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NEPA AND TITLE VII: THE ENVIRONMENT MEETS NEW COMMUNITIES AT SAN ANTONIO RANCH

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In 1970, within one year's span of time, two major pieces of congressional legislation were enacted which were widely hailed by planners and environmentalists as the dawn of a new day in social responsibility for growth and development in this country. The National Environmental Policy Act of 1969 (NEPA)¹⁶² was intended to instill environmental consciousness in federal agency decision making, while the Urban Growth and New Community Development Act of 1970 (Title VII of the Housing and Urban Development Act)¹⁶³ sought to stem the abuses of unrestrained private land development on social, economic, environmental, and political systems. Of paramount importance was the effort of both Acts to establish national policy where none had previously existed, with the federal government as the agent of prime responsibility. Neither Act has evolved as its sponsors would have foreseen, but the histories of both reveal a great deal about the potential development and limitations of public policy in the United States.

NEPA and Title VII were not intended to conflict with one another; on the contrary, both professed similarly great concern for the physical and human environment. In fact, the operating provisions of both could be viewed as being quite compatible—for example, considering environmental values in the evaluation of new community applications. But the case of San Antonio Ranch New Town (SAR) demonstrated that implementing NEPA for Title VII was not so simple, and that environmental concerns could indeed be in conflict with growth policy concerns, at least insofar as a federal agency interpreted them.

The litigation that eventually involved SAR—decided in *Sierra Club v. Lynn*¹⁶⁴—is interesting in several respects, pertaining to both envi-

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162. 42 U.S.C. §§ 4321-55 (1970), *as amended*, 42 U.S.C. §§ 4321-72 (Supp. II, 1972).

163. 42 U.S.C. §§ 4501-32 (1970).

164. 346 F. Supp. 834 (W.D. Tex. 1973), *aff'd in part, rev'd in part*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

ronmental concerns and policy relating to new communities. As the first new community project challenged by a citizen suit on environmental grounds, it became a major legal test of the Title VII program and the ability of HUD to implement new communities in the face of citizen and environmental discord. Significantly, however, the history of the SAR application for HUD assistance spanned a critical period in the introduction of NEPA provisions into agency operating procedures, and the experience actually helped to develop HUD regulations regarding NEPA for new communities. The outcome of the case itself may have proved an abject defeat for the citizen plaintiffs, but the reality of the litigation spawned rigorous studies and stringent regulations toward environmental protection that would not otherwise have existed. Finally, SAR and the procedural and environmental concessions it provoked from the program administrators on new community development hastened the demise of the Title VII program, which, with the adverse economic climate and the mountains of built-up HUD red tape, became almost totally infeasible for private development by 1974, and a financial debacle for HUD soon thereafter.

This paper attempts to evaluate the issues that comprised the SAR case for their significance in the context of NEPA decisions and for the New Communities Program. Although this case for NEPA involved the somewhat singular circumstances of a new community development, the issues were nevertheless quite typical of NEPA litigation. And although the Title VII program is at the very least dormant at present, the SAR experience contains many lessons for other federal programs that are based on a private-public partnership for development. This presentation will suggest that the very process of even limited judicial review of agency actions under NEPA can promote beneficial environmental and procedural effects, although the heightened consciousness of federal agencies can make traditional private enterprise participation in developmental programs difficult, if not impossible. Ironically, greater implementation of the NEPA provisions could actually stimulate more complete assumption by the federal government of its implicit social responsibility for important developmental programs like new communities.

THE NEW COMMUNITIES PROGRAM

Federal assistance to new community development dates back to Title X of the National Housing Act, enacted as Section 201 of the Housing

and Urban Development Act of 1965,¹⁶⁵ which provided mortgage insurance for certain qualifying private land developments, specifically including new communities.¹⁶⁶ This limited program was expanded considerably under Title IV of the Housing and Urban Development Act of 1968,¹⁶⁷ which actually created the New Communities Program as a distinct entity lodged within HUD. The first of the new community applicants, including SAR, originally filed under Title IV, until the program was upgraded and incorporated within the Urban Growth and New Community Development Act, Title VII of the Housing and Urban Development Act of 1970.¹⁶⁸

It was significant that the program was included as part of the first congressional statement of policy on urban growth:

To promote the general welfare and properly apply the resources of the Federal Government in strengthening the economic and social health of all areas of the Nation and more adequately protect the physical environment and conserve natural resources, the Congress declares that the Federal Government . . . must assume responsibility for the development of a national urban growth policy¹⁶⁹

The Act then enunciated eight principles for this national urban growth policy which, by implication of juxtaposition, were ultimate goals for the New Communities Program.¹⁷⁰ Congress also declared that private new community development had been hampered by the enormous front-end investment needs, site assembly difficulties, and coordination problems with the myriad public and private interests involved in any new community venture.¹⁷¹

To overcome these constraints and to achieve the stated objectives, federal guarantees of debt obligations of new community developers were to be available to assist in financing land acquisition and development and in constructing public facilities.¹⁷² In addition, the Act provided for supplementary grants of up to 20 percent of project costs to state and local governments for certain types of federal public facilities projects in new communities. Eligible projects included transportation,

165. 12 U.S.C. § 1749a (1970).

166. Demonstration Cities and Metropolitan Development Act of 1966, 12 U.S.C. § 1749cc-1 (1970).

167. 42 U.S.C. §§ 3901-14 (1970).

168. 42 U.S.C. §§ 4501-32 (1970).

169. *Id.* § 4502(c).

170. *Id.* § 4502(d).

171. *Id.* § 4511(e).

172. *Id.* § 4514.

health, education, recreation, open space, and water and sewer facilities.¹⁷³ Additional provisions of the Act included loans, technical assistance, and planning grants for new community developers.¹⁷⁴ New communities were also to have a reserved pool of subsidized housing program funds.¹⁷⁵ Most of the Act's provisions have never been implemented with congressional appropriations, and most supplementary grants were terminated with the general HUD program freeze effective July 1973. The latter, except for housing, have been partially reinstated through the Secretary's discretionary fund authorized by the Housing and Community Development Act of 1974, for which new communities are eligible.¹⁷⁶ Draft regulations for the program were issued in 1971, and proposed for revision in 1972;¹⁷⁷ they have never been formally adopted. The regulations specified criteria for judging new community eligibility for Title VII and procedures for applications, for which detailed guidelines were also issued. One element of the regulations of particular significance is the proposed "[a]dherence to the policies of the National Environmental Policy Act of 1969 and any regulations promulgated thereunder."¹⁷⁸ Few other environmental criteria or procedures were included.

Four basic types of new communities were identified for which Title VII assistance may be applied. These are:

- (1) *Satellite*—economically balanced new communities within metropolitan areas, representing effective alternatives to urban sprawl;
- (2) *Add-on*—additions to existing small towns and cities capable of conversion to growth centers;
- (3) *New towns in-town*—compact subcities within or adjacent to existing cities which can assist the renewal of central cities; and
- (4) *Free-standing*—frontier new communities distant from urban areas, heterogeneous and economically self-sufficient new towns to accommodate population growth.¹⁷⁹

173. *Id.* § 4519, as amended, 42 U.S.C. § 4519 (Supp. II, 1972).

174. *Id.* §§ 4515, 4520, 4521.

175. *Id.* § 4519, as amended, 42 U.S.C. § 4519 (Supp. II, 1972).

176. *See* 42 U.S.C.A. §§ 5301-17 (Supp. 1976).

177. HUD DRAFT REGULATIONS: ASSISTANCE FOR NEW COMMUNITIES, 24 C.F.R. § 32 (1971), revised, 24 C.F.R. § 720 (1972).

178. *Id.* § 32.7(c)(4). *See also id.* § 32.23(b)(2).

