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Comments

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COMMENTS

ENVIRONMENTAL LAW—NATIONAL ENVIRONMENTAL POLICY ACT—PROCEDURAL REQUIREMENTS APPLICABLE TO THE THRESHOLD AGENCY DETERMINATION THAT AN ENVIRONMENTAL IMPACT STATEMENT IS NOT REQUIRED; TESTS FOR ACTIONS CONSTITUTING "MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT". *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973).

In *Rucker v. Willis*,[1] the defendant owned a tract of beach property in North Carolina. He petitioned the United States Army Corps of Engineers[2] for a permit[3] allowing him to construct two commercial fishing piers and to excavate a boat basin and an access channel.[4] Copies of the required notice of application[5] were forwarded to appropriate federal, state and local agencies, environmental groups, private organizations and individuals.[6] One

1. 484 F.2d 158 (4th Cir. 1973).

2. Hereinafter referred to as the Corps.

3. The Corps has authority to grant permits such as the one in question under the provisions of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1970), which provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

4. One pier, over 1,000 feet long, was to be constructed in the Atlantic; the second pier and the marina were to be constructed in the adjacent sound. Rucker v. Willis, 358 F. Supp. 425, 426 (E.D.N.C. 1973).

5. Public notice is required under Eng'r Reg. No. 1145-2-303. 358 F. Supp. at 426.

6. Among those receiving notice were the regional Bureau of Sport Fisheries and Wildlife, the regional Bureau of Outdoor Recreation, the regional field representative of the Secretary of the Interior, all components of the Department of the Interior, the regional Shellfish Consultant of the Food and Drug Administration, the Environmental Protection Agency, the regional director of the National Park Service, the Southeastern Archeological Center of the Park Service, various officials of the Corps, the North Carolina

federal agency suggested a modification, which was later made an integral part of the permit,[7] but no other governmental agency commented adversely on the project. The Environmental Protection Agency,[8] responsible for water quality, did not respond.[9]

Numerous adverse responses, however, were received from individuals and private organizations. The Corps' normal procedure in such a case is to forward all criticisms to the agency with the greatest competence in evaluating the issue presented. That agency then informs the Corps of its findings and recommendations, which the Corps considers in making its final determination. In *Rucker*, however, since the majority of agencies with relevant expertise had already responded and in so doing had "substantially rebutted most"[10] of the adverse comments, the Corps decided not to forward the objections. The district engineer then found, without issuing written findings to substantiate his conclusions, that no Environmental Impact Statement[11] was re-

Department of Natural and Economic Resources, the Sierra Club, the Conservation Council of North Carolina, the town of Emerald Isle, the County Commissioners of Carteret County, and over 150 other groups, agencies, and individuals. 484 F.2d at 160.

7. The Bureau of Sport Fisheries and Wildlife suggested the modification to "protect this valuable estuarine resource." *Id.* at 161.

8. Hereinafter referred to as the EPA.

9. 358 F. Supp. at 426-27.

10. 484 F.2d at 162.

11. The Environmental Impact Statement (hereinafter referred to as the EIS) is the "action-forcing" provision referred to by section 102(2)(C) (*see* note 16 *infra*) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1970). It need not be an exhaustive collection of scientific facts. Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50 (N.D. Cal. 1972); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 348 F. Supp. 916 (N.D. Miss. 1972). It must, however, "at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public, and, indeed, the Congress to all known *possible* environmental consequences of proposed agency action." Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 749, 757 (E.D. Ark. 1971). *See also* Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va. 1973), *aff'd*, 484 F.2d 453 (4th Cir. 1973). The EIS is not merely an exercise in "product justification" but is rather a working paper, an essential input into agency decisions concerning the extent of federal action. Lathan v. Volpe, 455 F.2d 1111, 1121 (9th Cir. 1971); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971); Environmental Defense Fund, Inc. v. Armstrong, 325 F. Supp. 50, 57 (N.D. Cal. 1972). Volunteering to file a statement at some future time is not sufficient, Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972), because NEPA "does not authorize defendants to meet their responsibilities by locking the barn door after the horses are stolen." Lathan v. Volpe, 350 F. Supp. 262, 266 (W.D. Wash. 1972). *See also* Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14 (D. Hawaii 1972). For further analysis of what is required and how courts review EIS's, see Sierra Club v. Froehlke, 359 F. Supp. 1289 (E.D. Tex. 1973). *See generally* F. ANDERSON, NEPA IN THE COURTS (1973).

quired.[12] Consequently, on April 9, 1973, the Corps issued the permit.

The plaintiffs, adjoining landowners, brought an action to temporarily restrain and preliminarily enjoin the proposed project, alleging that it would significantly affect the environment and would cause them irreparable injury. The essence of their claim was that the co-defendant Corps failed to file an EIS as required by the National Environmental Policy Act.[13] They contended that the permit was therefore illegally issued. The district court found neither an abuse of discretion nor sufficient federal involvement to constitute major federal action and hence denied plaintiffs' motions.[14] The Court of Appeals for the Fourth Circuit affirmed, finding that the Corps' assessment of the potential environmental impact of the proposed project was not arbitrary and that, in any event, the project was not a major federal action significantly affecting the environment.[15]

When a proposed action or proposal for legislation is a "major Federal action significantly affecting the quality of the human environment,"[16] NEPA requires preparation of an EIS by

12. 484 F.2d at 162; *see* note 25 *infra.*

13. 42 U.S.C. §§ 4321 *et seq.* (1970) (hereinafter referred to as NEPA). Further references to specific code sections of NEPA will be to the uncodified section designations of Title I rather than U.S.C. sections; *see* note 11 *supra* for discussion of EIS's.

14. 358 F. Supp. at 425.

15. 484 F.2d at 158 (2-1 decision).

16. NEPA, § 102(2)(C) provides as follows:

> The Congress authorizes and directs that, to the fullest extent possible: (2) all agencies of the Federal Government shall—
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> (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—
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> (i) the environment impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (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
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
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> 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

the agency directly responsible for the proposed project.[17] This statement is then utilized in evaluating the environmental costs of the project. Conversely, if the administrator finds that the federal action is not major or that it does not significantly affect the environment, there is no requirement that an EIS be filed.

To make its assessment of the potential environmental consequences of a proposed project, the Corps, upon receipt of an application, appoints an officer to evaluate the project. This officer solicits comments from those organizations, both public and private, that possess expertise in areas that may be affected by the proposed project. He then evaluates the responses in light of the information gained by his personal investigation. If he determines that an EIS is required, he is responsible for its preparation. If, however, he determines that the proposed action involves no major federal participation or that it would not significantly affect the environment, previous case law requires that he must state the rationale behind his conclusion.[18] In *Rucker*, however, no such explanation was made, and the case effectively overrules the procedural commands of previous Fourth Circuit cases.[19] In addition, the views of the two-man majority in *Rucker* appear to be contrary to those of four other members of the Court of Appeals for the Fourth Circuit.[20] While it is apparent that the substantive decision reached in *Rucker* was correct, it is here contended that the procedural requirements of the Act were not followed.

The factual situation in *Rucker* presented the Corps with two distinct statutory duties: a discretionary duty concerning issuance of the permit[21] and a mandatory duty to consider the envi-

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> authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . , and shall accompany the proposal through the existing agency review processes . . . .

17. Greene County Planning Bd. v. FPC, 455 F.2d 412, 420 (2d Cir. 1972), *quoting* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971).

18. *See* notes 22-52 and accompanying text *infra.*

19. Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); *see* text accompanying notes 39-43 *infra.*

20. Judge Craven in Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973), Judges Russell and Field in Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973), and Judge Winter in Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), have taken positions contrary to that of the majority in *Rucker.* Chief Judge Haynsworth and Judge Widener, the majority in *Rucker,* had joined the opinions in *Ely* and *Appalachian Power* respectively.

21. *See* note 3 *supra.*

ronmental impact of the proposal.[22] The Corps evaluated the permit application, found it to be in order and issued the permit, properly complying with its discretionary duty. Its mandatory duty was not so clearly discharged, however. For example, since the project required the dredging of an access channel,[23] water quality degradation was possible. Yet there was no response from the EPA, the only agency with expertise in the matter of water quality. The Corps district engineer, the responsible officer in this case, did not, however, think it necessary to explain his decision not to require an EIS.

In addition, the district engineer's decision was "based on the fact that *no* Federal, State or local *agencies certified to him* that the permit would have a significant and adverse effect on the human environment."[24] This statement conceded that there was no consideration of water quality anywhere in the record and implies that the Corps did not make a detailed investigation of its own but rather relied excessively on the evaluations of others. To reach its conclusion, the reviewing court was therefore required to make a double inference: first, that the EPA failed to respond only because it found that there would be no degradation of water quality and second, that since there was no such degradation, the Corps had determined that the proposed project would not significantly affect the environment.[25]

The provisions of NEPA are mandatory and create procedures with which agencies must comply.[26] A few early district court decisions held that the procedural requirements of the Act were discretionary and did not create affirmative duties binding on federal agencies.[27] It is now well recognized, however, that

22. Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 348 (8th Cir. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1113 (D.C. Cir. 1971).

23. *See* note 4 *supra.*

24. 358 F. Supp. at 429.

25. 484 F.2d at 159 n.2 states in part:

> The district engineer issued no written findings. Neither did he specifically state that an impact statement was not necessary. From the issuance of the permit, however, the necessary inference is a finding that no impact statement was necessary, since the statute, 42 U.S.C. § 4332(2)(C), and the applicable regulation, 37 Fed. Reg. 2525 (Feb. 2, 1972), para. 11(c), both require a statement if their conditions are met, but do not require a negative finding or statement.

26. *See, e.g.*, Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

27. New York v. Department of the Army, 3 ENVIR. REP. 1947 (S.D.N.Y., Jan. 21, 1972); Ely v. Velde, 321 F. Supp. 1088, 1093 (E.D. Va. 1971), *rev'd*, 451 F.2d 1130 (4th

these decisions were in error; one court has emphasized that "the very purpose of NEPA was to tell federal agencies that environmental protection is as much a part of their responsibility as is protection and promotion of the industries they regulate."[28] Section 102(2)(C) requires that an EIS be prepared for any proposed project that is a major federal action significantly affecting the quality of the environment.[29] The initial determination of

Cir. 1971); Bucklein v. Volpe, 2 ENVIR. REP. 1082 (N.D. Cal., Oct. 29, 1970).

28. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1122 (D.C. Cir. 1971). The Congressional delineation of the scope of national environmental policy expressed in § 101 of NEPA "is as broad as the mind can conceive." First Nat'l Bank v. Richardson, 484 F.2d 1369, 1377 (7th Cir. 1973). However, without an enforcement section, which was absent from the original bill, such a declaration would have been ineffective. S. 1075, 115 CONG. REC. 3701 (1969). After extensive Senate hearings, the bill was amended to require that all agencies include in every recommendation or report on a major federal action a "finding" by the responsible official that he had considered the environmental consequences. 115 CONG. REC. 19008 (1969). The House, in deleting the "finding" provision, passed a much weaker version which went to the joint conference committee, which made two significant compromises. The language requiring a "detailed statement" was agreed upon to give the bill "action-forcing" powers but only at the expense of the declaration that all persons had a "right" to a healthful environment. This language was compromised to "should enjoy" a healthful environment. *See generally* Note, *Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline*, 81 YALE L.J. 1592 (1972).

29. The Guidelines of the Council on Environmental Quality (*quoted at* note 32 *infra*) state that each agency of the federal government shall comply with the requirements of NEPA unless existing law applicable to the agency's operations expressly prohibits compliance or makes compliance impossible. 36 Fed. Reg. 7724 (1971). This view of the nature of the Act is supported by the legislative history:

> The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in . . . [section 102(2)(C)] unless the existing law applicable to such agency's operations does not make compliance possible . . . . Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means to avoiding compliance with the directives set out in section 102. Rather . . . no agency shall seek to construe its existing statutory authorizations in a manner designed to avoid compliance.

