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Technology and the Environment: NEPA Strikes a Balance

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the Florida courts-one case involving undercover police informers and another involving relocated government witnesses. All were allowed to testify without the presence of TV cameras. Certainly the potential harm to the privacy interests of the individual will have to be considered in this area.

The momentum for increased courtroom television coverage is gathering. What might evolve is a new standard for how much the public is entitled to know and how much the individual is entitled to conceal. In any event, the time is probably not too distant when the home viewer will watch justice dispensed from the comfort of his armchair.

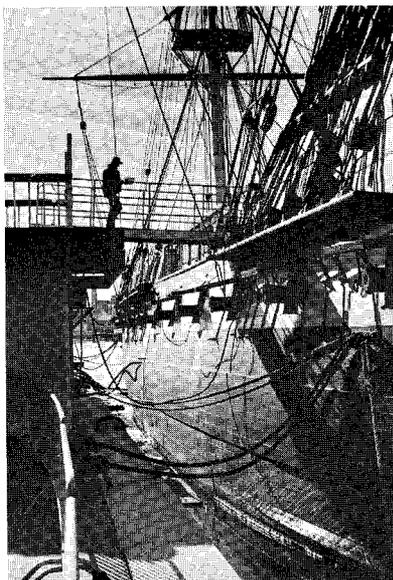


photo by John Clark Mayden

nology enjoys a favored status in our culture.

However, the carefree exploitation of human and natural resources through technological progress is not without its antagonists. For example, the pervasive influence of a scientific ideology in education and the social sciences draws criticism from those fearful of the dehumanization of the art of teaching and the study of man's behavior; other commentators decry the "alienation" of workers in industry that has been subject to extensive technological influence.¹

The progress of the "new industrial revolution" has had a particularly strong impact on the environment. The application of human expertise to man's surroundings entails for many an environmental crisis. As one writer notes:

The new pessimism toward technology and its role in society can thus be traced to two major realizations: The first is that modern technology faces us with grave threats to our lives, to our health and to our ability to enjoy our surroundings, and to our liberties, and these threats now weigh heavily against the unmistakable blessings technology has made possible. Second, there is little room for hope that these threats can be countered either quickly or easily. . .

J. G. Speth, *The Federal Role in Technology Assessment and Control*, in *FEDERAL ENVIRONMENTAL LAW 422* (E. Dolgin and T. Guilbert ed. 1974).

Although technology in itself need not be inimical to the well-being of man and his environment, its deployment often has been accompanied by the use of unsound judgment and ignorance of its potential harm to the ecology of which man is a part. The essential task facing environmentalists, then, is to provide information

¹ It has been suggested that intensive concentration of technology in the workplace alienates the laborer from his work-product, as well as increasing social stratification with the emergence of special interest groups tied to the use of technology (such as "technocrats"). See H. Lefebvre, *THE SOCIOLOGY OF MARX 196* (1969). Alienation, in the political sense, describes a loss of control over the means of production. Commentators note the lack of an active, interested involvement by workers in industry with a high concentration of technology. "Technological factors are paramount also in their impact on self-estrangement, since the machine system largely decides whether the worker can become directly engaged in the activity of work or whether detachment and monotony more commonly result." R. Blauner, *ALIENATION AND FREEDOM 8* (1964).

Recent Decisions

MARYLAND AND DISTRICT OF COLUMBIA



Technology and the Environment: NEPA Strikes a Balance

by John Jeffrey Ross

Until recently, only a minority has quarrelled with the rampant expansion of technology in this country. Applied science has produced both rapid economic growth and an enviable standard of living for a substantial number of people. Because economic and governmental progress depend heavily on man's facility to alter and control his macrocosm, tech-

as to the danger of misapplied technology, to raise the consciousness of "environmental protection," and to vindicate a conservationist philosophy in the courts and through legislation.

TECHNOLOGY AND ENVIRONMENTAL LAW

A significant challenge to the unwise use of technology has been offered through congressional action by the passage of the National Environmental Policy Act (NEPA, 42 U.S.C. §4321 *et. seq.*). NEPA underscores, as a matter of national policy, the recognition of the "profound impact of man's activity" on the ecology. Section 2, 42 U.S.C. §4321, declares the purpose of this law to be:

The declaration of national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation.

