The Impact of the National Environmental Policy Act on the Procedures of the Interstate Commerce Commission*

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I. INTRODUCTION

With passage of the National Environmental Policy Act of 1969 (NEPA),[1] Congress sought to impose upon federal agencies various substantive and procedural requirements designed to insure consideration of the environmental impact of agency decisions. This article focuses upon section 102(2)(C) of NEPA, which requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on . . . the environmental impact of the proposed action . . . ."[2] More particularly, an attempt will be made to determine the effect of section 102(2)(C) upon the decision-making processes of the Interstate Commerce Commission (ICC). To this end, this article will discuss the regulations, litigation, and recent legislation which concerns the relationship between NEPA and the ICC.

II. JUDICIAL INTERPRETATIONS OF NEPA'S REQUIREMENTS

Section 102(2)(C) of NEPA was created as part of the "action-forcing" mechanism[3] designed to implement the more general goals and directives

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1. 42 U S.C. §§ 4321-4374 (1970).
2. *Id.* § 4332(2)(C).
3. "To insure that the policies and goals defined in this act are infused into the ongoing

alluded to in other NEPA sections. It requires agency preparation of an environmental impact statement (EIS) whenever certain threshold requirements are met:

if the action is "federal,"

2) if it is "major" federal action,

3) if it "significantly" affects the quality of the environment, and

4) if it affects the "human" environment.

Though agencies must also file an EIS when making recommendations or reports on proposals or legislation, that topic is beyond the scope of this article. Nor will this article examine what constitutes "federal" action since our focus will be upon the ICC. However, for a proper understanding of the topic here examined, a brief review of some of NEPA's section 102(2)(C) requirements follows.[4]

A. NEPA Threshold Requirements

The "major federal action" test for determining when an EIS must be prepared reflects a broad standard which courts have dealt with on a case-by-case basis. As a result, definitions of this term are nearly as broad as the standard itself. For example, in *Natural Resources Defense Council v. Grant*,[5] the court held that "a major federal action is federal action which requires substantial planning, time, resources and expenditure."[6]

Most clearly, capital projects which anticipate the expenditure of substantial amounts of federal funds or which foresee extensive dredging or remodeling must be considered major federal actions. Only slightly less clear is the applicability of that standard to federal regulatory proceedings and program development. Any doubts that may have existed should have been dispelled by the Supreme Court's decision in *Aberdeen and Rockfish Railroad v. Students Challenging Regulatory Agency Procedures*.[7] In that case (to be discussed in greater detail) the Court stated that a general revenue proceeding instituted in the ICC is a "major federal action" within the meaning of section 102(2)(C) of NEPA.[8]

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programs and actions of the Federal Government, the act also established some important 'action-forcing' procedures." 115 CONG. REC. 40416 (1969) (remarks of Sen. Jackson). *See also* Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1113 (D.C. Cir. 1971).

4. For a comprehensive overview of what these threshold requirements entail, the reader should consult either the Council on Environmental Quality's guidelines, 40 C.F.R. §§ 1500.1-.14 (1976), or one of the myriad of law review articles on the subject, *e.g.*, D'Amato and Baxter, *The Impact of Impact Statements Upon Agency Responsibility: A Prescriptive Analysis*, 59 IOWA L. REV. 195 (1973); Remus, *The Impact of the National Environmental Policy Act on the Motor Carrier Industry*, 5 TRANSP. L.J. 127 (1973); 1974 WIS. L. REV. 600.

5. 341 F. Supp. 356 (E.D.N.C. 1972).

6. *Id.* at 366. Applying this standard, the court found that a project sponsored by the Department of Agriculture which involved 66 miles of stream channelization at a cost of $1,503,831, $706,784 of which was federally funded, was a major federal action.

7. 422 U.S. 289 (1975).

8. *Id.* at 318-19.

Beyond these general propositions, the guidelines of the Council on Environmental Quality (CEQ)[9] have done a fairly comprehensive job of codifying other considerations which courts have found important: 1) the cumulative impact of related federal programs; 2) whether the action, though localized, may *potentially* cause a significant effect; and 3) the existence of impacts likely to be highly controversial. The mere fact that an action is temporary does not preclude a finding that it is major.[10]

The vague nature of these considerations leaves a large area of discretion to agencies in determining whether they must file an EIS. Nevertheless, most agencies find it to their advantage to prepare an EIS whenever it seems that their action *may* be major, particularly where public controversy is likely to arise.

Whether an impact upon the environment is "significant" has been more thoroughly considered by courts than the "major federal action" threshold. Perhaps the best summary is to be found in *Hanly v. Kleindienst*.[11] There the court found two factors particularly relevant:

> (1) the extent to which the action will cause environmental effects in excess of those created by existing uses in the area affected by it, and
> (2) the absolute quantitative effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.[12]

Particular attention is given to the impact on those who are most directly affected by the project,[13] although citizen opposition, standing alone, is insufficient to merit a finding of significance.[14]

B. Preparation, Timing, and Contents of the EIS

The responsible federal agency has a primary and non-delegable duty to make its own comprehensive and objective evaluation of environmental impact.[15] It may not defer to standards set by other agencies and is responsible for an individual balancing of the relevant factors.[16]

An EIS is mandatory once threshold requirements have been met. Section 102's directive that agencies "to the fullest extent possible" shall file

