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National Environmental Policy Act Interpreted as Requiring Strict Procedural Compliance of Federal Agencies - Calvert Cliff's Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1190

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NATIONAL ENVIRONMENTAL POLICY ACT INTERPRETED AS REQUIRING STRICT PROCEDURAL COMPLIANCE OF FEDERAL AGENCIES—*Calvert Cliff's Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1190 (D.C. Cir. 1971)*

The problem with the National Environmental Policy Act of 1969[1] (NEPA), its critics have said, is that it is "simply a declaration of congressional policy" which does not impose any affirmative duties upon federal agencies.[2] The recent case of *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*,[3] however, has subdued those doubts. In an unanimous decision the court held that NEPA does impose obligations upon federal agencies and requires them to meet a "strict standard of compliance."[4]

Calvert Cliffs' Coordinating Committee brought the suit against the Atomic Energy Commission (AEC) after it had approved construction of the Calvert Cliffs' Nuclear Reactor Power Plant on the Chesapeake Bay in Maryland,[5] contending that the Commission's

1. 42 U.S.C. § 4321 *et seq.* (Supp. 1970).

2. Bucklein v. Volpe, 2 ERC 1082, 1083 (N.D. Cal. 1970). *Cf.* similar attacks on the effectiveness of NEPA: Lynch & Stevens, *Environmental Law–The Uncertain Trumpet*, 5 U. San Francisco L. Rev. 10 (1970); an attorney for intervenor in *Cliffs* wrote earlier, "Speaking solely from the standpoint of legislative care and legislative draftsmanship–and without meaning to reflect on the substantive portions of the law–it is an atrocious piece of legislation. As applied to the licensing activities of Federal agencies such as the AEC, it is poorly thought out and ambiguous at all crucial points. One has only to read the Congressional reports and debates to find the number of differing and conflicting interpretations which can be put on the legislation and which individual legislators did in fact put on the bill prior to its enactment. The final product is an invitation to litigation for the next decade." Trowbridge, *Environmental Issues in Reactor Licensing*, 12 Atomic Energy L.J. 251, 254 (1970); Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 Brooklyn L. Rev. 139 (1970).

3. Calvert Cliff's Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2nd 1190 (D.C. Cir. 1971), is a consolidation of Case No. 24, 871, in which petitioners attacked particular AEC rules as specifically applied to Calvert Cliffs Nuclear Power Plant, and Case No. 24, 839, in which petitioners attacked the substance of one aspect of the contested rules. "On August 27, 1971, the AEC announced that it would allow Judge (Skelly) Wright's opinion to go unchallenged." Barfield, *Energy Report*, 3 Nat'l J. 1925, 1928 (1971).

4. 2 ERC at 1780. The court differentiates between the substantive policies of NEPA, which leave "room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances," and the procedural provisions, which are "designed to see that all federal agencies do in fact exercise the substantive discretion given them. These provisions are not highly flexible." *Id. See generally* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612 (1970).

5. *See* Barfield, *supra* note 3.

regulations were deficient under Section 102 of NEPA.[6] The court agreed. Not only would the AEC have to make substantial changes in its regulations, the corrected regulations would have to apply retroactively to all licenses granted since January 1, 1970, the effective date of the Act, because each of the contested regulations "in some

6. 42 U.S.C. § 4332 (Supp. 1970), is the procedural mandate of NEPA:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall–

(A) utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental affects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

way limits full consideration and individualized balancing of environmental values in the Commission's decision-making process."[7]

I

The first administrative rule[8] the court considered had been promulgated pursuant to Section 102(c)[9] of NEPA requiring all federal organs to write "detailed statements"[10] describing the environmental impact of proposed federal actions which "shall accompany the proposal through the existing agency review process."[11] The AEC regulations had provided that an AEC hearing board was not required to consider a "detailed statement" except when a party to the proceedings or an intervenor raised an environmental issue.[12]

If the court had accepted the argument of the AEC, one of the worst fears of NEPA's admirers would have been realized: environmental impact statements would have no probative value in AEC hearings.[13] Environmental factors would be singled out and excluded from consideration by the AEC hearing board.

> The danger that other agencies will adopt the AEC's position, that so long as "responsible officials" see to the compilation of environmental statements and their submission to the appropriate authority, these officials might wreak whatever havoc on the biosphere they please, cannot be overlooked. Certainly, the temptation to so construe the effect of environmental statements will be strongest among

7. 2 ERC at 1784.