179. *See* 3 U.S. CODE CONG. & AD. NEWS, 91st Cong., 2d Sess. 5582, 5587-88 (1970); HUD DRAFT REGULATIONS: ASSISTANCE FOR NEW COMMUNITIES, 24 C.F.R. § 32:7(d) (1971).

A fifth category added in 1972 was paired new communities—either satellite or in-town developments linked together in management services and transportation.¹⁸⁰ Of the 17 new communities approved for federal loan guarantees to date, all but three are satellite communities.

The Program has been administered by the Office of New Communities Development (ONCD) in HUD, now called the New Communities Administration. Prior to any new community assistance, the ONCD (together with other HUD offices) conducts a thorough review of proposed project plans to ensure compliance with statutory and regulatory requirements. A favorable review culminates in official approval by the board of directors of the Community Development Corporation within HUD.¹⁸¹ The offer of commitment is then made to the developer of the new community, usually with a specific guarantee ceiling amount. After official acceptance by the developer of the offer, the terms and conditions under which both HUD and the developer must operate are negotiated and set forth in a project agreement, including a general development plan, and trust indenture, both legal and binding on all parties.¹⁸²

San Antonio Ranch was the eighth new community of the 17 approved by HUD under the New Communities Program.¹⁸³ The total

180. 24 C.F.R. § 720.6(b) (1972).

181. 42 U.S.C. § 4532 (1970). The board consists of five members who are appointed by the President and the Secretary.

182. HUD DRAFT REGULATIONS: ASSISTANCE FOR NEW COMMUNITIES, 24 C.F.R. § 32.24 (1971).

183.

Name	TITLE VII NEW COMMUNITIES		Date of Offer	Amount of Guarantee
	State	General Location		
1. Jonathan	Minnesota	(near Minneapolis)	2/70	\$21,000,000
2. St. Charles Comm.	Maryland	(near Wash., D.C.)	6/70	24,000,000
3. Park Forest South	Illinois	(near Chicago)	6/70	30,000,000
4. Flower Mound	Texas	(between Dallas/Ft Worth)	12/70	18,000,000
5. Maumelle	Arkansas	(near Little Rock)	12/70	7,500,000
6. Ceder-Riverside	Minnesota	(in Minneapolis)	6/71	24,000,000
7. Riverton	New York	(near Rochester)	12/71	12,000,000
8. San Antonio Ranch	Texas	(near San Antonio)	2/72	18,000,000
9. The Woodlands	Texas	(near Houston)	3/72	50,000,000
10. Gananda	New York	(near Rochester)	4/72	22,000,000
11. Soul City	North Carolina	(north of Raleigh-Durham)	6/72	14,000,000
12. Radisson ^a	New York	(near Syracuse)	6/72	c
13. Harbison	South Carolina	(near Columbia)	10/72	13,000,000
14. Roosevelt Island ^b	New York	(in New York)	12/72	c
15. Shenandoah	Georgia	(near Atlanta)	2/73	40,000,000
16. Newfields	Ohio	(near Dayton)	10/73	32,000,000
17. Beckett	New Jersey	(near Phila., Pa.)	10/73	d

a Formerly Lysander.

b Formerly Welfare Island.

c Projects of New York State Urban Development Corp.—eligible for grant assistance but not loan guarantees.

thus far approved falls far short of the original HUD target of 10 communities per year, and does not even approach the limits of guarantee commitments of \$500 million imposed by the Act.¹⁸⁴ No new communities were approved during 1974-75, and at the end of the year a moratorium was declared by HUD on all new applications and approvals under the Title VII program, pending a complete re-evaluation of the program. Many studies, mostly critical of the program and its administration, have been completed recently and congressional hearings have been held on the subject. Overall, the recession of 1974, high interest rates, energy uncertainties, and inflation of costs have endangered most large-scale real estate developments, and have demonstrated severe financial weaknesses in several Title VII new communities, which has led to some renegotiation of loan guarantee amounts and the threat of non-compliance suits by both HUD and developers.¹⁸⁵ Title VII developers, organized as the League of New Community Developers, have blamed HUD for their problems—the ever-increasing guidelines, scrutiny, and time delays involved in the application process, as well as unfulfilled promises for supplementary grants and other assistance. Apparently, the future of the New Communities Program is quite bleak at this point.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

NEPA established for the first time a national policy for the management and preservation of the environment. The substantive responsibilities of the federal government for the achievement of the stated environmental goals are set forth in section 101 of the Act.¹⁸⁶

To ensure that the "continuing responsibility" will be actively assumed by all federal agencies, section 102 specifically directs that a systematic and interdisciplinary approach be utilized in order to achieve integrated decision making.¹⁸⁷ Congress expressly created a duty of compliance with the environmental policy, but restricted it to the individual compliance of each agency without any higher review and

d Offer of loan guarantees and assistance not accepted by developer.
W. WATTERSON & R. WATTERSON, *THE POLITICS OF NEW COMMUNITIES: A CASE STUDY OF SAN ANTONIO RANCH 6* (1975).

184. 42 U.S.C. § 4514(e) (1970).

185. See 2 HOUSING & DEV. REP. 1180 (April 21, 1975).

186. 42 U.S.C. § 4331(b) (1970) states:

In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources

187. *Id.* § 4332.

approval by a watchdog group, definitely not the Council on Environmental Quality (CEQ). The legislative history of the NEPA leaves no doubt that both substantive and procedural ("action-forcing") obligations were intended for all federal agencies.¹⁸⁸

The legislative history is unclear as to whether the Act establishes any *right* of individuals to a healthful environment and whether the policies and the duties imposed by the Act are subject to judicial review. With respect to the former, such language was intentionally removed from an early version, but some observers have argued that constitutional guarantees of the fifth, fourteenth and ninth amendments create such a right.¹⁸⁹ As for judicial review, NEPA is ambiguous with regard to whether jurisdiction for review is implicitly conferred by the Act or whether review is possible only insofar as justified under the Administrative Procedure Act or other statutes.¹⁹⁰ The trend of the courts is to choose the latter basis for NEPA review, not only because it is legally the safer course, but also because NEPA is congruent with such existing factors as the changing mood of the nation on environmental concern and the diminishing standards of review of agency decision-making procedures by courts generally.¹⁹¹

Despite such favorable conditions, the history of NEPA's implementation has been limited basically to review of compliance with section 102. The CEQ first issued guidelines for federal agency compliance with NEPA in 1971¹⁹² but from the start these were not regulatory and have been generally restricted to section 102(2)(C), merging most of the broad action-forcing provisions of section 102 into the subsection's impact statement process, a substantial distortion of accepted NEPA intent. As a result, judicial review of NEPA has chiefly focused on: (1) agency determinations on whether or not to prepare impact statements ("threshold"); (2) the adequacy of impact statements ("full disclosure"); and (3) utilization of the environmental information in decision making. Only rarely has review been extended to conform-

188. See S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-765, 91st Cong., 1st Sess. (1969).

189. See F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* 15 (1973); Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 *RUTGERS L. REV.* 230 (1970).

190. 5 U.S.C. §§ 701-706 (1970).

191. F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* 22 (1973).

192. CEQ, *Statements on Proposed Federal Actions Affecting the Environment*, 36 *Fed. Reg.* 7724 (1971), revised, 38 *Fed. Reg.* 20551 (1973).

ance of the decision itself to the environmental policies and other information available.¹⁹³

The impact statement process required by the CEQ guidelines generally involves agency preparation of a draft environmental impact statement (EIS), disseminating it to relevant public agencies and private parties, and revising the draft and including the comments to form a final EIS, which is submitted to the CEQ. This lengthy and expensive process encourages the most restrictive possible definition of "major Federal actions" and the use of the EIS as an *ex post facto* justification of decisions already taken. These threshold and timing characteristics have provided the greatest point of vulnerability for citizen suits to enjoin federal projects, pending minimal procedural compliance with NEPA. The history of NEPA cases reveals a continual broadening of EIS procedural requirements, but only the inception of a concern for the policy compliance of agency decisions.

