoning or altering a proposed highway route would clearly outweigh the benefits of proceeding as planned, the court may consider it improper not only to halt further construction but even to require filing an impact statement.[86] In one instance the district court stayed an injunction for a period of 90 days in order to allow HUD the opportunity to comply with NEPA by filing an impact statement on a housing project.[87]

Some courts have refused to afford as much weight to the accumulating costs of delay, and have not hesitated to order successive remands until the statement is sufficient. For example, in *Sierra Club v. Lynn*,[88] which involved a proposed community development situated above an underground water reservoir, the district court required three impact statements plus an addendum before it was satisfied that there had been a full disclosure of the environmental facts and the possible alternatives to the proposal.[89] In addition, the court not only ordered HUD, the responsible agency, to establish a complete system of control and monitoring in order to avoid pollution of the city's water supply, but it also stated that it would retain jurisdiction in order to ensure that the imposed environmental safeguards would be fully implemented.[90] Although the environmentalists were unsuccessful in preventing the development, they did exert pressure on the federal agency and developers to turn untested hypotheses into firm plans for adequate protective control measures at the threatened site. Additionally, the court saw fit to award the plaintiffs attorneys' fees for having sounded the alarm and aroused public interest, with the result of a strong effectuation of NEPA policies of environmental protection.[91]

Thus, it is possible for the citizen to work within the existing framework of judicial review of administrative action and achieve some favorable re-

86. Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1332 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); Environmental Law Fund v. Volpe, 340 F. Supp. 1328, 1335 (N.D. Cal. 1972). *But see* Brooks v. Volpe, 350 F. Supp. 269, 282 (W.D. Wash. 1972).

87. Goosehollow Foothills League v. Romney, 334 F. Supp. 877, 880 (D. Ore. 1971) (noting that the area would not be irreparably damaged during that period).

88. 364 F. Supp. 834 (W.D. Tex. 1973).

89. *Id.* at 841.

90. *Id.* at 846.

91. *Id.* at 847.

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sults. Although the environmental complainant may not be able to permanently enjoin an agency proposal, he may at least effectively impose on an irresponsible agency the burden of meeting its statutory obligations of environmental protection.

TEXAS ADMINISTRATIVE AGENCIES AND JUDICIAL REVIEW

The Texas Legislature has established two major state agencies for the purpose of protecting the environment. In order to prevent pollution the Texas Water Quality Board (TWQB) and the Texas Air Control Board (TACB) were created by statutes similar in language and in effect, the Water Quality Act[92] and the Clean Air Act.[93] For convenience of administration, the statutes provide that action by the TWQB and the TACB may be appealed only to the district court of Travis County.[94]

Before seeking review of a Board order in the district court, a petitioner must exhaust all administrative remedies.[95] For example, an order of the Executive Director of the Board must be appealed to the Board before an appeal may be brought in court,[96] unless there is a showing that any delay would cause irreparable injury, or that the administrative remedy is inadequate, or that the agency's action is clearly unconstitutional or illegal.[97] Further, as a general rule, the court will review only a final action of an administrative agency.[98] In construing the broad language of the statute permitting appeals, the Texas Court of Civil Appeals has determined that there was no legislative intent that every projected proposal of the Board could be judicially appealed.[99]

The Texas Supreme Court has held that the applicable standard of review for administrative agency action is the substantial evidence rule.[100] To com-

92. TEX. REV. CIV. STAT. ANN. arts. 21.001-21.612 (1972).

93. TEX. REV. CIV. STAT. ANN. art. 4477-5 (Supp. 1973).

94. Tex. Laws 1969, ch. 760, § 1, at 2229, *as amended*, TEX. REV. CIV. STAT. ANN. art. 21.451(a) (Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 4477-5, § 6.01(a) (Supp. 1973).

95. Texas Air Control Bd. v. Travis County, 502 S.W.2d 213, 215 (Tex. Civ. App. —Austin 1973, no writ).

96. *Id.* at 216. The court stated in its opinion that it did not perceive how the rules of appeal "represent an aggrandizement of the power of the Board."

97. *Id.* at 216.