The balance of litigation under NEPA which reflects the technology/conservation dichotomy rests on the statute's requirement that all significant developmental activities in which the federal government is either directly or, through funding, indirectly involved be subject to strict scrutiny and evaluation. 42 U.S.C. §4332 (2). This examination of federal action entails the preparation and assessment of environmental impact studies pursuant to the need to predict and control the technological growth process.

A recent case which reflects the bifurcation of conservation and technology interests is *National Wildlife Federation v. Andrus*, 440 F.Supp. 1245 (D.D.C. 1977). The *Andrus* plaintiffs, members of various environmental groups, challenged a federal energy project approved by the Department of the Interior which would place a 23 megawatt power plant at the Navajo Dam on the San Juan River in New Mexico. Although the proposed power project was eminently meritorious,² the conservationists intervened

² The beneficiaries are Native Americans of the Navajo nation.

to protect one of the country's best trout fisheries and the interests of other wildlife whose fortunes were tied to the condition of the San Juan River.

In 1962, Congress authorized the Navajo Indian Irrigation Project (NIIP), P.L. 87-843, 43 U.S.C. §§615ii *et. seq.*, to provide 110,630 acres of arable land for the Navajo nation in New Mexico.³ To generate power for irrigation, Congress sanctioned the construction of a 15 megawatt powerplant on a tributary of the San Juan River. Page 1248 of 440 F.Supp.

In 1966, the Department of the Interior reevaluated the project and recommended that land more suitable for irrigation and NIIP purposes be substituted for some of the acreage in the original tract. Pursuant to this, Congress amended the NIIP in 1970, P.L. 91-416, to reflect changes in NIIP land composition as recommended by the Department. Although government documents discussed the placement of an irrigation energy source at a different site to coincide with the 1970 rearrangement of NIIP land, Congress granted no statutory approval for a powerplant other than that authorized in 1962. See 43 U.S.C. §§615ii-615yy; 620.

THE NAVAJO DAM ENERGY FACILITY

Despite the lack of statutory approval, the Department of the Interior planned the development of a 23 megawatt powerplant at the Navajo Dam and purchased \$3.6 million worth of energy equipment to furnish it. The Department proposed this activity as a service to the NIIP project as well as "other non-NIIP power demands." 440 F.Supp. at 1248-1249.

In opposing the project, the National Wildlife Federation urged the Interior

³ The NIIP represents a step forward for the Navajos. In addition to advancing that nation's agrarian interests, developing industry-related power demands might be quenched by energy provided through NIIP facilities. See M. Price and G. Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 Law and Contemp. Problems 97, 120, 126 n.2, 128 (1976). See generally, R. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan.L.Rev. 1213 (1974).

The NIIP is a participating project of the Colorado River Storage Project. See S. Rep. No. 363, 91st Cong., 1st Sess. (1969).

Department to consider in detail the environmental consequences of a 23 megawatt design on the San Juan and possible alternatives to its construction. Unable to admit its expenditure was premature, the government rejected any alternate considerations and proceeded with the original plan; the environmental advocates sought relief in the United States District Court for the District of Columbia.

Their complaint followed three theories: First, the Interior Department's project on the San Juan River was lawless; Second, the government failed to comply with the disclosure mandate of the National Environmental Policy Act; Finally, the government also violated the congressional reporting requirement of the Fish and Wildlife Coordination Act, 16 U.S.C. §§662 *et. seq.* 440 F.Supp. at 1255.

In order to justify its project in the absence of express statutory authorization, the government relied on the "mention" of a powerplant at the Navajo Dam in a 1969 Senate Report on the NIIP amendments. S.Rep. No. 363, 91st Cong., 1st Sess. at 2. Moreover, claimed the government, this report followed similar comment on NIIP energy alternatives presented to a House subcommittee in 1966; thus, a powerplant on the San Juan River at Navajo Dam was what Congress envisioned when it rearranged the NIIP land area in 1970. This argument failed to survive because no articulable congressional intent on the contested energy site emerged from the legislative history. Further, because of the absence of specific statutory sanction, the government was precluded from proceeding with the powerplant. *Id.* at 1249.