HUD first responded to NEPA with an initial version of circular 1390.1 in July 1971, which established a set of procedures and forms for evaluating threshold impact questions on the myriad HUD projects.¹⁹⁴ The fact that only a few projects proceeded to the final requirement of an EIS is disclosed in CEQ figures: from a total of 5,034 impact statements filed through mid-1974, HUD prepared only 84 for its diverse projects.¹⁹⁵ New communities were determined to be major actions by 1972, but other types of HUD activities, ranging all the way down to small subdivisions for mortgage insurance, were evaluated on a case-by-case basis. HUD seldom has been challenged in court under NEPA; only five of those cases have reached the U.S. Court of Appeals level—two on subsidized housing,¹⁹⁶ two on urban renewal,¹⁹⁷ and the case of San Antonio Ranch New Town.¹⁹⁸

SAN ANTONIO RANCH NEW TOWN

SAR consists of 9,318 acres and is located in northwestern Bexar

193. F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 24-26* (1973).

194. *DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY*, HUD Circular No. 1390.1 (July, 1971), *as revised*, April, December 1972, and July 1973.

195. CEQ, *ENVIRONMENTAL QUALITY 1974*, FIFTH ANN. REP. 390 (1974).

196. *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973); *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973).

197. *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973); *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973).

198. *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

County, Texas, approximately 20 miles from downtown San Antonio. The site is generally hilly and rocky, and lies directly over a portion of the Edwards Underground Aquifer, a large subsurface reservoir that provides almost all of San Antonio's water. Part of the site lies on the direct recharge area for the aquifer, which consists of porous limestone and geological faults through which precipitation and surface waters reach the aquifer. This site is also located near the new University of Texas at San Antonio and the South Texas Medical Center.

SAR plans call for a 30-year development period and an ultimate population of 87,972, with a full range of land uses and providing 17,660 jobs in the community. A wide variety of housing types, including 25 percent which are to be subsidized, is to be built at SAR, and a special mass transit link between the town center and downtown San Antonio has been proposed but not funded.¹⁹⁹

The SAR site is entirely outside of the corporate limits of any municipality, but as of April 1974, it lies fully within the extra-territorial jurisdiction of the City of San Antonio.²⁰⁰ Consequently, San Antonio has authority to approve subdivision platting, as well as power over annexation and incorporation, for the entire SAR site. Also, San Antonio in many cases supplies public utilities including electricity, gas, water, and sewer to the area in which SAR is located. Schools in the area are a function of the Northside Independent School District. Bexar County, on the other hand, provides few services and has almost no powers of land use control.

Three different and overlapping modes of governance have been proposed for SAR: a municipal utility district (MUD), annexation by the City of San Antonio, and a local citizens association. The MUD, approved in December 1973 by the Texas Water Rights Commission, covers 3,166 acres (the earliest stages of development), and, through a board of directors appointed by the developers, has authorized the issuance of \$26.9 million in bonds to finance infrastructure costs. As in any annexation by the city, the bonds will be a taxable obligation of all property owners within the MUD.²⁰¹ In a resolution of February 1972, the City Council of San Antonio expressed its intent to annex SAR at an appropriate time in the future.²⁰² In a related contractual but non-

199. HUD, ADDENDUM TO FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED NEW COMMUNITY OF SAN ANTONIO RANCH NEW TOWN, BEXAR COUNTY, TEXAS 19-25 (Aug. 24, 1972).

200. TEX. REV. CIV. STAT. ANN. art. 970a, § 3 (1963).

201. TEX. WATER CODE ANN. § 54.001-.738 (1972).

202. San Antonio, Tex., City Council Resolution No. 72-7-9 (Feb. 10, 1972).

binding agreement with SAR, the council promised to supply utilities to SAR even if not annexed.²⁰³ The formation and role of the proposed citizens association has not yet been delineated.

The Edwards Aquifer extends west-to-east through six counties, from Brackettville to Kyle. The direct recharge zone of the aquifer covers some 100 square miles of Bexar County, along the northern edge of San Antonio, with less than one percent of this area developed as of 1972. The few legal restrictions on development over the recharge zone that were in existence at the time of the SAR approvals were embodied in a 1970 Edwards Order of the Texas Water Quality Board (TWQB), which order chiefly concerned densities and permits for septic tanks.²⁰⁴ Largely due to SAR, the TWQB issued an amended Edwards Order in 1974, which extended controls to private sewage systems and set standards for effluent discharges within the recharge zone. Other public agencies in the region charged with ensuring the quality of water resources include the Edwards Underground Water District and the San Antonio River Authority.

The SAR development team applied to HUD for assistance under the New Communities Program in November, 1970. The required A-95 approval through the Alamo Area Council of Governments (AACOG) was obtained in May 1971, after some debate over environmental concerns resulting from the project.²⁰⁵ The draft environmental impact statement, published in September 1971, engendered a torrent of environmentalist opposition to the project, including at first the San Antonio City Council and the Bexar County Commissioners. The Draft EIS hardly mentioned the aquifer, dismissed sewage as an easily solvable effect, examined no alternatives, and included only marginal grazing land as resource commitments in the project.²⁰⁶ The report was identifiably the work of the developer team, not HUD. And not a single state, regional, or local agency except AACOG was on the distribution list for review and comments on the Draft EIS.

The SAR issue became a cause celebre for opposition on environmental issues and urban versus suburban federal funding grounds. Finally, however, the City Council, under heavy political pressure, reversed its

203. SAN ANTONIO, TEX., ORDINANCE NO. 40358 (Feb. 3, 1972), *amended*, ORDINANCE NO. 40397 (Feb. 17, 1972).

204. Tex. Water Quality Bd., Order No. 70-0731-12 (1970).

205. Office of Management and Budget, Circular A-95 (July 24, 1969), (revised Feb. 9, 1971), (revised Nov. 13, 1973).

206. *See* HUD, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED NEW COMMUNITY OF SAN ANTONIO RANCH, BEXAR COUNTY, TEXAS (Jan. 20, 1972).

position on SAR in early 1972.²⁰⁷ The final EIS published in January 1972 was an improvement primarily in comprehensiveness and in the point-by-point rebuttals of the many solicited and unsolicited comments to the draft.²⁰⁸ The HUD Community Development Corporation decided to approve the SAR application even prior to the end of the 30-day final EIS circulation period and on February 23, 1972, the decision was announced. The HUD offer of commitment was for \$18 million in loan guarantees, but was made conditional on the completion of further scientific studies concerning environmental impacts.²⁰⁹

On the day of the announcement, four local citizens' groups,²¹⁰ followed by Bexar County and the Edwards Underground Water District, filed suit in federal district court to block implementation of SAR. The named defendants were HUD and the SAR developers, who were joined later by the TWQB. In March 1972, Judge Adrian A. Spears agreed to hold the suit in abeyance while the studies were conducted, since all parties agreed that the final EIS was inadequate.²¹¹ The developers commissioned studies and convened the SAR Water Quality Advisory Review Board, composed of public agencies, to review the findings. The studies became the basis for the addendum to the final EIS, published in August 1972, which included all previous materials as well. The addendum was a precisely written, reasonably complete document, buttressed by the study findings and a HUD geological consultant, but arguably deficient in some NEPA section 102(2)(C) categories.²¹² After 30 days, HUD decreed the conditions met and authorized the execution of a project agreement.²¹³

The trial itself opened in San Antonio on April 30, 1973, and comprised nine days of testimony, chiefly from water quality scientists and urban planners. The decision in May fully exonerated the defend-

207. See W. WATTERSON & R. WATTERSON, *THE POLITICS OF NEW COMMUNITIES: A CASE STUDY OF SAN ANTONIO RANCH* 22-26, 60-70 (1975).