115 CONG. REC. 40418 (1969).

Prohibitions in existing laws can, in specific instances, enable an agency to effectuate programs of significance without complying with NEPA requirements. For instance, in United States v. S.C.R.A.P., 412 U.S. 669 (1973), the Court held that a federal district court lacks jurisdiction to suspend an emergency 2.5 percent surcharge on goods being shipped for recycling, even though the ICC failed to prepare an EIS. NEPA did not act to repeal section 15(7) of the Interstate Commerce Act, which vests the ICC with the exclusive power to suspend rates. The activity of the ICC is, however, distinguishable from general agency activity since actions under section 15(7) have been held to be nonreviewable in Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (1963). *See also* Alabama Gas Corp. v. FPC, 476 F.2d 142, 147-48 (5th Cir. 1973); Nielson v. Seaborg, 348 F. Supp. 1369, 1372 (D. Utah 1972). Similarly, judicial review under the Administrative Procedure Act is foreclosed "only upon a showing of 'clear and convincing' evidence of a contrary legisla-

whether the proposed project is such an action is left to the discretion of the responsible agency.[30]

NEPA establishes, as an integral part of the basic mandate of federal agencies,[31] the need to consider environmental matters[32]

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tive intent." Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967). Judicial review has never been foreclosed with NEPA. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 299 (8th Cir. 1972); Citizens for Clean Air, Inc. v. Corps of Eng'rs, 356 F. Supp. 14, 20 (S.D.N.Y. 1973).

30. Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972); Harlem Valley Transp. Ass'n v. Stafford, 360 F. Supp. 1057, 1066 (S.D.N.Y. 1973); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167, 1170-71 (S.D. Iowa 1972); Scherr v. Volpe, 336 F. Supp. 886, 888 (W.D. Wis. 1971); Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 789 (D. Me. 1971). The Corps' own regulations provide:

> *Regulatory permits.* In evaluating permit applications, the District Engineer will carefully evaluate the impact on the environment of the proposed action considering environmental information provided by the applicant, all advice received from Federal, State and local agencies, and comments of the public. If the District Engineer believes that granting the permit may be warranted but could lead to significant environmental degradation, an environmental statement will be prepared.

37 Fed. Reg. 2525, para. 11(c) (1972).

31. NEPA, § 101(b) provides as follows:

> In order to carry out the policy set forth in this chapter, 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 to the end that the Nation may—
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
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> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

32. The Guidelines of the Council on Environmental Quality, 36 Fed. Reg. 7724 (1971) provide:

> 5. *Actions included.* The following criteria will be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement: (a) "Actions" include but are not limited to: (i) Recommendations or favorable reports relating to legislation including that for appropriations. The requirement for following the section 102(2)(C) procedure as elaborated in these guidelines applies to the (i) agency recommendations on their own proposals for legislation and (ii) agency reports on legislation initiated else-

at every distinct and comprehensive stage[33] of the review process. The primary and non-delegable[34] responsibility for fulfilling that function lies with the controlling agency, here the Corps.[35] One court has held that an agency "has abdicated a significant part of its responsibility"[36] if it fails to conduct its own investigation and substitutes the statement of others for the one it was to prepare. In such a situation the controlling agency would appear content:

> to collate the comments of other federal agencies, its own staff, and intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not the likelihood, that the applicant's statement will be upon self-serving assumptions.[37]

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where. (In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental statement.) The Office of Management and Budget will supplement these general guidelines with specific instructions relating to the way in which the section 102(2)(C) procedure fits into its legislative clearance process; (ii) Projects and continuing activities: directly undertaken by Federal agencies; supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance; involving a Federal lease, permit, license, certificate or other entitlement for use; (iii) Policy, regulations, and procedure-making. (b) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases . . . . The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action.

33. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1128 (D.C. Cir. 1971). Also, "NEPA requires more than full disclosure of environmental consequences and project alternatives; NEPA requires full consideration of the same in agency decision making." Natural Resources Defense Council, Inc. v. Grant, 355 F. Supp. 280, 286 (E.D.N.C. 1973).

34. Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 352-53 (8th Cir. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971); Citizens for Clean Air, Inc. v. Corps of Eng'rs, 356 F. Supp. 14, 18 (S.D.N.Y. 1973); City of N.Y. v. United States, 337 F. Supp. 150, 158-60 (E.D.N.Y. 1972).

35. Greene County Planning Bd. v. FPC, 455 F.2d 412, 420 (2d Cir. 1972), *quoting* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1119, 1123 (D.C. Cir. 1971). *See also* Hanly v. Mitchell, 460 F.2d 640, 646 (2d Cir. 1972); Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 362 F. Supp. 627, 632 (D. Vt. 1973). *But cf.* Sierra Club v. Hardin, 325 F. Supp. 99, 122 (D. Alas. 1971).

36. Greene County Planning Bd. v. FPC, 455 F.2d 412, 420 (2d Cir. 1972).

37. *Id.* Another court has criticized a responsible agency for having done "virtually nothing except to take the promoter's work sheet at face value and endorse it without

These precedents demonstrate that, in *Rucker*, the Corps should have made its own detailed investigation of the possible environmental consequences of the proposed activity.[38]

The responsible agency must not only complete the initial assessment of a particular project but must also explain its reasoning if it has determined that an EIS need not be prepared. The Court of Appeals for the Fourth Circuit was one of the first courts to require that the rationale of an agency decision be articulated. In *Ely v. Velde*,[39] it held that the Law Enforcement Assistance Administration, in approving the use of federal funds for the construction of a prison facility in a scenic and historic area of Virginia, had to comply with the requirements of NEPA. The court said that one such requirement was that:

> The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it *must also make a sufficiently detailed disclosure* so that in the event of a later challenge to the agency's procedure, the courts will not be left to guess whether the requirements of . . . NEPA have been obeyed.[40]

Less than six months prior to *Rucker*, the Fourth Circuit, in *Appalachian Power Co. v. EPA*,[41] held that NEPA did not require the EPA to prepare an EIS in support of agency approval of a state's Clean Air Act[42] implementation plans. The court did, however, require that the record of expert views and opinions, the technological data, and other relevant material on which the

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independent investigation." Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 880 (D. Ore. 1971). The Court of Appeals for the Second Circuit has said:

> [W]e must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would be in the overall public interest." The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).

It is not clear whether this general requirement applies to the EPA. *See generally* Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 447 F.2d 495 (4th Cir. 1973).

38. *See* text accompanying note 24 *supra*.

39. 451 F.2d 1130 (4th Cir. 1971).

40. *Id.* at 1138 (emphasis added).

41. 477 F.2d 495 (4th Cir. 1973).

42. 42 U.S.C. § 1857h-5c (1972).

administrator himself had acted, *i.e.*, the record as a whole, be presented for review, stating:

> Courts require that administrative agencies "articulate the criteria" employed in reaching their result and are no longer content with bare administrative *ipse dixits* based on supposed administrative expertise. While the agency may have discretion to decide, "[d]iscretion to decide does not include a right to act perfunctorily or arbitrarily"; and, in order for a Court to make a critical evaluation of the agency's action and to determine whether it acted "perfunctorily or arbitrarily," the agency must in its decision "explicate fully its course of inquiry, its analysis, and its reasoning." And, in making its review, the Court must have, not merely that full articulation of the agency's reasoning, but it must also have "the whole record" on which the agency acted . . . .[43]

The Fourth Circuit Court of Appeals is not the only court that adheres to this view. In a series of decisions, the Court of Appeals for the District of Columbia has established essentially the same criteria. In a case in which an agency decided that an EIS was unnecessary, the court stated that "the *minimum* requirement for compliance with the 'action-forcing' provisions of NEPA is for the agency to supply a *statement* of reasons *why it believes that an impact statement is unnecessary.*"[44] The court also stated that the administrative officers should "articulate the standards and principles that govern their discretionary decisions in as much detail as possible,"[45] "including an appraisal of the decision's environmental effects."[46] This appraisal is required because "a statement of reasons . . . will insure that the agency has given adequate consideration to the problem and that it understood the statutory standard."[47]

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43. Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973) (footnote omitted).

44. Arizona Pub. Serv. Co. v. FPC, 483 F.2d 1275, 1282 (D.C. Cir. 1973) (emphasis added).

45. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

46. Citizens Ass'n v. Zoning Comm'n, 4 ENVIR. REP. 2063 (D.C. Cir., Feb. 6, 1973).

47. Scientist's Institute for Pub. Information v. AEC, 481 F.2d 1079, 1095 (D.C. Cir. 1973). *See also* Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1249 (10th Cir. 1973); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 353 (8th Cir. 1972); National Helium Corp. v. Morton, 361 F. Supp. 78, 97 (D. Kan. 1973); Durnfurd v. Ruckelshaus, 5 ENVIR. REP. 1007 (N.D. Cal., Dec. 12, 1972); Town of Groton v. Laird, 353 F. Supp. 344, 349 (D. Conn. 1972); Scherr v. Volpe, 336 F. Supp. 886, 888 (W.D. Wis. 1971); Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 788 (D. Me. 1971). *But cf.*

While the aforementioned cases involved situations analogous to that in *Rucker*, there is an earlier case reaching a directly opposite conclusion. In *Citizens for Clean Air v. Corps of Engineers*,[48] the plaintiffs challenged a permit issued by the Corps under the same statutory authority as the permit in *Rucker*.[49] The Corps did not file an impact statement but only submitted the evaluations of other agencies. The court acknowledged that the Corps would have been justified in determining that an EIS was not required but found:

> [T]his perfunctory listing of other agencies' conclusions is an inadequate record to support the Corps' threshold determination and legally constitutes arbitrary and capricious action, however earnestly the course was chosen.
>
> . . . .
>
> The decision to issue the permit without the environmental impact review was counter to the fundamental requirements of NEPA.[50]

The relative size of the project involved is the only basis upon which these cases are distinguishable, but the majority in *Rucker* must have believed this distinction to be legitimate. Apparently attempting to prevent waste of judicial resources, they felt that the proposed project clearly was not major and probably would have no significant effect on the environment. Since an EIS would obviously not be needed, the court saw no real reason to reverse the decision of the district court.

Judge Craven dissented because he believed that strict compliance with the procedural requirements of NEPA was mandatory, regardless of expense. Further, he apparently thought that a greater savings of judicial resources would result from strict insistence upon procedural regularity, thereby establishing a precedent to warn other agencies that noncompliance with NEPA's procedural requirements would not be tolerated.

The decision of the majority indicates that it viewed *Rucker* as a burden of proof case in which the plaintiffs could not establish their claim. Judge Craven felt that this analysis was misdi-

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Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972); Hanly v. Mitchell, 460 F.2d 640, 646 (2d Cir. 1972).

48. 349 F. Supp. 696 (S.D.N.Y. 1972).

49. 33 U.S.C. § 403 (1970); *see* note 3 *supra*.

50. Citizens for Clean Air, Inc. v. Corps of Eng'rs, 349 F. Supp. 696, 707 (S.D.N.Y. 1972).

rected and insisted that the decision should have focused on the Corps' procedural shortcomings. His view is subject to criticism since the Corps altered its regulations[51] immediately after the permit was issued, making repetition of the Corps' action in *Rucker* impossible. Correction of the Corps' procedural shortcomings would therefore no longer be a valid reason for reversal.

As Judge Craven pointed out,[52] however, the change in regulations had, in effect, demonstrated that the procedures the Corps had utilized in *Rucker* were insufficient to ensure that the requirements of NEPA were met. More important, however, is the effect the decision will have on agencies which still have regulations similar to those the Corps had utilized before *Rucker*. This decision will allow such agencies to continue to make threshold determinations without explaining the rationale supporting their position. Even though the new regulations will prevent the Corps from utilizing this questionable procedure in the future, the court should nevertheless have reversed the case to ensure that other agencies would adopt the correct procedures. This implication that other agencies need not explain their threshold determinations, along with the court's discussion of what constitutes a "major Federal action significantly affecting the quality of the human environment," ensures the continued vitality of the *Rucker* case.

Courts have the duty of interpreting the statutory phrase "major Federal action significantly affecting the quality of the human environment."[53] Statutory interpretation is a function at which the courts are relatively more expert than are administrative agencies.[54] To allow agencies to avoid the procedural requirements of NEPA by arbitrarily asserting that the project in question is not a major federal action significantly affecting the envi-

51. Eng'r Reg. No. 1105-2-507, 38 Fed. Reg. 9243 (Apr. 12, 1973).

52. 484 F.2d at 164.

53. Citizens for Clean Air, Inc. v. Corps of Eng'rs, 356 F. Supp. 14, 18 (S.D.N.Y. 1973); Natural Resources Defense Council, Inc. v. Grant, 355 F. Supp. 280, 286 (E.D.N.C. 1973); Scherr v. Volpe, 336 F. Supp. 886, 888 (W.D. Wis. 1971).

54. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 613 (1965). *See also* Richards v. United States, 369 U.S. 1, 7 (1961); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 354 (1943). Hardin v. Kentucky Util., 390 U.S. 1, 14 (1968), states:

> The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. . . . "[W]here the only or principal dispute relates to the meaning of the statutory term," . . . [the controversy] presents issues on which courts, and not administrators, are relatively more expert.

ronment would render the Act powerless.[55] "The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review."[56]

Rucker listed various indicia[57] which courts at different times had utilized in determining whether a proposed project was a major federal action. This list included projects financed wholly or in part by the federal government, designed or planned in part by a federal agency, and carried out under the auspices of a federal agency.[58] The court pointed out that at other times the Court of Appeals for the Fourth Circuit had "focused on the qualitative impact [of the project] upon the environment in order to determine whether federal action was major."[60] The court found none of these indicia present in *Rucker* and therefore held that issuance of the permit for the proposed project was not a major federal action.[61]

The initial attempt to define "major Federal action" was *Sierra Club v. Hardin*,[62] which dealt with the licensing of a pulp mill in a region which arguably could have qualified for wilderness status under the Wilderness Act of 1964.[63] The court stated that, while "it may be possible in the future to develop some *per se* categories of major federal actions, . . . [past experience with such mills] dictates that for the present complete investigation of the impact of individual mills will continue to be appropri-

55. Arizona Pub. Serv. Co. v. FPC, 483 F.2d 1275, 1282 (D.C. Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823, 829 (2d Cir. 1972); Greene County Planning Bd. v. FPC, 455 F.2d 412, 420 (2d Cir. 1972).

56. Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973). *See also* Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164, 1177 (6th Cir. 1972), *citing* City of N.Y. v. United States, 337 F. Supp. 150, 160 (E.D.N.Y. 1972), which states:

> To permit the agency to ignore its duties under NEPA with impunity because we have serious doubts that its ultimate decision will be affected by compliance would subvert the very purpose of the Act and encourage further administrative laxity in this area. . . . Preservation of the integrity of NEPA necessitates that the Commission be required to follow the steps set forth in § 102, even if it now seems likely that those steps will lead it to adhere to the present result.

57. 484 F.2d at 163.

58. *Id.*

59. *See* Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971). *See also* Izaak Walton League v. Schlesinger, 337 F. Supp. 287, 294 (D.D.C. 1971).

60. 484 F.2d at 163.

61. *Id.*

62. 325 F. Supp. 99 (D. Alas. 1971).

63. 16 U.S.C. §§ 1131-36 (1972).

ate."[64]

The courts have since attempted to develop various per se categories to describe major federal actions. The list of indicia in *Rucker* was only one such attempt. Another court has stated that a federal action is major if it requires substantial planning, time, resources or expenditures.[65] Another defined an action as major if the administrator retained any significant discretionary powers permitting him to make design alterations.[66] Still another stated that major federal action typically existed "only when a project is wholly or partly federally funded."[67] Generally, however, the courts agree that the existence of a major federal action is to be determined by "a judgment based on the circumstances of the proposed action."[68]

No articulated tests to identify major federal actions can provide acceptable results in all cases. To illustrate, if an action is held to be major "only when a project is wholly or partly federally funded," construction of a federally-funded pier would be a major federal action. If it significantly affected the environment, it would be subject to the procedural controls of NEPA. On the other hand, clear cutting of thousands of acres of a national forest would not be a major federal action and therefore not subject to NEPA, regardless of the environmental devastation it would cause. In enacting NEPA, Congress could not have intended such an incongruous result. While it is true that all legal tests can be criticized for occasionally reaching unfair results, articulated tests for major federal actions are especially susceptible to such criticism.

The process of selecting the criteria which make up an articulated test subjects such a test to further attack. Despite the explicit statement in *Rucker* that no attempt was made to "limit the list"[69] to the criteria noted, the court could easily have included "federally licensed"[70] as one of its categories. The Court

64. Sierra Club v. Hardin, 325 F. Supp. 99, 126 n.52 (D. Alas. 1971).

65. This test is perhaps the most popular articulated test. Citizens Organized to Defend the Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (S.D. Ohio 1972); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972); Julis v. City of Cedar Rapids, 349 F. Supp. 88, 89 (N.D. Iowa 1972).

66. Jones v. Lynn, 477 F.2d 885, 890 (1st Cir. 1973).

67. James River & Kanawha Canal Parks v. Richmond Metropolitan Authority, 359 F. Supp. 611, 628 (E.D. Va. 1973).

68. Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 n.7 (5th Cir. 1973).

69. 484 F.2d at 163.

70. Davis v. Morton, 469 F.2d 593, 596 (10th Cir. 1972).

of Appeals for the Tenth Circuit has stated that "*the only involvement necessary* by the federal government to constitute major federal action *is approving or licensing the project.*"[71] In *Rucker*, the decision to omit "federally licensed" as an approved category dictated the outcome of the case. An attempt to articulate an acceptable list of indicia of major federal action draws the attention of the court away from consideration of what the test should be for future diverse factual situations.

The Court of Appeals for the District of Columbia recently considered the meaning of the phrase "major Federal action" in holding that NEPA required the preparation of an EIS for major federal research programs which, *when instituted*, would significantly affect the environment.[72] The court stated that federal action exists "not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment."[73] Further, NEPA's procedural requirements have "been held to apply where a federal agency . . . grants licenses and permits to private parties."[74] In such a case, the action taken by the federal agency affected the environment because "the agency made a decision which permitted some other party— private or governmental—to take action affecting the environment."[75]

This analysis suggests that a proper test for major federal actions should not consist of the articulation of various indicia of major federal actions; instead it should focus on the nature and extent of federal participation and the effect of the particular project on the environment.[76] The benefits of such a flexible approach would successfully answer the objections raised to articulated tests by assuming that the legislative purpose is served. Application of this analysis to a particular factual situation will

71. *Id.* at 597 (emphasis added), *citing* Izaac Walton League v. Schlesinger, 337 F. Supp. 287, 291 (D.D.C. 1971). *See also* Scientist's Institute for Pub. Information v. AEC, 481 F.2d 1079, 1085 (D.C. Cir. 1973); Greene County Planning Bd. v. FPC, 455 F.2d 412, 419 (2d Cir. 1972).

72. Scientist's Institute for Pub. Information v. AEC, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

73. *Id.*

74. *Id.*

75. *Id.* at 1089.

76. Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), *as discussed in* text accompanying notes 58-59 *supra*. *See also* Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971), and text accompanying notes 62-64 *supra*.

not result in the arbitrary inclusion or exclusion of criteria which will control unforeseeable situations, perhaps automatically precluding the proper result. Each case is analyzed solely on the basis of the nature and extent of federal involvement in that particular case, an approach which appears inherently viable.[77]

The operation of this proposed test is simple—as the significance of the effect of a proposed project on the environment increases, the requisite amount of federal involvement decreases.[78] The test therefore does not allow the establishment of specific indicia of major federal action because considerations will vary depending upon the facts of the particular case. For example, to subject the licensing of the Alaska pipeline to the procedural controls of NEPA, one looks to the nature of the federal involvement (licensing) and the tremendous effect of the project on the environment. Because the impact is great, the federal involvement required to invoke the procedural requirements of NEPA

77. Since the phrase "major Federal action significantly affecting the quality of the human environment" is so difficult to define, it is obviously just as difficult to determine whether agency application of the phrase is arbitrary or capricious. Therefore, de novo review of factors considered by the agency is entirely appropriate. Review should be directed at determining "whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set in §§ 101 and 102 of NEPA . . . ." Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 664, 665 (8th Cir. 1973). The above cases relied on the contention that:

> Given 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. . . . NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.

Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 298-99 (8th Cir. 1972). *See also* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Additionally,

> it is the courts' function to insure that the mandate of the statute . . . has been carried out and that all relevant environmental effects of the project be given appropriate consideration by the responsible official whenever it is unreasonable to conclude that the project is without the purview of the Act.

Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 425 (5th Cir. 1973) (emphasis omitted), *quoting from* Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973).

78. Of course, federal involvement can never decrease to the point that federal action is no longer arguably "major." Inclusion of the term "major" in NEPA "raises the obvious inference" that not all federal actions are meant to be included. Julis v. City of Cedar Rapids, 349 F. Supp. 88, 89 (N.D. Iowa 1972). *See also* James River & Kanawha Canal Parks v. Richmond Metropolitan Authority, 359 F. Supp. 611, 628 (E.D. Va. 1973); Citizens Organized to Defend the Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (S.D. Ohio 1972).

may be minimal. Hence the licensing procedure in this situation would be characterized as a major federal action, and the project would be subject to the procedural controls of NEPA. On the other hand, if one considers Willis' pier in *Rucker*, he finds the same federal involvement (licensing), but the project has only minimal effect on the environment. Since the impact is small and the federal involvement less than considerable, the licensing procedure would be characterized as non-major, and the project could proceed without being subjected to the controls of NEPA. This suggested "sliding scale" test will enable courts to analyze more fully those activities which Congress apparently desired agencies to consider in reaching decisions which may affect the environment. It will prevent inadvertent environmental degradation by agencies of the federal government, a primary purpose of the Act, and better enable the courts to evaluate the need for EIS procedures in any particular factual situation.

This procedure has frequently been utilized when need for environmental protection was readily apparent. For example, in *Greene County Planning Board v. FPC*,[79] the possibility of adverse environmental consequences outweighed the relatively slight federal involvement. The Commission, concerned only with licensing the private construction of a pump storage power project, was required to file an EIS before construction was permitted. Similarily, in *Calvert Cliffs' Coordinating Commission, Inc. v. AEC*,[80] the Commission was required to prepare an EIS even though its only contact with the proposed project was its licensing of the nuclear reactor. In *Wyoming Outdoor Coordinating Council v. Butz*,[81] the Forest Service proposed to issue a permit to allow private clear cutting of a portion of Teton National Forest. While issuance of the permit was the sole federal involvement, the action was deemed major, and an EIS was required. There is extensive case law describing what does[82] and does not[83] constitute

79. 455 F.2d 412 (2d Cir. 1972).

80. 449 F.2d 1109 (D.C. Cir. 1971).

81. 484 F.2d 1244 (10th Cir. 1973).

82. *Id.*; Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); National Helium Corp. v. Morton, 361 F. Supp. 78 (D. Kan. 1973); Citizens for Clean Air, Inc. v. Corps of Eng'rs, 356 F. Supp. 14 (S.D.N.Y. 1973); McLean Gardens v. National Capital Planning Comm'n, 4 ENVIR. REP. 1708 (D.D.C., Oct. 21, 1972); Billings v. Camp, 4 ENVIR. REP. 1744 (D.D.C., Oct. 4, 1972); Arizona Wildlife Fed'n v. Volpe, 4 ENVIR. REP. 1637 (D. Ariz., Sept. 15,

major federal action, but each decision must be re-evaluated in light of the suggested test.

Rucker only cursorily considered the meaning of the phrase "significantly affecting the quality of the human environment,"[84] briefly discussing the effect of granting the permit in burden-of-proof language.[85] The court found that the permit application would not have the effect of introducing a previously nonexistent use.[86] This finding indicates that preparation of a highly expensive EIS for a pier to which no governmental agency had objected was a waste of resources. It was therefore unnecessary for the court to analyze more fully the actual meaning of the word "significantly."

Defining "significantly," however, has caused courts as much difficulty as analyzing the word "major." "Although all words may be 'chameleons, which reflect the color of their environment,' 'significantly' has that quality more than most."[87] Judge Skelly Wright of the Court of Appeals for the District of Columbia believes that the permissible interpretations are intentionally broad. He maintains that they properly reflect "the Act's

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1972); Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1972); Sierra Club v. Volpe, 351 F. Supp. 1002 (N.D. Cal. 1972); Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1972); Stop H-3 Ass'n v. Volpe, 349 F. Supp. 1047 (D. Hawaii 1972); Lee v. Resor, 348 F. Supp. 389 (M.D. Fla. 1972); Conservation Soc'y of S. Vt., Inc. v. Volpe, 343 F. Supp. 761 (D. Vt. 1972); Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972); Businessmen Affected Severely by Yearly Action Plans, Inc. v. District of Columbia City Council, 339 F. Supp. 793 (D.D.C. 1972); City of N.Y. v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972); Sierra Club v. Sargent, 3 ENVIR. REP. 1905 (W.D. Wash., Mar. 16, 1972); Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971); Willamette Heights Neighborhood Ass'n v. Volpe, 334 F. Supp. 990 (D. Ore. 1971); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 331 F. Supp. 926 (D.D.C. 1971).