9. 40 C.F.R. § 1500.6 (1975).
10. Simmons v. Grant, 370 F. Supp. 5 (S.D. Tex. 1974).
11. 471 F.2d 823 (2d Cir. 1972).
12. *Id.* at 830-31.
13. Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972).
14. Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972). The significance of a proposed action may vary with the setting, so that similar actions may have different impacts in different areas. Also, the setting which is selected should be appropriate: one which is too large will "dilute" the environmental impact whereas one which is too small may preclude analysis of total effects.
15. Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975).
16. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). The only modification of this requirement has been in relation to state agencies. In 1975 Congress amended section 102 so as to allow federal agencies to defer to state preparation of EIS's where major federal actions are funded under a program of grants to the states. National Environmental Policy Act Amendments of 1975, Pub. L. No. 94-83, 89 Stat. 424 (amending 42 U.S.C. § 4332 (1970)).

impact statements cannot be used as an escape hatch. In *Calvert Cliffs' Coordinating Committee v. AEC*,[17] Judge Skelly Wright indicated that this phrase does not make agency NEPA duties flexible, but means that agencies must comply to the fullest extent unless there is a clear conflict of statutory authority.[18]

One of the major issues that has arisen with respect to section 102(2)(C) relates to the timing of the EIS. Since one purpose of the impact statement is the facilitation of agency decision-making, the time at which the statement is issued may critically affect the decision's outcome. As a result, the final EIS must be prepared before the project is launched so as not to inject factors which change the cost-benefit analysis.[19] More specifically, EIS preparation must occur before an "irretrievable commitment" of resources is made so as to avoid post hoc rationalization of decisions already made.[20] Such early preparation of the EIS is meant to facilitate agency compliance with the substantive provisions of NEPA requiring consideration of environmental factors at every important stage of decision-making.[21]

Problems arise when an agency holds public hearings before coming to a decision. The last sentence of section 102(2)(C) requires that the statement "accompany the proposal through the existing agency review process."[22] Many agencies base final decisions upon findings developed as a result of hearings. As to them, without a requirement that the EIS be prepared before hearings are held, the purpose of the hearing process could be undermined.[23]

A key case dealing with this problem is *Green County Planning Board v. FPC*.[24] There the FPC had not required its staff to prepare impact statements prior to hearing but instead directed applicants to submit their own statements. This procedure conformed to the then-existing CEQ guidelines,[25] but the court said that this flew in the face of NEPA's requirement that the statement should accompany the proposal through the existing agency review process. Therefore, the court held that a draft EIS had to be prepared before the hearings were held.[26] This seemed to be a sensible way to attain fulfillment of NEPA's objectives without making the hearing process a mere formality.

This ruling is particularly important to the topic before us because it has direct application to the ICC and its procedures. A subsequent case, how-

17. 449 F.2d 1109 (D.C. Cir. 1971).
18. *Id.* at 1115. *See* Pennsylvania v. Federal Maritime Comm'n, 392 F. Supp. 795, 802 (D.D.C. 1975).
19. Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).
20. Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975).
21. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).
22. 42 U.S.C. § 4332(2)(C)(v) (1970).
23. *See* THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 240-42 (1972).
24. 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 847 (1972).
25. 36 Fed. Reg. 7724 (1971).
26. 455 F.2d at 422.

ever, has called into question the vitality of *Green County*.[27] This matter will be discussed further.

A glance at the subsections of section 102(2)(C) gives one a good idea as to the type of analysis an EIS must reflect. The impact statement must be detailed, comprehensive, accurate, and objective.[28] One major reason for this is the development of a record for purposes of judicial review.[29] However, the depth and detail of a statement may be tailored to the intensity of the potential environmental consequences.[30] As a result, agencies may submit impact statements when in doubt as to whether the "major federal action" and "significance" standards require one, without risking judicial rulings that the statement is insufficient for lack of comprehensiveness.[31]

III. NEPA AND THE ICC

In its Fifth Annual Report (1974), the CEQ found that implementation of NEPA has gone through three stages.[32] The first took place in 1969-70, when awareness of the statute's requirements began to spread. The second stage lasted from 1970-73 and basically reflected agency attempts to comply with NEPA. During this period, the CEQ revised its interim guidelines to provide expanded guidance on the timing and preparation of EIS's and their use in agency decision-making processes. These and subsequent guidelines accumulated agency experience and codified many of the court decisions referred to above. The third stage began in 1973 and continues to the present with agencies attempting to integrate NEPA into their operations.

A. The ICC's Initial Regulations

On April 16, 1971, the ICC issued a notice of proposed rulemaking which dealt with implementation of NEPA's section 102(2)(C) requirements.[33] After public comments had been forwarded and considered, the Commission revised and codified those rules in 1972.[34] The overriding

27. It is unclear but likely that *Green County* has been overruled on this point by Aberdeen and Rockfish R.R. Co. v. S.C.R.A.P., 422 U.S. 289 (1975).

28. Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972); D'Amato and Baxter, *The Impact of Impact Statements Upon Agency Responsibility: A Prescriptive Analysis*, 59 IOWA L. REV. 195 (1973).

29. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir 1971). It might be noted also that decisions *not* to prepare an EIS must be adequately documented for judicial review purposes. Thus, agencies may need to submit a "mini-impact statement" when making a negative declaration. Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972). *See* 49 C.F.R. § 1108.10(b) (1976).

30. THE SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 633 (1975).

31. In accord with this principle, the ICC regulations provide for preparation of either Environmental Threshold Assessment Surveys, 49 C.F.R. § 1108.13 (1976), or Environmental Impact Statements, 49 C.F.R. § 1108.14 (1976) depending upon the type of federal action involved.

32. THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 372 (1974).

33. 339 I.C.C. 508 (1971).