98. Payne v. Texas Water Quality Bd., 483 S.W.2d 63, 64 (Tex. Civ. App.—Dallas 1972, no writ) (suit premature on interlocutory order giving temporary approval to proposed waste control ordinance); Moody v. Texas Water Comm'n, 373 S.W.2d 793, 797 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.) (order in the nature of a recommendation concerning a proposed project is not conclusive).

99. Payne v. Texas Water Quality Bd., 483 S.W.2d 63, 64 (Tex. Civ. App.—Dallas 1972, no writ).

100. Railroad Comm'n v. Shupee, 57 S.W.2d 295, 302 (Tex. Civ. App.—Austin 1933), *aff'd*, 123 Tex. 521, 527, 73 S.W.2d 505, 509 (1934). An exception is made where there is a distinction between "administrative" (transportation permit), and "legislative" (rate fixing), action by the Railroad Commission. Thus, where the Commission is involved in a legislative function in the exercise of its rate making power, a

ply with the separation of powers provision of the Texas Constitution,[101] the supreme court has declared that a statute providing for de novo review by a preponderance of the evidence is unconstitutional as the courts have no authority to determine legislative questions.[102] An appeal from an agency order involves only "determining if there is substantial evidence to support the Board order so that it is not illegal, arbitrary, or unreasonable."[103] Hence, under present case law, any legislative attempt to provide for de novo review will not be upheld.[104]

The Texas courts, however, have not definitively stated what constitutes "substantial evidence." For example, in *Railroad Commission v. Shell Oil Co.*,[105] the supreme court did not provide a definition, but stated it would decide the question as follows:

> The *record* is to be considered *as a whole*, and it is for the court to determine what constitutes substantial evidence. The court is not to substitute its discretion for that committed to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court.[106]

In a subsequent case, *Jones v. Marsh*,[107] the supreme court gave a bit more guidance:

> [T]he finding of the administrative body or agency will be sustained by the court if it is reasonably supported by substantial evidence, meaning *evidence introduced in court*. . . . [I]n making its decision . . . the court examines and takes into consideration all of the evidence.[108]

Under this test the parties may introduce any evidence admissible under the general rules of evidence, including expert testimony and exhibits, rather than rely solely on a submitted administrative record. In fact, the adminis-

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trial de novo is required to satisfy the requirements of due process. *See* Texas & N.O. R.R. v. Railroad Comm'n, 155 Tex. 323, 338, 286 S.W.2d 112, 123 (1955); Lone Star Gas Co. v. State, 137 Tex. 279, 302, 153 S.W.2d 681, 692-93 (1941).

101. TEX. CONST. art. II, § 1.

102. Chemical Bank & Trust Co. v. Falkner, 369 S.W.2d 427, 432-33 (Tex. Sup. 1963).

103. *Id.* at 432-33. *See also* Southern Canal Co. v. Board of Water Engineers, 159 Tex. 227, 232, 318 S.W.2d 619, 623 (1958); Fire Dept. v. City of Fort Worth, 147 Tex. 505, 509, 217 S.W.2d 664, 666 (1949).

104. It is interesting to note that the Water Quality and Air Control Acts attempted to provide for de novo in cases involving an appeal of cancellation or suspension of a waste discharge permit or air standard variance. *See* TEX. REV. CIV. STAT. ANN. art. 21.451(f) (1972), art. 4477-5, § 6.01(f) (Supp. 1973), providing that appeals shall be tried "in the same manner as appeals from the justice court to the county court." In other words, where a corporation or individual is subject to having his "license to pollute" revoked, he would be allowed a broader judicial review of the Board's decision than a party who is aggrieved by the polluter's license to operate.

105. 139 Tex. 66, 161 S.W.2d 1022 (1942).

106. *Id.* at 79, 161 S.W.2d 1022, 1029-30 (1942) (emphasis added).

107. 148 Tex. 362, 224 S.W.2d 198 (1949).