8. 10 C.F.R. § 50, App. D, AA 12, 13, at 249 (1970):

> 12. If any party to a proceeding . . . raises any [environmental] issue . . . the Applicant's Environmental Report and the Detailed Statement will be offered in evidence. The atomic safety and licensing board will make findings of fact on, and resolve, the matters in controversy among the parties with regard to those issues. Depending on the resolution of those issues, the permit or license may be granted, denied, or appropriately conditioned to protect environmental values.
>
> 13. When no party to a proceeding . . . raises any [environmental] issue . . . such issues will not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the Commission's review processes, they will not be received in evidence, and the Commission's responsibilities under the National Environmental Policy Act of 1969 will be carried out in toto outside the hearing process.

9. 42 U.S.C. § 4332, *supra* note 6.

10. Criticism of what exactly a "detailed statement" is abounds. *See, e.g.,* Sive, note 4 *supra;* Lynch & Stevens, note 3 *supra;* Note, *supra* note 3; Note, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality,* 17 U.C.L.A. L. Rev. 1070 (1970).

11. 42 U.S.C. § 4332(C)(V), *supra* note 6.

12. 10 C.F.R. § 50, App. D, *supra* note 8.

13. *See* note 10 *supra.*

> those who . . . have always acted capriciously and do not wish to stop now.[14]

Furthermore, the court said if the word "accompany" is not to be read "so narrowly as to make the Act ludicrous,"[15] the AEC must adopt regulations which assure *consideration*[16] of environmental values throughout the agency review process. "[I]t must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process *beyond* the staff's evaluation and recommendation" (emphasis added).[17] Noting that the Commission's hearing boards automatically consider nonenvironmental factors the court said that environmental factors should not be excluded "from the proper balance of values envisioned by NEPA."[18]

The court thus reversed a trend begun by *New Hampshire v. Atomic Energy Commission*[19] which allowed the AEC in pre-NEPA days to exclude nonradiological considerations during its agency review hearings. Erasing at least a full year of skeptical criticism of the

14. Note, *supra* note 2, at 150.

15. 2 ERC at 1784:

> We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in Section 102(2)(C) requirement (that the "detailed statement" accompany proposals through the agency review processes) if "accompany" means no more than physical proximity–mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards if the boards are free to ignore entirely the comments of the statement?

16. 2 ERC at 1781:

> The sort of consideration of environmental values which NEPA compels is clarified in Section 102(2)(A) and (B). In general, all agencies must use a "systematic, interdisciplinary approach" to environmental planning and evaluation "in decisionmaking which may have an impact on man's environment." In order to include all possible environmental factors in the decisional equation, agencies must "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values be given appropriate consideration in decisionmaking along with economic and technical considerations." "Environmental amenities" will often be in conflict with "economic and technical considerations." To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance.

17. 2 ERC at 1785.

18. *Id.*

19. In New Hampshire v. Atomic Energy Comm'n, 406 F.2d 170 (1st Cir. 1969), *cert. den.*, 395 U.S. 962 (1969), the court determined that New Hampshire could not require the Commission to hear evidence on thermal pollution of the Connecticut River. Congress was aware of this decision and the decision in Zabel v. Tabb, 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), denying permission to the Army Corps of Engineers to withhold a license for a landfill project on the basis that the project would adversely affect

value of "detailed statements."[20] the court stated that statements including nonradiological data submitted pursuant to the requirements of NEPA do have probative value and must take their rightful place in the chain of evidence during agency proceedings. Notwithstanding the rest of the decision this one section of the holding will assure more open and fruitful hearings before federal administrative boards in the future.[21]

II

Calvert Cliffs' Coordinating Committee also contested the validity of an AEC regulation prohibiting consideration of nonradiological factors until March 4, 1970,[22] months after January 1, 1970, the effective date of NEPA. The AEC explained that federal agencies were not expected to comply with NEPA's effective date.[23] The court disagreed:

> [NEPA] does have a clear effective date, consistently enforced by reviewing courts up to now. Every federal court having faced the issues has held that the procedural requirements of NEPA must be met to uphold federal action taken after January 1, 1970. The absence of a "timetable" for compliance has never been held sufficient to put off the date on which a congressional mandate takes effect. The absence of a "timetable," rather indicates that compliance is required forthwith.[24]

If the court had decided otherwise it would have meant that more than two years of projects would have escaped compliance with NEPA.[25]

But while it was clear that NEPA applied to all federal proceedings conducted after the effective date, did it also apply to proceedings commenced *before* the effective date but not yet completed? The *Cliffs* court said it did, irrespective of hardship and expense.[26]

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the fish and wildlife when it implemented NEPA. 115 Cong. Rec. 29,053 (daily ed. Oct. 8, 1969) (remarks of Senator Jackson). Apparently Congress desired to remedy these situations where the responsiblity for environmental protection was diffused throughout several statutes. *See* Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 E.L.R. 50035, 50049 (1970).