34. 49 C.F.R. § 1100.250 (Oct. 1972 ed.).

consideration of these regulations was obviously administrative efficiency. The regulations required submission of impact statements by all parties filing initial papers, but they did not specifically indicate their required content. The comments of the Department of Transportation (DOT) noted this lack of specificity and suggested clearer requirements as to contents and timing.[35] This suggestion was rejected, with the ICC candidly admitting that the rules were a product of a balancing of requests by special interest groups rather than of consideration of NEPA's objectives.[36]

The final rules significantly modified those originally proposed. Most important to this discussion is the subsection which concerned the environmental impact of ICC proceedings. As originally proposed, that subsection
read as follows:

> DETERMINATION OF ENVIRONMENTAL IMPACT.—The National Environmental Policy Act does not contemplate that all of this Commission's proceedings shall be subject to the scrutiny of an environmental investigation even though all such proceedings may have some slight environmental impact. For example, it would not be administratively feasible to require environmental statements and determinations in the vast number of individual motor carrier operating rights applications filed with this Commission each year.
>
> The following classifications of proceedings have been determined to be among those which might have a significant effect on the quality of the environment:
>
> 1) Rulemaking proceedings except those relating to rules of agency organization, procedure, or practice.
>
> 2) Application for a certificate authorizing the construction, extension, or abandonment of all or a portion of a line of a railroad.
>
> 3) Notice or petition to discontinue train or ferry service.
>
> 4) Application for, approval of, or to amend, a rate association agreement . . . .
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> . . . .
>
> 6) Proceedings concerning the lawfulness of rates for the future on waste products or reusable materials or on substitute raw materials . . . .[37]

The promulgated subsection, however, eliminated the "classification of proceedings . . . which might have a significant effect on the quality of the environment" from the proposed rule and substituted a generalized statement requiring all initial papers filed with the ICC to include a statement on environmental impact:

> PAPERS TO SHOW EFFECT OF SUBJECT MATTER OF PROCEEDING ON THE QUALITY OF HUMAN ENVIRONMENT. (1) In all initial papers filed with the Commission by a party, there shall be filed a statement indicating

35. Ex Parte No. 55 (Sub-No. 4), Implementation of Public Law 91-190, 340 I.C.C. 431, 435 (1972).

36. *Id.* at 437.

37. Ex Parte No. 55 (Sub-No. 4), Implementation of Public Law 91-190, 339 I.C.C. 508, 527 (1971).

> the presence or absence of any effect of the requested Commission action on the quality of the human environment. If any such effect is alleged to be present, the paper shall include, but not be limited to, statements relating to each of the relevant factors set forth in . . . this section.
>
> (2) In all proceedings determined or alleged to have a significant effect on the quality of the environment, all parties shall file statements submitting information relating to the relevant factors set forth in . . . this section.[38]

Despite the fact that the revised rule required all parties to submit statements on environmental impact, that rule represented a significant undercutting of the subsection originally proposed. "The major opposition raised to the proposed rules was the inclusion of the listed proceedings and the special attention they would be required to receive."[39] Carriers feared that subjecting the concerns listed in the original subsection to special scrutiny would impede the likelihood that their requests would be granted. As a result, the rule provided little guidance as to what the ICC will generally consider a "major federal action significantly affecting the quality of the human environment."

Under the ICC's procedures, public notice was limited to situations where environmental impact is "found" or alleged to be present. This meant that if the applicant filing initial papers did not allege an impact or if no impact "appears evident in a proceeding in which notice would not ordinarily be given to the public, no added notice would be required."[40] As an example the Commission noted that "if the environmental statement accompanying the filing of a tariff asserts that environmental issues are not present and none appears to be involved, then formal notice need not be given to the public."[41]

This regulation was closely tied to the rule that required the EIS to issue as part of determinations made *after* hearing. In other words, *draft* impact statements would *not* be made available to the public prior to the initial hearing. As a result, it was possible that 1) no notice would issue to the public if carriers filing initial papers alleged there was no environmental impact and no one challenged those allegations; 2) that because of no notice, significant challenges to carrier requests did not occur prior to or during initial hearings; and 3) that because draft impact statements did not issue until after the Commission's first hearing, expected environmental impacts were not known to the public until significant steps in the decision-making process had taken place. Thus, the ICC's rules minimized the action it would take in considering environmental impact.

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38. 49 C.F.R. § 1100.250(d) (Oct. 1972 ed.).
39. Ex Parte No. 55, Implementation of Public Law 91-190, 340 I.C.C. 431, 439 (1972).
40. *Id.* at 440.
41. *Id.* This was in direct contrast to the DOT procedures which attempt to have all potentially interested parties informed and require early preparation and circulation of draft EIS's.

In July of 1976 new regulations were promulgated by the ICC which substantially revamped its EIS process. An examination of these changes is a sequel to the following case study.

B. The ICC and the Courts

As has been noted above, the ICC rules implementing NEPA were promulgated in 1972. Challenges to ICC decisions, however, continued and intensified. This was due to the fact that the rules gave little specific guidance for the preparation of impact statements and also because the Commission's good faith was questionable. As was noted in *New York v. United States*,[42] "the Commission has been slow in reacting to the directives of the CEQ . . . and of NEPA itself that each federal agency establish formal procedures to guide the preparation of § 102(2)(C) environmental impact statements . . . ."[43] In that case an action had been brought to annul an ICC order authorizing the abandonment of a railroad line running between New York and New Jersey. Referring to the then-proposed ICC rules, the court found that NEPA applied to such railroad abandonments and remanded the case to the ICC for consideration of environmental factors.

One of the effects of *New York v. United States* was clarification that NEPA applies to abandonment proceedings. A second effect was the Commission's amendment of its rules pertaining to NEPA implementation. As was discussed above, the proposed subsection which classified proceedings with potential environmental impact was eliminated.