108. *Id.* at 369, 224 S.W.2d 198, 202 (1949) (emphasis added).

trative record is not admissible per se in the court proceeding.[109] The explanation for this rule, analogous to the arbitrary-capricious and rational basis tests of the federal courts, is the principle that judicial review should not operate to determine whether the agency actually heard sufficient evidence to support its decision, but rather whether there existed sufficient facts at the time to justify the decision.[110] Additionally, since most agency proceedings are informal, the agency is not required to compile an "appeal-proof" record, and the evidence before the administrative body alone would not be competent evidence upon which to base judicial review.[111]

This Texas form of judicial inquiry into administrative action has been termed "substantial evidence de novo review."[112] It has been critized on the basis that most of the evidence produced in the judicial proceeding was not before the agency at the time it made its decision, yet the court requires that the agency's record give reasonable support to its decision.[113] This point is valid insofar as the agency has the burden of providing a record upon which the reviewing court could conclude that the agency did not act arbitrarily and unreasonably. But it should be noted that agency decisions concerning matters of policy are presumed to be valid, and if the agency's factfindings can be reasonably inferred from the evidence, its decision will not be set aside unless it is found to be arbitrary. The primary advantage of the "substantial evidence de novo review" is that it ensures the plaintiff a full hearing of the issues, because evidence which is introduced in a judicial hearing might have been excluded, deliberately or not, from the administrative record.

In more recent decisions the Texas Supreme Court has endorsed review which is limited to or based primarily on the agency's findings. In one respect this position is pursuant to construction of a statute specifically calling for formal administrative hearings and review restricted to the official record produced there.[114] The shift also indicates a preference to avoid the once-favored judicial trial of the facts.[115] Accordingly, the reasonableness of an agency decision will be determined as a question of law by the substantial evidence provided by the agency's record before the court; in con-

109. Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 80, 161 S.W.2d 1022, 1030 (1942); Halsell v. Texas Water Comm'n, 380 S.W.2d 1, 16-17 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).

110. Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 80, 161 S.W.2d 1022, 1030 (1942).

111. Cook Drilling Co. v. Gulf Oil Corp., 139 Tex. 80, 82, 161 S.W.2d 1035, 1036 (1942).

112. Reavley, *Substantial Evidence and Insubstantial Review in Texas,* 23 Sw. L.J. 239 (1969).

113. *Id.* at 242.

114. Gerst v. Nixon, 411 S.W.2d 350, 356 (Tex. Supp. 1966).

115. City of San Antonio v. Texas Water Comm'n, 407 S.W.2d 752, 756 (Tex. Sup. 1966).

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troversies involving policymaking or highly technical matters, the court will accord extraordinary weight to the expert findings of the agency. The existing inconsistency of application of standards was the impetus behind an unsuccessful legislative attempt to enact a uniform standard of judicial review of agency action in Texas.[116] The statute would have provided for review to be confined to the record produced during official agency proceedings, and the agency judgment to be set aside, *inter alia*, if not reasonably supported by substantial evidence in the record or if found to be arbitrary or capricious.[117] While some standard is needed for the establishment of uniform procedures, this particular proposal would have seriously curtailed the introduction of evidence to the detriment of the party challenging the agency.

Finally, it should be noted that there have been few judicial appeals from decisions of the two major administrative bodies responsible for environmental protection in Texas: the Water Quality Board and Air Control Board. This is not necessarily due to the fact that the agencies are fully complying with the legislative mandate of preventing pollution of the state's water and air.[118] Rather, the requirements of prior exhaustion of administrative remedies, the petitioning of appeals in Travis County, the principles of limited judicial review as well as limited remedies may all be factors contributing to the public's failure to challenge agency issuance of waste discharge permits and air standard variances in Texas.

THE COURT AS AN ENVIRONMENTAL FORUM

Whether the courts should provide an efficacious forum in which actual environmental issues can be litigated has been the subject of debate. Because of its primary function as a neutral forum for the resolution of specific issues and the obtaining of relief for injuries, the judicial proceeding can provide a viable alternative to politically-pressured administrative hearings, emotional public debate, and the inadequacy of administrative remedies.