208. See HUD, *FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED NEW COMMUNITY OF SAN ANTONIO RANCH, BEXAR COUNTY, TEXAS* (Jan. 20, 1972).

209. HUD NEWS, No. 72-131 (Feb. 28, 1972).

210. These groups were: the Sierra Club, South Texas Group; Citizens for a Better Environment; League of Women Voters, San Antonio Area; and American Association of University Women, San Antonio Branch.

211. *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973), *aff'd in part, rev'd in part*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

212. See HUD, *ADDENDUM TO FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED NEW COMMUNITY OF SAN ANTONIO RANCH NEW TOWN, BEXAR COUNTY, TEXAS* 19-25 (Aug. 24, 1972).

213. W. WATTERSON & R. WATTERSON, *THE POLITICS OF NEW COMMUNITIES: A CASE STUDY OF SAN ANTONIO RANCH* 39 (1975).

ants, but, with the sympathy of the judge clearly for the plaintiffs, the environmentalists' court costs were assessed against the SAR developers and the court retained jurisdiction to prevent any renegeing on responsibilities.²¹⁴ After motions for rehearing were denied, all of the results were appealed by the respective aggrieved parties to the Court of Appeals for the Fifth Circuit in New Orleans. The injunction on construction activity at SAR which the plaintiffs sought was denied. Finally, on October 4, 1974, the Court of Appeals handed down its decision, affirming the lower court in dismissing all challenges to SAR's development and reversing Judge Spears on the attorneys' fees and the retention of jurisdiction.²¹⁵ Certiorari was denied by the United States Supreme Court, thus finally ending the long legal struggle.

San Antonio Ranch New Town can be viewed as an excellent idea in the wrong place. The plans are worthy, the justification sound and the implementation mechanisms at least feasible. But what is to prevent this limited utopia from causing an environmental catastrophe of the first order? The studies and precautionary measures adopted for SAR certainly rank with the most sophisticated and stringent yet produced, but the inherent danger still exists. Although the SAR developers and their HUD sponsors had to be forced to carry out the extreme steps of protection, the final plans by themselves may be considered efficacious by current standards.

In actuality, however, the environmental problems seemed less subject to scientific and technological solution than to legal and administrative recourse. SAR, as a potent political application surfacing in 1970, was reviewed by HUD with the resignation of a *fait accompli*, but this was before Title VII linked the New Communities Program to national urban growth policy and before the evolution of NEPA requiring more careful and open decision making, if not more environmentally correct.²¹⁶ The implementation of these laws and their administrative fallout worked wonders on the SAR project between 1970 and 1974, but ultimately failed either to create an optimal solution for San Antonio's growth or to ensure the protection of its water supply. The benefits of Title VII and NEPA are indisputable in the SAR case, but

214. *Sierra Club v. Lynn*, 364 F. Supp. 834, 852 (W.D. Tex. 1973), *aff'd in part, rev'd in part*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

215. *Sierra Club v. Lynn*, 502 F.2d 43, 67 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

216. See W. WATTERSON & R. WATTERSON, *THE POLITICS OF NEW COMMUNITIES: A CASE STUDY OF SAN ANTONIO RANCH* 81-86 (1975).

their shortcomings are also unmistakable and symbolize the deficiencies of current public policy on urban and environmental matters. These points are emphasized by an analysis of the legal issues involved in the SAR controversy, particularly with regard to matters related to NEPA and Title VII statutes.

NEPA AND SAR

Although NEPA was implemented for the most part subsequent to the filing of the SAR application with HUD, its provisions nevertheless applied to SAR for the HUD review and approval process.²¹⁷ There are no threshold questions involved with the SAR application because HUD promptly determined that all new communities qualified as major federal actions. But the HUD decision on SAR can be challenged on several other grounds, generally categorized as follows: (1) procedural irregularities in carrying out the required EIS process for SAR; (2) inadequacy of the final EIS (the addendum) according to the NEPA requirements; (3) insufficient consideration of environmental information in the decision to approve SAR; and possibly (4) inconsistency of HUD's decision to approve SAR with the environmental information at hand, in violation of the NEPA policy. The first three were advanced in *Sierra Club v. Lynn*, and were rejected by both the trial and appellate courts.²¹⁸

Procedural Irregularities

Because of the novelty of the EIS process for HUD and because of a general awareness of the sensitivity of the SAR project both environmentally and politically, HUD allegedly made some errors in the preparation and timing of the impact statements. The appellate court evaluated the arguments on each of these irregularities and concluded that compliance had been accomplished since the evidence was less than conclusive for proof of error.²¹⁹ It is debatable in any event whether a finding of procedural error would be enough to grant the plaintiffs' prayer of blocking SAR implementation rather than merely delaying the project while the proper steps were followed de novo.

217. CEQ, *Statements on Proposed Federal Actions Affecting the Environment*, 36 Fed. Reg. 7729 (1971), revised, 38 Fed. Reg. 20551 (1973).

218. *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973), *aff'd in part, rev'd in part*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

219. *Sierra Club v. Lynn*, 502 F.2d 43, 58-59 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

Strong circumstantial evidence existed that HUD almost totally delegated to the SAR developers the job of preparing the official impact statements. NEPA legislation and the CEQ and HUD guidelines on the NEPA implementation clearly demand that federal agencies themselves prepare every EIS. The leading case on this aspect of EIS preparation is *Greene County Planning Board v. FPC*,²²⁰ in which the court concluded:

The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of [the applicant] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based on self-serving assumptions.²²¹

HUD has previously been guilty of the same practices:

[T]he agency charged with environmental responsibility [HUD] appears to have done virtually nothing except to take the promoter's worksheet at face value and endorse it without independent investigation.²²²

The preponderance of interpretation prohibits the delegation by agencies of EIS preparation, and actually requires independent technical evaluation, including separate studies.

The courts in *Lynn* accepted HUD's testimony that agency personnel wrote the statements and that its consultant scrupulously reviewed developer environmental studies.²²³ The charge of EIS delegation thus failed for lack of factual evidence, which is very difficult for parties outside of agencies to obtain. In addition, even if the procedural allegations could be proven against HUD, the resulting action would probably only be another temporary halt until more studies and another EIS could be completed, still begging the substantive questions.

Another major procedural issue in the SAR case was the timing of the HUD approval of SAR vis-a-vis the EIS preparation and promulgation. Timing entered the SAR case on two counts: (1) HUD's decision to approve the SAR application preceded the required 30-day circulation

220. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

221. *Id.* at 420.

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

223. *Sierra Club v. Lynn*, 502 F.2d 43, 59-60 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

period for the final EIS; and more substantively, (2) the final EIS was admitted by HUD to be inadequate after the offer of commitment had been made to SAR. Regarding the former, HUD sent a "draft" letter of commitment to the developers well in advance of the expiration of the 30-day circulation period. The draft letter, almost a verbatim facsimile of the final letter, represented the decision of the Community Development Corporation to approve SAR, in violation of HUD regulations in circular 1390.1 and CEQ guidelines:

The Final Environmental Impact Statement shall be filed with the CEQ and made available to appropriate agencies and to the public at least thirty (30) days prior to HUD approval of, or commitment to, the proposed action.²²⁴

Such contravention of supposedly standard procedural requirements violates the intent of NEPA that environmental information become an integral part of agency decision making. Nevertheless, the appellate court dismissed this allegation by insisting that the CEQ guidelines, "although highly persuasive, do not govern compliance with NEPA,"²²⁵ and stating that the only relevant letter of commitment was that sent following the 30-day period—the clear intention of the Community Development Corporation decision-makers.