Any remaining doubt that NEPA applies to ICC abandonment proceedings was erased by the Second Circuit's decision in *Harlem Valley Transportation Association v. Stafford*.[44] There, various public interest groups alleged that the Commission's procedures with respect to rail abandonments violated NEPA. The lower court had granted a preliminary injunction requiring that the determination of whether an EIS would be required be made at the outset of all abandonment proceedings.[45] Furthermore, relying upon *Green County Planning Board v. FPC*,[46] it held that NEPA required preparation of a draft statement *prior* to any hearing. The Second Circuit affirmed, noting that "the ICC made no effort to modify its procedures after certiorari was denied in [*Green County*]."[47] Judge Lumbard observed that after the CEQ guidelines were revised in order to incorporate *Green County*, the ICC protested that strict adherence would require a twenty percent increase in staff and appropriations. The CEQ had noted in response that no other agency had come even close to such a high estimate.[48] As a result, Judge

42. 337 F. Supp. 150 (E.D.N.Y. 1972).
43. *Id.* at 158.
44. 500 F.2d 328 (2d Cir. 1974).
45. 360 F. Supp. 1057 (S.D.N.Y. 1973).
46. 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).
47. 500 F. 2d 328, 332 (2d Cir. 1974).
48. *Id.* This figure does seem to be inordinately high; the DOT, for example, in 1974 estimated that it expended $2,400,000 in preparing impact statements and $800,000 in the

Lumbard found that "[r]equiring the ICC to prepare impact statements prior to hearing may inconvenience it but does not prohibit any effort by the Commission to regulate carriers subject to its jurisdiction."[49]

Though the Commission's responsibilities in abandonment proceedings were greatly clarified, additional problems arose as to the enforcement of NEPA in rate regulation cases. Involved in these problems was the doctrine of *Arrow Transportation Co. v. Southern Railway*,[50] which held that 49 U.S.C. § 15(7) vests exclusive power in the Commission to suspend the operation of new rates and withdraws from the judiciary any pre-existing power to grant injunctive relief against such rates. As a result, judicial review of rate-making decision by the ICC is significantly limited. Consequently, examination of the Commission's consideration of environmental factors is also limited. This situation is discussed in the following case studies.

C. Case Studies: SCRAP I & II

On December 21, 1971, the ICC handed down a decision in Ex Parte No. 281, Increased Freight Rates and Charges.[51] It declined to exercise power under 49 U.S.C. § 15(7) to suspend an interim 2.5% across-the-board increase in railroad rates. This interim surcharge was a temporary measure and was to be followed by a more selective rate increase. On February 28, 1972, the railroads filed this selective increase proposal. Prior to this, they had been directed to file an EIS with respect to these increases. Based on preliminary determinations, the ICC suspended under 49 U.S.C. § 15(7) the effectiveness of these rates. On March 6, 1972, the ICC served a short draft EIS upon interested parties which concluded that no substantial effect upon the environment would occur.

Soon after, a group named Students Challenging Regulatory Agency Procedures filed a lawsuit (*SCRAP I*) alleging that the ICC's decision not to suspend the *interim* 2.5% surcharge would have a substantial effect upon the environment and thus required the preparation of an EIS. The basis of this claim was that the pre-existing rate structure discriminated against recyclable materials and that general rate increases heightened the problem. SCRAP sought suspension of the surcharge and an injunction against its collection. A three-judge district court granted this relief.[52] On September

comment process. The total comprised only 1.85% of its total budget. THE SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 637 (1975). Rather, it has been litigation delays which caused the greatest problems. Twenty-six percent of all NEPA litigation has involved DOT. THE SEVENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 123-24 (1976).

49. 500 F.2d 328, 333 (2d Cir. 1974).

50. 372 U.S. 658 (1963).

51. 340 I.C.C. 358 (1971).

52. S.C.R.A.P. v. United States, 346 F. Supp. 189 (D.D.C. 1972). At this point it may be good to stop and highlight the controversy surrounding Ex Parte No. 281. The draft EIS was very short and somewhat conclusory. Furthermore, the Environmental Defense Fund sought permission to cross-examine the Commission staff as to who had prepared the statement. This request was denied. In view of the ICC's responsibility to prepare its own EIS, the Commission's

27, 1972, the ICC came to a final decision on Ex Parte No. 281.[53] It suspended the interim surcharges but declined to declare unlawful the selective increases. The decision noted that the railroads were in dire need of larger revenues and that the possible adverse effects to the environment were: "1) whether increased rail freight rates will divert traffic from the railroads to other modes of transportation in degradation of our human environment, and 2) whether the proposed increased rail rates will adversely affect the movements (and hence, it is argued the recycling) of secondary materials."[54] As to the first, the danger was considered minimal because motor carriers had been subject to the same cost increases that the railroads had encountered.[55] As to the second, the ICC found that the rate structure did *not* discriminate against recyclables and that in any event the question would more appropriately be considered in pending Ex Parte No. 270,[56] which was a comprehensive reexamination of the entire rate structure.[57]

On November 7, 1972, the ICC reopened the case for reconsideration of environmental effects. At this point the railroads agreed to suspend their rates for another seven months. A new draft EIS was issued by the Commission and became final on May 1, 1973.[58] This EIS came to essentially the same conclusion as the report of March 6, 1972. Ex Parte No. 281 was terminated.