Perhaps the greatest handicap of the judiciary in hearing environmental challenges to an administrative agency is its practice of deferring to the agency's expertise. The reason for this traditional rule of administrative law is that the administrative experts are presumably better equipped to decide questions involving complex technical issues. This rule has been strongly adhered to as evidenced by the recent decision of *Ohio v. Wyandotte Chemi-*

116. H.B. No. 248, § 17, 63d Legis. (1973) (killed in committee).

117. *Id.*

118. That the agencies may be abusing their statutory authority or neglecting their responsibilities is attested by a recent legislative resolution calling for an investigation into the state's air and water pollution control programs. H.S.R. No. 136, 63d Legis. (1973).

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cals Corp.,[119] where the Supreme Court refused to exercise its original jurisdiction over a diversity action concerning industrial pollution of Lake Erie for the reason, *inter alia*, that the Supreme Court was not the proper and necessary forum for resolving the complexities of the scientific issues and the governmental agencies involved.[120] As the majority stated:

> [S]uccessful resolution would require primarily skills of factfinding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise . . . .[121]

Undeniably the case posed great technical problems which would have been difficult for the Court to resolve. Justice Douglas, however, stated in his dissenting opinion that this case presented no more difficulty than water rights cases previously adjudicated by the Court.[122] As was done in those cases, Justice Douglas suggested that the Court could appoint a Special Master and a panel of scientific advisors to aid in trying the facts.[123] This proposal seems to be a practical solution and one certainly more desirable than having the courts abdicate their responsibility to a body of administrative experts who have no expertise in the law. Indeed, while the court may over-emphasize the expertise of the agency in scientific matters, they may underestimate their own expertise. Judges are professional analysts, who, in their capacity as neutral arbiters, deal with a gamut of problems affecting individuals as well as the public at large. They may very well be the better experts to decide environmental matters which generally affect the broad public interest. Since an agency is a political appendage, it naturally operates under a certain amount of political pressure, and may tend to exhibit an expedient bias. Additionally, while an agency may be expert in its field, it is not necessarily expert "in every aspect of science, technology, aesthetics or human behavior."[124] The court is the expert in balancing these factors; it therefore is the appropriate arbiter to weigh the balance of the costs to the environment and the benefits to be gained by proposed agency action.

Under traditional administrative law, however, the court's function may often be constrained to the point of ineptitude. For example, in *Scenic Hudson Preservation Conference v. Federal Power Commission*,[125] the majority of the Court of Appeals for the Second Circuit upheld the Commission's licensing of a proposed hydroelectric storage plant, mechanically ex-

119. 401 U..S 493 (1971).
120. *Id.* at 504.
121. *Id.* at 505.
122. *Id.* at 511-12.
123. *Id.* at 511-12.
124. Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463, 484 (2d Cir. 1971) (dissenting opinion), *cert. denied*, 407 U.S. 926 (1972).
125. 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

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pressing the need for caution in keeping its personal views from influencing its decision.[126] Further, the majority left with the Commission the resolution of the technological issue concerning pollution of the aqueduct carrying New York's supply of water.[127] At least the threat to New York's water supply did arouse some concern for adequate judicial review; in his dissenting opinion Judge Oakes stated that the court should refuse to be bound by the substantial evidence test.[128] The Commission's findings with respect to the environmental effects of the project were inconsistent and insufficient, leaving Judge Oakes to conclude that while the Commission purported to act under the orders of an earlier remand, it in fact acted arbitrarily and abused its discretion with regard to the proposal. This case supports Professor Sax's contention that the real merits of environmental cases are avoided by the courts.[129]

While they have been conscientious in broadly construing the policies of NEPA and in requiring strict compliance by the agencies thereunder, the courts have avoided deciding the environmental issues on the merits of the case before them. In the recent decision of *International Harvester Co. v. Ruckelshaus*,[130] the Court of Appeals for the District of Columbia Circuit characterized the role of the reviewing court as embracing "a constructive cooperation with the agency involved in furtherance of the public interest."[131] This requires first a presentation of a "reasoned decision" on the part of the agency and then a construction of the statute by the court to discern whether the agency has exercised a "reasoned discretion" not in deviation from "ascertainable legislative intent."[132] The case involved the technical complexities of a nonenvironmental petition seeking to suspend the statutory emission standards prescribed by the Clean Air Act,[133] which explains the court's deference to the expertise of the agency. The court skirted the environmental issues, preferring a substantive evaluation of the agency's assumptions and methodology. Concurring in the remand but disagreeing with the majority's reasoning, Chief Judge Bazelon suggested that the agency be required to allow the public the right of cross-examination at a hearing