20. *See* note 10 *supra*.

21. 2 ERC at 1792 and 1793.

22. 10 C.F.R. § 50, App. D, at 249 (1970).

23. 2 ERC at 1783; Brief for Respondents in Case No. 24,871, at 49. The Commission's reasoning is stated in 35 Fed. Reg. 18469 (Dec. 4, 1970).

24. 2 ERC at 1786.

25. *Id.*

26. The AEC argued vigorously that they could not comply with NEPA as required because of possibly creating a national power crisis. The court rejected their argument. 2 ERC at 1786. The court stated that the AEC did not even take minimal steps to comply with NEPA. In Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749,

> NEPA procedures, once established, [must] be applied to consider prompt alterations in the plans or operation of facilities approved without [NEPA] compliance.[27]
>
> Furthermore, while complete compliance with NEPA will be required of applicants who have not been issued a construction and operation permit before January 1, 1970, as much compliance as possible is required of applicants who have been issued a construction permit but not an operating permit before the effective date.[28]

The AEC had required no alternation in projects issued a construction permit before January 1, 1970. Instead, the Commission only ordered the applicants to observe present environmental standards.[29] Even after the effective date, the Commission refused to require alterations in constructed facilities not yet issued an operating permit, "*[w]hatever* environmental damage [AEC] reports and statements [might] reveal."[30] The court concluded that the AEC requirements were plainly insufficient.[31]

If the "special purpose"[32] of NEPA is to assure the fruitful and independent balancing of environmental and nonenvironmental factors, then the AEC regulations circumvent what Congress had intended.[33] Since it is likely many construction permits were issued prior to January 1, 1970, without consideration of environmental costs,[34] failure to do so afterwards and before an operating license has been issued and at a point in the proceedings when environmental damage still may be discovered and remedied, could result in

2 ERC 1260 (E.D. Ark. 1971), the court stated that if an agency of the federal government failed to comply with NEPA the least it could do would be to point out how its compliance with NEPA was deficient. "The decision makers could then determine whether any purpose would be served in delaying the project while awaiting" new criteria. 325 F. Supp. at 758.

27. 2 ERC at 1787.

28. *Id.* at 1791.

29. 10 C.F.R. § 50, App. D, ¶¶ 1, 14 (1970).

30. 2 ERC at 1792.

31. *Id.*

32. The special purpose of NEPA is to assure that agencies commit themselves to balancing all factors in each individual case. 2 ERC at 1788:

> In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would effect the balance of values. *See* text at pages 7-9 *supra*. The magnitude of possible benefits and possible costs may lie anywhere on a broad spectrum. Much will depend on the particular magnitudes involved in particular cases. In some cases, the benefits will be great enough to justify a certain quantum of environmental costs; in other cases, they will not be so great and the proposed action may have to be abandoned or significantly altered so as to bring the benefits and costs into a proper balance. The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.

33. *See* 2 ERC at 1784.

34. *Id.* at 1786.

an "irreversible and irretrievable commitment of resources which will inevitably restrict the Commission's opinions."[35] Weighed against this possibility, no action by an applicant including the incorporation in constructed facilities of expensive "new technological developments designed to protect the environment . . ." could be overlooked.[36]

III

Another AEC regulation strongly criticized by the court provided that an applicant's compliance with federal or state laws and regulations governing "aspects of environmental quality" would be considered a "satisfactory showing that there would not be a significant adverse effect on the environment."[37] The AEC reasoned further that compliance with NEPA was unnecessary in such circumstances, relying on Section 104 of NEPA for support. That section states that "nothing in Section 102 or 103 [of NEPA] shall in any way affect the specific statutory obligations of any federal agency to comply with criteria or standards of environmental quality."[38]

In *Cliffs* the AEC contended that "specific statutory obligation" was the Water Quality Improvement Act of 1970 [WQIA],[39] and that NEPA and the Water Quality Act were mutually exclusive.[40] The court, however, agreed with petitioners that the two acts can be applied simultaneously:

> Obediance to water quality certifications under WQIA is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties. Water quality certifications essentially establish a *minimum condition* for the granting of a license. But they need not end the matter. The Commission can then go on to perform the very different operation of balancing the overall