Eleven days before the final rates were to go into effect, SCRAP and the Environmental Defense Fund filed motions for a preliminary injunction restraining their implementation. The injunction was granted. Eleven days after that, the Supreme Court on direct appeal reversed the injunction as to the interim rates,[59] holding that *Arrow Transportation Co. v. Southern Railway*[60] was controlling. Shortly before, Chief Justice Burger, acting as circuit justice, had stayed the preliminary injunction on the final rates, and his order was affirmed by the full court on June 25, 1973.[61] The preliminary injunction was vacated and the case remanded in November 1973.[62] The district court vacated the ICC order terminating Ex Parte No. 281, ordered preparation of a new EIS analyzing the problem of recyclables in greater detail, and ordered that a new hearing be held after circulation of the new impact statement.[63]

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refusal to allow its staff to be cross-examined raised some suspicions, especially since it had previously relied upon statements prepared by the railroads. *See also* ASSOCIATION OF ICC PRACTITIONERS, TRANSPORTATION LAW SEMINAR, PAPERS AND PROCEEDINGS, 11-24 (1972).

53. 341 I.C.C. 290 (1972).
54. *Id.* at 319.
55. *Id.* at 324-25.
56. 341 I.C.C. 290, 327 (1972).
57. 340 I.C.C. 868 (1971).
58. ICC, Ex Parte No. 281, Increased Freight Rates and Charges, 1972 (Environmental Matters) 22 (May 7, 1973).
59. United States v. S.C.R.A.P., 412 U.S. 669 (1973) [hereinafter cited as *SCRAP I*].
60. 372 U.S. 658 (1963).
61. Aberdeen & R.R.R. v. S.C.R.A.P., 413 U.S. 917 (1973).
62. Aberdeen & R.R.R. v. S.C.R.A.P., 414 U.S. 1035 (1973).
63. S.C.R.A.P. v. United States, 371 F. Supp. 1291 (D.D.C. 1974).

In *SCRAP II*,[64] the Supreme Court considered an appeal from the decision of the district court. From the confusion of the extended litigation, the Court attempted a synthesis of many statutes and cases.

The first major consideration[65] was the Interstate Commerce Act,[66] which gives the ICC power to declare railroad rates unlawful if unjust, unreasonable, preferential, or discriminatory[67] and also allows suspension of a rate for seven months pending a determination of its lawfulness.[68] In *general* revenue proceedings the ICC may focus entirely on the railroad's general need for revenue and defer the question of the legality of specific increases.[69] The second major consideration was NEPA and agency duties thereunder. Some reconciliation of the requirements of the two statutes had to be made.

The Supreme Court noted that a general revenue proceeding was involved[70] and that in such proceedings courts have traditionally refused to set aside rate increases where the ICC has examined only whether the *general* increase is reasonable and not whether particular increases are reasonable.[71] However, that policy was inapplicable in this case because no injunction against the collection of rates had been issued by the lower court. Furthermore, since the ICC had already decided that environmental factors would get no further consideration in Ex Parte No. 281, the ICC's decision on environmental considerations was final and courts could grant relief:"a general revenue proceeding is itself a 'major federal action,' independent of any later adjudication of the reasonableness of particular rates, requiring its own final environmental impact statement so long as the proceeding has a substantial effect on the environment."[72] Thus, the general revenue proceeding may be "final" for NEPA purposes even though it is "interim" for purposes of the Interstate Commerce Act.

Secondly, the Court called into question the holdings of *Green County*[73] and *Harlem Valley*[74] that draft impact statements must be prepared prior to hearings.[75] It held that the phrase "shall accompany the proposal through the existing agency review process"[76] does not affect the timing of the EIS

64. Aberdeen & R.R.R. v. S.C.R.A.P., 422 U.S. 289 (1975) [hereinafter cited as *SCRAP II*].

65. Certain preliminary jurisdictional questions were dealt with first, but discussion of them is beyond the scope of this paper.

66. 49 U.S.C. §§ 1-1240 (1970).

67. 49 U.S.C. §§ 13, 15 (1970).

68. 49 U.S.C. § 15(7) (1970).

69. United States v. Louisiana, 290 U.S. 70 (1933).

70. 422 U.S. at 314.

71. *Id.* at 316. In such cases courts have declined review on the ground that administrative remedies have not been exhausted.

72. *Id.* at 318-19.

73. 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

74. 500 F.2d 328 (2d Cir. 1974).

75. 422 U.S. at 320-21. The status of *Green County* and *Harlem Valley* with respect to this issue is unclear. The court suggests these cases were wrongly decided on this point, but clarification is necessary.

76. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C)(v) (1970).

but merely directs what must be done with it after preparation.[77] The agency must have the final statement ready when it makes a report or recommendation on a proposal for federal action but need not prepare a draft earlier. Thus the lower court's additional order that the ICC begin its hearing processes anew did not stand since the Commission was found to have complied with NEPA's procedures.[78]

Finally, the Court concluded that the final EIS submitted by the Commission was sufficient. It stated that SCRAP's contention that the underlying rate structure must be explored in the EIS should be rejected, since general revenue proceedings require only the conclusion that the railroads are in immediate financial need.[79] In fact, since the Commission had in a separate proceeding begun an investigation of the railroad rate structure, SCRAP's arguments lost much of their force.[80] The ICC's action could not be considered an approval of the existing rate structure, but was merely a necessary response to immediate needs. Therefore, no analysis of the effect upon the shipment of particular commodities had to be included in the EIS.[81]

The foregoing recounting of the *SCRAP* cases illustrates the effort which may be expended in preparation of an impact statement. The major result of the cases is that the ICC need not prepare a comprehensive EIS relating to every phase of major federal actions, but may defer environmental issues for more appropriate handling in subsequent proceedings. A second result is the apparent overruling of *Green County* and *Harlem Valley* as to the timing of an impact statement: a draft EIS need not be prepared prior to initial hearings and may not be necessary at all.