Failing to show that reference to a project in congressional documents is equivalent to public law, the government pursued the theory of "legislation by appropriation" to demonstrate that agency "wishful thinking" can blossom into congressional sanction as long as you can get Congress to foot the bill. In answer to proposals to fund *legal* NIIP endeavors, Congress had approved necessary grants for their maintenance. In addition to legitimate requests for NIIP appropriations were inconspicuous references to the Navajo Dam powerplant. The defendants

argued that because Congress did not disallow these added petitions, it in effect demonstrated approval of the powerplant "by appropriation."

Unawed by this sleight of hand, the court noted that the burden does not rest with Congress to scrutinize every proposal to determine the legality of federal agency action. Moreover, the record failed to show that there was sufficient congressional awareness of the 23 megawatt project to support the "legislation by appropriation" sought by the government defendants. Finally, the court stated agreement with established case law in the District of Columbia Circuit which holds that "Congress does not legislate through the appropriations process." 440 F.Supp. at 1250; *Atchison, Topeka and Santa Fe Railway Co. v. Callaway*, 382 F.Supp. 610 (D.D.C. 1974). See *D.C. Federation of Civic Ass'ns v. Airis*, 129 U.S. App. D.C. 125, 391 F.2d 478 (1968).

NONCOMPLIANCE WITH FWCA

The plaintiffs claimed, and the court agreed, that the Department of the Interior failed to conform to section 662(b) of the Federal Wildlife Coordination Act, 16 U.S.C. §§661 *et seq.*, by neglecting to submit a report to Congress on the consequences of an energy site at the Navajo Dam. This mandate, a complement to the disclosure requirement of the National Environmental Policy Act, provides Congress with sufficient data on a project affecting fish and wildlife to allow the necessary remedial conservation legislation. The government unsuccessfully defended its disregard for this important congressional reporting obligation by arguing that it had already released necessary information pursuant to NEPA's section 102(2)(C). In light of the court's finding that the information requirements of NEPA and FWCA are not redundant, and, considering the important status of equality which fish and wildlife enjoy vis-a-vis development projects, the government's circumvention of the FWCA effectively ruined its case. 440 F.Supp. at 1254. See T. Guilbert, *Wildlife Preservation Under Federal Law*, in *FEDERAL ENVIRONMENTAL LAW* 555 (E. Dolger and T. Guilbert ed. 1974).

THE NEPA REQUIREMENTS

The central issue of *Andrus* is the failure by the Interior Department to comply with the disclosure requirements of the National Environmental Policy Act. Had the bona fides of the agency been articulated through a cogent, informative environmental impact statement (EIS), the conclusive effects of other errors in the government's case may have been mitigated.

As stated earlier, the key provision of NEPA, and one often litigated, is Section 102, 42 U.S.C. §4332, which commands strict compliance with the Act. An especially clear mandate is §102(2)(C), which states, insofar as is pertinent:

all agencies of the federal government shall . . . (C) include in every recommendation or report on proposals for legislation and other Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action[.]

NEPA §102(2)(c)(i)-(iii), 42 U.S.C. §4332(2)(C)(i)-(iii). See F.R. Anderson, *NEPA IN THE COURTS* 49-55 (1973).

The role of the EIS becomes increasingly important when conservation and technology conflict, and for any significant project it serves as a point of departure for an interdisciplinary consideration of ideas and proposals representing both interests. The reasoned assessment of an activity's environmental consequences serves to control overreaching technology. "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations." *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, 146 U.S.App.D.C. 33, 36, 449 F.2d 1109, 1112 (1971). As the Ninth Circuit notes, "failure to follow this [EIS] procedure creates a risk that serious and unavoidable consequences of the action, which the EIS would reveal, will not be brought to the

attention of agency decision-makers." *City of Davis v. Coleman*, 521 F.2d 661, 670 (1975). See *Jones v. District of Columbia Redevelopment Land Agency*, 162 U.S.App. D.C. 366, 376, 499 F.2d 502, 512 (1974). See generally, Note, *Public Participation in the Environmental Impact Statement Process*, 61 *MINN. L. REV.* 363, 365-366 (1977); A.J. Cerchione and A.M. Black, *Planning: A Communications Process in PLANNING, ENVIRONMENTAL SCIENCE, AVIATION* (J.J. Yannacone, Jr. ed. 1974).