As for the charge that the final EIS was admittedly faulty and the decision therefore untimely, again it must be pointed out that NEPA, the CEQ guidelines, and the HUD Regulations on NEPA all envision the completion of an acceptable EIS prior to major decisions on any project. Contravention of the letter and spirit of NEPA and its regulations has been judicially censured before:

Subsequent drafts . . . obviously did not correct the situation, since the final agency decision as to location of the highway had already been made. The environmental impact statement was intended by Congress to provide decision-making bodies with sufficient information to make an environmentally sound decision, not to offer evidence of the wisdom of that decision once it has been made.²²⁶

Not only was the final EIS admittedly deficient, but HUD did not even hire its consultant to evaluate the developer environmental studies until

224. DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY, HUD Circular No. 1390.1, § 5d(2) (b) (July 1971) (revised, Apr. 1972, Dec. 1972, July 1973).

225. *Sierra Club v. Lynn*, 502 F.2d 43, 58 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

226. *Daly v. Volpe*, 350 F. Supp. 252, 259 (W.D. Wash. 1972), *aff'd*, 514 F.2d 1106 (9th Cir. 1975).

two months after the offer of commitment. HUD nevertheless steadfastly refused to withdraw the offer.²²⁷ The order of events in the approval process greatly enhanced the potential for the environmental assessment and ultimate statement to become a post hoc rationalization of a decision already made and irrevocable. This is certainly not the intent of NEPA.

The appellate court, however, justified HUD's actions as legitimate because the CEQ Guidelines could be interpreted as requiring only a draft EIS prior to the first major decision, and because the status quo on the project was in fact maintained until the studies and the addendum were completed, thus meeting every stipulated district court and the NEPA condition.

Post-submission efforts to rehabilitate the statement to comport with NEPA's provisions or to minimize adverse environmental consequences and maximize benefits should not be barred by initial inadequacies. . . . [A]n initial finding of section 102 non-compliance must not irrevocably preclude eventual compliance. HUD's compliance with NEPA must be measured by the contents of the final impact statement as supplemented by the later addendum.²²⁸

Following this logic there would be little incentive for agency compliance with NEPA at any point at all until specifically challenged in court on a case-by-case basis, and then it would be only a matter of time until eventual compliance.

EIS Adequacy

Although several other issues of importance relate to the addendum to the EIS for SAR—such as failure of HUD to examine induced environmental impacts, to set out a cost-benefit analysis of the project, to fully consider outside comments—the greatest significance for NEPA and HUD lies in the treatment of alternatives to the SAR project. In its final EIS of January 1972, HUD included only two pages on “alternatives to the proposed action,” concluding from the “analysis” that the new town was “by far the best alternative.”²²⁹ The addendum, al-

227. Testimony of A.P. DeVito, Trial Transcript p. 1623, *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973), *aff'd in part, rev'd in part*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

228. *Sierra Club v. Lynn*, 502 F.2d 43, 60 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

229. HUD, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED NEW COMMUNITY OF SAN ANTONIO RANCH, BEXAR COUNTY, TEXAS 50-52 (Jan. 20, 1972).

though covering the topic in much greater detail, was still limited to three basic alternatives: (a) taking no action, (b) requiring actions of a significantly different nature, that is, another location which would provide similar benefits with different environmental impacts, and (c) different designs or details of the proposed action which would present different environmental impacts. No action would leave unsolved the inevitable growth problem, another location would leave the aquifer recharge zone vulnerable to unplanned development, and a different design would probably be less environmentally sensitive.²³⁰

Consideration of alternatives has from the start been a critical component of agency compliance with NEPA, especially in impact statements.²³¹ A thorough listing of alternatives must be accompanied by a detailed analysis of impacts so that a reasoned choice can be made.²³² In addition, all reasonable alternatives must be considered, even if outside of the agency's purview.²³³ The CEQ guidelines indicate the proper range and depth of alternatives analysis:

A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.²³⁴

Even the addendum EIS for SAR failed to adhere to the standards outlined above for description and analysis of potential alternatives. First, the consideration of the alternatives did not occur until the decision making was completed, thus indicating an effort at justification

230. HUD, ADDENDUM TO FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED NEW COMMUNITY OF SAN ANTONIO RANCH NEW TOWN, BEXAR COUNTY, TEXAS 92-102 (Aug. 24, 1972).

231. *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1128 (D.C. Cir. 1971). See also *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1972).

232. See *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 350 (8th Cir. 1972).

233. *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973).

The fact that some reasonably related alternative might require Congressional legislation is not sufficient either to place it beyond the consideration of the agency or beyond inclusion in the impact statement. Likewise, the fact that a particular alternative would require substantial coordination with another federal agency is not sufficient, in and of itself, to place its consideration beyond the requirements of NEPA.

Id. at 1344. See also *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

234. CEQ, *Statements on Proposed Federal Actions Affecting the Environment*, 36 Fed. Reg. 7724 (1971).

rather than honest inquiry. Second, the presentation of alternatives lacked the rigorous analysis of potential impacts, including costs and benefits, that guidelines and precedents seem to demand. And third, several obvious alternatives to the proposed action are inexplicably absent from the discussion in the addendum EIS.

In the alternative of "no action," the rationale offered is the dubious contention that the development of SAR will protect the recharge zone from otherwise inevitable uncontrolled development. This argument is analogous to a "destroy-in-order-to-save" proposition. Not only would SAR cause incremental pollution to the aquifer at least as great as smaller scattered development, but the expected induced parasitical development contiguous to it could amount to uncontrolled development up to 40,000 persons. Just what might happen was not rigorously assessed. For example, the development in the absence of SAR would not be inevitable if public action, assisted by HUD, forestalled it or controlled it. The Texas Water Quality Board regulation, enactment of county zoning, annexation by the City of San Antonio, or purchase as open space are a few obvious alternatives. These, in fact, should have been discussed as separate alternatives to the proposed HUD action on SAR.

These missing alternatives are not too unreasonable for consideration, for the effects are as ascertainable as those of SAR and implementation is only as remote as public policy permits.²³⁵ Acquisition and preservation of the aquifer recharge zone had been a serious proposal by responsible citizens, including United States Representative Henry B. Gonzalez and has since been started by a local group with private donations.²³⁶ Although expensive, it was neither unreasonable nor unforeseeable at the time of the EIS preparation; with federal assistance it would be less so. HUD made no attempt to study the feasibility of such an alternative.

Control over the inevitable development in the recharge area was also not discussed as a viable alternative. To discourage the development of new subdivisions and other projects on the recharge zone of the aquifer, HUD and other federal agencies could modify such assistance programs

235. *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974). The court stated that "there is no need for an [impact statement] to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." *Id.* at 472.

236. W. WATTERSON & R. WATTERSON, *THE POLITICS OF NEW COMMUNITIES: A CASE STUDY OF SAN ANTONIO RANCH* 31 (1975).

as FHA and VA insurance. Extension of land use controls by state and local governments was likewise not unforeseeable, especially with HUD encouragement. These measures are reasonable possibilities for averting the so-stated inevitable development in the absence of SAR, and they deserved discussion and analysis in the EIS.

The problems of alternative sites and other feasible action raise the question of the meaning of alternatives for NEPA. In *National Resources Defense Council v. Morton*²³⁷ the court established the principle of policy objectives for NEPA alternatives stating that “[w]hen the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened.”²³⁸

The court was referring to oil and gas leases as part of the overall energy policy. The analogy is quite striking to SAR and Title VII: HUD is charged both with growth policy to curb urban sprawl and with approving new community assistance. To view a new community project like SAR in isolation—neglecting other advantageous sites for growth in the area and other means of protecting the aquifer—is to ignore the range of options available to achieve statutory objectives. In the past HUD has responded in urban renewal to the statutory objectives of slum clearance and prevention, and not restricted itself to construction of specific re-use facilities like office buildings.²³⁹ What was missing in the SAR impact statements was a similar linkage between objectives and alternatives as mandated in NEPA and case precedent.