83. Kings County Economic Community Dev. Ass'n v. Hardin, 478 F.2d 478 (9th Cir. 1973); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973); Civic Improvement Comm. v. Volpe, 459 F.2d 957 (4th Cir. 1972); Jones v. District of Columbia Redev. Land Agency, 5 ENVIR. REP. 1139 (D.D.C., Mar. 7, 1973); Durnfurd v. Ruckelshaus, 5 ENVIR. REP. 1007 (N.D. Cal., Dec. 12, 1972); Kisner v. Butz, 350 F. Supp. 310 (N.D. W. Va. 1972); Maddox v. Bradley, 345 F. Supp. 1255 (N.D. Tex. 1972); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972); Morris v. TVA, 345 F. Supp. 321 (N.D. Ala. 1972); Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972); Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972); Echo Park Residents Comm. v. Romney, 3 ENVIR. REP. 1255 (C.D. Cal., May 11, 1971).

84. 484 F.2d at 163.

85. *Id.* at 163 n.7.

86. *Id.* at 163. This test is a traditional one indicating a significant effect on the environment.

87. Hanly v. Kleindienst, 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, J., dissenting) (footnote omitted).

attempt to promote an across-the-board adjustment in federal agency decision-making"[88] requiring that the quality of the environment be of concern to all federal agencies.[89] Two courts have specifically noted a "complete lack of Congressional or administrative guidelines"[90] to be used in interpreting the term "significantly." Proper definition of the term is therefore left entirely to the courts.[91] This approach seems perfectly justified because:

> [T]he bulk of the important questions in environmental cases call more for the talents and training of the courts and judges than for those of the administrative agencies and administrators. The basic reason is the very breadth of the questions, the requirement of balancing opposing economic and social interests. Such balancing and weighing require more art than science. There is no technical formula under which "the preservation of natural beauty and historic shrines" can be weighed against "the cost of a project."[92]

Concern must therefore be directed toward determining how courts, rather than agencies,[93] have defined "significantly." Congressional intent in passing NEPA assists in determining the limits of the word. Section 102 of the Act makes "exploration and consideration of environmental factors an integral part of the administrative decision-making process."[94] Moreover, it requires that the agencies "strive constantly to improve federal programs to preserve and enhance the environment."[95] President Nixon has

88. Scientist's Institute for Pub. Information v. AEC, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

89. *Id. See also* Davis v. Morton, 469 F.2d 593, 596 (10th Cir. 1973); Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164, 1174 (6th Cir. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971); Scherr v. Volpe, 336 F. Supp. 886, 889 (W.D. Wis. 1971).

90. First Nat'l Bank v. Richardson, 484 F.2d 1369, 1373 (7th Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972).

91. The function of the reviewing court is to determine de novo all relevant questions of law. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1972). *See also* K. DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 29.01 (1958).

92. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629 (1970) (footnotes omitted). *See also* Hardin v. Kentucky Util., 390 U.S. 1 (1968) & note 54 *supra.*

93. In Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), the Second Circuit disagreed with the government's contention that the procedural mandates of section 102(2)(C) applied only to actions found by the agency itself to have a significant environmental effect.

94. City of N.Y. v. United States, 337 F. Supp. 150, 160 (E.D.N.Y. 1972).

95. Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164, 1174 (6th Cir. 1972); *accord*, Monroe County Conservation Council v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972); Kalur v. Resor, 335 F. Supp. 1, 12 (D.D.C. 1971). *See also* Environmental Defense Fund,

said that NEPA requires the agencies to develop "measures to protect and enhance environmental quality."[96] Senator Henry Jackson, chairman of the Senate Interior Committee and chief proponent of the Act, stated:

> If an environmental policy is to become more than rhetoric . . . each of these agencies must be enabled and directed to participate in active and objective oriented environmental management. Concern for environmental quality must be made part of every phase of Federal action.[97]

Thus, the definition of "significantly" that one finally adopts must emphasize preservation of the environment as the paramount concern. It appears that if a major federal action *could* (as opposed to *would*) significantly affect the quality of the environment, NEPA demands preparation of an EIS.

In defining "significantly," the courts have attempted to establish a rule of law to meet all contingencies. These tests, however, are not subject to criticism like the tests for determining major federal action but rather are inherently flexible and require a case-by-case analysis. The Second and Seventh Circuits utilize a two-part test that considers: first, the extent to which the action by itself will cause adverse environmental effects in excess of those created by existing uses and second, the quantitative adverse effects of the act or project itself, including the cumulative harm that results from its contribution to existing adverse conditions.[98] The Court of Appeals for the District of Columbia has

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Inc. v. Corps of Eng'rs, 470 F.2d 289, 293-94 (8th Cir. 1972), in which the court said, "[I]n enacting NEPA Congress resolved that it will not allow federal agencies nor federal funds to be used in a predatory manner as far as the environment is concerned."

96. Exec. Order No. 11514, 3 C.F.R. 526 (1972). President Nixon has since stated that:

> Environmental concern must crystalize into permanent patterns of thought and action. What began as an environmental awakening must mature finally into a new and higher environmental way of life. If we flag in our dedication and will, the problems themselves will not go away.

Special Message to the Congress on Environmental Protection, 1972 U.S. CODE, CONG. & AD. NEWS 605 (Feb. 8, 1972).

97. 115 CONG. REC. 29087 (1st Sess. 1969). *See also*, Getty Oil Co. (Eastern Operations) v. Ruckelshaus, 342 F. Supp. 1006, 1021 (D. Del. 1972); Conservation Council v. Froehlke, 340 F. Supp. 222, 225 (M.D.N.C. 1972).

98. First Nat'l Bank v. Richardson, 484 F.2d 1369, 1373 (7th Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823, 830-31 (2d Cir. 1972). The second portion of the "two-part test" would appear to subsume the first. The courts are apparently concerned with both the absolute effect of the project itself and the cumulative effect of the project when considered in conjunction with other pre-existing uses. "One more factory polluting air and water

announced three criteria[99] to be utilized in reviewing any agency claim that an act or project is not significant—whether an agency took a "hard look" at the problem, whether the agency identified the relevant areas of environmental concern, and whether the agency made a convincing argument that the impact will be insignificant.

In addition to and independent of these judicially derived tests is the requirement, established by the Guidelines of the Council on Environmental Quality, that an EIS be prepared when the environmental impact of proposed major federal actions is likely to be "highly controversial."[100] While this phrase has not been the subject of extensive interpretation, there are opposing views of its actual meaning. In apparently the first judicial consideration of the phrase, the United States District Court for the District of Oregon applied a literal interpretation by quoting the Guidelines. It then stated that from the inception of the proposed activity opponents of the project had been petitioning governmental agencies "in the hope of convincing them that the building's construction would be a hazard to the environment."[101] According to the court, this vocal opposition sufficiently identified the project as "highly controversial."[102]

The Second Circuit, on the other hand, has adopted the view that:

> [T]he term "controversial" apparently refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action *rather than the existence of opposition to use*, the effect of which is relatively undisputed. . . . The suggestion that "controversial" must be equated with neighborhood opposition has [been rejected].[103]

In his dissent, Judge Friendly maintained that:

> [The CEQ Guidelines] provide that "if there is a potential that

in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel." *Id.* at 831.

99. Maryland - National Capital Park & Planning Comm. v. United States Postal Serv., No. 72-2126 (D.C. Cir., Aug. 23, 1973).

100. *See* para. 5(b) note 32 *supra.*

101. Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore. 1971).

102. *Id. See also* Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 787 (D. Me. 1972), in which the court noted the requirement of an EIS in "controversial" situations but failed to apply this standard in deciding the case.

103. Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972) (emphasis added). *See also* Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 787 (D. Me. 1971).

> the environment may be significantly affected," the statement is to be prepared.
>
> . . . .
>
> I see no basis for reading this as limited to cases where there is a dispute over what the environmental effects actually will be. Rather I would think it clear that this includes action which the agency should know is likely to arouse intense opposition, even if the actual environmental impact is readily apparent.[104]

The Court of Appeals for the Fifth Circuit has taken the view that the Council on Environmental Quality Guidelines are merely advisory because the Council lacks the authority to prescribe regulations governing compliance with NEPA.[105] In accord with this view, unless the "highly controversial" language of the Guidelines is incorporated into the regulations of the agency, this requirement of the Council will not be enforceable in court.[106]

The Fifth Circuit view seems to be preferable to that of the Second Circuit. The only "action-forcing" provision of NEPA speaks in terms of "actions significantly affecting the . . . environment."[107] It is difficult to see how the phrase "highly controversial" fits into the Second Circuit's own test of "significantly affecting the environment."[108] If the phrase "highly controversial" cannot be so categorized, the only way that it can force an agency to act is if the agency itself has adopted "action-forcing" regulations containg such language.

If an agency has included "highly controversial" in its regulations, the majority view of the Second Circuit seems preferable to that of Judge Friendly, who would allow the decision whether to require an EIS to depend upon the visibility of environmentalists' objections. The majority pointed out that to have held as Judge Friendly suggested would have surrendered "the determination [of whether an EIS was required] to opponents of a major federal action, no matter how insignificant its environmental effect when viewed objectively."[109]

Whether the reviewing court utilizes the test of the Second and Seventh Circuits or that of the District of Columbia Circuit,

104. Hanly v. Kleindienst, 471 F.2d 823, 838-39 (2d Cir. 1972) (Friendly, J., dissenting) (emphasis in original).

105. Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973).

106. *Id.* at 426.

107. NEPA, § 102(2)(C); *see* note 16 *supra.*

108. *See* text accompanying note 98 *supra.*

109. Hanly v. Kleindienst, 471 F.2d 823, 830 n.9A (2d Cir. 1972).

the test must be applied in a manner which will permit flexibility in the analysis of future cases. The word "significantly" can, after all, be interpreted to mean anything from " 'not trivial' through 'appreciable' to 'important' and even 'momentous.' "[110]

NEPA's objectives are to declare "a national policy which will encourage . . . harmony between man and environment [and] to promote efforts which will prevent or eliminate damage to the environment."[111] It is therefore inconceivable that Congress intended to allow agencies to escape the provisions of section 102 of the Act by interpreting "significant" to mean nothing other than "important" through "momentous." One of the purposes of the EIS "is to insure that the relevant environmental data are before the agency and *considered by it prior to the decision to commit federal resources to the project.*"[112] If an agency could escape the procedural requirements of NEPA by categorizing an action as "not momentous" and therefore "not significant," it would fail to supply that environmental data which Congress, in enacting NEPA, had contemplated would be made available. This procedure would force Congress, in deciding whether to commit federal resources, to balance projected benefits of a proposed project against unknown amounts of environmental degradation. Excluding from consideration those projects that have an "appreciable" effect would contravene the intent of the Act. This inexcusable result can be avoided only if "significant" is interpreted to mean " 'not trivial' through 'appreciable.' "[113]

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110. *Id.* at 837.

111. NEPA, § 101(a) provides as follows:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

112. Hanly v. Kleindienst, 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, J., dissenting) (emphasis added).

113. *Id.* Of course, actions with only trivial effect would not require preparation of an EIS. Use of the term "significant" excludes some actions with minor effect; *cf.* note 78 *supra.*

The test established by the Court of Appeals for the District of Columbia[114] provides an excellent method of identifying those actions which do significantly affect the quality of the environment. The court must first question whether the agency took a "hard look" at the problem.[115] Did the federal officials carry out "the mandate of Congress to accord a high priority to environmental factors"?[116] Did the balancing by the agency give insufficient weight to the environmental values expressed in the Act?[117] Was the agency's decision consistent with a good faith weighing of the environmental impact of the project?[118]

After answering these questions, the court should consider whether the *agency* identified the relevant areas of environmental concern in making its determination. For projects in urban areas, the court might require that the agency consider such things as population distribution, sewer facilities, traffic, community support facilities, air and water pollution, drainage, aesthetics and noise.[119] For rural projects, the court could require consideration of wilderness values, fish and wildlife distribution and density, migratory patterns, plant life, timber regeneration time, air and

114. *See* text accompanying note 99 *supra.*

115. Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 410 (W.D. Va. 1973), *aff'd*, 484 F.2d 453 (4th Cir. 1973); National Helium Corp. v. Morton, 361 F. Supp. 78, 94 (D. Kan. 1973). The question of who has the burden of proving whether or not the agency has considered these factors is currently unsettled. The courts which place the burden on the plaintiff do so partially because of the enormous dollar cost of an EIS but primarily because the procedure is time-consuming both in man-hours needed to prepare a report and in time lost at the beginning of projects. Howard v. EPA, 4 ENVIR. REP. 1731 (W.D. Va., Sept. 14, 1972). The opposing view places the burden on the agency after the plaintiff makes a prima facie showing of non-compliance with NEPA. First Nat'l Bank v. Watson, 363 F. Supp. 466 (D.D.C. 1973); Sierra Club v. Froehlke, 359 F. Supp. 1289 (E.D. Tex. 1973). It is the agency, not the plaintiff, that is charged with the protection of the environment. Since virtually all of the record is produced by the agency, the better view would seemingly place the burden on the agency. The very nature of the problem "is so extensive that if the burden were placed wholly on citizen plaintiffs, the full disclosure requirements of NEPA would never be implemented satisfactorily . . . ." 359 F. Supp. at 1335.

116. Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164, 1175 (6th Cir. 1972).

117. Environmental Defense Fund, Inc. v. TVA, 5 ENVIR. REP. 1183 (E.D. Tenn., Mar. 21, 1973).

118. Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973).

119. Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 426 (5th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973); McLean Gardens v. National Capital Planning Comm., 4 ENVIR. REP. 1708 (D.D.C., Oct. 21, 1972); Town of Groton v. Laird, 353 F. Supp. 344, 349 (D. Conn. 1972); Maryland - National Capital Park & Planning Comm. v. United States Postal Serv., 349 F. Supp. 1212, 1214 (D.D.C 1972); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore. 1971).

water pollution, soil degradation and aesthetics.[120] For suburban areas, the court could utilize a combination of factors; the flexibility of the test allows consideration of the environmental characteristics which are important in the particular case.

Finally, the court should consider whether the agency made a convincing argument that the impact was not significant.[121] The court could here apply a standard varying from "could be not trivial" to "could be appreciable," again depending upon the nature of the threatened environmental degradation balanced against the values of the proposed project. Such an approach would retain the necessary flexibility.

Observation of the functioning of NEPA leads one to question the actual effectiveness of the Act and its highly expensive EIS. The authors of two early law review articles questioned the real effectiveness of the Act,[122] and time may have justified their fears. Consider the following statement made by Senator Jackson in 1969:

> The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life. It touches every aspect of man's existence. It threatens, it degrades, and destroys the quality of life which all men seek.
>
> We see increasing evidence of this inadequacy all around

120. Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 367 (E.D.N.C. 1972).

121. The following cases give examples of *significant actions*: Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972); National Helium Corp. v. Morton, 361 F. Supp. 78 (D. Kan. 1973); McLean Gardens v. National Capital Planning Comm'n, 4 ENVIR. REP. 1708 (D.D.C., Oct. 21, 1972); Billings v. Camp, 4 ENVIR. REP. 1744 (D.D.C., Oct. 4, 1972); Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1972); Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1972); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972); Businessmen Affected Severely by Yearly Action Plans, Inc. v. District of Columbia City Council, 339 F. Supp. 793 (D.D.C. 1972); City of N.Y. v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971). The following cases give examples of *non-significant actions*: Kings County Economic Community Dev. Ass'n v. Hardin, 478 F.2d 478 (9th Cir. 1973); Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973); First Nat'l Bank v. Watson, 363 F. Supp. 466 (D.D.C. 1973); Durnfurd v. Ruckelshaus, 5 ENVIR. REP. 1007 (N.D. Cal., Dec. 12, 1972); Town of Groton v. Laird, 353 F. Supp. 344 (D. Conn. 1972); Kisner v. Butz, 350 F. Supp. 310 (N.D. W. Va. 1972); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 348 F. Supp. 916 (N.D. Miss. 1972).

122. Note, *NEPA, Full of Sound and Fury . . . ?*, 6 U. RICH. L. REV. 116 (1971); Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 BROOKLYN L. REV. 139 (1970).

> us: hap-hazard urban and suburban growth; crowding, congestion, and conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being; the loss of valuable open spaces; inconsistent and, often, incoherent rural and urban land-use policies; critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species; faltering and poorly designed transportation systems; poor architectural design and ugliness in public and private structures; rising levels of noise; the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards; growing scarcity of essential resources; and many, many other environmental quality problems.[123]

In the four and one half years since this statement was made, there seems to have been little environmental improvement.[124] By placing the responsibility for environmental protection on existing agencies, Congress has probably asked for the impossible. As was recently noted in *Developments in Environmental Law:*

> [F]or the most part the agencies which must do the "full good faith" balancing of economic and social costs against environmental costs are generally structured to be advocates for economic expansion. As long as agencies are left to do the balancing, and so long as they have a dual mandate of environmental protection and economic development in their particular field—for example, power growth for the FPC, nuclear development for the AEC, or flood containment for the Army Corps of Engineers—is not the environment *bound* to come out on the short end?[125]

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123. 115 CONG. REC. S12125 (daily ed. Oct. 8, 1969).

124. It must be remembered that NEPA was passed in recognition of the increasing pressures on the environment:

> The inadequacy of present knowledge, policies, and institutions is reflected in our nation's history, in our national attitudes, and in our contemporary life. . . . We no longer have the margins for error that we enjoyed. The ultimate issue posed by shortsighted, conflicting and selfish demands and pressures upon the finite resources of the earth are [*sic*] clear.

S. REP. No. 91-296, 91st Cong., 1st Sess. 4 (1969).

125. *Developments in Environmental Law*, 3 ENVIR. L. REP. 50001, 50008 (1973) (emphasis in original).

It is always the responsibility of the reviewing court to insure that the goals of NEPA are not avoided by threshold agency determinations that an EIS is not needed. The courts must demand a statement by a responsible agency official delineating why no EIS has been prepared. If no such statement is forthcoming, the court should preliminarily enjoin the proposed project. Only in this manner can the court accurately determine whether a proposed agency action is a major federal action significantly affecting the environment and thereby subject to the procedural controls of NEPA.

RICHARD B. CAMPBELL

INSURANCE—ACCIDENTAL DEATH—A PROVISION LIMITING RECOVERY OF ACCIDENTAL DEATH BENEFITS TO AN OCCURRENCE OF DEATH WITHIN NINETY DAYS OF THE ACCIDENT IS CONTRARY TO PUBLIC POLICY AND UNENFORCEABLE. *Burne v. Franklin Life Insurance Co.*, 451 Pa. 218, 301 A.2d 799 (1973).

Appellant brought an action for the recovery of double indemnity, accidental death benefits under a life insurance policy[1] issued to her husband by appellee insurance company. While the policy was in effect, the insured sustained serious injuries which rendered him an invalid from the moment of his accident. The utilization of sophisticated and expensive medical techniques, however, kept the insured alive in a comatose state for 4½ years. The insurance company paid the face amount of the policy but refused to pay the accidental death benefits. The court of common pleas granted the insurance company's motion for summary judgment on the basis that the insured's death had not occurred within ninety days of the accident and therefore did not meet the time limitation expressed in the double indemnity provision.[2] On appeal, the Supreme Court of Pennsylvania reversed the lower court, with directions that summary judgment be entered for appellant.[3] A policy provision limiting payment of accidental

1. The policy, naming appellant as beneficiary, was in the amount of $15,000 and also contained a double indemnity provision for an additional $15,000 if the death of the insured resulted from purely accidental means. Burne v. Franklin Life Ins. Co., 451 Pa. 218, 220, 301 A.2d 799, 800 (1973).

2. *Id.* at 221, 301 A.2d at 801. The policy stated that accidental death benefits would be payable only if "death occurred . . . within ninety days from the date of the accident." *Id.*

The grant of summary judgment was based also on the following exception in the policy: "This Accidental Death Benefit shall not be payable * * * (10) if the death of the insured shall occur while any premium is being waived under any disability benefit attached to or incorporated in said policy." *Id.*

3. *Id.* at 227, 301 A.2d at 804. The supreme court reversed the lower court's enforcement of both the time-limitation provision and the waiver-of-premium exception. *See* note 2 *supra*. The supreme court said the waiver-of-premium exception was invalid because it contravened public policy and created an "obvious ambiguity" when read in conjunction with the entire waiver-of-premium supplement. *Id.* at 226, 301 A.2d at 803-04. The *Burne* dissent criticized this portion of the majority's holding and claimed that whatever ambiguity existed in the waiver-of-premium exception was manufactured by the court. *Id.* at 240-41, 301 A.2d at 810-11. Although the dissent might have a valid claim, the majority's finding of ambiguity in an actually unambiguous policy term is a traditional technique of judicial construction employed to avoid the harsh results to the insured of the operation of the clause. *See*, Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis*, 5 AKRON L. REV. 1, 6 (1972). *See also* pp. 159-60 *infra*. Since *Burne*'s approach to the question of the validity of the waiver-of-premium clause is not a novel one, this paper will not treat it.

death benefits to an occurrence of death within ninety days of the accident is unenforceable on grounds of public policy and is not applicable when there is no dispute about cause of death.[4]

Until *Burne v. Franklin Life Insurance Co.*,[5] judicial construction of time-limitation clauses in accidental death insurance policies had been characterized by strict application of general contract law.[6] One of the earliest accident-insurance cases to be decided in the United States, *Perry v. Provident Life Insurance & Investment Co.*,[7] involved a claim for accidental death benefits under a policy limiting recovery to an occurrence of death within ninety days of the accident. Since the insured's death had occurred just beyond the ninety-day period,[8] no computation of time could bring the death within the coverage of the policy. The court noted "the loss in this case came very near being within the terms of the policy,"[9] but it did not attempt to avoid the harsh results of an application of general contract principles. In reject-

4. The dissent also argued that the majority's decision regarding the time-limitation clause suffered from an ambiguity:

> Is the reader to understand (1) that *all* 90-day provisions in accidental death benefit endorsements are invalid as violative of public policy, or (2) only those found in policies owned by insureds who in fact die outside 90 days but without "some possible uncertainty" as to causation?

451 Pa. at 234, 301 A.2d at 807.

Although the majority's holding might have been clearer, the majority did not say it was striking the time-limitation clause in all situations but only in the case in which there is no dispute that the cause of death was accidental. The import of the decision, however, is effectively to eliminate an insurance company's use of the time-limitation clause to limit its liability.

5. 451 Pa. 218, 301 A.2d 799 (1973).

6. The prevailing view regarding insurance policy terms in general is that they should be construed as any other contractual term to give full effect to the intention of the parties if that intention is not contrary to public policy. *See* Kingman v. Nationwide Mut. Ins. Co., 243 S.C. 405, 411, 134 S.E.2d 217, 220 (1964); 13 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 7381, at 1 (1943); W. VANCE, HANDBOOK ON THE LAW OF INSURANCE § 136, at 808 (3d ed. 1951). It is also generally accepted that insurers have the right to limit their liabilities and to impose whatever conditions they please on their obligations, provided they are not in contravention of some statutory provision or public policy. *See* Rhame v. National Grange Mut. Ins. Co., 238 S.C. 539, 544, 121 S.E.2d 94, 96-97 (1961). A few decisions, on the other hand, have indicated a different rule of construction should apply to insurance policies from that which applies to ordinary contracts. *E.g.*, Wilson v. Commercial Union Assurance Co., 90 Vt. 105, 109-10, 96 A. 540, 542 (1916). The special nature of insurance contracts, however, has not compelled the courts to apply a different rule of construction to time-limitation clauses. *See* p. 151 *infra*.

7. 99 Mass. 162 (1868).

8. The insured had been injured on December 11, 1866, at 9:00 A.M. and had died ninety-one days later on March 12, 1867, at 9:00 A.M. The court counted the date of the accident in its computation. *Id.* at 163.

9. *Id.* at 164

ing the beneficiary's claim that enforcing the time-limitation provision would violate the "general object and tenor of the policy,"[10] the court implied that the operation of the contract had fulfilled the parties' expectations.

Since the *Perry* decision in 1868, all reported American decisions involving a similar question have upheld the validity of the time-limitation clause.[11] It has been upheld against claims that it was unfair to the insured,[12] unreasonable,[13] contradictory to the main policy provision,[14] and contrary to public policy.[15] Most decisions have denied recovery to the beneficiary because the beneficiary failed to state a cause of action, without an examination of the validity of the provision.[16]

10. *Id.* at 163. The same court in a later decision avoided the harsh result of a strict application of contract principles in the construction of another provision within the same policy. The provision provided for weekly disability payments for accidental injuries that were not fatal. Construing that provision together with the accidental death provision, the court concluded: "[T]he evident intent is that, if any injury happens within the meaning of the policy, it is insured against or coming within one class or the other." Perry v. Provident Life Ins. & Inv. Co., 103 Mass. 242, 243 (1869). On this basis the court awarded the beneficiary the disability payments before the insured's death.