35. *Id.* at 1792.
36. *Id.*
37. 10 C.F.R. § 50, App. D, at 249 (1970):
> 11(b). With respect to those aspects of environmental quality for which environmental quality standards and requirements have been established by authorized Federal, State, and regional agencies, proof that the applicant is equipped to observe such standards and requirements will be considered a satisfactory showing that there will not be a significant, adverse effect on the environment. Certification by the appropriate agency that there is reasonable assurance that the applicant for the permit or license will observe such standards and requirements will be considered dispositive for this purpose.
38. 42 U.S.C. § 4334 (Supp. 1970); *see generally* 2 ERC at 1788 and 1789.
39. *See especially* 33 U.S.C. § 1171 (1970).
40. Senators Muskie and Jackson thought that "[t]he compromise worked out between the bills provides that the licensing agency will not have to make a detailed statement on water quality if the state or other appropriate agency has made a certification . . ." 115 Cong. Rec. 29,053 (daily ed. Oct. 8, 1969). Under NEPA, however, the agency must still *balance* conflicting factors. *See* Note, *The Regulation of Nuclear Power After the National Environmental Policy Act of 1969,* 24 Rutgers L. Rev. 753, 763 *et seq* (1970).

> benefits and costs of a particular proposed project, and consider alterations (above and beyond the applicable water quality standards) which would further reduce environmental damage.[41]

If the court had affirmed the validity of the AEC's regulations, the AEC hearing boards would only consider environmental factors unregulated by state or federal laws, a small segment of the spectrum.[42] The result would have been that "NEPA procedures, viewed by the Commission as superfluous, [would] wither away in disuse, applied only to these environmental issues wholly unregulated by any other federal, state or regional body."[43] Furthermore, compliance with a federal or state statute or regulation is not *ipso facto* compliance with NEPA and cannot exclude the regulated factor from the important balancing analysis. Interpreting Section 104 on which the AEC relied, the court concluded:

> Section 104 can operate to relieve of its NEPA duties *only if* other "specific statutory obligations" *clearly preclude* performance of those duties. . . . Because the Commission *can* still conduct the NEPA balancing analysis, consistent with [the Water Quality Improvement Act] Section 104 does not exempt it from doing so. And it, therefore, *must* conduct the obligatory analysis under the prescribed procedures (emphasis added).[44]

If the court's opinion is adhered to in future decisions, federal agencies may be required to insist on environmental controls "more strict" than those established by statute.[45]

41. 2 ERC at 1790.

42. The significance of the AEC's regulation was described by the court:

> Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (*e.g.*, water pollution), but not quite enough to violate applicable (*e.g.*, water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonethless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action–the agency to which NEPA is specifically directed.

2 ERC at 1788, 1789.

43. 2 ERC at 1788.

44. *Id.* at 1790; 2 ERC at 1788:

> Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

45. 2 ERC at 1790.

For example, in the present case conformance of nuclear reactors to the standards of the Water Quality Improvement Act is no assurance that they will not adversely affect the environment. More may be required. In some cases it may be discovered that an environment in which a nuclear reactor is scheduled will be safe from possible adverse effects only if the reactor meets ad hoc standards promulgated during AEC proceedings which are stricter than standards established by the Water Quality Improvement Act. Thus the court has effectively made compliance with federal or state statutes satisfactory only if more demanding standards are unnecessary to protect the environment.[46]

CONCLUSION

By requiring strict compliance with NEPA procedures the court has recognized that development of nuclear reactors can only continue consistent with high environmental standards. In the case of the Atomic Energy Commission, the "need to develop nuclear energy has dominated the Commission's activities, even those of an essentially regulatory nature."[47] In spite of the fact that Congress created the AEC for the purposes of developing *and regulating* atomic power,[48] the Commission's regulations limiting hearings to consideration of radiological data has favored nuclear reactor development but has not always been consistent with high environmental standards.[49] If future courts heed the *Cliffs* decision, environmentalists may look forward to the day when administrative agencies urge industries subject to their control to adopt higher environmental standards.

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46. *Id.*

47. Hearings on Environmental Effects of Producing Electric Power Before the Joint Comm. on Atomic Energy, 91st Cong., 1st Sess., pt. 1, at 111-12 (1969). *See also* 42 U.S.C. § 2012(a) (1964); 42 U.S.C. § 2013(a) (1964).

48. Note, *supra* note 40, at 754.

49.

> When performing its legislative function, [the AEC] promulgated radiation protection standards based on the effects certain doses of radiation would have on human beings, assuming that what is safe for man is safe for the environment. These two factors–a narrow jurisdictional interpretation [limiting itself to consideration of radiological factors] and a restricted basis for setting radiation protection standards–had permitted the Commission (1) to license power plants without consideration of the fact that the reactor would dump a considerable amount of nonradioactive pollutants into the environment; and (2) to pass radiation protection standards which, although not immediately harmful to man, might have had disasterous effects on other organisms and ecosystems. Because of its restricted approach in licensing nuclear power plants and in establishing radiation protection standards, the Commission has condoned the creation of significant causes of pollution. *Id.*