The district and appellate courts in *Lynn*, however, rejected all arguments challenging the sufficiency of the addendum EIS. Although admitting that “the scope and extent of HUD’s treatment of alternatives was less than exhaustive,”²⁴⁰ the court nevertheless decided there was reasonable compliance with NEPA. The court, in effect, appeared to be persuaded by the *volume* of materials finally assembled by HUD and the developers.²⁴¹ This conclusion is inconsistent not only with the

237. 458 F.2d 827 (D.C. Cir. 1972).

238. *Id.* at 835.

239. See Picher, *Alternatives Under NEPA: The Function of Objectives in an Environmental Impact Statement*, 11 HARV. J. LEGIS. 595, 607 (1974).

240. *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

241. *Sierra Club v. Lynn*, 364 F. Supp. 832 (W.D. Tex. 1973), *aff’d in part, rev’d in part*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975). The court in *Lynn* stated that

the Environmental Impact Statement . . . is sufficient to permit a reasoned decision as to the environmental effects of SAR. This is especially true if one reads the

facts and precedent, but with the needs of urban and environmental policy as well.²⁴² Thus it is submitted that the courts erred in *Lynn* in focusing on the SAR project, rather than on legislatively set policy objectives.

HUD Decision to Approve SAR

This is the most important issue of the NEPA interpretation, where most cases are won or lost. The matters in the SAR case discussed so far, while important, could of themselves probably only delay further implementation of the project. Review of the HUD decision, however, could overturn the project approval and all but scuttle the effort. For this reason, judicial review of the NEPA cases has focused on the evaluation of the agency decision as to whether it was arbitrary or unreasonable after full consideration of environmental factors.²⁴³ It is difficult to make a case for SAR. If it is assumed that the environmental information and analysis in the addendum to the EIS were adequate to comply with NEPA, then the presumption must be that the HUD decision was sufficiently based on environmental factors ignoring the timing problem. If the EIS indicated insufficient environmental information, as argued here, then HUD did not have the facts or analysis and is vulnerable to a showing of an arbitrary decision.

It was undisputed that the SAR development would cause some pollution; the factual disagreement centered on how much and what standards of judgment to employ. The HUD position was that: (1) studies had failed to prove great damage to the aquifer; (2) the probable pollution (sewage leaks, storm runoff, soil percolation) would be less than the no-action situation and also less than existing state and local standards; and (3) required precautions and monitoring would reduce the probability of a catastrophe to a minimum. The facts, however, were that the danger was unknown and that the only studies had been conducted by the SAR developer team.

67 exhibits, consisting of, *inter alia*, maps, letters and reports, which comprise appendices A and B.

Id. at 842.

242. Picher, *Alternatives Under NEPA: The Function of Objectives in an Environmental Impact Statement*, 11 HARV. J. LEGIS. 595, 607 (1974). NEPA ought to be read as requiring consideration of all alternatives through which the relevant statutory, not project, objective of the acting agency can be effected. *Id.* at 607.

243. *E.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Environmental Defense Fund v. Corps of Engr., U.S. Army*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

The important question to be addressed is whether, even assuming that HUD had all the necessary information on which to base its decision, did the inherent risks, however uncertain, exceed the advantages of the SAR project at its location? Regardless of the particular standard of review or burden of proof chosen by a court, NEPA ultimately requires some justification of the agency decision.²⁴⁴ Even assuming a more complete and open analysis of alternatives by HUD for the EIS, it is difficult to justify SAR at its site when a small amount of pollution to the water supply was inevitable and a catastrophe possible, while reasonable alternatives that would satisfy agency objectives appeared to exist. Not only were the implications of alternatives to SAR not adequately explored and the environmental risks not studied until after the major decision to approve SAR, but the balancing of the benefits and the costs was apparently avoided by HUD even through the time of the trial. This confrontation by the agency with the impact of its actions is the heart of NEPA no matter what standard of judicial review is employed.²⁴⁵

In the *Lynn* decisions, emphasis was placed on the multitude of studies and precautions adopted by HUD for the protection of the environment from the SAR development.²⁴⁶ As admirable as these efforts and precautions may have been, both courts wrongly confused the institution of such palliatives with the "reasoned decision" process that NEPA intends.²⁴⁷ What the protective measures did was to reduce the risk of environmental damage—clearly the purpose of NEPA—but in post hoc fashion after the decision to proceed with the project had been made.²⁴⁸ In such circumstances, the courts should have found the decision lacking, by whatever standard, and should have ordered de novo review of the SAR project costs and benefits in its ameliorated state. Such an adaptive action as substantive review is definitely within the spirit of NEPA and is warranted by the unusual case.

244. See Jordan, *Alternatives Under NEPA: Toward an Accommodation*, 3 *ECOLOGY L.Q.* 705, 742-43 (1973).

245. *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) where it is stated that "[i]f the decision was reached procedurally without individualized consideration and balancing of environmental factors . . . fully and in good faith . . . it is the responsibility of the courts to reverse." See 42 U.S.C. § 4332(2)(c) (1970).

246. *Sierra Club v. Lynn*, 364 F. Supp. 832, 844, *aff'd in part, rev'd in part*, 502 F.2d 43, 63 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975) (district court and court of appeals discuss environmental protection).

247. See *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 353 (8th Cir. 1972).

248. See 42 U.S.C. § 4321 (1970).

Substantive Review of HUD's Decision

In judicial review under NEPA, there is a constant tension between the courts' perceived needs: (1) to evaluate whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values,²⁴⁹ and (2) not "to substitute its judgment for that of the agency."²⁵⁰ The trend of judicial review is toward a more literal reading of NEPA: that the action-forcing provisions of section 102 are intended to implement the policy goals of section 101, with environmental values taking their place in decision making alongside the economic and technical considerations.²⁵¹ If this is to be so, the courts must look beyond the appurtenances of the agency decision in order to determine whether a decision was made for self-serving bureaucratic reasons or in pursuit of statutory objectives. One appellate court has stated that "[g]iven an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits."²⁵²

HUD made no effort to set out the benefits to be gained by its approval of SAR for Title VII guarantees, and did very little independent work in assessing the potential or probable environmental costs of the project, until opposition and court action forced some concessions. Although benefit-cost analysis for urban development projects probably does not permit a rigorous, quantified analysis,²⁵³ a decision on a project like SAR must be justifiable in some organized manner, particularly with respect to relevant alternatives of design, location, and means to the desired objective. For SAR, HUD did not set out all the relevant factors in its decision in any rational or comprehensive manner, and the courts did not see fit to pursue the matter for review on the merits.

There is a possible caveat in the call for greater implementation of the benefit-cost framework for judicial review of agency decisions. Because the net economic and technical benefits of a proposed action are to be weighed against environmental costs, which are frequently intangible and indeterminable, the balancing process is vulnerable to introduction

249. *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).^j

250. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

251. *See* 42 U.S.C. § 4332(2)(B) (1970).