III. Developments since *SCRAP*

A. Recent Legislation

Perhaps the best insight into the difficulties which NEPA has generated for the ICC is given by examination of recent legislation relating to NEPA and recyclables. When the Regional Rail Reorganization Act of 1973[82] was first being considered, the Senate version contained specific instructions for the ICC to follow in dealing with freight rates for recyclables.[83] The ICC was directed to effect lawful changes in the rate structure so as to "promote the movement of recovered materials in commerce at the lowest possible rates compatible with the maintenance of adequate transportation service,"[84] and the Administrator of the Environmental Protection Agency (EPA) was to take

77. 422 U.S. at 320.
78. *Id.* at 321.
79. United States v. Louisiana, 290 U.S. 70 (1933).
80. 422 U.S. at 325.
81. *Id.*
82. Pub. L. No. 93-236, 87 Stat. 985 (1973).
83. S. Rep. No. 93-601, 93d Cong., 1st Sess. 53 (1973), *reprinted in* [1973] U.S. Code Cong. & Ad. News 3242, 3292-93.
84. *Id.*.

all action necessary to insure that these changes were implemented.[85] Unreasonable and unjustly discriminatory rates were made unlawful, with unjust discrimination specifically related to competition between recovered and virgin natural materials.[86] To insure proper consideration of this competition, the Senate version provided that in proceedings before the ICC, virgin and recovered materials were presumed to be competitive when these are functionally or technically equivalent in the production of similar end products.[87] Furthermore, any interested person was allowed to challenge an existing rate, and in such a proceeding the burden of proof was shifted from the challenging party to the carrier.[88]

The House showed little interest in these provisions, and as a result the Act as passed merely directed the ICC to adopt rules designed to eliminate discrimination against recyclable materials.[89] This provision was codified at 45 U.S.C. § 793. But in 1976, section 793 was extensively amended by section 204 of the Railroad Revitalization and Regulatory Reform Act (4-R Act)[90] and now more closely resembles the original Senate version.[91] Section 793 now "directs the Commission to conduct an expedited investigation of the rate structure for the transportation of recyclable or recycled materials and . . . the manner in which that rate structure has been affected by the general rate increases approved by the Commission."[92] Secondly, it authorizes the Administrator of the EPA to participate as a party in those proceedings and to take steps necessary to insure the ICC's compliance with this directive.[93] Thirdly, it requires the development of research and demonstration programs designed to improve transportation of reclaimed material.[94] And finally, it requires the ICC to "comply fully" with NEPA requirements.[95]

It is not clear why section 793 was thus amended, and the legislative history relating to this point is not helpful. We may speculate, however, that Congress was not entirely happy with the ICC's attitude towards environmental concerns. The Senate Report stated: "The record before the Committee indicates that the Commission may not be taking into account the full competitive relationship between the recyclable and recycled commodities,

85. *Id.*
86. *Id.* The legislative history noted: "In past investigations of rates for competing recovered and virgin materials, the ICC has denied that certain virgin and recovered materials compete with each other or has rejected evidence of the extent and manner of such competition." *Id.*
87. *Id.*
88. *Id.*
89. 45 U.S.C. § 793 (Supp. IV 1974).
90. Pub. L. No. 94-210, 90 Stat. 33 (1976).
91. 45 U.S.C.A. § 793 (West Supp. 1977).
92. S. REP. No. 94-499, 94th Cong., 2d Sess. 51 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 14, 65.
93. 45 U.S.C.A. § 793(b) (West Supp. 1977).
94. *Id.* § 793(c).
95. *Id.* § 793(d).

on the one hand, and virgin materials on the other hand."[96] Possibly the lengthy *SCRAP* litigation had brought to Congress' attention some signs of unwarranted hesitation on the part of the Commission.

Particularly interesting is the directive in the revised section 793 that "in all proceedings under this section, the Commission shall comply fully with the requirements of the National Environmental Policy Act of 1969."[97] That sentence may be read as requiring ICC compliance with NEPA only in proceedings mandated by section 793 (section 204 of the 4-R Act). However, the legislative history, though sparse, indicates that Congress' intent was to require such compliance in all proceedings arising under both sections 203 and 204 of the 4-R Act.[98]

Section 203 amended sections 15(3) and 15a of the Interstate Commerce Act.[99] It specifies that in deciding on proposals to cancel joint and through rates under section 15(3), the Commission must consider the question of potential energy savings, compare distances over alternate routes, and take into account the overall impact of such cancellation on affected shippers. It also requires that the ICC "in any proceeding which involves a proposed increase or decrease in railroad rates, specifically consider allegations that such increase or decrease would change the rate relationship between commodities. . . ."[100]

There is thus implicit in section 793 a congressional determination that the ICC has been lax in its compliance with NEPA where transportation of recyclable materials is at issue. Furthermore, if section 793 is read together with section 203 of the 4-R Act, it becomes evident that Congress was concerned not only with the rates applied to reclaimed materials but also more generally with the Commission's consideration of environmental effects arising from all its rate-making proceedings.

B. Rates for Recyclables

On February 26, 1976, the ICC instituted an investigation of the rate structure relating to recyclable and recycled materials.[101] The final impact statement for this proceeding issued on December 20, 1976. It found that:

> The environmental impacts associated with the various freight rate policies considered are insignificant. Demand analyses show that the utilization of scrap steel is virtually unresponsive to price, as technological limitations on furnace inputs constrain the substitutability between steel scrap and iron ore. Recycling aluminum offers considerable energy savings, but the unresponsiveness to price and the small proportion of rail costs to total price means freight rates have negligible impacts on scrap

96. S. Rep. No. 94-499, 94th Cong., 2d Sess. 51 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 14, 65.

97. 45 U.S.C.A. § 793(d) (West Supp. 1977).

98. S. Rep. No. 94-499, 94 Cong., 2d Sess. 51 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 14, 65.

99. 49 U.S.C.A. §§ 15(3), 15a (West Supp. 1977).