The second *Perry* decision is an example of the accident-insurance cases in which the courts have wavered from the rule that ordinary contract principles govern the operation of insurance policies. *See* Hudson, *Insuring and Exclusion Clauses in Individual, Accident and Health Policies*, 1958 INS. L.J. 135. In the early years of accident-insurance policies, courts tended to consider "as accidental or an accident anything that could be fitted within the dictionary definitions of these two words." *Id.* at 145. In the view of some commentators, the courts' tendency to avoid the harsh results of a strict application of contract law brought about a warping of general contract principles when applied to accident-insurance policies. *See, e.g.*, Note, *Problems Created by the Purchaser's Inability to Bargain Over Life Insurance*, 29 IND. L.J. 635, 639 (1953-54). Accident-insurance cases involving time-limitation clauses, however, have not been characterized by a departure from a strict application of contract principles. The time-limitation provision apparently has been an effective shield for the insurance companies in their rivalry with the courts that have sought to extend their liability in accident-insurance cases. *See* VANCE, *supra* note 6, § 180, at 944.

11. *See* Annot., 39 A.L.R.3d 131 (1971), which collects cases involving a question of the validity of provisions in accident policies limiting payment of benefits for death and other losses to those losses that occur within a specified time from the date of the accident. There are no reported South Carolina decisions involving the validity of the time-limitation clause.

12. Brown v. United States Cas. Co., 95 F. 975 (C.C.N.D. Cal. 1899).

13. Clarke v. Illinois Commercial Men's Ass'n, 180 Ill. App. 300 (1913).

14. Alamo Health & Accident Ins. Co. v. Cardwell, 67 S.W.2d 337 (Tex. Civ. App. 1934).

15. Bennett v. Life & Cas. Ins. Co., 60 Ga. App. 228, 3 S.E.2d 794 (1939); Mullins v. National Cas. Co., 273 Ky. 686, 117 S.W.2d 928 (1938); Douglas v. Southwestern Life Ins. Co., 374 S.W.2d 788 (Tex. Civ. App. 1964).

16. *E.g.*, Orill v. Prudential Life Ins. Co. of America, 44 F. Supp. 902 (N.D. Cal. 1942); Randall v. State Mut. Ins. Co., 112 Ga. App. 268, 145 S.E.2d 41 (1965); Thompson

In all the decisions, the claims of the beneficiaries have been defeated by the familiar principle of freedom of contract.[17] The courts have relied upon the premise that an insurance policy is a voluntary contract into which the parties freely entered, and therefore the unambiguous contract terms should bind them both.[18] Perhaps the harshest result of the application of the voluntary contract concept was reached in *Mullins v. National Casualty Co.*[19] In that case, the insured died just five hours beyond the expiration of the thirty-day period, and for the last twenty-four hours before his death he had been practically pulseless. The doctor testified that, from the moment of the accident, the insured never had a chance to recover and the herculean medical efforts made had merely prolonged his life. Despite the oppressive operation of the thirty-day provision, the court denied the beneficiary recovery of the accidental death benefits.[20] Thus, equitable considerations, even when they seem to be overwhelming, have been insufficient to overcome time-limitation contractual provisions.

Although the beneficiaries in some cases have raised claims that the time-limitation clauses were unreasonable or unfair,[21] the courts did not address the issue of whether the insurance policies under examination might be considered "contracts of adhesion."[22] The special nature of insurance policies which might

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v. Iowa State Traveling Men's Ass'n, 179 Iowa 603, 161 N.W. 655 (1917). *Orill* raised the issue of pre-existing disease, and *Thompson* involved a question of whether the accident caused the death-resulting disease. In both cases, however, the time-limitation clause was the primary basis for the denial of the beneficiaries' claims.

17. *E.g.*, Douglas v. Southwestern Life Ins. Co., 374 S.W.2d 788 (Tex. Civ. App. 1964). This decision, one of the latest to uphold the validity of the time-limitation clause, invoked the principle.

18. Brown v. United States Cas. Co., 95 F. 935, 936 (C.C.N.D. Cal. 1899).

19. 273 Ky. 686, 117 S.W.2d 928 (1938).

20. The court said:

> [W]ith all the liberality to be indulged in favor of the person insured, it must not be forgotten that the parties to an insurance contract have the right and the power to contract what accidents and risks shall be covered by it and what shall not be, and that the courts may not make a new or different contract for the parties at the instance of one of them.

Id. at 690, 117 S.W.2d at 931.

21. Cases cited notes 12-13 *supra.*

22. The term "contract of adhesion" was first used in reference to American insurance contracts. *See* Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198 (1919). "[F]reedom of contract rarely exists . . . . Life-insurance contracts are contracts of 'adhesion.' The contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms." *Id.* at 222.

identify them as contracts of adhesion has always been apparent.[23] Because of the unequal bargaining position between the insurer and the insured, the policy terms are generally not subject to negotiation. If the insured in *Mullins*,[24] for example, wished protection, he had to "adhere" to the terms stipulated by the insurance company.[25] Even if the bargaining position of the parties had been equal, the insured probably did not have the ability to understand the complex policy provisions and thus had no knowledge of the extent of his protection.[26]

Nevertheless, the tendency of the courts has been to ignore the adhesion argument and to hold the insured bound to the terms of the policy, even when he has not read the policy.[27] The adhesion argument has not prevailed because the courts have seen a purpose behind the clause, leading them to conclude it was a "reasonable provision."[28] In *Brown v. United States Casualty Co.*,[29] the court assumed that the insurance company had adopted the terms best suited to the parties. In an attempt to justify its faith in the good judgment of the insurer, the court said the assumption was supported by considerations of necessity and fairness.[30] The provision was necessary because the insurer had no other way to establish the premium than to limit its liability to a stated time period; it was fair because statistics and experience proved that the final result of an accident would show itself within ninety days of the injury.[31] The court concluded that, al-

23. The time-limitation clause examined by the court in Brown v. United States Cas. Co., 95 F. 935 (C.C.N.D. Cal. 1899), was part of a standardized policy. Thus, even the earliest insurance policies had this element of adhesion.

24. 273 Ky. 686, 117 S.W.2d 928 (1938).

25. *See* Note, *supra* note 10.

26. *Id.*

27. *See* 1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 15:25, at 687-88 (2d ed. 1959). In the words of Justice Holmes: "No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party." Lumber Underwriters v. Rife, 237 U.S. 605, 609 (1915).

28. Commentators have pointed out another reason. The use of an adhesion analysis to defeat insurance contractual provisions, the operation of which might produce harsh results, ignores extensive public control over insurance companies. In most states, there have for many years been statutory provisions specifying certain insurance policy clauses and prohibiting others. Furthermore, state insurance commissioners long have had control over what language may be used in a policy. *See* KRUEGER & WAGGONER, THE LIFE INSURANCE POLICY CONTRACT 79 (1953); Kessler, *Forces Shaping the Insurance Contract*, 1954 IND. L.J. 151.

29. 95 F. 935 (C.C.N.D. Cal. 1899).

30. *Id.* at 937.

31. The court, however, offered no evidence supporting these two conclusions.

though the time-limitation provision might operate harshly in individual cases, "it must be regarded in the same manner as the fundamental principles of government, seeking the greatest good to the greatest number."[32]

Other courts examining the purpose behind the clause have viewed insurance companies more objectively but still have reached the same result as in *Brown*.[33] In *McKinney v. General Accident Fire & Life Assurance Co.*,[34] the court said that a stated period limiting recovery of accidental death benefits was necessary to delineate between deaths caused by accident independently of all other causes and deaths caused by disease. The arbitrariness of the time period was justified by the difficulty of the insurer's showing that a death, claimed to be accidental but actually caused by disease, did not result from the accident.[35] In *Clarke v. Illinois Men's Association*,[36] the court employed similar reasoning to conclude that a time limitation was consistent with the right and duty of the insurance association to protect itself and its members against unjust claims.[37] The *Mullins*[38] court cited *McKinney*'s reasoning concerning the purpose behind the clause and rejected the beneficiary's claim that the time of death was not the essence of the policy.

Recent advances in medical technology have enabled physicians to determine the cause of death with certainty. Apart from the *Burne* decision, however, the most recent cases still have noted the purpose behind the time-limitation clause of delineating purely accidental deaths.[39] In cases in which there was no dispute that the sole cause of death was the accident, one would expect the courts to rely solely on the freedom-of-contract princi-

32. Brown v. United States Cas. Co., 95 F. 935, 937 (C.C.N.D. Cal. 1899).

33. Cases cited notes 34, 36 & 38 *infra*.

34. 211 F. 951 (8th Cir. 1914). The insurance provision under examination in *McKinney* stipulated that, if the accident was not followed by immediate and total disability until the moment of the insured's death, the insurer's liability would be limited to accidental death occurring within ninety days of the accident.

35. The court said: "It is not difficult to prove by the mistaken opinions of witnesses that a death which occurs more than 90 days after an accident . . . was caused by that accident independent of all other causes, even when the truth is that it was caused by disease alone . . . ." *Id.* at 952.

36. 180 Ill. App. 300 (1913).

37. *Id.* at 303.

38. 273 Ky. 686, 688, 177 S.W.2d 928, 929-30 (1938). *See also* Contois v. State Mut. Life Assurance Co., 156 F.2d 44 (7th Cir. 1946), *aff'g* 66 F. Supp. 76 (N.D. Ill. 1945).

39. *E.g.*, Douglas v. Southwestern Life Ins. Co., 374 S.W.2d 788 (Tex. Civ. App. 1964).

ple to uphold the validity of the provision. Even in those cases,[40] however, the courts have affirmed the validity of the clause by citing its purpose as established in the early twentieth century decisions.[41]

In some decisions,[42] beneficiaries have claimed that, apart from its arbitrariness, a time-limitation clause violates public policy in another respect. The beneficiaries apparently attempted to bring the provision within the class of contractual terms which tend to "endanger the public interests or injuriously affect the public good and which are subversive of sound morality . . . ."[43] If the provision were brought within that class, it might be held unenforceable. The issue of a public policy violation appears to have been raised first in *Mullins*.[44] The beneficiary argued that the time-limitation clause allowed the insurance company to profit from the extraordinary efforts made to save the insured's life. The court acknowledged that the contention presented an "appealing situation" but disposed of it by affirming the provision's reasonable purpose without discussing the implications of the beneficiary's argument.[45] In several other cases,[46] the beneficiaries asserted that the requirement of death within a certain time period violated public policy because it tended to encourage the beneficiary to deny the insured medical treatment. As in *Mullins*, the courts in those cases rejected the argument as unsound without setting forth any basis for that conclusion.[47]

Burne offers a striking contrast to the long line of decisions in other jurisdictions upholding the validity of the time-limitation clause. While those decisions avoided treatment of

40. Bennett v. Life & Cas. Ins. Co., 60 Ga. App. 228, 3 S.E.2d 794 (1939); Mullins v. National Cas. Co., 273 Ky. 686, 117 S.W.2d 928 (1938); Douglas v. Southwestern Life Ins. Co., 374 S.W.2d 788 (Tex. Civ. App. 1964).

41. *See* p. 152 & note 35 *supra*.

42. Weickselbaum v. Commercial Travelers Mut. Accident Ass'n of America, 129 N.Y.S.2d 612 (Sup. Ct. 1954), *aff'd*, 284 App. Div. 987, 136 N.Y.S.2d 366 (1954); Douglas v. Southwestern Life Ins. Co., 374 S.W.2d 788 (Tex. Civ. App. 1964).

43. *E.g.*, Ritter v. Mutual Life Ins. Co., 169 U.S. 139, 154 (1898) (Harlan, J.).

44. 273 Ky. 686, 117 S.W.2d 928 (1938).

45. *Id.* at 688, 117 S.W.2d at 929-30.

46. Bennett v. Life & Cas. Ins. Co., 60 Ga. App. 228, 3 S.E.2d 794 (1939); Douglas v. Southwestern Life Ins. Co., 374 S.W.2d 788 (Tex. Civ. App. 1964).