252. *Environmental Defense Fund v. Corps of Engr., U.S. Army*, 470 F.2d 289, 298 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

253. *But see* W. LETWIN, *MUNICIPAL LAND BANKS: LAND RESERVE POLICY FOR URBAN DEVELOPMENT* (1969); J. ROTHENBERG, *ECONOMIC EVALUATION OF URBAN RENOVATION* (1967); Lichfield, *Cost-Benefit Analysis in City Planning*, 26 J. AM. INST. OF PLANNERS 273 (1960).

of subjective and arbitrary factors by the agency.²⁵⁴ In addition, the complexities of the technical analysis inherent in the type of benefit-cost analysis may lie beyond the abilities of judges to apprehend and effectively review. In his concurrence to *International Harvester v. Ruckelshaus*,²⁵⁵ Judge Bazelon admitted that he did not "have the technical know-how to agree or disagree with [the defendant's] evaluation."²⁵⁶ But he envisaged a "new era in administrative law" for the environment in which courts would require agencies "to establish a decision-making process which assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public."²⁵⁷ This is the direction of substantive review of NEPA: judicial probing of the facts and information that led to an agency decision in order to arrive at an evaluation of that decision, with assistance of outside technical expertise.

TITLE VII AND SAR

Although the SAR application to HUD was filed prior to the enactment of Title VII, its review and approval clearly are subject to the later legislation.²⁵⁸ Title VII establishes a broad foundation for urban growth policy in general and for the New Communities Program in particular. Basic principles for national urban growth policy are set out first, followed by a listing of undesirable growth trends at work in the United States, and finally a number of eligibility criteria for new community assistance.²⁵⁹ Since Title VII has not been tested in court, prior to the *Lynn* case, it is not certain how well any new community project must comport with the rather generalized criteria, trends, and principles. SAR, or any other new community in the Title VII program, could conceivably be challenged on compliance with these congressional statements. Each point of contention would require a detailed demonstration of how the community project fails to meet the eligibility criteria, reverse the undesirable trends, and fulfill the growth policy principles. This was the approach of the plaintiffs in *Sierra Club v. Lynn*, and the attack met with a total rebuff from both courts.²⁶⁰ An agency apparently has great autonomy in interpreting its own statutory authority.

254. See Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. IND. & COM. L. REV. 685, 698 (1972).

255. 478 F.2d 615 (D.C. Cir. 1973).

256. *Id.* at 651.

257. *Id.* at 652.

258. 42 U.S.C. § 4529 (1970).

259. *Id.* §§ 4502(d), 4511(b), 4513.

260. *Sierra Club v. Lynn*, 364 F. Supp. 832, 838-40, *aff'd in part, rev'd in part*, 502 F.2d 43, 52-57 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

The more interesting application of Title VII is its compatibility with the NEPA interpretations discussed above, particularly with regard to the matter of alternatives, as that issue, central to NEPA, also strikes at the very heart of Title VII. There are two facets for consideration: (1) alternatives to the site chosen for the project, and (2) alternatives to the project itself for meeting policy objectives. Most HUD and other federal officials have been very conscious of the former, but almost oblivious to the latter. Alternative site analysis has become quite common for all sorts of activities, including public housing, projects in urban renewal areas, and the location of federal facilities. Alternatives to the program itself, however, have never been an important agency preoccupation because of bureaucratic compartmentalization, congressional mandates, and appropriations.

Some HUD programs have routinely included the analysis of alternative sites in terms both of HUD policy objectives and of other applicable statutory policy. Two pre-NEPA cases added firm dimensions to the evaluation of alternative sites.²⁶¹ Both cases involved the conflict of explicit HUD goals, and actions pursuant thereto, with the Civil Rights Acts of 1964²⁶² and 1968.²⁶³ The site selection for the multi-family housing projects in the two cases, one in Chicago, the other in Philadelphia, was presumably beneficial from the point of view of HUD's statutory missions of providing housing for poor people, but the sites also had the recognized effect of increasing racial concentration in the subject areas, in violation of the civil rights statutes. Both appellate courts refused to permit HUD to follow the politically safest path in providing low-income housing, that is, by further segregation; instead, it was held that HUD had a duty at least to include factors related to the other statutory concerns in its decision calculus. In *Shannon v. HUD*²⁶⁴ the court stated:

The defendants assert that HUD has broad discretion to choose between alternative methods of achieving the national housing objectives set forth in the several applicable statutes. They argue that this broad discretion permitted HUD in this case to make an unreviewable choice between alternative types of housing. We agree that broad discretion may be exercised. But that discretion must be exercised within the framework of the national policy

261. *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (public housing); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970) (urban renewal).

262. 42 U.S.C. §§ 2000-2000h-6 (1970).

263. 42 U.S.C. §§ 3601-19 (1970).

264. 436 F.2d 809 (3d Cir. 1970).

against discrimination in federally assisted housing . . . and in favor of fair housing.²⁶⁵

In a pre-NEPA atmosphere, the court demanded that HUD establish a broader decision-making process to incorporate socio-economic variables relevant to compliance with civil rights law. The introduction of NEPA into HUD has furthered the multiple-policy consciousness of *Gautreaux v. Romney*,²⁶⁶ and *Shannon* by its focus on the natural and human environment in agency decision making.²⁶⁷

Title VII both strengthens and weakens this decision process. As with other programs, wholly alternative actions to achieve its ends are not readily considered. But the legislation stipulates many different policy concerns for new communities development, including preservation and enhancement of the natural and urban environment, provision of opportunities for minority group members, and advancement of the nation's housing supply.²⁶⁸ These encompass a wide range of national policies, leaving little ambiguity for judicial interpretation as in *Gautreaux* and *Shannon*.

But the matter of alternative sites for new communities is different for Title VII and other programs where the initiative comes from a private applicant, who already has the site for the new community, as well as the basic parameters of design and function, to present for HUD's acceptance or rejection. Cooperation between the applicant and HUD can alter many of the parameters to make them fit the Title VII guidelines, regulations, and legislation, but one that cannot be altered is the site, the control of which is so important in new community development as to be the original impetus for some developers to seek Title VII assistance. As presently constituted, the New Communities Program cannot expect a developer, especially in the private sector, to hold several alternative sites throughout the protracted HUD review so that HUD can choose the best. Yet that is what *Gautreaux*, *Shannon*, and the NEPA interpretations suggested in this article seem to demand—not only that alternatives, especially sites, be considered by HUD, but also that HUD be prepared to reject an application if the environmental and social costs outweigh project benefits or even if an alternative site were

265. *Id.* at 819.

266. 448 F.2d 731 (7th Cir. 1971).

267. See Durchslag & Junger, *HUD and the Human Environment: A Preliminary Analysis of the Impact of the National Environmental Policy Act of 1969 Upon the Department of Housing and Urban Development*, 58 IOWA L. REV. 805, 836-42 (1973).

268. 42 U.S.C. § 4511f (1970).

significantly superior in fulfilling the far-reaching Title VII principles and objectives.

Such is clearly not the case now, nor was it for SAR. But the impact of this omission has even been worse—without alternatives, HUD tends to evaluate new community applications in a vacuum, ending up with inoffensive but insipid new communities that pass the multi-faceted review by not seriously violating any policy objectives, but at the same time without positively fulfilling any objectives. HUD's "path of least resistance" response to the expanding range of policy concerns has led to the approval of such mediocre new communities under Title VII that everyone concerned has become disillusioned with the program's lack of success, in terms of its goals as well as financial feasibility, and would prefer termination of the program to further embarrassments.

The alternatives provision that is so pivotal to the NEPA gives some directions for salvaging such programs as Title VII from the abyss of negativism and mediocrity that threatens their existence. Attempts to make a pre-selected assistance program on a pre-selected site optimize policy objectives and have proved to be fruitless at least in the New Communities Program. NEPA, with its broad goals and expansive interpretation, can provide a potentially useful framework for improving the Title VII process and product.

Implementation of NEPA and Title VII

Similar to NEPA, the role of objectives in defining the range and type of alternatives for an agency to consider can be applied to Title VII as a judicially reviewable framework by which agency decisions can be made. The Title VII legislation includes an imposing array of goals, principles, and criteria generally concerning the improvement of urban development. Even the more specific standards for new community assistance are based on a myriad of congressional objectives.²⁶⁹ None of these, of course, can be fulfilled entirely by any one or series of new communities. The point is that these objectives can best be realized by a broad attack on the urban problems they represent, which is the *raison d'être* of federal urban policy and which can only be conducted if the whole spectrum of federal programs are coordinated to produce the most effective results.