126. *Id.* at 468.
127. *Id.* at 480.
128. *Id.* at 482.
129. *See* J. SAX, DEFENDING THE ENVIRONMENT 125-58 (1971). Sax argues that the courts involve themselves only in the peripheral legalities of the case, *i.e.*, procedural failings on the part of the agency or abuse of its statutory authority, and then merely remand the case for further hearings and reports. Rarely, however, does a remand result in a changed decision by the agency. As long as the courts continue to be guided by the substantial evidence and arbitrary-capricious tests, the agency's decision will not be set aside. Perhaps the most relief granted will be a delay in the project until all procedural requirements are met.
130. 478 F.2d 615 (D.C. Cir. 1973).
131. *Id.* at 647.
132. *Id.* at 648.
133. 42 U.S.C.A. § 1857f-1 (Supp. 1973).

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and an opportunity to challenge the agency's conclusions prior to its final decision.[134] Judge Bazelon reached this conclusion partially "out of awareness of the limits of our own competence for the task."[135] But mere allowance of public confrontation will not adequately resolve the pressing environmental concerns. Out of deference to the experts the court may wish to entrust the matter to public debate, but this ultimately will not provide a resolution of those legal issues affecting "all humanity's interest in life, health, and a harmonious relationship with the elements of nature."[136] The public interest should more adequately be served within the sanctum of judicial due process.

Possibly environmental cases could best be adjudicated in a specialized environmental court system.[137] The major advantage of such a specialized judicial system would be the availability of experts for dealing with the technical problems of environmental cases. This expertise could be provided by a staff of special masters who are versed in various technical disciplines, as well as by the judges' own familiarity, acquired through continuous application, with the numerous environmental statutes and agency regulations. With the necessary supporting expertise, the special court would be capable of making an informed determination on the merits of each case. Since an adequate hearing of an environmental case may consume a substantial amount of court time, the specialized court system would also serve to relieve that burden from the presently over-docketed courts. The environmental court, with its resources of time and specialized knowledge, should be able to conduct a de novo trial of the facts. This would provide a full, fair hearing before the court of all relevant factors, rather than restrict the court's scrutiny to an administrative record and such evidence as the plaintiff may be able to introduce. De novo review would project the court beyond the limitations of the substantial evidence and arbitrary-capricious tests to a broad judicial penetration into those issues which prompted the plaintiff's cause of action.

134. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (concurring opinion). According to Judge Bazelon, the majority's interpretation of the Clean Air Act precludes the right to challenge until after the decision is made, since the proceeding is rulemaking rather than adjudicatory, and confrontation is not required under the traditional rules of administrative law. *Id.* at 651.

135. *Id.* at 652. Indeed, Judge Bazelon prefaced his opinion with the statement:

> Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government's approach to these matters was statistically valid.

Id. at 650-51.

136. *Id.* at 651.

137. *See generally* Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973); Whitney, *The Case for Creating a Special Environmental Court System—A Further Comment*, 15 WM. & MARY L. REV. 33 (1973).

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CONCLUSION

A brief analysis may indicate that the restriction of judicial review within the confines of traditional administrative law has kept environmental challenges to agency decisions on the shorter side of remedied. The presumption of validity accorded agency findings, supported by substantial evidence in the administrative record and absent any arbitrariness or capriciousness, combine with due deference to administrative expertise to keep the courts from fully considering the environmental issues raised. A further probe into the situation, however, will reveal that citizen suits brought against administrative agencies have not been without their positive results. Although only a temporary injunction may issue, that judicial order serves to force the recalcitrant or negligent agency to comply with statutory directives providing for environmental protection. The citizen may thus act as the watchdog of the agency, exerting pressure on the agency to assume fuller responsibility for the adverse environmental consequences of its actions. Since under the prevailing standards of judicial review the environmental challenger can bark but he cannot bite, a specialized environmental court system could conceivably best serve to adequately adjudicate environmental causes and provide the plaintiff a full evidentiary hearing on the merits of his contention.

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