100. Pub. L. No. 94-210, 90 Stat. 39 (1976).

101. Ex Parte No. 319.

use. Similar results were obtained for recycled copper, lead, zinc, paper, cullet, plastics, textiles, rubber and ashes.[102]

This general conclusion was reached even though it was acknowledged that producers relying exclusively on scrap materials are significantly affected by transportation rates, and even though maintenance of a constant disparity between scrap and iron ore rates (as opposed to the growing disparity between these rates) would have prevented the 12,653,000 net ton decrease in scrap consumption which occurred from 1966 to 1975.[103] It implies that congressional fears of rate discrimination against recyclables are unfounded.

C. THE NEW ICC REGULATIONS

Apparently the ICC has now accepted its full responsibilities under NEPA, as the regulations in effect throughout the *SCRAP* controversy[104] have been supplanted by new regulations.[105] Three major changes from the prior regulations merit particular attention. First, the new rules distinguish among various classes of ICC actions: 1) those which normally require impact statements,[106] 2) those which may require impact statements but normally do not,[107] and 3) those in which environmental issues normally are not present.[108] A second modification is that though carriers filing applications must still submit environmental information, the information required varies according to which of the above-described categories is applicable. And thirdly, the revised regulations seek to have a draft EIS prepared prior to evidentiary hearings.

Thus, the first step in the Commission's section 102(2)(C) process occurs when a shipper makes an application before the Commission. He must at this point decide in which category of actions his application fits. If it is a rail line construction, commuter fare increase, discontinuance of passenger trains, or a merger, control, or consolidation of two or more Class I railroads,[109] it is an action which normally requires an EIS, and the applicant must submit a Detailed Environmental Impact Report (DEIR),[110] which is

102. ICC, EX PARTE NO. 319: INVESTIGATION OF FREIGHT RATES FOR THE TRANSPORTATION OF RECYCLABLE AND RECYCLED MATERIALS i (1977).

103. *Id.* at 9-12 to 9-17.

104. 49 C.F.R. § 1100.250 (Oct. 1972 ed.).

105. 49 C.F.R. §§ 1108.1-.20 (1976). The rulemaking proceeding (Ex Parte No. 55 (Sub-No. 4)) in which these new regulations were promulgated was instituted in response to the Second Circuit's decisions in *Green County* and *Harlem Valley*, both of which called into question the adequacy of the ICC's NEPA proceedures. Just as these proceedings were getting underway, however, the Supreme Court handed down its decision in *SCRAP II*. Though the decision left many questions about NEPA unanswered, its result indicated that the Commission's regulations arguably complied with NEPA. As a result a number of parties involved in Ex Parte No. 55 asserted that no new regulations were necessary, 352 I.C.C. 451, 454 (1976). Nevertheless, the Commission decided that new regulations would be more appropriate.

106. 49 C.F.R. § 1108.8(d) (1976).

107. *Id.* § 1108.9.

108. *Id.* § 1108.10.

109. *Id.* § 1108.8(d).

110. *Id.* § 1108.12.

similar in scope to an EIS. If instead the proposed action relates to line abandonments or acquisitions, railroad mergers, trackage rights proceedings, general rate increases, water carrier certification, cases involving recyclables,[111] or common use of rail terminals,[112] a Supplemental Environmental Evaluation (SEE) must be filed. A SEE is in effect a watered-down DEIR, with a format somewhat similar to that of an EIS.[113] All other actions require a statement from the applicant indicating the presence or absence of any environmental impact resulting from the proposed action.[114] Additionally, other parties to the proceeding may file statements alleging or denying the presence of environmental impacts, though they must be prepared to support the allegation with specific data.[115]

The second step of the process requires determination by the ICC of whether or not the action is "major" and "significant" enough to trigger NEPA's EIS requirements.[116] For proceedings not requiring a DEIR or a SEE, the initial procedural order will normally include a Summary Environmental Negative Declaration (SEND) prepared by the Commission's environmental affairs staff which indicates that the action is not a major federal action significantly affecting the quality of the human environment.[117] A SEND is subject to further evaluation[118] and may be replaced by an EIS, or, where appropriate, an Environmental Threshold Assessment Survey (TAS), which is in effect a more detailed SEND.[119] If the Commission decides that an EIS is required, a draft is prepared and circulated for comment by other agencies.[120]

The final statement is to "accompany the proposal through the Commission's review process"[121] and except for when statutory time limitations prevent it,[122] a final EIS will be made available to the public at least fifteen days prior to that portion of any oral hearings relating to the impact statement.[123]

On the whole, these new regulations appear both to facilitate compliance with NEPA and to relieve some of the burdens currently placed on applicants before the Commission. As was noted by the Commission:

> [U]ncertainties which currently exist with regard to the nature and scope of environmental information to be filed with each type of application will

111. In investigation and suspension or a formal docket case involving recyclables, the SEE need not be filed until thirty days after service. *Id.* § 1108.12(b)(2).
112. *Id.* § 1108.9(a)(2).
113. *Id.* § 1108.12(b). Additional information is required for rail abandonment applications. *Id.* § 1108.12(c).
114. *Id.* § 1108.12(d).
115. *Id.* § 1108.12(e).
116. *Id.* § 1108.14.
117. *Id.* § 1108.10(b).
118. *Id.*
119. *Id.* § 1108.13.
120. *Id.* § 1108.14.
121. *Id.* § 1108.14(e).
122. *Id.* § 1108.16(d).
123. *Id.* § 1108.16(b).