What this implies is that for any urban area some federal coordinating agency should recommend the best set of programs to combat the

269. See 42 U.S.C. § 4513 (1970).

perceived problems in the area. Although such super-coordination is perhaps an unreasonable expectation, a balanced review and program implementation is quite credible at the agency level. HUD itself has many different funded programs besides new communities at its disposal or its influence. HUD should be able to focus on an urban area's problems vis-a-vis Title VII objectives and then find an ameliorative solution from its available instruments. As shown in the SAR case, the problems of low-income housing and minority opportunity, not to mention environmental fragility, were important to San Antonio but were not well treated by the SAR project. A better solution might have been: (1) SAR with an altered plan, (2) a new community at a different location, perhaps on surplus federal lands, (3) several major housing projects in lieu of a new community, or (4) more downtown urban redevelopment.

These alternatives all relate to the statutory objectives of Title VII, and all lie within HUD's general purview. This is not to contend, however, that HUD has an equal ability to fund all such projects or to initiate them. But the interesting aspect is that the question of alternative sites and alternative programs blend together in the pursuit of objectives, and the confluence falls within the evolving scope of NEPA. The broader view by agencies is not only going to be required by courts under the NEPA, but it may also lead to a more effective application of resources to fulfill statutory objectives.²⁷⁰

The second approach to implementing alternatives consideration under Title VII involves the institution of fixed standards by which new community applications from the private sector could be evaluated. The "performance" of an applicant's project would then be measured by the extent to which it accomplishes the objectives implicit in the standards. These standards could be varied by area to reflect local problems and priorities. The standards could include the environmental-location accessible to minority communities, housing mix related to area needs, and other factors derived from Title VII objectives.²⁷¹

The use of standards would be fairer for developer-applicants, who could know beforehand, the strengths and weaknesses of their own projects, so that post hoc review, including judicial review under NEPA, would not delay and destroy the project feasibility. The fixed nature of

270. See Picher, *Alternatives Under NEPA: The Function of Objectives in an Environmental Impact Statement*, 11 HARV. J. LEGIS. 595, 604 (1974).

271. See Gillespie, *Industrial Zoning and Beyond: Compatibility Through Performance Standards*, 46 J. URBAN L. 723 (1969) (zoning performance standards).

the standards may strike some as inflexible and bureaucratic, especially when flexible discretionary standards represent reform from past rigidities, but the agency review would permit the cross-comparisons of new communities with other program actions and assist in determining the best solution for local problems, as well as more rigorous review under NEPA in court. To some extent the detailed HUD guidelines for new community applications already incorporate many such standards, but these have been added incrementally, without standardization with other programs, and actually only represent minimum qualifications, mostly procedural, with all important review retained in HUD's discretion.

A final approach for Title VII might be termed an adversary arrangement, in which HUD would utilize its assistance programs to fund local and regional agencies to conduct new community planning in their areas both before and during applications under Title VII.²⁷² Ex ante planning would be only a slight extension of normal development planning, applied to the identification of needs, sites, and design for new communities in any urban area, presumably based on HUD criteria. Such planning, notably missing from SAR, would provide the frame of reference, as well as documented rationale, for evaluation of new community applications once made. Funds for local planning during an application's review would be aimed at increasing the local area's capability to respond rationally to the proposal and to plan for the inevitable implementation of the new community, if approved.

The purpose of assistance for planning is to create a local advocate that can articulate opposition in constructive terms, related to Title VII objectives and local needs. Such advocacy can have the effect of "analyzing" the proposed project with respect to possible alternatives by countering benefits with perceived costs in an adversary balancing test.²⁷³ Although the process and results are unpredictable, planning assistance can act to institutionalize and rationalize debate, especially where other mechanisms are absent.

Other types of improvements could certainly be suggested, but the three above derive directly from the SAR experience, the evolving directions of NEPA interpretation, and the needs of Title VII with regard to new communities. The proposed measures indicate ways in which NEPA, as an innovation in the decision-making process, can

272. *E.g.*, 40 U.S.C. § 461 (1970); Housing and Community Development Act of 1974, 42 U.S.C.A. §§ 5301-17 (Supp. 1976).

273. This is similar to what Judge Bazelon called for in *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650-53 (D.C. Cir. 1973).

serve the realization of Title VII objectives, and remove some of the incompatibility as revealed by the SAR case. Neither act has been fully implemented, but together they can further the ends for which they were created.

CONCLUSION

As it happens, SAR was more in concert with Title VII objectives as they related to San Antonio's problems than either the plaintiffs or the above discussion would seem to credit. It was a reasonable answer to the runaway problem of urban sprawl in the area. It was essentially a good proposal in the wrong place. Such an accident, however, should not excuse the careless decision making and the myopic process by which SAR was approved. SAR was never part of an area-wide approach to urban growth problems; it was never linked to comprehensive efforts to protect the Edwards Aquifer as a vital natural resource. Alternatives were never seriously considered, and the costs of potential environmental damage were never weighed against benefits which might accrue from SAR.

Ironically, although the goals and procedures of NEPA and Title VII were deeply compromised in the SAR review and approval, the implementation of those acts still greatly improved the SAR project incrementally over the years until its final legal vindication. The scientific studies and the protective measures introduced for SAR not only lowered the probability of pollution damage but also serve as a model for other developments to follow. The Title VII regulations as they were introduced brought forth much analysis of the impact of SAR on San Antonio and much cooperation with local officials. These effects were directly due to the advent of NEPA and Title VII, and of the form of judicial review that has come to symbolize and enforce at least the former. Not only was the admittedly inadequate final EIS completely redone in order to achieve compliance, making the case, according to the trial judge, "an entirely different lawsuit,"²⁷⁴ but the attention and publicity surrounding the case also awoke great concern for the aquifer, culminating in more stringent land use controls and a campaign to acquire undeveloped portions of the recharge zone. The suit itself induced these and other changes.

274. *Sierra Club v. Lynn*, 364 F. Supp. 834, 850 (W.D. Tex. 1973), *aff'd in part, rev'd in part*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

The problems of HUD's performance on SAR, especially those relating to alternatives and the maximization of benefits over costs, appear to be inherent in programs wherein the initiative derives from the private applicant. The nature of the relationship either virtually precludes a sufficient and reasoned decision process on the part of the federal agency, or, if NEPA is fully implemented, it may make untenable the participation of private enterprise. Even with the introduction of the improvements suggested above, HUD or any other agency cannot really exercise, as to outside initiatives, the sort of decision-making that the NEPA at least is beginning to demand—that is, full consideration and explication of environmental factors and a resulting rational decision. Conversely, private developers, with their fragile balances of cash flow and timing, cannot be expected to be attracted by the delays and uncertainties of a reasoned federal decision process. SAR, for example, because of the time and cost losses, may be doomed by its "success" in being approved and exonerated.

The NEPA provisions, if fully implemented, will tend to make federal agencies more responsible for their own actions, and more cautious in their activities. One likely victim is the public-private partnership implicit in programs like the New Communities Program. If objectives like those of Title VII are to be realized, agency initiative will have to be substituted which may cause less federally sponsored developmental activity to occur under existing legislation or may induce new programs with less delegated responsibility. In either event, the result is likely to be greater ability on the part of the federal agency to accomplish policy objectives in the areas of urban growth and the environment, as based on the stringent demands of NEPA for rational and open decision processes.

The SAR case was an important milestone in the development of a more mature and sophisticated federal decision-making process that conforms with NEPA. The battle itself was lost, but the war was perhaps a victory. And the outcome might be very different today.