In their first attack on the adequacy of the Government's Environmental Impact Statement, the *Andrus* plaintiffs argued



photo by George Martin Kripner

that the Interior Department failed to demonstrate the necessarily elaborate consideration of the powerplant's consequences. The court concurred with the plaintiffs' allegation and commented at 440 F.Supp. 1252:

As these excerpts from the [final environmental statement] indicate, defendants concede that there will be an effect on the fish and wildlife below the dam, but they give no details as to what that effect may be. The many references to *future studies* which will determine later the environmental impact of the powerplant reflect the fact that defendants have yet to make the sort of probing examination which is required by NEPA. (emphasis added).

Because NEPA commands that the Government should study environmental effects *prior* to commencing a project, the fragmented impact analysis proposed by the Department of Interior for each stage of its project at the Navajo Dam failed to pass statutory analysis. According to the District of Columbia Circuit, "NEPA's purpose was to break the cycle of . . . incremental decision-making," and an agency must consider environmental effects of the entire proposed action at its initial planning stage. *Natural Resources Defense Council v. Nuclear Regulatory Commission* (NRC), 178 U.S.App. D.C. 336, 342, 547 F.2d 633, 639 (1976), *rev'd. on other grounds. Vermont Yankee Nuclear Power Corp. v. NRDC*, 46 U.S.L.W. 4301.

Andrus presents an analogous situation where the Department of the Interior proposed a cursory and piecemeal inspection of the ecological consequences of a major federal action. Avoiding a thorough environmental assessment of the project at the initial planning stage means that subsequent decisions during later stages of a project will be unduly influenced by the irretrievable commitment of resources. Furthermore, the isolation of issues as they arise in the ongoing progress of a project's development ignores the impact of the project as a whole. In other words, the NEPA command to examine the environmental impact of a major Federal action necessarily entails an impact assessment before the powerplant is translated from idea to project. *Andrus*, *ante* at 1251-1252. The impact of EIS preparation on the use of technology is most formidable at the planning stage.

Closely related to the failure by the Department of the Interior properly to examine the Navajo Dam energy facility was the refusal "adequately to address the comments of various interested parties, including several governmental agencies which were critical of [the environmental impact statement the Department issued]." This course of action by the defendants was also condemned by the court. *Id.* at 1252-1253. *Cf. W. Rogers, Jr.*, ENVIRONMENTAL LAW 729-730 (1977) ("The environmental impact statement thus serves not only to give notice of environmental consequences but also to

verify the genuineness of the decision-making process. The document should show who was consulted, what they said, and the agency's response.")

In order to minimize adverse environmental consequences of a project or use of a technology, a federal agency should entertain courses of action other than its own proposal. Section 102(2)(E) required the Interior Department to "study, develop, and describe appropriate alternatives," to its version of the 23 megawatt Navajo Dam powerplant. Pursuant to this, the plaintiff environmentalists urged the government to examine other sources or less environmentally obnoxious means of obtaining power for the irrigation project. In addition, the Department was asked at least to suspend construction pending more extensive environmental studies.

Noting that the Department of the Interior reviewed only two alternatives proposed by "other interested parties," and both in a conclusory and perfunctory manner, the court found that the defendants once again acted contrary to NEPA. Pages 1253-1254 of 440 F. Supp. Citing *Monroe County Conservation Council v. Volpe*, 472 F.2d. 693 at 697-698 (2d Cir. 1972), the court reasoned that the search for viable alternatives is "the linchpin of the entire impact statement." *Id.* Indeed, "[a] sound construction of NEPA . . . requires a presentation of the environmental risks incident to reasonable alternative courses of action." *Natural Resources Defense Council v. Morton*, 148 U.S. App. D.C. 5, 12, 458 F.2d 827, 834 (1972).

CONCLUSION

It might appear that environmental protection as a constraint on technology does not occur without cost. In *National Wildlife Federation v. Andrus*, the defendants also enjoyed an important constituency: the Navajo Indians who would benefit from the energy facility which was the subject of this litigation. However, the concept "environmental" must be understood to transcend the traditional view of "trees, wildlife and open space" to include the concern for the human ecology.

The very essence of the need for a reasoned analysis of any project (which, a

fortiori, involves massive doses of technology), is the belief that the adverse effects of any collision of the needs to develop, conserve resources, maintain clean air and water, and to protect population interests can be lessened by the use of reason in the decision-making process. Environmental impact study may be required for socio-economic effects and urban construction as well as for dams and highways. The logical end of environmental protection is not the death of technology, but the rebirth of technology as a vital resource for the benefit of man and his life space.

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