47. In Bennett v. Life & Cas. Ins. Co., 60 Ga. App. 228, 3 S.E.2d 794, 795 (1939), the court stated, "[T]he policy by reason of this clause is not a wagering policy." The decision does not explain why that conclusion was reached. *See* p. 157 *supra*, for a discussion of why a wagering analysis might be an inappropriate approach to the question of the validity of the time-limitation clause.

public policy considerations altogether, *Burne* presents several public policy arguments for invalidating the provisions.[48] The *Burne* court, however, made no distinction among the different considerations; rather, the "public policy reasons" merged indistinguishably in the opinion. Such an approach would not be subject to criticism if the issues raised by each distinct public policy argument applied to all. Because each policy argument raises different issues, one must examine the arguments individually to determine the validity of the court's conclusions.

Apparently, the beneficiary in *Burne*, like the one in a 1964 Texas case,[49] made the claim that the effect of the ninety-day clause was to encourage the beneficiary to deny the accident victim maximum medical care. Unlike the earlier decision, however, *Burne* directly confronted that implication of the provision. The court pointed to the significant advances made in medical technology since the ninety-day provision first appeared in accident-insurance policies.[50] Modern medical technology often makes it possible to prolong life indefinitely, if only at its most basic level. Thus, the physician and the family of an accident victim have the burden of deciding when life must be terminated in a hopeless case. The court determined that the decision of whether or not to disconnect the life-sustaining devices should not be hampered by the prospect that prolonging the insured's life would mean the forfeiture of accidental death benefits.

Thus, grave, ethical issues, which might arise in a situation in which the insured is critically injured in an accident, led the court to conclude the ninety-day provision violated public policy.[51] The grave issues to which the court referred were those concerning euthanasia. The court commented in a footnote that the purpose of its opinion was "not to introduce this controversy into the area of life insurance policies but to forestall it."[52]

Understandably, the *Burne* court would want to avoid a dis-

48. *Id.* at 221-23, 301 A.2d at 801-02. It is difficult to pinpoint the public policies the *Burne* court thought were violated because the decision does not discuss them individually. As has been suggested below, the violations which the court had in mind might have been defects analogous to the introduction of wager into the insurance policy and the unconscionability of the clause. *See* pp. 159-60 *infra*.

49. Douglas v. Southwestern Life Ins. Co., 374 S.W:2d 788 (Tex. Civ. App. 1964). *See also* p. 153 & note 47 *supra*.

50. 451 Pa. at 221-22, 301 A.2d at 801-02.

51. *Id.* at 222, 301 A.2d at 801.

52. *Id.* n.3.

cussion of euthanasia, which raises controversial legal issues and presents moral and ethical questions beyond the ordinary competence of a court. Even if it were settled that turning off the respirator in a hopeless case is an act of euthanasia, the question of criminal liability of the doctor and the family of the accident victim still remains.[53] Apart from those unsettled questions, an additional consideration arises in the insurance context of the *Burne* case—whether the act amounts to an intervening cause, bringing the death within the exclusions of the accidental death policy. The intervening cause problem is tied inextricably to the unsettled issues surrounding euthanasia.[54] Thus, in skirting the issue of euthanasia, the *Burne* court omitted reference to the issue of intervening cause.

Besides an avowed purpose to forestall the introduction of the controversy of euthanasia into insurance law, other considerations led the *Burne* court to invalidate the time-limitation provision. However, as mentioned above, the other public policy considerations merged indistinguishably in the opinion. Because of the court's approach, one can only speculate about what specific public policy considerations actually entered into the court's deliberations. At any rate, it is submitted that the policy considerations discussed in the remaining portion of this article could have been considered by the court.

The argument that the effect of the operation of the ninety-day provision was to introduce the element of wager into the insurance policy[55] could have entered into the court's reasoning.

53. No common law court has ever convicted a doctor for turning off the respirator sustaining the life of a suffering terminal patient. Likewise, there apparently have been no instances in which a family member has been tried and convicted for authorizing such an act. Nevertheless, the legal consequences for both the physician and the family member conceivably could be prosecution and conviction for murder. There have been proposals for the legalization of certain forms of euthanasia, one of which is classifying the act of shutting off the respirator as an act of omission rather than of commission. However, none of the proposals has received any acceptance in the courts. Fletcher, *Prolonging Life*, 42 WASH. L. REV. 999 (1967). *See also Symposium—The Medical, Moral and Legal Implications of Recent Medical Advances*, 13 VILL. L. REV. 732 (1968), for discussion of the ethical and scientific issues as well as the legal problems surrounding euthanasia.

54. If the insured were already "technically" dead when the plug of the respirator was pulled, then perhaps the act would not be an intervening cause. However, the medical or technical definition of death might not be the legal definition.

55. According to Professor Corbin: "[E]very insurance contract is aleatory in character performable upon an uncertain event, and is one in which one of the parties will get something for nothing. The reason that it is not a wager is that it is a contract for the transfer of an existing risk and is not one that creates a wholly new risk." 6A A. CORBIN, CONTRACTS § 1482, at 642-43 (1962).

Courts generally require that the owner or beneficiary of a life insurance policy have an insurable interest,[56] arising out of the relationship of the policy owner or beneficiary with the insured.[57] If the requisite insurable interest is lacking, the insurance policy may be declared "void as a wagering contract against public policy, which condemns gambling speculation upon human life."[58] The policy against wagering insurance contracts is based on the possibility that the beneficiary will be motivated to bring about the insured contingent, the death of the insured.[59] It is generally recognized that a wife has an insurable interest in the life of her husband, based on both a financial and personal relationship.[60] Nonetheless, it could be argued that in *Burne* the wife's insurable interest in her husband, based on the financial relationship, was eliminated by the operation of the time-limitation clause. Because the condition of the insured was hopeless anyway, the prospect of forfeiting the double indemnity benefits could have been enough of an inducement to the beneficiary to deny the insured maximum medical care and thereby cut short his life.[61]

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56. *See generally* 1 G. RICHARDS, LAW OF INSURANCE §§ 92-102, at 369-406 (5th ed. W. Freedman 1952). It is not in every situation that the beneficiary will be required to have an insurable interest. Nevertheless, the same policy reasons underlying the requirement that the policy owner have an insurable interest also support a like requirement for the beneficiary in most situations. *But see* p. 157 & note 63 *infra*.

57. An insurable interest in life insurance exists in two different types of relationships: (1) a financial relationship (a wife's procuring of life insurance on her husband to guard against financial loss in the event of his death) and (2) a relationship based on some societal or familial ties, such as husband and wife. Vukowich, *Insurable Interest: When It Must Exist in Property and Life Insurance*, 7 WILLAMETTE L.J. 1, 5 (1971).

58. Crosswell v. Connecticut Indemnity Ass'n, 51 S.C. 103, 105, 28 S.E. 200, 201 (1897). "Gambling or wagering of any kind, particularly in the guise of an aleatory contract like insurance, is deemed to be contrary to good morals and conducive to harmful and economic consequences." RICHARDS, *supra* note 56, § 65, at 329.

59. Vukowich, *supra* note 57, at 8. Also, since wagering often causes the wagerer to effect unnaturally the occurrence of the insured event, it can be argued that it leads to dishonesty or stealth. *Id.*

60. *E.g.*, Crosswell v. Connecticut Indemnity Ass'n, 51 S.C. 103, 110, 28 S.E. 200, 203 (1897); *cf.* Ramey v. Carolina Life Ins. Co., 244 S.C. 16, 20-21, 135 S.E.2d 362, 364 (1964), in which the wife's insurable interest in her husband was denied by the court because she took out the policy on his life without his consent.

61. The beneficiary would probably make the following argument to show how the operation of the time-limitation clause denies an insurable interest in a situation in which the insured is certain to die of accidental injuries: The beneficiary still has a familial relation to the insured. However, the financial interest in the insured's continued existence no longer exists. Not only are the medical expenses to keep the insured alive overwhelming, but the continued costly medical care will result in the forfeiture of the double indemnity benefits. Since the insured is suffering hopelessly, is unaware of anything around him, and is certain to die even with the extraordinary medical techniques em-

The *Burne* court, however, avoided mention of the terms "wager" and "insurable interest." In addition to the absence of reference to wager in the opinion, the settled law concerning life insurance leads one to conclude that the *Burne* court did not view the provision as a wagering clause.[62] The general rule is that everyone has an insurable interest in his own life; one can obtain valid insurance on his own life and make it payable to whomever he wishes, even if the beneficiary has no insurable interest in the insured.[63] Furthermore, it is settled that an insurable interest must exist only at the time a life insurance policy is effected and not at the time of death.[64] If the argument were made that the beneficiary's insurable interest in the insured was extinguished by the operation of the time-limitation clause, the counter argument would be that the insured, as the policy owner, still had an insurable interest in his own life. The beneficiary's lack of insurable interest in the insured therefore would not make the ninety-day provision a wagering clause. Commentators have proposed that there be a requirement for an insurable interest both at the inception of the policy and at death because such a rule would provide a greater deterrence to homicide.[65] Also, the requirement that both the policy owner and the beneficiary have an insurable interest at the time of death would have the same desirable effect. However, there is no decisional support for either of the proposals. Finally, there is an additional characteristic of the wager analysis which makes it unlikely that the *Burne* court voided the ninety-day provision for this reason. Many authorities hold that only the insurer may raise the defense of a lack of insurable interest to defeat the claims of the beneficiary.[66] Even if the *Burne* court had

ployed, the absence of a financial interest in the insured's continued existence negatives the still-existing familial interests. Thus, the beneficiary will be motivated to deny the insured full medical care. In fact, it could be argued that even the familial interest will result in the denial of extraordinary medical techniques; thus, the plug of the respirator will be "mercifully" pulled. Such an argument regarding the time-limitation's denial of the type of familial interest existing at the initiation of the policy, however, gets into all the difficult legal and ethical issues which the *Burne* court tried to avoid in its decision.

62. *See generally* Vukowich, *supra* note 56.

63. Ellison Independent Life & Accident Ins. Co., 216 S.C. 475, 481, 58 S.E.2d 890, 892 (1950). Even though the donee beneficiary will be tempted to unlawfully terminate the life insured, the law considers this to be of slight concern, "since the selection of the beneficiary by the insured is, in ordinary cases, sufficient guaranty of the existence of such good faith and confidence between them as will sufficiently protect the insured." VANCE, *supra* note 6, § 31, at 189.

64. Vukowich, *supra* note 57, at 23.

65. *Id.* at 35-38.

66. VANCE, *supra* note 6, § 31, at 199.

found that the beneficiary had standing to raise the issue, presumably the insurer could have argued that the beneficiary's lack of insurable interest voided the entire insurance policy and not just the time-limitation clause.

Nevertheless, *Burne*'s analysis of this particular aspect of public policy is similar to that used by courts declaring other types of contract provisions to be unenforceable because they tend to promote a result injurious to public welfare.[67] As discussed above, the operation of the ninety-day clause offered an inducement endangering the life of the accident victim. Courts have not hesitated to hold illegal, and unenforceable, contracts that offered a financial inducement to jeopardize a person's life or health.[68] The *Burne* dissent claimed that before a contract can be voided on public policy grounds the court must consider the intention of the parties at the time they bargained.[69] However, other courts have not viewed the invalidation of such illegal contracts as dependent upon the intention of the parties when they entered the bargain.[70]

One could argue, therefore, that *Burne* relied upon a basic contract principle regarding illegal contracts[71] to hold that the ninety-day provision contravened public policy and was unenforceable. *Burne*'s analysis of that public policy element, however, lacked any evidential basis for its premises. Therein may lie a weakness which could make the decision less likely to be followed in other jurisdictions. A court taking the bold step of overturning a contract provision on public policy grounds will obviously have its decision scrutinized.[72] When other courts examine the *Burne* decision, they will note it furnished no empirical evidence that medical technology had improved to such an extent that life could be prolonged indefinitely. The court also did not

67. *Id.* § 48, at 291.

68. *See* RESTATEMENT OF CONTRACTS § 591 (1932).

69. 451 Pa. at 230-33, 301 A.2d at 805-06.