> be substantially eliminated. The existing rules provide that whenever a significant environmental impact is found or alleged all parties shall file detailed environmental impact statements. The adopted rules, on the other hand, require the filing of a detailed environmental impact report (which is similar in scope to an impact statement) only if the particular action has been previously identified in proposed rule 1108.8(d) as normally requiring an impact statement.[124]

Consequently, applicants before the Commission will be able to more readily develop environmental expertise in those areas most likely to have a significant impact upon the environment. They will no longer have to waste time and money researching potential impacts which will clearly be insignificant. In addition, since the rules now specify the type of information required to be submitted, applicants may prepare DEIR's and SEE's with more certainty that they will be adequate.

NEPA considerations should also be better served. Early preparation of a final EIS will certainly facilitate environmentally conscious decision-making and better inform interested parties as to the impacts that can be expected to result from the action. Also, accurate classification designed to indicate which of the ICC's actions are likely to have significant environmental impact will help focus attention on problem areas and direct energies to their solution.

However, a cautionary note should be injected. As *SCRAP II* indicated, the ICC need not prepare impact statements prior to hearings. Nevertheless, the Commission decided that it would be wiser to investigate environmental problems fully at the outset of actions in order to prevent delays once proceedings are in progress.[125] Furthermore, the Administrative Procedure Act[126] may require that the EIS be available during adjudicatory proceedings.[127] The Commission ackowledged this fact[128] and weighed it heavily in its decision to require final impact statements to be completed before oral hearings. However, there may be situations where the final EIS will not be available prior to significant points in the decision-making process. But since these are limited to occasions where statutory time limits require expeditious action, they should not be much of a problem.[129]

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124. Ex Parte No. 55 (Sub-No. 4), 352 I.C.C. 451, 458 (1976).

125. *Id.* at 460-61.

126. Ch. 324, §§ 1-12, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

127. 5 U.S.C. §§ 552, 554. In view of the fact that the APA requires decisions in adjudicatory proceedings to rest on a well-developed record, and NEPA requires that environmental factors be considered in agency decision-making, where adjudicatory proceedings are held "the impact statement should be treated as evidence, subject to cross-examination, and be placed in the record along with the other evidence." Ex Parte No. 55 (Sub-No. 4), 352 I.C.C. 451, 460 (1976). *SCRAP II* did not present this problem because there a rulemaking proceeding was involved and the APA does not pose as strict requirements in rulemaking proceedings as it does in adjudicatory proceedings.

128. *Id.*

129. Note that Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), indicated that NEPA duties may be excused when there is a clear statutory conflict between NEPA and another statute.

The only other potential problem area of the Commission's current regulations is the classification of cases involving recyclable commodities as cases which do not normally require an EIS.[130] The Commission explained this by indicating that its past experience with recyclables leads it to conclude that neither rate increases nor other types of actions involving recyclables have any significant impact upon their use.[131] This conclusion would not be troubling if the legislative history of the 4-R Act, noted above, did not indicate Congress' intent that the transportation of recyclable commodities should receive special attention by the Commission. However, since the ICC's expertise in matters of transportation regulation far exceeds that of Congress, we may trust that its conclusions are justified.

IV. Conclusions

Other agencies have had greater success implementing NEPA than the ICC has. The nature of this difference can be better understood by looking at three points: 1) each agency's past experience with cost-benefit analysis and environmental assessment, 2) the nature of each agency's decision-making processes, and 3) each agency's conception of its primary responsibility.

The DOT, for example, has in the past been required to consider "environmental" factors in its assessments. Section 4(f) of the Department of Transportation Act of 1966 requires the Secretary of Transportation *not* to approve any highway project which will use parkland unless there is no feasible and prudent alternative, and unless all possible steps are taken to minimize harm to that parkland.[132] The ICC, on the other hand, has primarily been concerned with economic impacts analyzed according to congressional directives. Also, the DOT has often been engaged in cost-benefit analysis, whereas the ICC follows rather narrow statutory tests when deciding on an issue. Experience has greatly benefited the DOT and made its transition into NEPA procedures rather painless. In comparison to agencies such as the DOT, then, the ICC was disadvantaged in two ways: it had little experience in dealing with "environmental" factors, and it was less accustomed to sweeping cost-benefit analysis.

Secondly, the manner in which decisions are reached differs greatly among agencies. For instance, the DOT makes its investigations and assessments using primarily its own resources, while the ICC is to a large extent dependent upon adversary proceedings and must balance the special interests involved. Thus, DOT personnel seek all the facts to be used in cost-benefit analysis and are mindful that it is DOT money that is being spent. In regulatory proceedings, however, the facts considered are usually

130. 49 C.F.R. § 1108.9 (1976).

131. *See* Ex Parte No. 55 (Sub-No. 4), 352 I.C.C. 451, 464-65 (1976). The DOT's experience with NEPA has been much less traumatic than that of the ICC, largely because of its previous experience with cost-benefit analysis generally and environmental issues specifically.

132. 49 U.S.C. § 1653(f) (1970).

those presented by the parties. Often these parties are restricted to interested carriers, none of whom care to raise difficult environmental issues or who are concerned enough about them to perform the requisite research.

Finally, each agency's conception of its responsiblities differs. The DOT considers its NEPA duties equal to its other responsibilities. But the ICC has always considered itself an adjudicator-regulator, an entity designed to decide controversies relating to the transportation of commodities and goods. The fair and efficient movement of these items is the ICC's primary goal. NEPA duties are considered less important than the issues of economic regulation.

It is too early to tell how environmental concerns will fare under the new ICC regulations, but it is safe to say that the Commission has made great strides in adequately adjusting to NEPA's requirements. It is not likely that the *SCRAP* history will be repeated with some new issue, for the ICC seems to be developing an "environmental outlook." Under the new regulations environmental issues will be scrutinized more closely by the ICC, although it remains to be seen whether they will substantively affect its regulatory decisions.