70. *See* CORBIN, *supra* note 55, § 1375, at 10-19. As the concurring opinion points out: "Bargains providing financial inducements for a person to *voluntarily* accept restrictions on one's marriage, divorce, sexual relationships and other domestic relationships have frequently been stricken as opposed to public policy." 451 Pa. at 227, 301 A.2d at 804, citing RESTATEMENT OF CONTRACTS, §§ 581-89 (1932). Thus, the *Burne* court is justified in striking the provision as a violation of public policy even if the insured could have foreseen, and voluntarily agreed to, the possible consequences of the time-limitation clause when he entered into the insurance contract.

71. *See* CORBIN, *supra* note 55, § 1375, at 10-19.

72. *Id.* at 11.

support with empirical evidence its premise that beneficiaries of an insurance policy actually would be motivated to withhold full medical care from the insured to avoid the forfeiture of accidental death benefits.[73] The court in *Burne* apparently based its premises on common knowledge (as courts are permitted to do).[74] Nevertheless, the lack of evidential basis for its essential premises makes the decision susceptible to the dissent's criticism that the court usurped a function of the Pennsylvania insurance commissioner.[75]

The unfairness of the ninety-day clause might have been another reason the court rejected it. Nevertheless, what was said above about the possible wagering aspect of the clause is equally applicable to this other element of public policy. Since terms such as "equity" and "fairness" were avoided, the reliance on considerations of fairness was only implied in the decision's language. The court said the clause presented a "gruesome paradox" by permitting recovery in the case of an accident victim who died instantly but denying recovery for the death of an accident victim "who endures the agony of prolonged illness, suffers longer, and necessitates greater expense by his family in the hopes of sustaining life even momentarily beyond the ninety day period."[76] Such an effect, the court said, "offends the basic concepts and fundamental objectives of life insurance . . . ."[77]

Burne's description of the "gruesome paradox" of the clause resembles the claims of unfairness made by beneficiaries and rejected summarily by the courts in some of the earlier decisions.[78] There have been instances in which courts have stretched contract principles to avoid the harsh application of insurance policy provisions, especially in cases involving a question of

73. The dissent criticized the majority holding for the lack of evidence for its premises. 451 Pa. at 236-37, 301 A.2d at 808.

74. CORBIN, *supra* note 55, § 1375, at 11.

75. 451 Pa. at 238, 301 A.2d at 809. *See* p. 151 & note 28 *supra*.

76. 451 Pa. at 222, 301 A.2d at 801-02.

77. *Id.*, 301 A.2d at 802. The dissent was especially critical of this conclusion of the majority and said it thought the fundamental objective of life insurance was actually "to provide a fund of money payable upon one's death to a designated beneficiary in accordance with terms and conditions and for the considerations mutually agreed upon between the insurer and the purchaser . . . ." *Id.* at 236, 301 A.2d at 808. On the other hand, it might be argued that the dissent's definition was too limited. As pointed out above, life insurance is usually procured to guard against financial loss. *See* note 57 *supra*. Financial loss may be at its greatest in the *Burne* situation where the insured lingers beyond the time-limitation period because the increased medical expenses are offset only by the face amount of the policy.

78. *See* pp. 152-53 *supra*.

whether a loss came within the exceptions and exclusions of the policy.[79] Nevertheless, the courts in those cases disclaimed any reliance on equitable considerations and based their decisions on the principle that ambiguous terms should be construed strictly against the insurer.[80] This principle of construction might have been misused in that the courts read ambiguity into unambiguous terms to arrive at just results.[81] Yet, by relying on this principle of construction, the courts could point to their adherence to the rule that an insurance contract should be interpreted to conform with the intention of the parties. In *Burne* no claim was made that the ninety-day clause was ambiguous. Furthermore, the intention of the parties was not an issue in the majority opinion. Thus, if *Burne* placed any weight on the unfairness of the provision, it not only ignored the rule "that equitable considerations cannot be deemed sufficient to overcome contractual provisions"[82] but also went beyond even those cases in which contract principles were misused to reach equitable results.

If it could be shown that the *Burne* court used an unconscionability analysis, then perhaps its consideration of the unfairness of the ninety-day clause could be reconciled with the conflicting precedents discussed above. No other case has dealt with the possible unconscionability of the provision. However, if *Burne* treated the unconscionability issue, the decision would be in line with authority approving invalidation of other types of contractual provisions contrary to public policy. According to the *Restatement (Second) of Contracts*, the determination of whether a contract term is or is not unconscionable is to be made "in the light of its setting, purpose and effect."[83] The *Restatement* implies that the analytical structure of unconscionability should focus on two types of abuses—one relating to the contract formation, or procedural abuse, and the other to the substantive unfairness of the contract.[84] The prevailing view is that a contract term

79. *E.g.*, Perry v. Provident Life Ins. & Inv. Co., 103 Mass. 242 (1869).

80. *See* Dauer, note 3 *supra*. The *Burne* court also based its invalidation of the waiver-of-premium exception on the same principle. 451 Pa. at 226, 301 A.2d at 804.

81. Regarding the majority's finding of ambiguity in the waiver-of-premium exception, see the discussion in note 3 *supra*.

82. Westenhover v. Life & Cas. Ins. Co., 27 So. 2d 391, 393 (La. App. 1946).

83. RESTATEMENT (SECOND) OF CONTRACTS § 234, comment *a* at 528 (Tentative Drafts Nos. 1-7, 1973). The particular policy outlined by the *Restatement* "also overlaps with rules which render particular bargains or terms illegal." *Id.*

84. Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 932 (1969). *See also* Comment, 114 U. PA. L. REV. 998 (1966), treating unconscionability under UNIFORM COMMERCIAL CODE § 2-302.

must be characterized by both procedural and substantive unconscionability to be overturned as unconscionable.[85] Thus, to determine whether *Burne* properly approached the issue of the fairness of the ninety-day clause, one must examine the language of the decision for evidence that the court considered both substantive and procedural abuse.

There is language in the decision to the effect that the operation of the ninety-day provision was substantvely unconscionable. As pointed out above,[86] the court discussed the "gruesome paradox" created by the clause. It concluded the provision was oppressively unreasonable because it served as a trap for the insured and a means of escape for the company in case of loss.[87] The court also discussed the unreasonableness of the purpose of the clause, which would point to the provision's substantive unconscionability.[88] There was no dispute in *Burne* that the death of the insured was accidental. Thus, since the purpose behind the clause was to delineate purely accidental deaths, the court concluded the clause could not reasonably be applied to the factual situation and should be disregarded.[89]

Absent from the opinion, however, is evidence that the court considered procedural unconscionability. The dissent pointed out, with some justification concerning the unfairness issue, that the majority should have considered the intention of the parties at the time they entered the contract.[90] The intention of the parties is one of the factors a court must consider in examining the setting of a contract term to determine if the element of procedural unconscionability exists.[91]

However, proof that the insured intended to accept the inclusion of the ninety-day clause, fully aware of its possible consequences, would not necessarily defeat a finding of procedural unconscionability. If the court had treated the unequal bargaining position of the parties, the insured's acceptance of the oppressive policy term might have made no difference so far as its unenforceability is concerned.[92] Like the earlier decisions concerning

85. Comment, *supra* note 84, at 1002.

86. *See* p. 159 *supra*.

87. 451 Pa. at 225, 301 A.2d at 803.

88. *See* Spanogle, *supra* note 84, at 958: "Courts must weigh the legitimate interests of the drafting party against identifiable public policies that the terms may contravene."

89. *See* pp. 152-53 *supra*.

90. *See* 451 Pa. at 230-31, 301 A.2d at 806-07.

91. RESTATEMENT, *supra* note 83.

92. *See* Comment, *supra* note 84, at 999.

the fairness of a time-limitation clause, however, *Burne* did not discuss the issue of adhesion. The court thus ignored one of the essential bases upon which other courts have relied to determine certain contractual provisions were unconscionable.

Although most cases indicate some type of procedural abuse is necessary, other decisions have applied a result-oriented definition of unconscionability.[93] Therefore, when the contract term is particularly harsh as in *Burne*, the claimant would have to show little or no procedural abuse. Nevertheless, an adhesion analysis would have been a natural approach for the *Burne* court since the characteristic of adhesion is particularly apparent in insurance contracts.[94] If an adhesion analysis had been used, the court's invalidation of the ninety-day clause on equitable grounds might have provided a greater impetus for other courts to take a similar course of action.

After concluding that public policy considerations compelled holding the ninety-day clause unenforceable, the court then made the questionable assertion that there was no persuasive decisional authority for upholding the provision.[95] The court cited *Sidebothom v. Metropolitan Life Insurance Co.*,[96] decided thirty years earlier, as the single case relied upon by the trial court in granting the insurer's request for summary judgment. The *Burne* court pointed out that *Sidebothom* could be factually distinguished as presenting causation problems. However, absent in the *Burne* decision is the admission that the ninety-day provision was still the crucial basis for *Sidebothom*'s holding that the beneficiary had not stated a cause of action.[97] Other decisions which *Burne* cited as leading cases and distinguished as involving "an inherent uncertainty as to whether death would in fact ensue"[98] also were decided by the courts primarily because the time-limitation clause precluded recovery. Furthermore, the *Burne* majority apparently overlooked other leading cases in which a time-limitation was upheld even though there was no dispute that the cause of death was an accident and that from the moment of the accident death was certain to ensue.[99]

93. Spanogle, *supra* note 84, at 949.
94. *See* p. 150-51 *supra*.
95. 401 Pa. at 223, 301 A.2d at 802.
96. 339 Pa. 124, 14 A.2d 131 (1940).
97. *Id.* at 127-28, 14 A.2d at 132.
98. 451 Pa. at 223 n.4, 301 A.2d at 802 n.4.
99. *See* cases cited note 40 *supra*.
100. 451 Pa. at 224, 301 A.2d at 802.

This less than accurate assessment of the decisional authority approving the validity of the ninety-day provision is certainly subject to criticism. The court's treatment of the inapplicability of the clause to the factual situation in *Burne* is similarly defective. The court held the inapplicability of the clause brought into operation the "well settled" principle "that if a provision in an insurance policy cannot reasonably be applied to a certain factual situation it should be disregarded."[100] The authority cited by the court for this "sound rule" was an 1884 Pennsylvania case, *Grandin v. Rochester German Insurance Co.*[101] That case, however, is no real authority for the application of such a rule in *Burne* since the court in *Grandin* held the disputed provision inapplicable only after it had determined the intent of the parties at the time they entered the bargain.[102] In *Burne*, the intent of the parties was not an issue. Thus, it appears that *Burne* manufactured this "sound rule"; a more obvious example of creative use of precedent would be difficult to find.[103]

Even in light of the discussion above, the policy considerations in *Burne* seem compelling. Criticism has recently been directed toward the insurance industry because of dissatisfaction with certain results when basic contract law is applied to the policy.[104] Thus, the result reached in *Burne* might encourage courts in other jurisdictions to look more closely at public policy issues when examining the validity of the time-limitation clause.

If the court's analysis had been more adequate in several respects, other courts probably would be more inclined to follow *Burne*. In its examination of the public policy issues, the decision should have specified exactly what public policy issues were being considered and should have treated them individually. Such an approach would have eliminated the ambiguities discussed above. The court should have examined the issue of euthanasia

101. 107 Pa. 26 (1884).

102. *Id.* at 35. The *Grandin* court said:

> [W]here it is attempted to defeat a recovery upon the ground that under one of its conditions the policy is void, we are driven to an examination of the character of the condition and the reason upon which it is founded, in order to ascertain whether it would have been in the contemplation of the parties when the contract of insurance was made.

Id.

103. The inapplicability of a contract provision to the factual situation, which might indicate the term's unreasonableness, may be, however, one of the factors in determining the substantive unconscionability of the contract. *See* p. 161 *supra.*

104. *See* Note, *supra* note 10, at 635.

under an analysis similar to that used by courts in treating illegal contracts. With that type of traditional analytical framework, the decision would have had more respectability to other courts. Furthermore, the court might have furnished empirical evidence for its premises to support its conclusions. The court also by-passed the issue of unconscionability; it could have tackled the element of unfairness by discussing both substantive and procedural abuses. Even though other courts have been hesitant to apply an adhesion analysis in this area of life insurance, the use of such an analytical structure by the court would have put the issue of unconscionability into sharper focus. Moreover, since the court did not have the excuse of construing an ambiguous contract provision to hold the ninety-day clause invalid, the use of an adhesion analysis would have made the decision less susceptible to the criticism that the court was relying on equitable considerations to rewrite the insurance contract for the parties. Finally, the court should have avoided the manipulation of the reasoning in decisions it cited which had only tenuous applicability to the question in *Burne*.

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